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

WORKING PAPER

**ENTraNCE for Judges 2021:
Selected Case Notes**

Pier Luigi Parcu, Giorgio Monti, 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 who are 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 focuses 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://fcp.eui.eu/entrance-judges/>

Each working paper includes the case notes written by the national judges who have participated 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 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.

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 2021). The training programme was organised by RSCAS between November 2020 and October 2021, with the financial contribution of the DG Competition of the European Commission. The case notes included in the working paper summarise judgments from different EU Member States that relate to diverse aspects of competition law enforcement. This working paper thus aims to increase the understanding of the challenges that are faced by the national 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

The cases summarized and discussed by the judges in this working paper were presented as part of the ENTranNCE 2021 training course. They represent a useful snapshot of the kinds of legal issues that arise at national level in the application of EU or national competition law. The case-law discussed reveals that national judges apply and reflect upon the case-law of the European Court of Justice (ECJ) and reveal a sophisticated understanding of the competition law provisions. One issue that arises in many of the cases is the complexity of the factual (and at times regulatory) matrix that gives rise to disputes. In this introduction, we offer a quick summary of each of the case notes so that the reader can get an impression of the range and types of issues that are under consideration.

Cartels

The cases in this section reveal the continuing relevance of fundamental issues in cartel cases, like the importance of developing a competition culture (evident for example the obvious cartel among security companies in Croatia, reported by judge Maja Valušnig) and the evidentiary burdens faced by competition authorities, as revealed by Judge Ivana Manestar when discussing the suspected cartel among owners of marinas in Croatia.

The relationship between competition and regulation is a theme which emerges clearly in Jelena Čuveljak's discussion of *Croatian Society of Orthodontists vs. CCA*. Here the competition authority found a price list agreeing the prices of certain dental services, but it emerged that this list was probably a document to be sent to the State for determining the prices, which are regulated by the under the Dental Activity Act. This raises important questions about attributing liability: is this a cartel where the State merely ratifies the decision of the association on prices, or does the State intervene actively and test the prices against the public interest and sets its own? In the latter case, might the State's activities hamper the development of the internal market? Similar issues have been addressed by the EU Court of Justice in a case about the setting of lawyer's fees in Italy.¹ The national court, however, took the view that the price list was itself evidence of an anticompetitive agreement, and did not go into a discussion of the link with the regulatory framework – i.e., a missed opportunity.

Alice Thibaud recounts one of the several cases brought by many competition authorities against the flour mill cartel.² In this case, the legal issue at play was whether the applicant, a relatively small flour mill had participated in the cartel even if it took a relatively passive role. The court took the view, applying relevant EU case-law, that a party to a cartel may escape liability only if it publicly distances itself from the anticompetitive agreement – i.e., this entails actively informing the other members of its unwillingness to go along with the agreement. So far so good, but the Advocate General advising the Court de Cassation considered whether the EU rules were 'too strict', arguing that relying on the perception of the other cartel members to determine participation in a cartel seemed 'too strict'. However, the principle is clear: if an undertaking agrees to enter into an anticompetitive agreement, it has a duty to leave the agreement as soon as possible, in no uncertain terms.

Procedure

When it comes to procedure, national courts and national competition authorities enjoy procedural autonomy, save for the minor harmonization achieved by the ECN+ Directive.³ Otherwise, national courts apply their procedures: EU law only places a limit that these procedures are 'effective' and applied in a non-discriminatory manner. A number of the cases discussed here raise questions about the effectiveness of certain national procedures.

¹ Case C-35/99, *Criminal Proceedings against Michele Arduino* (2002) ECLI:EU:C:2002:97.

² For a discussion of the cases see G. Monti 'Galvanising National Competition Authorities in Europe' In Gerard and Lianos (eds) *Reconciling Efficiency and Equity: a Global Challenge for Competition Policy* (Cambridge, 2019).

³ 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.

Ioana Oltean discusses a case where the national court reviewed the fairness of the penalties imposed by the Romanian competition authority in a distribution agreement. There was concern that while some distributors were fined, others were not even if all were party to the same type of anticompetitive agreement that the National Competition Authority (NCA) had investigated. The Court upheld the complaint, finding no good reason why some retailers escaped the imposition of a fine. An appeal to the Supreme Court is pending and, as Judge Oltean observes in her comments, it is arguable that a firm cannot complain about a penalty simply because others were not fined for the infringement. On the other hand, there is value in a competition authority offering clarity as to why similarly placed firms are treated differently.

The Czech court's judgment in CHAPS indicates that where the NCA starts an investigation, then that is the date of the end of the infringement. Any conduct subsequent to that date may be penalized only upon commencement of a second prosecution. As Lucie Mikulikova observes in her discussion, this approach is different from that of the Commission (where the illegality can go on until the date of the finding of infringement) and there is no clear fundamental rights protection to justify the Czech court's approach. Indeed, as Judge Mikulikova demonstrates in her case annotation, the approach leads to less effective public and private enforcement.

The validity of a search warrant is discussed by Judge Marika Papathoma Kalligerou when reporting on the long-running saga in *ExxonMobil and Others v. Cyprus Commission for the Protection of Competition*. Here, competition concerns about the anticompetitive conduct, started in 2005, dragged on because of problems with the composition of the Cypriot NCA. The result was that the search warrant was void because issued unlawfully. The national court however also took time to explain the level of detail required for a legitimate search warrant. While the national court cites relevant cases from the ECJ, this seems to be a matter that is more appropriately governed by national law or the case-law of the European Court for Human Right (ECtHR)..

Maria de Fátima Reis Silva discusses the litigation in *Super Bock Bebidas v Portuguese Competition Authority*, where the parties sought to protect the release of certain information that they deemed confidential. The case gave to the national court the occasion to explain which legally applicable rules protect this kind of information. The discussion shows how even such a relatively minor legal issue can hamper the enforcement of competition law if not handled attentively.

Decisions of an association of undertakings

Dzintra Amerika's discussion of *Automotive Association v. Latvian Competition Council* is a fascinating account of the importance of distinguishing between restrictions by object and effect. As the judge explains, the agreement between the association and insurers was designed to solve a market failure, while at the same time having some exclusionary effects. The NCA decision was quashed for slotting this into the 'object' category, because the welfare effects were ambiguous and more evidence, including a definition of the relevant market, was required to work out whether the agreement should be condemned. In applying relevant case-law from the ECJ,⁴ the national court nevertheless raises the question about what agreements, other than cartels, are deemed to be restrictive by object.

Sanna Holkeri discusses a case that draws a different line – i.e., that between legitimate lobbying and collusion. The context of the case was the liberalization of the bus market in Finland; the court was asked to determine which conduct fell outside the scope of competition law, because it merely constituted of representations to the State, and when the conduct turned into collusion among incumbent operators to exclude new rivals from the market.

⁴ Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* (2013) ECLI:EU:C:2013:160.

Access to data

Data is the new oil, and the cases show precisely why data matters for rivals.

Judge Ana Paula Lobo discusses a case from Portugal which brings us back to the well-known *IMS Health* judgment.⁵ However, this time the alleged refusal to supply data was from the pharmacies to a firm that would process this data. What is challenged is the choice of the pharmacies to form an association which would then provide the analysts of the data in-house. This served to exclude the rival data analytics firm (known as IMS, but not clear if this is the same firm as the ECJ judgment's). Stifling the market for rival data analytics providers, this was found to be an abuse of dominance.

Stefan Schlotter discusses a recent judgment applying new rules on abuse of dominance in Germany, the so-called tipping rule. The dominant online real estate brokerage firm offered discounts to estate agents who advertised their properties exclusively via its online platform. The tipping rule provides that a dominant firm abuses its position if it prevents rivals from achieving network effects. On the facts, the more houses are available on a website, the more visitors it would attract on the other. The concern then is that the discounts deny rival platforms the opportunity to generate network effects. In a private litigation the court found that an exclusivity rebate granted if 95% or more of properties were listed exclusively on the dominant platform for seven days. The reason for this was that the market is very fast and many properties are viewed and sold quickly so that securing exclusivity even for just seven days conferred a major competitive advantage on the dominant platform.

Private Enforcement

A number of courts are busy with follow-on claims that result from the Commission's trucks cartel decision.⁶ Enrique SanJuan-Muñoz discusses case-law about the quantification of damages when the cartel is based on an exchange of information. These are follow-on claims from the Commission's trucks cartel decision; the question arose whether this had an effect on the price of trucks bought downstream. The national court sets out criteria that can be used to work out if an information exchange may be shown to have effects on downstream prices.

Jesús Ángel Suarez Ramos reports on another follow-on case from the trucks cartel decision. Here, the court's judgment reveals how favorably the court looks on claimants and the generous manner in which it facilitates access to evidence to give the claimant the best shot at establishing damages suffered as a result of the cartel. Notably, part of the harm was the delay in implementing new technology and the court allowed the claimant to request evidence of this from the defendant as the cost of operating trucks would be affected by this delay.

Emanuela Germano and Gian Paolo Macagno present one of many cases in Italy that follow similar fact-patterns. An association of banks had set out standard terms for its members. The Bank of Italy (at the time, competent to test the compliance of these terms with competition law) found that some of the clauses were anticompetitive. Nevertheless, the contracts were implemented. In the various actions claiming that the contracts were void, two issues have been litigated: (i) the binding value of the Bank of Italy's decision: prior to the Damages Directive these decisions only had the status of privileged evidence and were not binding; (ii) the effect of the breach of competition law: is the whole contract void or should the court hold that the agreement as a whole stands save for the offending clauses? In *Mangione Antonio Natale et al. v. Veneto Banca SPA - Flaminia SPV SRL*, the bank was relying on the contracts in question and tried to enforce a guarantee against the client who claimed that the agreement was void. The authors discuss the judgment of the court of appeal and also indicate further aspects of this case, such as whether there was indeed a restriction of competition law at all in the first place.

⁵ Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* (2004) ECLI:EU:C:2004:257.

⁶ Commission Decision of 19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 — *Trucks*). OJ C-108/6, 6.4.2017.

Parent-Subsidiary Liability

In competition law, parents are responsible for their children when it comes to public enforcement of competition law.⁷ What about in damages claims?

Judge Birgit Burn-Herregodts discusses a follow-on damages claims from the trucks cartel in Belgium, where the purchaser of some 22 trucks sought damages against parent companies and subsidiaries seeking to be compensated for the overcharge caused by the cartel. The court held that the Damages Directive was inapplicable which was to the disadvantage of the parties as they were unable to benefit from the presumption that damage was suffered.⁸ Being unable to quantify their loss, the complainants lost the case. The court however did agree that a claim against parent companies could stand. The judge observes that there is limited litigation in the Belgian courts, in spite of the Damages Directive, and also observes that centralizing cartel damages claims in a single court could help develop greater specialization among the judiciary.

Eduardo Pastor Martínez also discusses a follow-on action in the trucks cartel and it is interesting to compare this with the previous judgment for the first instance court here takes a much more claimant-friendly approach, seeking to read national laws in conformity with the Damages Directive. However on appeal a stricter approach is taken and the court does not consider that the subsidiary can be liable for the acts of the parent. The issue has now been settled by the ECJ in the *Sumal* judgment, also emanating from a Spanish court in the context of the trucks cartel lawsuit, finding that subsidiaries may be liable for the competition infringements of the parent companies.⁹

Ana Isabel de Matos Mascarenhas Pessoa considers a case where the national court raised a number of questions for the ECJ. An energy company agreed with a supermarket to offer clients who had the supermarket's loyalty card a discount in their energy. In addition, there was an agreement that the supermarket would not become an energy retailer. The latter agreement caught the competition agency's attention as there was a potential rival excluded from the market. This raises questions about whether the non-compete agreement is one between potential competitors and even if it is, whether there can be countervailing efficiencies. This calls on the ECJ to elaborate further on its guidance in *Generics*.¹⁰

Competition and Regulation in the Media and Telecom Sectors

Judge Rosa Perna discusses an appeal against an unusual bid rigging finding by the Italian NCA concerning the purchase of football broadcasting rights. The rights-holder (Lega Calcio) opened bids for five lots of the football packages for 2015-2018. After finding the winner of each tender, Lega Calcio engaged in discussion with the tenderers to adjust the allocations because it feared that one bidder (Sky) had secured too many broadcasting rights. The Italian NCA intervened, finding that the agreement between Lega Calcio and the broadcasters was anticompetitive and frustrated the purpose of the competitive process for buying broadcasting rights. However, on appeal, the court quashed the decision, in particular because the rearrangement of the broadcasting rights was necessary as a result of the laws in force for selling of football broadcasting rights. As Judge Perna notes, this factual setting is problematic in showing that it is not easy to create a competitive market for broadcasting football market.

7 Paraphrasing AG Kokott in Joined Cases C-628/10 P and C-14/11 P, EU:C:2012:11, *Alliance One International Inc., formerly Standard Commercial Corp., and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others* (2012) ECLI:EU:C:2012:11. Para 1.

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

9 Case C-882/19, *Sumal, S.L. v Mercedes Benz Trucks España, S.L.* (2021) ECLI:EU:C:2021:800.

10 Case C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority* (2020) ECLI:EU:C:2020:52.

Judge Gianmario Palligiano further discusses the interaction of competition and regulation in the media sector, analysing an Italian case concerning the assignment of broadcasting frequencies in the transition from analogue to digital, and explores the role of the EU case-law in specifying how the national regulator can assign these frequencies.

Unfair competition

Svetlana Belajeva discusses a judgment that serves to set the parameters for unfair competition. In this case one TV station appeared to imitate the news format of its rival who sued alleging that the imitation was unfair competition under Latvian Law. Similarly judge Aleksandra Rutowska discusses the application of Polish law to unfair competition, here the defendant adopted a name similar to that of a well-established company and it was held that this constituted unfair competition as it was shown that customers considered that claimant and defendant were collaborating – the defendant was thus free riding on the reputation of the claimant.

State aid

Often State aid cases are about 'illegal' State aid. Judge Mirella Delia, instead, narrates the saga that a farmer had to undergo to secure lawful state aid. The issue concerns the administrative arrangements for granting relatively small sums for farmers whose land is damaged by wildlife. The facts reveal the complex bureaucracy that has been created to manage relatively simple claims. If this is not an isolated incident, it reveals the need for the state or the Commission to be active also in ensuring that state aid is disbursed when this is authorized.

Conclusion

From this review of the judgments reported in this working paper, we gain an insight of the work national courts are doing to implement EU competition law. A fair number of legal issues are now well-settled by the case-law of the ECJ, meaning that references for preliminary rulings become less important than the application of the competition law *acquis*. The case-law on private enforcement shows that there is a need for class action regimes: it cannot be in anyone's interests for there to be so many courts involved in adjudicating follow-on actions in the trucks cartel. Procedural means of consolidating these cases would be desirable.

CARTEL AGREEMENTS

Maja Valušnig, Zagreb Administrative Court

High Administrative Court of the Republic of Croatia

Judgment number: UsII-54/15 -22nd April, 2016

1) Brief summary of the facts of the dispute

The Plaintiff: Klemm sigurnost d.o.o. (a security company) brought an action against the decision of the Defendant: the Croatian Competition Authority: Klasa: UP/I 034-03/14-01/002, urbroj: 580-09/88-2015-100 – 17th. March, 2015, before the High Administrative Court of the Republic of Croatia seeking its annulment.

The Croatian Competition Authority, in its decision, concluded that the Plaintiff, along with several other security companies, has, through explicit agreement, during a meeting held at the premises of one of the entrepreneurs, Tectus d.o.o., which has its registered office in Zagreb, at Radnička cesta 48, on 23rd October, 2013., agreed on a minimum price for private physical protection services, thereby distorting competition in the period from 23rd October, 2013, to 17th January, 2014, by direct pricing within the meaning of Article 8 Paragraph 1 of the Competition Act and, by so doing, that they concluded a prohibited agreement which limited competition on the relevant private security market, and that this represents a breach of national competition law. In its decision, the Croatian Competition Authority declared their agreement void, and fined all of them with different amounts of fines (from 171.000,00 kn., as the lowest fine, to 1.333.000,00 kn, as the highest fine).

The Plaintiff claimed that he had never had the will or awareness to negotiate with other entrepreneurs in any way in order to set the minimum price for private physical protection services, and thereby to distort competition. He pointed out that the purpose of the meeting was not to agree on minimum prices for services, but to exchange certain experiences and attitudes, and the potential establishment of a chamber of entrepreneurs that would deal with security activities. He also stated that Boris Lončarić, an employee of the Plaintiff, was present at the meeting in question, but that the said Lončarić has no right to bind the Plaintiff in his actions, given that he is not a member of the management board, nor is he a procurator, nor has he been authorised by the Plaintiff to negotiate or oblige the Plaintiff.

The Plaintiff also claimed that the only evidence that an illicit agreement was concluded is, exclusively and only, an article that was published in the magazine *Zaštita*, whose editor was also the organizer of the disputed meeting, and who, during the proceedings before the Defendant, stated that he had published a press release in the newspaper article of the magazine *Zaštita* without any consent, or the prior approval, of the Plaintiff, or of other entrepreneurs, on the basis of journalistic freedom, according to which the minimum cost of a security guard's hour is the amount of HRK 32.50, and this was determined between the participants at the disputed meeting.

The Croatian Competition Authority stated that, in the proceedings that were initiated, witnesses and parties were heard, an analysis of the bids offered after the meeting by those entrepreneurs who had participated at the meeting was carried out and, based on all of the above evidence, it was concluded that, in this case, there was a prohibited agreement on the minimum hourly price for private physical service protection in the amount of HRK 32.50.

As for the basic claim of the Plaintiff, that, at the disputed meeting, the Plaintiff was not represented by the Plaintiff's legal representative but by his employee, the Defendant pointed out that the Plaintiff's claim is unfounded, and that since then the entrepreneurs could have concluded prohibited agreements in such a way as to conclude them by using employees who are not members of the Board, or by those who do not have the authority to represent that undertaking. The Defendant also claimed that the mere conclusion of such agreements, which are aimed at limiting competition, is considered to be a breach of competition law, and that the conclusion of any cartel agreement is considered to be the most serious violation of competition law.

2) Summary of the judicial proceedings

The judicial proceedings were simple. The Court concluded that the fact that none of the Plaintiff's bids had stated the disputed price of HRK 32.50 does not mean that the disputed agreement was not concluded, nor that no agreement was reached, at the meeting on 23rd October, 2013, on the minimum price for the provision of private physical protection services by other entrepreneurs later, and those that were offered for public tenders. The fact that the Plaintiff did not apply the agreement does not affect the determination of the prohibited agreement. As to the Plaintiff's objection that he had neither the will nor the awareness to agree with other undertakings in any way on the minimum price for private physical protection services, the respondent correctly relied on the case law of the European Court and the General Court, that it is not necessary to prove that the undertaking was aware of the specific breach of the Treaty on the Functioning of the European Union, but it is sufficient to establish that it could not fail to be aware that its conduct was distorting competition.

3) Ruling of the court

The Court confirmed the decision of the Croatian Competition Authority, and rejected the Plaintiff's claim completely.

4) My personal comment

I think that to be able to understand the peculiar behaviour of the Plaintiff, it is important to mention that, in Croatia, the concept of competition law is just beginning to develop. For that reason, it is not so unusual for entrepreneurs to conclude prohibited agreements on minimum prices in such an open and public way, and even to subsequently publish such an agreement in an article, and yet not to be aware of the fact that they have done something wrong. However, that does not exonerate the Plaintiff, due to "*Ignorantia juris non excusat*", -an old legal principle which holds that a person who is unaware of a law may not escape the [liability](#) for violating that law merely by being unaware of its content. I thus agree completely with the judgment of the High Administrative Court of the Republic of Croatia.

Jelena Čuveljak, High Commercial Court of Croatia

Case No.: Supreme Court of the Republic of Croatia, U-zpz 16/2015-4, March 2nd. 2021

Case: Croatian Society of Orthodontists vs. CCA

Croatian Competition Agency, Class: UP/I-034- 03/13-01/034, Reg. No.: 580-04/88-2014-038, June, 12th, 2014, High Administrative Court of the Republic of Croatia No. UsII-70/2014 of March 5th, 2015

Facts of the Case

The CCA established that an association of entrepreneurs - the Croatian Society of Orthodontists, in the period from 1st October, 2010, to 9th October, 2013, by means of the document "Minimum price list for orthodontic services", determined the minimum prices for orthodontic services, thus entering into a prohibited agreement under the terms of Article 8, Paragraph 1 of the Competition Act (Official Gazette 79/09 and 80/13. - hereinafter: CA), whose purpose or consequence is to prevent any limit on, or distortion of, competition, and that such an agreement is prohibited. It was therefore decided that the "Minimum price list for orthodontic services" was null and void, for which reason an administrative-punitive measure was determined in the amount of HRK 150,000.00, with an execution deadline of 15 days from the day on which this decision becomes final, and with the stipulation that this decision would be published in the *Official Gazette*, as well as on the Defendant's website.

By a judgment of the High Administrative Court of the Republic of Croatia, number UsII-70/2014 of 5th March, 2015, the complaint was taken into action and the decision of the Competition Agency, Class: UP/I-034-03/13-01/034, 580-04/88-2014-038 of 12th June, 2014, which established that the Association of Entrepreneurs of the Croatian Society of Orthodontics, based in Zagreb, at Šubićeva 9, had established minimum prices for orthodontic services in the period between 1st October, 2010, and 9th October, 2013, through the document. "Minimum price list for orthodontic services", and had thus established a prohibited agreement within the meaning of Article 8(1). CA, and this agreement was annulled and the Croatian Society of Orthodontists was given a symbolic administrative and punitive measure in the amount of HRK 150,000.00.

The High Administrative Court of the Republic of Croatia established that, in this specific case, there is no controversy on the fact that the Applicant had produced the document: "Minimum Price List", which lists the prices for 12 explicitly described services (check-ups, therapies, etc.). There is controversy about whether such a document constitutes an agreement, since it takes into account the provisions of Article 8, Paragraph 2 of the CA, about which the Applicant is currently complaining during the administrative proceedings in question and their actioning. In this regard, during the proceedings, the Applicant stated that, under Article 9(8) of the Statute of the Chamber, the lowest prices for dental services offered by doctors of dental medicine outside the public health service network is established, which is why, in accordance with the said Statute and the appreciation of the statutory procedure, they submitted to the Chamber a proposal for a "Minimum Price List", for determination. That submission also stressed that the minimum price list in question was not established by the Chamber, and it was not used and not applied, noting that, when agreeing upon it, the prices that were applied and paid by the Croatian Health Insurance Institute were taken, and they were an integral part of the orthodontic contracts concluded by that Institute with doctors outside the public health service network.

Within its public powers, the Chamber does not adopt a single price list for dental services, but adopts a “Nomenclature of Dental Services”, with the number of points for each individual service. By multiplying the number of points for the services specified in the “Nomenclature” by the Kuna amount of the value of the point, the minimum cost for each dental service is obtained. Accounting that falls below the minimum prescribed price represents disloyal competition and, under the Ordinance on the jurisdiction, organization, and manner of operation of the Honourable Court at the Chamber, it is considered to be a serious violation of the rules of conduct in the performance of dental medicine. With the same submission, the Defendant was also informed that, by examining the Minimum Price List, it was established that the price level for the procedures that are prescribed by the price list was above that of the minimum price that is specified by the “Nomenclature”, which is in accordance with the regulations of the Chamber.

Since, therefore, this is about the field of dental medicine, which is regulated by a special law, it was necessary to take into account the provisions of the Dental Activity Act (Official Gazette, no. 121/03, 117/08. and 120/09), which regulates the structure and conditions for the exercise of dental medicine as a service that ensures the provision of dental assistance to persons in the realization and protection of oral health. Namely, the provisions of Article 34 of the above Act stipulate that the Chamber adopts a single Price List for dental services, one which defines the lowest prices for dental services. According to the provision of Article 42(1) of the same Law, the Chamber determines the lowest costs for the work of dental practitioners who work outside the public health service network.

Due to the legal provisions that were cited in the first place, as well as the factual situation that is laid down in the administrative proceedings in question, the Court may not accept the Defendant's correct position, according to which the “Minimum Price List” constitutes a prohibited agreement within the meaning of Article 8 of the CA. This is because the conditions and manner of performing dental medicine are regulated by a special law, from which it follows that only the Chamber, is also, under Article 64, authorized to determine the minimum cost of the work of a doctor of dental medicine who works outside the public health service network. It is also authorized to carry out professional supervision, within which, if it finds a violation of regulations and of the general Acts relating to the health industry, it is obliged to inform the health inspection department of the Ministry responsible for health without delay, and no later than 15 days from the date of learning about the problem.

The Court therefore finds the Defendant's conclusion that the present case concerns a prohibited agreement, which is manifested in the price arrangement, which agreement constitutes a restriction of competition, to be incorrect. Namely, the entrepreneur's agreement on prices must be able to aim, or to result. in the application of such agreed prices on the market, which was absent here, because the “Minimum Price List” is not in use, nor could it be, in view of the legislation in the field of dental medicine, according to which only the Chamber can define the lowest prices for dental services, with a calculation that is below the minimum prescribed price, and which is subject to sanctions in accordance with special regulations.

If the Applicant has therefore violated the provisions of the cited Law on Dental Activity, or the regulations that have been adopted under that Act, through a document such as the “Minimum Price List”, the Chamber is authorized to take measures to prevent such conduct, which, however, has not been done. Moreover, it follows from the Chamber's letter of 2nd December, 2013, that the amounts of the prices for the procedures that are prescribed by the “Minimum Price List” are above the minimum prices that are specified by the “Nomenclature”, which is in accordance with the Regulations of the Chamber.

Contrary to the Defendant's position, the Court finds that the "Minimum Price List" does not constitute an agreement, as it has in the form of the ZZTN, especially as a result of the reasoning that it does not, either directly or indirectly, determine the minimum price for dental services, since the determination of these fall under the exclusive competence of the Chamber, and not of the Applicant. Such a document, through either its content or its legal nature, does not have a binding character, nor can it therefore be applied at all in kind, since dental practitioners, when determining the lowest prices for their services, are obliged to comply with the "Price List" that has been adopted by the Chamber, under the threat of sanctions in the case of contrary treatment. For this reason, the Court finds that the "Minimum Price List" in question, which was deemed compliant by the Chamber, in accordance with the rules that fall under its jurisdiction, was neither intended, nor was it intended to have, a distorting effect on competition in the relevant market, within the meaning of the ZZTN.

Against that judgment, the Public Prosecutor's Office applied for an extraordinary review of its legality, due to the misapplication of substantive law. The Public Prosecutor proposed to the Supreme Court of the Republic of Croatia that the judgment be reversed and the action rejected.

According to the assessment of the Supreme Court of the Republic of Croatia, the reference of the High Administrative Court of the Republic of Croatia to the fact that the Chamber has jurisdiction to determine prices, and not the Association, does not affect the legality of the Agency's contested decision, since, as the application points out, when the law does not give the power to an association of entrepreneurs to determine the prices of products, i.e., for the services of its members, any pricing in such a case and, in particular, the determination of the minimum or fixed prices, is contrary to competition regulations. In this regard, the Applicant cannot refer to the provisions of the Law on Dental Activity, which stipulates that the Chamber should adopt a single price list, which is a request that the provisions of the CA does not apply in the case of the adopted minimum price list that is in question.

Conversely, an association of undertakings that have determined the prices of their members' services will not be subject to sanction by the competition authorities, and this should only occur when such a power is explicitly stated in the legal provisions governing the scope and powers of that association of undertakings. It is for this reason that the conclusion reached in the contested judgment has been incorrectly cited, since Art. 8, CA, provides that all agreements between two or more independent undertakings, decisions of the association of undertakings, and concerted action, which, as objectives or consequences, result in distortions of competition in the relevant market, are prohibited – this is not a relevant indication that the "Minimum Price List" in question is not used, and is not in use. This is because it is sufficient for the agreement to contain an agreement on prices, and to be considered prohibited according to the objective and, under the cited provision, the consequences do not need to arise. (In this regard, the application for the protection of legality also refers to the Guidelines in the application of Art. 101, in that the horizontal agreements are affected for it to be defined as a restriction of competition, according to the objective, in the sense that the restriction of competition, according to the objective, is one that, in its very essence, has the possibility to restrict competition and to examine the actual or potential effects of the agreement on the market, this is not necessary when its anti-competitive objective has been established).

When an agreement is therefore found to be aimed at restricting competition, there is no need to take into account its specific effects (in this regard, the CJEU in Case C- 49/92P, *Commission v. Anic Partecipazioni SpA* (1999) ECR-I-4125). The judgment of the High Administrative Court of the Republic of Croatia was therefore reversed, and the action against the CCA decision rejected.

Comment

Perhaps the most important aspect of this entire case, which deals with a prohibited agreement, is that a different view is taken on the same facts – the document "Minimum price list for orthodontic services." The specificity of this case is in the fact that the Chamber of Dental Medicine is authorized by law to prescribe the minimum prices for dental services. The disputed document was submitted by the Croatian Society of Orthodontics to the Chamber so that it could decide on the minimum prices for dental services under its powers.

In this particular case, the CCA and the Supreme Court did not find evidence that the prohibited provisions had been applied in practice, but the mere fact that the Company produced the document in question established the ways in which the prohibited agreement was acted upon.

Acknowledging the fact that the Chamber is authorized to adopt such a regulation on the minimum prices for services, and that the Society submitted a proposal for such a regulation, I am personally unsure whether or not it would be considered a prohibited agreement, in this case.

Alice Thibaud, French National School for the Judiciary

Decision of the Commercial, Financial and Economic Chamber of the French Court of Cassation of February 10th, 2021 (Appeal G 19-20.599)

1. On April 23rd, 2008, the French Competition Council, which has since become the French Competition Authority (Autorité de la Concurrence), initiated an ex-officio investigation into practices in the food flour sector.

On June 17th, 2008, it conducted a series of inspections and seizures, in particular, at a company that is called VK Mühlen.

2. By a decision of March 13th, 2012 (Decision No.12-D-09), the French Competition Authority found that VK Mühlen, the predecessor of Goodmills Deutschland GmbH, had infringed the provisions of Article 101 of the Treaty on the Functioning of the European Union (TFEU) by participating in an anti-competitive agreement. This agreement lasted from May 14th, 2002, to June 17th, 2008, and was aimed at limiting the imports of flour, in bags, from Germany into France. Twelve meetings were held in the course of this cartel, at the invitation of the German millers' trade association (Verband Deutscher Mühlen). The participation of VK Mühlen was considered to have been established between September 24th, 2003, the date on which it participated in the sixth meeting, and June 17th, 2008, the date on which the cartel ended, as a result of the inspection and seizure operations. VK Mühlen was fined €17,110,000.
3. The company appealed against this decision. Its appeal was rejected by the Paris Court of Appeal on November 20th, 2014.

The Paris Court of Appeal held that, when a company participates, even without it taking an active part, in one or more meetings with an anti-competitive purpose, and does not immediately and publicly distance itself from the content of such meetings, thereby giving the impression to the other participants that it subscribes to the outcome of the meetings and will comply with them, it is established that it participates in the resulting cartel.

4. The company appealed to the Supreme Court. In a judgment dated October 4th, 2017, the Commercial Chamber of the Court of Cassation overturned the judgment.

The Court of Cassation made this decision on the grounds that the Paris Court of Appeal had based its decision solely on the absence of public distancing by the company, VK Mühlen, following the sole meeting, on September 24th, 2003, which it had attended, without identifying any factual elements that establish the continuation of the anti-competitive behavior of this company until the end of the infringement, even though it was not disputed that it had not participated in the six collusive meetings that were held after the meeting of September 24th, 2003.

5. In a judgment dated July 4th, 2019, the Paris Court of Appeal retried the case, and set the fine at €5,733,000, thus reducing VK Mühlen's participation in the anti-competitive cartel to the period from September 24th, 2003, to July 27th, 2004, the date on which an invitation to participate in the eleventh cartel meeting was not sent to VK Mühlen.
6. Goodmills Deutschland GmbH, as successor to the company, appealed against the judgment of the Paris Court of Appeal of July 4th, 2019.

It argued, in particular, that the absence of distancing cannot, in the context of a cartel that continues over time and that is characterized by a succession of collusive meetings, be the only element that is used to establish that an undertaking, which is invited, but which is not present at these collusive meetings, continued to participate in the infringement after the only meeting at which it was present.

7. The Advocate General of the Court of Cassation ruled in favor of annulment on the following grounds:
- That it is risky to make the sanction of an anti-competitive practice depend solely on the perception of the other participants in the cartel of this participation, even if this jurisprudence seems to be established;
 - That the invitations were only sent in a discontinuous manner, no invitation having been sent for meetings Nos. 8 and 9;
 - That by refusing to attend meeting number 7, the company clearly indicated its position of refusal.

The Advocate General emphasized that the two elements which are required by European case law, namely, participation in an unlawful meeting, and public and perceived non-distancing, were established. Nevertheless, she called for stronger proof: the fact that the company would have used the information obtained at meeting No. 6 to determine its behaviour in the market under consideration, and to knowingly substitute the risks of competition with practical cooperation.

8. However, the Court of Cassation rejected the appeal in the decision that is commented upon. The Court of Cassation noted that the Court of Appeal had not merely established the absence of the distancing of the company, VK Mühlen, after its presence at a meeting that materialized its participation in the cartel, but noted that factual elements were noted, from which it had deduced, in a sovereign manner, that they established the continuation of the participation of this company in the cartel up to the date which had been set.

The Court of Cassation thus noted that the Paris Court of Appeal had analyzed the terms of the invitations to meetings Nos. 7 and 10, and deduced that they proved that "until the invitations to meeting No. 11 were sent, the parties to the cartel considered that VK Mühlen shared their objectives, and was prepared to assume the risks, and was one of them, and that, although it did not have control over the sending of the invitations, it could nevertheless put an end to them and mislead the sender and the other cartel members by expressly distancing itself and indicating that it no longer wished to be invited, which it did not do."

Comment

This decision deals with the judge's assessment of the duration of participation in a continuing cartel, in particular, when the company participated in a collusive meeting and then the cartel continued by holding other meetings, in which the company did not participate.

This assessment is important and delicate, as it is one of the elements that allows the amount of the fine imposed on the offending company to be determined.

In order to assess this duration, the Paris Court of Appeal, in its judgment of July 4th, 2019, undertook an analysis of the relevant Community case law, stating, in particular, in its Point 83:

"With regard to establishing the duration of participation in a cartel, in the context of anti-competitive practices which take place over a period of time and manifest themselves through a succession of collusive meetings, the Court of Justice specified, in Paragraph 19 of its judgment of September 15th, 2015, Total Marketing Services v. Commission (C-634/13 P), that, "even where it is not disputed that an undertaking no longer participates in the collusive meetings of a cartel, it is required to distance itself publicly from the cartel so that it may be considered to have ceased to participate in it, the proof of that distancing having to be assessed according to the perception of the other participants in that cartel" (emphasis added).

Additionally, in Paragraphs 22 and 23 of the same judgment, it says that, according to its case law,

“the requirement of distancing is an indispensable means of proof in rebutting the presumption of the unlawfulness of an undertaking's participation in an anti-competitive meeting, but that, as regards participation, in the case of participation, not in individual anti-competitive meetings, but in an infringement extending over several years, it follows from its case law that the absence of public distancing is only one of the elements to be taken into consideration in order to establish whether an undertaking has actually continued to participate in an infringement.”

The Court of Cassation, the highest French court in the field, has validated the analysis of the Paris Court of Appeal.

European case law is thus the direct origin of the French case law on the subject, despite the criticism levelled at it, notably, by the Advocate General of the Court of Cassation, in her opinion, which was made public.

Ivana Manestar, Zagreb Commercial Court

Case note on the judgment of the High Administrative Court of Croatia

Ref. no. UsII-35/2015-10 of 17th March, 2016

1) Brief summary of the facts of the dispute

Various members (undertakings) of the Nautical Tourism (Marinas) Association, which was founded by, and under the organization of, the Croatian Chamber of Commerce, as well as the Croatian Chamber of Commerce itself (as an association of undertakings), disputed the decision of the Croatian Competition Agency (from hereon: CCA), Ref. no. UP/I-034-03/13-01/047 of 17th March 2015, which:

- stated that the said undertakings (marinas) and the Croatian Chamber of Commerce had concluded a prohibited agreement with the object of the prevention, restriction or distortion of competition, pursuant to Art. 8 of the Croatian Competition Protection Act, by exchanging information on the future marina berth prices in the Republic of Croatia, which took place during a conference of the Marinas' Association of the Croatian Chamber of Commerce on 25th October, 2012,
- determined the time during which each undertaking, and the Croatian Chamber of Commerce, participated in the prohibited agreement,
- declared the prohibited agreement null and void,
- imposed monetary sanctions for each of the undertakings that participated in the anti-competitive agreement,
- imposed a symbolic monetary sanction on the Croatian Chamber of Commerce, as an association of undertakings that is obliged by law to take appropriate measures in order to assure its members are abiding by the law, and that organized the conference, and whose employee kept the Minutes to that conference, but that did not benefit from the prohibited agreement.
- During a preliminary examination of the market's state, which was started at the initiative of another undertaking, the CCA obtained the Minutes of the conference of the Marinas' Association of the Croatian Chamber of Commerce, which took place on 25th October, 2012, and which, among other things, expressly stated that:

"The present (undertakings) also announced that their marinas will not raise berth prices in the coming year, and those who do raise prices will do so minimally, at a cost that is equivalent to the inflation rate in Croatia."

The CCA determined the relevant market as being the market for renting the services of marina berths in the territory of Croatia, however, the CCA did not find it relevant to determine the relevant market precisely, and to determine the market power of each participant at the conference, since the prohibited agreement was horizontal and contained severe restrictions to competition.

All the accused parties denied concluding a prohibited agreement and denied participating in any kind of information exchange regarding future marina berth prices. They denied even that berth prices was one of the topics of that conference, and they have often stated that the disputable sentence in the Minutes was the result of the inexperience of the person who was keeping those Minutes, as it was the first and only time that he had taken Minutes.

The CCA questioned all the participants at the said conference during a hearing, as well as the person who was keeping the Minutes (Witness A); the person who was allegedly the only person who, at one point, spoke about marina berth prices (Witness B), and the news reporter who was allegedly the only person, besides Witness A, who heard Witness B speaking about marina berth prices (Witness C).

Witness A, who was an employee of the Croatian Chamber of Commerce, stated that taking the Minutes is not in his job description, and that, at the conference of the Marinas' Association, which took place on 25th October, 2012, he did it for the first and only time; that the disputable sentence was expressed by Witness B, who was, at the time, the representative of the largest member of the Marinas' Association (ACI) and also the President of that Association, after the conference was formally finished, and while everyone was about to leave the venue, and that he did not remember for whom the statement was intended, but since he heard it, he decided to enter it in the Minutes under the first item on the agenda – the evaluation of the nautical season, 2012. He explained that he generalized the statement of just one person as being the decision of all of the participants due to the fact that Witness B was the representative of ACI, which was the owner of the largest number of marinas in the Marinas' Association.

Witness B said that he made the statement relating to marina berth prices in 2013, after the conference had already finished, formally, as an answer to a question from Witness A, who was interested in what to say, if asked while he was representing the Croatian Chamber of Commerce at foreign nautical fairs about the still unannounced marina berth prices for the 2013 season, but that he was speaking only on behalf of ACI, additionally stating that others would do the same if they were smart. He said that he later repeated this statement to the members of the press.

Witness C, a representative of a nautical magazine, stated that he was present at that conference from beginning to end, unlike some other representatives of the media, who left shortly after the completion of the speeches given by the representatives of two Croatian ministers, and that the first topic was about an evaluation of the last nautical season, the second was a discussion on the new Maritime Property Act, and the third was the appearance of Croatia at foreign nautical fairs. He added that the prices of marina services were mentioned only once, at the end of the conference and, incidentally, by the representative of ACI, in the context that, in case he were to remain as the President of the Board of Directors of ACI, ACI's price policy would stay the same, and that nobody else had commented on that statement.

The other witnesses said that they did not hear the disputed sentence during the conference, and all of the accused parties, except for two, denied that they had ever received the Minutes from that conference, but those undertakings denied that they had ever read it, although Witness B said that, while he was the President of the Marina Association, the Minutes were always delivered afterwards to all off the members via e-mail, and that the first item on the agenda at the conference that followed was one to ascertain the accuracy of the Minutes of the previous one, which was confirmed as being a regular practice, even by the accused Croatian Chamber of Commerce. However, the Croatian Chamber of Commerce denied that this was the case in relation to the disputed Minutes from the 25th October, 2012, Conference.

The CCA did not believe that the disputed sentence in the said Minutes was the result of the professional inexperience of Witness A (The CCA had found him to be sufficiently experienced). It established that the content of the Minutes of the following conference, which was held on the 19th March, 2013, confirmed that there had been an exchange of information regarding future marina berth prices during the 25th October, 2012, Conference, because the latter stated that most marinas had raised their prices for the 2013 season by 3 – 6%, while ACI did not do so, and had granted discounts and privileges for annual marina berths, which was, in the eyes of the CCA, the establishment of the results of previously announced future anti-competitive behavior.

The CCA also did not believe those witnesses who had stated that there was no discussion on future marina berth prices at the 25th October, 2012, Conference, since they were all current or former employees of the accused undertakings and it found that there was no material evidence that Witness C, who was allegedly an uninterested witness, was ever present at the conference in question.

The CCA concluded that, since the parties in question adopt price lists annually, the information that was exchanged at the conference held in 2012 regarding future marina berth prices (for the 2013 season) was sufficient for the parties to coordinate their behavior in that regard, and that, given the nature of the exchanged information (future prices), the said exchange represented a restriction of competition by its object, and therefore it is unnecessary to determine the anti-competitive effects of that exchange (which would require the determination of the characteristics of the relevant market, and of the characteristics of the information that was exchanged). Pursuant to the relevant *Acquis Communautaire*, the undertakings that participated at the Conference, and who had not expressly distanced themselves from the conclusions adopted at that conference, had tacitly approved the prohibited agreement, and therefore the fact that some of them did not coordinate their behavior according to those conclusions, does not exempt them from the responsibility for the illicit behavior that has been described.

2) Summary of the judicial proceedings

The undertakings in question, and the Croatian Chamber of Commerce, filed separate lawsuits against the CCA that disputed the named decision, and the CCA gave defence statements to each of those lawsuits, after which the High Administrative Court of the Republic of Croatia (hereafter: The Court), which was, at that time, competent to decide on the cases that were brought against the CCA in competition matters. That Court decided to merge all of those procedures into one. and held a public hearing, during which all of the parties kept to their earlier statements. The Court refused to question the witnesses and the party representatives who had already been questioned in detail before the CCA, and who had refused to execute their financial expertise, since the parties were accused of concluding an agreement which was prohibited by competition law by its object, and not by its effect. The Court decided to annul the CCA's disputed decision.

3) The Ruling of the Court

The Court agreed with the CCA that the disputed statement of Witness B, who was, at the time, the representative of ACI, and who was, economically, the strongest member of the Marinas' Association, and also the President of the said Association, which was expressed at the October, 2012, Conference, and was made during the discussion on the first agenda item – the evaluation of the last nautical season, adding that, because of Witness B's position, his statement could be interpreted as being an invitation to coordinated behavior.

However, the Court found that the facts of the case do not, for the time being, allow for a conclusion that says that there was an exchange of information on future prices at the conference that was held on 25th October, 2012. Namely, the Court was of the view that the content of the Minutes of the following Conference, which was held in March, 2013, cannot, by itself, be deemed to be evidence of a previous exchange of future price information that facilitated coordinated behavior, given the fact that the March, 2013, Conference was the first conference which was presided over by the newly elected President of the Marinas' Association, with one of the main topics being the preparation for the 2013 season which, naturally, included an exchange of information on prices, which had already been formulated by the marinas for that season, and, especially, the fact that all of the participants at the October, 2012, Conference, except for one undertaking and the Croatian Chamber of Commerce, denied hearing the disputed statement of the ACI representative (Witness B), whereas the CCA failed to establish whether the Minutes of that Conference were ever delivered, via e-mail, to all of the accused participants.

The Court therefore considered that the facts of the case had not been fully established by the CCA, due to which it was impossible to determine whether the disputed sentence in the Minutes of the Conference in October, 2012, results from an exchange of information which restricted competition by its object, or that it was a unilateral declaration of one undertaking, from which other undertakings have not expressly distanced themselves when they have been given the chance to do so, and that they are, therefore, deemed to have tacitly agreed with that declaration.

The Court, also, added that the facts of the case were not fully established with regard to the statements of the accused parties: that their price lists for marina berths for the 2013 season were already determined before the conference in October, 2012, and that this would lead to the upholding of their defence.

In conclusion, The Court annulled the disputed decision and the case was remanded to the CCA for reconsideration.

4) Procedure in front of the CCA after the ruling of the Court

The CCA stated that, since the accused parties denied having received the Minutes of the Conference that was held in October, 2012, via e-mail, or have claimed that they had no recollection in that regard, the only way to determine the delivery of the said Minutes would be to conduct an unannounced search of their business premises, i.e., of the computers in their business premises. Bearing in mind that four years have passed since the disputed conference, and that the accused parties know exactly which documents would lead to their being found liable for infringement of Competition Law, the CCA deemed that conducting an unannounced search in such circumstances would not serve its purpose.

The CCA questioned the Court's standpoint: that the disputed sentence had not resulted from an exchange of price information among the accused parties, but from the unilateral declaration of a representative of one undertaking which was made at the end of the Conference, while the other participants were leaving, with the effect of sharing strategic information with other undertakings, who will be presumed to have accepted that information and to have adjusted their behaviour accordingly, unless they have clearly and expressly refused to accept that kind of information.

The reasoning of the CCA was that if, during the Conference in October, 2012, only three people heard the disputed sentence of the representative of ACI (Witness B) – Witness A, as the representative of the Croatian Chamber of Commerce, the representative of one of the other undertakings, and Witness C, as the representative of the media, and given the fact that the name of the person who gave the statement is not registered in the Minutes, then, even if other undertakings received the Minutes via e-mail, they would not know whose statement it was, and so the statement would lose its significance, especially from the Court's standpoint (that it was given by the representative of the largest member of the Marinas' Association and, therefore, it was suited to being interpreted as an invitation to join in with coordinated behaviour) and, given the fact that the Minutes were drawn up by the Croatian Chamber of Commerce, and not by the ACI, the strongest member of the Marinas' Association, which would mean that the information which was of a confidential nature, was not revealed by the ACI, but by the Croatian Chamber of Commerce, and thus that it is questionable whether the behaviour that has been described could be construed as being a unilateral revelation of information of a confidential nature, in the meaning of the relevant CEU practice.

In conclusion, it was the CCA's standpoint that determining whether the accused parties had received the Minutes of the Conference that was held in October, 2012, would, firstly, be practically impossible, and, secondly, would be legally irrelevant, since the characteristics of the disputed statement do not give rise to the conclusion that there is the existence of a prohibited agreement. For that reason, the CCA decided to adjourn the proceedings, due to the lack of legal prerequisites.

5) Personal comment

It is my personal observation that the defence of the members of the Marinas' Association and the Croatian Chamber of Commerce was not persuasive and lacked basic credibility. Namely, it is not convincing that a person with long-term professional experience in any area of expertise, let alone in the field of nautical tourism, as was Witness A, would register a statement expressed by only one of the participants at the Conference to another, after the Conference was finished. and while everyone was starting to leave the venue, as being an announcement of something with which all of the participants were compliant in regard to the first item on the agenda. Furthermore, it should be noted that the Minute Keeper (Witness A) stated that he heard the disputed statement being made by the ACI's representative (the ACI being one of the undertakings), and that person was the President of the Marinas' Association (Witness B), who made the statement to someone else, who was unknown to him. However, Witness B stated that the disputed statement was made in answer to a specific question that was posed to him by Witness A. Thirdly, the Croatian Chamber of Commerce, which admitted that it was usual for the first item on the agenda of a Conference of the Marinas' Association was put there to ascertain that the contents of the Minutes of the last conference were accurate, perhaps predictably, denied that this was the case with the Minutes of the Conference that was held in October, 2012. It is also peculiar that none of the accused members of the Marinas' Association disputed a stipulation in the Minutes of the Conference that was held in March, 2013, regarding the first item on the agenda – the preparations for the 2013 season, about the fact that all of the undertakings, except the ACI, had raised their marina berth prices at the rate of inflation (3 – 6%), and that the ACI provided its clients with discounts and privileges, i.e., nobody is disputing that the price policy that had already been applied was discussed, because that kind of discussion cannot constitute an anti-competitive agreement, but they are disputing that they ever discussed prices for the 2013 season at the Conference held in October, 2012, prior to their announcement and application, even though this was also registered in the Minutes, because they are aware that this kind of behaviour constitutes a cartel. It remains unclear to me how the Court could agree with the CCA's conclusion that the disputed statement was expressed with regard to the first item on the agenda – the evaluation of the results of the last season (which conclusion the CCA gave as a response to the implausible defence that the disputed statement was made at the end of the meeting and, incidentally, only by one person to another), to then conclude that the statement was intended to be heard by all of the participants at the Conference (which, in my opinion, would presume that, since the person giving the statement is the President of the Marinas' Association, and the President of the Board of Directors of the largest undertaking in the Association (the ACI), everybody was at least listening to him, even if they were not participating in the discussion), and still, nevertheless, demand from the CCA, given the "fact" that the majority of the participants (all except one) denies hearing that statement, which is, surprisingly, not in any way questionable by the Court from the verity point of view, to provide the Court with the evidence that the participants at that conference, who were members of the Marinas' Association, were delivered with the Minutes of that conference, thus characterizing the behaviour described as being a possible unilateral invitation by one undertaking to coordinated behavior. I agree with the CCA that the characteristics of the disputed statement, under the presumption that nobody heard it during the Conference, make it hard for the statement to be construed as being a unilateral invitation by one undertaking to coordinated behavior, because the Minutes do not stipulate the undertaking which made that statement (author's comment - because it was not the statement of solely one undertaking, but was one of the results of a discussion between more undertakings), i.e., there is no invitation by a specific undertaking, and the Minutes were drawn up and, allegedly, were sent to all of the members of the Marinas' Association by the Croatian Chamber of Commerce, who did not make that invitation, and which was one of those accused, as it organized the Conference and, in a way, was obliged to secure that its members were abiding by the law, unlike those of its members who were accused of being the beneficiaries of the anti-competitive agreement, the only ones who could coordinate their behaviour regarding price policy.

This means that the delivery of the Minutes could not be construed as being an invitation by the Croatian Chamber of Commerce, to its members, that they be involved in coordinated behavior. However, since the CCA is obliged to follow the legal standpoints of the Court, that Court had no other option but to adjourn the proceedings.

PROCEDURAL ASPECTS IN COMPETITION LAW ENFORCEMENT

Ioana Oltean, Constanta First Instance Court

Brief summary of the facts of the dispute

Regarding the facts of the case, the evidence shown before the National Court indicated that, during the commercial relations that took place between the Applicant and its distributors, the first party used a type of 'promotional forms' that had a mixed format (both tabular and textual paragraphs).

The Table identified the supplier, the promotional period, the types of products, the product codes, the current list prices, the basic discounts, the promotional discounts, the advertising costs (publication in magazines), as well as the expression "*the supplier guarantees throughout the promotion that the product will not be promoted on any competing retail network*". This expression was interpreted and framed by the competition authority as 'restricting resale prices' and as 'restricting promotions or the promo clause', in the sense that these are anti-competitive practices.

The Applicant attacked the decision of the National Competition Authority and, through this paper, I will present one of the points invoked: that the decision establishes a different judicial treatment for companies that are in the same situation as the Applicant, the jurisprudence of the Court of Justice of the European Union stating that competition sanctioning decisions which are issued in breach of the standard of proof or the principle of equal treatment are, in turn, sanctioned by their annulment.

Summary of the judicial proceedings

The National Court believed that the evidence which was brought to its attention pointed to a discriminatory practice by the National Competition Authority, in the sense that similar practices of other retailers were not sanctioned in other cases.

In terms of the applicable law, the Court looked at Art. 101 of TFUE (ex Article 81 TEC), and according to the settled case-law, the concept of the '*restriction of competition by object*', which referred to agreements or concerted practices that are, in themselves, '*sufficiently harmful*' to competition, makes it unnecessary to examine their effects on competition (Judgment of 30th June, 1966, LTM (56 / 65, EU: C: 1966: 38, p. 359); Judgment of 11th September, 2014, CB v Commission (C 67/13 P, EU: C: 2014: 2204, Paragraphs 49, 53 and 57), and of 27th April, 2017, the FSL and Others v Commission (C 469/15 P, EU: C: 2017: 308, Paragraph 103, and the case-law cited). The Court found that, without doubt, the illegal practice of the Applicant existed.

However, in the light of the proportionality of the sanction, the National Court analysed the case of another retailer that had a similar practice to that of the Applicant. However, whilst analysing the documents in the case file, the Court came to the conclusion that there was a non-unitary application of the law by the National Competition Authority, since it issued administrative acts that would successively finalize (without the existence of any disjointing provision), the single investigation. In essence, the more serious violation, of the same type, by another retailer, was met with no sanction but, rather, by the closing of the investigation's file.

In the case of the second retailer, therefore, a much more complex/elaborate illicit activity was outlined than that which had been retained by the Applicant, including the practice of the Promo/Competitiveness/Advertising clause, the obvious purpose of which was to prevent the retailer's suppliers from carrying out simultaneous promotions (in other competing store chains) of the products being promoted within the networks, and to the said retailer, a practice sanctioned by the contested decision in the case of other retailers and/or suppliers (who allegedly acted in a coordinated manner).

Since the supplier was prohibited, as a result of the promotional forms and contracts, from undertaking simultaneous promotions of the products in advertising on the networks of other retailers, the result was, in fact, that the supplier could not grant, at the same time, promotional discounts in other competing stores, with the consequence that they were indirectly fixing the sales prices. The only possibility for consumers to benefit from the promotional price reduction of that product was thus to purchase it only from the stores of a single retailer, and not from any other competing store. It was stated in the contested decision, therefore, that such a restriction eliminated the choices of the final consumers, with the consequence that they are affected in terms of price. In conclusion, the wording, which the contested decision itself considers to be an infringement, is also found in the documents of other companies that were investigated, but which were not sanctioned for those practices. The Court therefore found that the Applicant's sanction was in obvious violation of the principles of equal treatment, and the standard of proof, with the National Competition Authority applying the law differently in identical or comparable situations, situations which entail the annulment of the decision itself.

In other words, in the light of the above, it could not be accepted that, on the basis of evidence of the same value and/or nature, an infringement by object was upheld only for some of the undertakings that are subject to a joint investigation and that are located in the same situation, or in a manifestly similar situation. It follows that both the withholding of the Applicant's participation in an anti-competitive settlement and its sanctioning are, in those circumstances, unlawful, in relation to there being a breach of the principle of equal treatment, including one in the manner of the sample.

Second, the Applicant did not allege that the decision was unlawful, but, considering that it was proven that they were in a situation that was similar to that of another retailer, including, in the light of the standard of proof that is required, in order to prove the alleged anti-competitive facts that are in question, they asked that the law be applied to them in the same way. The Applicant also claimed that closing the investigation for the other retailer demonstrates a presumption of legality, which means that if formulations, such as those indicated above, are not anti-competitive by object, then those for which it was sanctioned could not validly lead to the conclusion that there was a violation of the law.

In essence, the Court considered that it is inadmissible for the National Competition Authority to defend itself by invoking the Commission as being involved in a possible illegality in issuing an order, in order to obtain the maintenance of the contested decision, as no one is allowed to plead his own fault, in order to obtain the protection of a right or interest, in accordance with the general principle of law that is enshrined in the *adage nemo auditur propriam turpitudinem, allegans*. According to the stated principle, when invoking unequal legal treatment in a joint investigation, the Competition Authority therefore had the task of proving the unfounded character of such a criticism, of not being able to remove it by asserting or acknowledging that it is illegal, and that no one can take advantage of his own turpitude. Moreover, the circumstances of the present case, in which issues relating to the discretion of the Competition Authority in relation to the fulfilment of the requirements of the standard of proof and the constituent elements of the alleged anti-competitive act that has been imputed to the Applicant, are discussed, as well as the sanction that will be imposed in the event of abusive conduct by the Competition Authority, which differs from that in *Bolloré SA and Others v. Commission of the European Communities*, which essentially focused on the influence of an economic indicator with a precise, mathematical value (the figure of business), on the sanction that was imposed.

In other words, since it requires the comparative examination of the situations in which the two companies found themselves in relation to both the standard of proof which the Competition Authority considers necessary in order to establish the existence of the alleged anti-competitive act that is in question, and its elements, it follows that the judgment of the Court of Justice of the European Union of 19th July, 2012, in Cases C-628/10 and C-14/11, *Alliance One International Inc., Standard Commercial Tobacco Co. v. European Commission and European Commission v. Alliance One International Inc., Standard Commercial Tobacco Co. Inc., Transcontinental Leaf Tobacco Corp. Ltd.*, is applicable.

Contrary to the Competition Authority's contention, all of the individualized documents above concern food (which, according to Regulation (EC) No 178/2002 of the European Parliament and of the Council, also includes beverages), and they were part of the file on the joint investigation. However, one of the main reasons why several investigations were brought together was, precisely, for the efficient conduct of the investigation, which involves the corroborative analysis of the documents and their proper valuation in relation to each of the facts and undertakings investigated, so that the Competition Authority could not rely on the defective fulfilment of this obligation, as it is equivalent to invoking the notion that it is itself at fault, which cannot be accepted, as has previously been demonstrated.

In this context, the Court stated that, as it turned out that the other retailer did not submit all of the documents regarding the relevant relations with its suppliers and the Competition Authority, this did not make up the necessary verifications in this respect regarding the documents in the joint investigation, and, therefore, there is a possibility that other promotions may have taken place under the same conditions as those resulting from the individualized documents, above.

Furthermore, the analysis of the manner in which the principle of equal legal treatment is applied involves, by its nature, an examination of the documents relating to the two economic operators in question (as did the European Court in Cases C-628/10 and C -14/11, *Alliance One International Inc., Standard Commercial Tobacco Co. Inc. v. European Commission and European Commission v. Alliance One International Inc., Standard Commercial Tobacco Co. Inc., Transcontinental Leaf Tobacco Corp. Ltd.*) and that it is not conditioned in any way by the existence/non-existence of documents concerning both economic agents, so that the Competition Authority's defence was redundant, in the sense that the documents concerning the other retailer do not refer to the Plaintiff, and do not have as their object the commercial relations with the Plaintiff.

Contrary to the Competition Authority's assertions, the same documents show, in the same way as in the case of the Applicant, the manifestly similar manner in which sales prices were set for the products in the promotion, which was achieved through the conclusion of contractual documents (contracts, annual agreements, electronic correspondence, etc.) that expressly provided for the minimum or fixed price level that the other retailer had to charge during the period in which the product was being promoted. In addition, the documents reveal the restrictions on the sales price for each supplier (of those indicated above) to the other retailer, and to other competing store chains during the promotion period, which indicates a more serious action by this retailer.

Third, the Court states that, in order to establish an infringement/observance of the principle of equal treatment, it is not necessary for it to carry out its own administrative investigation (which has a different purpose from that pursued by the Applicant who is alleging the infringement/irregularity in question), a sufficient legal instrument being the judicial investigation (which is completed with the institutions by means of debate, deliberation and the pronouncing of a decision).

The ruling of the Court

In conclusion, the contested decision was unlawful, as it was found that the Competition Authority had established a different legal treatment for companies (with special reference to the other retailer) that were in the same situation as the Applicant, in terms of their relevance to the assessment of an infringement of competition rules, including the standard of proof that is required in order to prove the alleged anti-competitive facts in question.

The Competition Authority could not, in a joint investigation, as in the present case, treat different comparable situations differently, and only penalize some of all of the companies that were involved in similar, and similarly proven, practices.

The same arguments for finding the innocence of the other retailer should have been valid for the Applicant, the case-law of the Court of Justice of the European Union requiring that, in circumstances such as those in the present case, the Competition Authority must rely on the same criteria in its decisions, under the sanction of their annulment.

Personal comment

At the moment of writing this case note, the Supreme Court of Justice in Romania, in an appeal against the decision outlined above, admitted the claim, but the ruling was not adopted yet. Although I am in accord with the reasoning of the Court of Appeals, highlighted above, I foresee that the Supreme Court will argue on the fact that, in contravention of the law, as in criminal law, the wrongdoings of another person cannot be factored in whilst deciding on another case. I find this approach slightly rigid when applied in competition law, due to the nature of the law itself and the nature of the sanctions imposed here. My opinion is that reasoning that runs contrary to those factors that are stated above by the Court of Appeals would not be fair to the retailer who was sanctioned, and may thus produce economic effects that have a considerable impact. Beyond the law, which it is, of course, mandatory to apply, one cannot ignore the fact that it is important for the well-being of the EU to have predictability in the application of sanctions, and a regime that must be adopted by every player in the market. Otherwise, such sanctions tend to be discouraging, and they will force these players outside of the EU, an aspect which is not in the consumer's favour, nor of that of the economy or of all of those involved. The relevance of the case is that it constitutes a first step in a different direction than that which the national law of my country has always followed, in the sense indicated above.

Lucie Mikulikova, Prague Municipal Court

Introduction

This contribution deals with a recent judgment of the Regional Court in Brno (hereinafter referred to as 'the Court') of 25th November, 2020, No. 30 Af 28/2018-373, which annulled the decision of the Office for the Protection of Competition (hereinafter referred to as 'the NCA'). The NCA's decision declared that there was an abuse of a dominant position, under Czech competition law, by CHAPS spol. s r.o. (hereinafter referred to as 'CHAPS'), on the market for transport connection search services. In particular, this occurred due to their refusal to give access to timetable data, and to their subsequent use in the online environment by potential competitors. The Court clarified the concepts: '*an undertaking*' and '*services of general economic interest*'. However, its ruling has far-reaching consequences, since it has shed light on the length of time during which there was infringing conduct that could be sanctioned in a formally initiated anti-trust proceeding. According to the Court, an official initiation of administrative proceedings by the NCA shall be viewed as the moment that interrupts (from a procedural point of view) the scrutinised anti-competitive conduct, despite the fact that the same conduct continued after that moment. The part of the infringement that took place after the formal initiation of an administrative proceeding cannot therefore be scrutinised and sanctioned as a result of those proceedings. The newly established rule differs from the current practice of the Czech NCA and, more interestingly, also from the standards that are applied by the European Commission (hereinafter referred to as 'the Commission') in the enforcement of Articles 101/102 of the Treaty on the Functioning of the European Union (hereinafter referred to as 'TFEU'). In my opinion, the CHAPS judgment will have negative implications for the public, as well as for the private enforcement of competition law.

Facts of the case and the NCA's decision

Under a contract that was concluded between CHAPS and the Ministry of Transport in 2001, CHAPS created and operated a nationwide information system on transport connections (CIS) and an internet search engine for transport connections (IDOS)¹¹. Carriers were required by Czech law¹² to provide CHAPS with their current timetables in a special format that allowed for the automatic machine processing of the data in the CIS. In April, 2008, potential competitors, such as Seznam.cz, Bileto and Google Inc., also intended to provide search engines and other services that were based on the updated timetables. However, CHAPS refused to share the data in a format that was compatible with the CIS, in which format they mandatorily, and free of charge, had it submitted to them by the carriers.

On 31st October, 2013, the NCA initiated formal anti-trust proceedings against CHAPS for an alleged breach of competition law. The NCA's First Instance decision (issued on 22nd December, 2015) declared that there were two offences that had been committed by a single and continuous infringement, lasting from 11th April, 2008, to 31st August, 2015¹³, namely, (i) an abuse of a dominant position under the Czech Competition Act,¹⁴ and (ii) an abuse of a dominant position under Article 102 TFEU. According to the NCA, CHAPS *distorted competition* on (i) the market for transport connection search engine services with nationwide coverage, and on (ii) the market for information on existing timetables in the Czech Republic, *by abusing its dominant position (iii)* on the market for updated timetable data, to the detriment of its competitors and consumers. The fine imposed for these two offences amounted to CZK 2,199,000 (approx. €86,000).

11 The maintenance of the Central Information System for Transportation (CIS) consisted of a set of data on timetables for public passenger transport and a software product enabling the use of the timetable data in digital form. The CIS included: a timetable database, a register of stations and stops, a codebook of lines and routes, and a register of carriers. CHAPS was required to operate, without remuneration, the traffic connection search engine on the Internet (IDOS) on which the output of the CIS dataset was accessible to the public.

12 Act No. 111/1994 Coll., on Road Transport, as amended, and Act No. 266/1994 Coll., on Railways, as amended.

13 Since September, 2015, according to the amendment, the CIS data shall be disclosed in a machine-processable format, thus making it *de facto* a public good.

14 Section 11 of Act No. 143/2001 Coll., on the Protection of Competition (hereinafter referred to as 'the Czech Competition Act').

The Appeal's decision, issued by the Chairman of the NCA, amended the First Instance decision in two ways – the EU offence was annulled due to the lack of sufficient evidence on its capability to affect trade between EU Member States, and the fine was proportionally reduced to CZK 1,080,000 (approx. €42,120); the rest of the decision, concerning the infringement of national law, was upheld.

Legal proceedings and CHAPS's pleas in law

CHAPS filed a lawsuit to the Court against the NCA's decision. In the course of the judicial review, the Court dealt with the following pleas in law.

Firstly, CHAPS claimed that it could not be considered 'an undertaking', but should be considered to be a public authority, due to the fact that it was responsible both for the maintenance of the CIS database and the creation and operation of IDOS search engine. CHAPS recalled that even if it fulfilled the definition of an undertaking, it was contractually entrusted with services that were of general economic interest, and which are subject to competition rules only in so far as the application of such rules does not obstruct the performance of its tasks. It underlined the fact that it had never traded the data on a commercial basis, since the performance of the tasks was based on a public contract, under the terms of which there was no remuneration.

CHAPS further challenged the conclusion that only an entity with unlimited access to the CIS data could compete on the merits. This false assumption had artificially created a dominant position for CHAPS. According to the Claimant, the NCA disregarded the fact that the data could also be obtained privately from the carriers. Neither the Czech legislation nor the contract prevented those carriers from also providing the data, in a computer-processable format, to other companies, on a commercial basis. In this context, CHAPS drew attention to the activities of the companies INPROP and Kiwi, which are in the field of air and public transportation. The Claimant further argued that the NCA did not consider the position of CHAPS in the downstream markets for this traffic information and the search engine, where it was competing with other companies, such as the operators of nationwide search engines for desktop¹⁵ and mobile¹⁶ devices, including the operators of sub-search engines for a particular mode of transport (e.g., trains), or only for a particular area (e.g., public transport in a particular city). CHAPS also questioned the definition of '*relevant markets*'. It argued that the NCA had neither carried out an adequate economic analysis¹⁷, nor had it correctly analysed the supply and demand side of the market, since sub-search engines could also create competitive pressure via substitution chains or multi-homing. It stressed that the NCA did not take into account that the IDOS search engine is a part of 'a multi-sided platform', on which the providers of transport connection data, the recipients of that data and the advertisers interact with each other.

CHAPS also challenged the legal classification of the offence as '*a refusal to supply*'. In this respect, the Claimant argued that it had been publishing the CIS data on its website in pdf and xls formats, and thus all third parties had unlimited access to it. However, CHAPS considered the timetable data, when managed in its CIS dataset, to be its intellectual property.

CHAPS further argued that consumer welfare has been enhanced since the IDOS search engine had been available to consumers, free of charge, since it did not favour any of the carriers, and it had been constantly refreshed with upgrades and add-on units. Nevertheless, providing the CIS data to CHAPS's potential competitors would make it economically impossible for the Claimant to fulfil its general public interest objectives. CHAPS's refusal to share the CIS data was thus objectively justifiable.

¹⁵ Teroplan's and Google's search engines. In April, 2015, Seznam also launched its search engine on *mapy.cz*.

¹⁶ Mobile Apps, such as CircleGate, Timetables in your Pocket and Pubtran.

¹⁷ For example, a modified version of the SSNIP test, which was concerned with the quality of services, or a correlation analysis.

CHAPS finally argued that the NCA had erred in treating the offence as lasting from 11th April, 2008, to 31st August, 2015. According to CHAPS, the infringement could not have been terminated on the latter date, since it was discontinued (from a procedural point of view) at the point of the initiation of the formal anti-trust proceedings by the NCA, i.e., on 31st October, 2013. The Claimant also contested the amount of the fine imposed on it by the NCA.

The Court's ruling

The Court admitted that the Ministry of Transport had contractually bound CHAPS to pursue some of the State's powers in order to perform public tasks. However, in the given case, it was possible for an entity, such as CHAPS, to simultaneously meet both the definition of '*a public body*', under the Information Act¹⁸, and of '*an undertaking*' that was subjected to competition rules. The collection of timetable data was considered to be the task of the State, and was performed in the general public interest. Nevertheless, CHAPS had no power to decide at its own discretion to whom, and under what conditions, it would provide this data commercially. In this respect, the Court distinguished the position of CHAPS from that of the State in the decision of the ECJ in *Compass-Datenbank GmbH v. Austria*,¹⁹ a case which concerned the denial of access to data from the Austrian commercial register for further commercial exploitation.

The Court also agreed with the NCA's definition of the relevant markets and CHAPS's dominant position. According to the Court, treating the market for an automatic connection to search services as a so-called 'multi-sided platform' could not lead to a more favourable outcome for CHAPS. Given the particular historical circumstances and the legal framework, the Court found that CHAPS's privileged position was significantly close to being an infrastructure monopoly (an essential facility), and was reinforced by carriers' and transport coordinators' concerns about sharing the timetable data with other competitors. The Court also rejected the argument that the data constituted the intellectual property of CHAPS. The Court concluded that direct access to the CIS data would enable potential competitors to develop their own database, together with a search algorithm that would allow them to design their own search engines in a different way, to link their products to other programmes and to introduce innovative products, etc., and this was prevented by CHAPS's conduct.

Although the Court found no merit in most of the objections that had been raised by CHAPS, ultimately, it annulled the contested decision, due to the fact that the NCA had incorrectly determined the duration of the infringement, considering it to have ended on 31st August, 2015. The Court criticized the NCA for disregarding the fact that the anti-trust (administrative) proceedings had been officially initiated on 31st October, 2013, with the statement of the charges (in the form of a Resolution), and that this procedural act had interrupted (terminated) one infringement (act) and, at the same time, had led to the initiation of a new one, because the Claimant had continued its infringement even after the official launch of anti-trust proceedings. The Court emphasised that the moment of the commencement of anti-trust proceedings unambiguously delimits in time the scrutinised conduct, which can be the subject of these proceedings, and thus gives certainty about the facts on which the accused undertaking focuses its defence. The NCA's decision was therefore annulled on the grounds of the incorrect determination of the duration of the infringement and its actual impact on the amount of the fine imposed, and the case was referred back to the NCA for further proceedings.

¹⁸ Act No. 106/1999 Coll., on free access to information, as amended. The obligation to share information usually lies with public authorities, State-owned enterprises, or entities that are vested with the powers of the State.

¹⁹ Judgment of the ECJ of 12th July, 2012, C-138/11 *Compass-Datenbank GmbH against Austria*, EU:C:2012:449.

The clear lesson from the CHAPS judgment is that a guilty verdict, and the amount of the resulting fine, cannot cover that part of an infringement that has continued after the formal initiation of anti-trust proceedings. In any new decision, the NCA is obliged to follow the Court's legal opinion that only the infringement committed by CHAPS in the period from 11th April, 2008 (6th December, 2010) to 31st October, 2013, i.e., until the date of the formal initiation of anti-trust proceedings, can be investigated in the ongoing proceedings. In order to investigate the second part of the infringement, i.e., the part that continued after 31st October, 2013, the NCA should commence new administrative proceedings.

Comment

Until the CHAPS judgment, the NCA had viewed breaches of competition law, whether national or EU, as being made up of a single and continuous infringement, until this decision was handed down, providing that the undertaking's conduct continued until that time²⁰.

In Czech *criminal law*, if an accused person continues to commit a criminal offence, for which s/he is being prosecuted, after the indictment has been formally handed down, such conduct is deemed to be a new (continuing) offence from that moment onwards²¹. According to the decision-making practice of the Czech administrative courts, with reference to Article 6 of the European Convention on Human Rights and the case-law of the European Court on Human Rights, the above-mentioned principle is also relevant in administrative law²². Nonetheless, until the CHAPS judgement, the question of the applicability of this criminal principle in competition law cases has not been subject to judicial scrutiny. The CHAPS judgment is thus the first judgment that has directly addressed this issue. The Court, with its decision, has unambiguously subscribed to the principles that are applicable in criminal law by concluding that an undertaking can only be found guilty (and thus be sanctioned) for any anti-competitive conduct which occurred before the official initiation of the anti-trust proceedings.

It is also interesting, in the given sense, that the Court did not consider the Statement of Objections, which was issued on 17th April, 2015, to be relevant here²³. The Statement of Objections, besides other things, described in detail *what type of conduct*, and in *what period of time*, it was considered to be a breach of competition rules. At least on this point, CHAPS was clearly and precisely informed about the scope of the infringement, so that it was given sufficient opportunity to defend itself, to comment on all of the facts set out in the statement of objections, and to propose new evidence to support its assertions. It is therefore not easy to understand why the Court found the practice of the NCA to be diminishing the procedural rights of the Claimant.

The findings of the Court have major implications for the NCA's decision-making practice. The NCA's approach, in the infringement decisions that have been issued to date, cannot be reversed. However, in ongoing and newly initiated anti-trust proceedings, which often last several years, the NCA will have to broaden the subject matter of these proceedings (even doing this repeatedly) in order to sanction the anti-competitive conduct in its entirety. The NCA may do so by initiating new administrative proceedings for "*new*" conduct that has occurred after the initiation of formal

20 Many of the decisions of the NCA were confirmed by the Czech Supreme Administrative Court [see Judgments of the Supreme Administrative Court of 23rd October, 2008, No. 8 Afs 17/2007 (ČEZ); of 31st October, 2013, No. 8 Afs 40/2012 (Husky); of 20th December, 2013, No. 5 Afs 3/2012 (*Sokolovská uhelná*); and of 21st June, 2017, No. 3 As 110/2016 (*Candy*); of 7th June, 2017, No. 6 As 68/2017 (*RWE*)]. See also the decision of the Chairman of the NCA of 10th December, 2018, No. ÚOHS-R122/2018/HS-36602/2018/310/HMK (České dráhy). In all of these cases, the unity of the offence was maintained, even after the formal opening of anti-trust proceedings, and the entire offence was prosecuted as a single and continuous infringement during a single proceeding.

21 See Section 12(11) of Act No. 141/1961 Coll., on Criminal Procedure (Criminal Procedure Code), as amended, and Article 6 of the European Convention on Human Rights.

22 Section 11(2) of the Criminal Procedure Code was used in administrative punishment by analogy (see Judgments of the Supreme Administrative Court of 20th October, 2016, No. 3 As 205/2015, and of 12th July, 2017, No. 6 As 116/2017).

23 The '*resolution initiating the formal anti-trust (administrative) procedure*' describes a factual context of the conduct of which the undertaking is accused, including the period with an open-ended termination period (usually using the formulation '*at least since ...*'). In a later course of the ongoing anti-trust proceedings, the NCA issues the '*statement of objections*' that describes *in detail* what conduct, and for *what* period of time, it is considered that there has been a breach of competition rules, and to indicate the amount of the fine that the accused is going to face for his anti-competitive conduct. Then, a '*final decision*' is normally issued a few months after the statement of objections. The Commission uses the same instrument in its proceedings.

proceedings. Indeed, this formalistic and inconsistent approach means splitting the investigation of a de facto single and continuous infringement into several (procedurally) “*separate*” infringements, which can only be sanctioned in separate anti-trust proceedings²⁴. This may lead to situations in which the NCA will tend to postpone the moment for the initiation of formal anti-trust proceedings to a later stage, which may have an adverse effect on the undertakings’ rights to defence. It is also possible that the NCA will not investigate part of an occurrence of illegal conduct following the official initiation of anti-trust proceedings; this option is the least desirable, in particular, from the perspective of the injured parties and their future claims for compensation.

Although, ultimately, the CHAPS judgment concerned the infringement of national law, the NCA is also bound by its principles in cases of the parallel application of Articles 101/102 TFEU and national competition rules.

It is worth mentioning, at this point, that the Commission regularly declares a single and continuous infringement of Articles 101/102 TFEU for a period which is extended up to *the date of the issuance of its final decision*²⁵, even though the opening of the formal investigation precedes this date by several months, or even years. The shared power of National Competition Authorities and the Commission, in the enforcement of Articles 101/102 TFEU, cannot be disregarded, since NCAs should achieve the same objectives as the Commission when applying those provisions. However, the choice of procedural tools, and the way the anti-trust proceedings are carried out by the NCA, is a national matter. In the future, it may well be that, in a particular case concerning the investigation of an alleged breach of Article 101/102, the duration of such an infringement will significantly differ. Providing that the case is investigated by the NCA, the single and continuous infringement will last no longer than the commencement of formal anti-trust proceedings. However, if a formal anti-trust investigation were to be initiated by the Commission, or if the Commission took over the case at a later stage, the single and continuous infringement would last until the Commission's decision. This discrepancy will also significantly affect the amount of the damages that are adjudicated in civil proceedings that are based on follow-on actions.

As mentioned above, the Czech legal order offers some procedural instruments that enable the NCA to reflect the principles that are set out in the CHAPS judgment and, at the same time, to (at least partially) achieve the objectives of the EU. Yet, the different approach of the Czech NCA may cause problems in both the public and the private enforcement of EU competition law.

A practical example of such a case which I would like to mention, is that of anti-trust proceedings that concern the alleged abuse of a dominant position by České dráhy (‘ČD’), a State-owned Czech rail incumbent, which is on the market for the provision of rail transport services on the Prague-Ostrava route. The case was initiated by the NCA under Section 11 of the Czech Competition Act and Article 102 TFEU in January, 2012. In November, 2016, the Commission took over this case²⁶ (the so-called *Czech Rail - Falcon*²⁷ case), and on 30th October, 2020, the Commission issued the Statement of Objections, which indicated that ČD had breached EU anti-trust rules by charging prices that were below cost in the period from 2011 to 2019²⁸. If the Commission issues a decision in the *Czech Rail - Falcon* case declaring a breach of Article 102 TFEU, it is highly probable that ČD will be fined for a single and continuous infringement that is of the length that is specified in the Statement

24 According to Section 88(3) Act No. 250/2016 Coll., on Liability for Offences and Administrative Proceedings, anti-competitive infringements that are subject to a number of ongoing anti-trust proceedings cannot be consolidated and heard in joint proceedings.

25 See the decisions of the Commission of 27th June, 2017, in Case AT.39740 *Google Search (Shopping)*; of 18th July, 2018, in Case AT.40099 *Google Android*; of 20th March, 2019, in Case AT.40411 *Google Search (AdSense)*.

26 See Article 11(6) of Regulation 1/2003. If the Commission initiates an anti-trust proceeding into the same conduct, allegedly infringing Article(s) 101 and/or 102 TFEU, which has already been investigated by an NCA, the NCA loses its jurisdiction over the case. Yet, once the Commission ceases its investigation, the NCA may conclude that the conduct violates *national* competition rules.

27 Case AT.40156 *Czech Rail (Falcon)*. On 30th January, 2020, the ECJ dismissed the appeals in the joined cases C-538/18 P and C-539/18 P, which were brought by ČD, and that sought to set aside the judgments of the General Court in Cases T-325/16 and T-621/16, upholding the Commission's inspection decisions (AT.40156 *Falcon* and AT.40401 *Twins*). More details available at: <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40156>

28 European Commission – Press release. *Anti-trust: The Commission sends Statement of Objections to České dráhy for alleged predatory pricing*. Brussels, 30th October, 2020. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2017>.

of Objections, *i.e.*, from 2011 to 2019. On the other hand, if the proceedings were completed at the national level by the Czech NCA, then, assuming the infringement is found, according to the CHAPS judgment, ČD would be held liable for the period from 2011 to January, 2012, *i.e.*, at the most, until the NCA's formal initiation of the anti-trust proceedings in January, 2012. There is no doubt that the determination of 'the cessation of the infringement' (2011 v. 2019), and a significantly different duration of the infringement (*less than 1 year v. 8 years*), would have a great impact on the amount of the fine that is imposed on ČD by the investigating body.

As indicated above, the CHAPS judgment may also have negative implications for the injured parties in the private enforcement of competition law. There is a big difference if an anti-competitive conduct is treated as (i) a 'single and continuous infringement' lasting until a final decision (*alternatively*, a Statement of Objections) is handed down, or (ii) as a series of 'fragmented' anti-competitive offences that are delimited by the dates of the official initiations of anti-trust proceedings. Indeed, the moment of the cessation of the infringement – even though this is only from a procedural point of view – is not only decisive for a conclusion as to whether such conduct falls within the temporal scope of Act No. 262/2017 Coll., on Anti-trust Damages Actions (which has been effective since 1st September, 2017), and which implemented Directive No. 2014/104, on Anti-trust Damages Actions, into the Czech legal system, but may also be relevant for the application of the (non-) direct effect of the Directive²⁹. Moreover, this moment is also crucial for the commencement of the limitation period for bringing an action for damages³⁰. The fact that the Commission has taken over the ČD case (*Czech Rail - Falcon*) may thus be of crucial importance for the competing carriers' claims in ongoing civil actions for damages. It will have an impact, not only upon the Defendant's possible assertion that the damages claim is already time-barred, but also on the total amount of the adjudicated damages, which usually reflects the Commission's, or the NCA's, infringement decision defining the nature, scope and the duration of the infringement.³¹

In conclusion, the Court missed the opportunity to reflect the specifics of EU competition law proceedings, in which the moment of issuance of a Statement of Objections could, at least, have been considered to be a document that is sufficient for the purpose of specifying the charges, without affecting the undertakings' rights to defence. Nevertheless, the judgment had been challenged by the NCA with a cassation complaint, which has not yet been decided upon by the Czech Supreme Administrative Court. However, the issue of the artificial interruption of anti-competitive offences has already been resolved by the adoption of an amendment to the Czech Competition Act. On 26th October, 2021, the amendment was approved by both Chambers of the Parliament³². The amendment states that the issuance of the Statement of Objections shall be the relevant point in time that delimits the infringement under investigation³³. In practice, the CHAPS judgment has thus become obsolete.

29 In Czech law, the general limitation period for claiming damages is three years; the ongoing investigation of the NCA is not relevant to the running of that period [Section 629(1) of Act No. 89/2012 Coll., the Civil Code, as amended]. On the other hand, under Section 9(1) of the Act on Anti-trust Damages Actions, a special limitation period of five years does not start to run before the cessation of the anti-competitive conduct.

30 See Article 10 of the Directive 2014/104.

31 The action for damages brought by *RegioJet against ČD*, which is pending before the Prague Municipal Court, is currently suspended, due to the Commission's ongoing procedure in the *Falcon* case. It is also worth noting that several requests for access to documents under the Act on Anti-trust Damages, have already been filed. See the request for a preliminary ruling that was lodged by the Supreme Court of the Czech Republic on 1st February, 2021, in *RegioJet a.s.* (C-57/21). Available at: <<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=238821&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10479828>>.

32 The amendment to the Czech Competition Act was passed by the Senate, the Second Chamber of the Parliament, on 26th October, 2021. More information about the legislative process is available at: <<https://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=101088>>.

33 A new Paragraph 9 was added to Section 22b of the Czech Competition Act, and it reads as follows: '(9) *If the accused continues the conduct, for which the proceedings for a continuing or collective offence of distortion of competition have been initiated against him, after the initiation of such proceedings, such conduct shall be deemed to constitute a single act until the statement of objections.*'

Marika Papathoma Kalligerou, Cyprus Administrative Court

ExxonMobil and Others v. The Commission for the Protection of Competition

Recourses Nos. 1646/2017, 1650/2017, 53/2018, 125/2018

Judgment delivered on 29.4.2021

Court: Administrative Court of Cyprus (First Instance Court)

The Applicants requested from the Court the annulment of the decision of the Commission for the Protection of Competition (hereinafter called "the *Commission*"), dated 30/10/2017, to impose upon them administrative fines for the violation of the Law on the Protection of Competition (Law 13(I)/2008), (hereinafter called "*the Law*").

The facts of the dispute

The main facts of the cases go back to 2005, when the Commission, on 20/10/2005, decided to conduct an investigation *ex officio* into petroleum products, in the event of a breach of Article 4 (as from 2008, this was Article 3(1)(a)) of the Law. In the same decision, the Commission authorised her President to decide if, and when, a sudden investigation at the company's premises should be conducted.

Some days after that, on the 10th and the 11th October, 2005, the President of the Commission decided that the officers of the Commission should conduct sudden investigations in each of the Company's offices. She therefore prepared and signed the orders for investigation, which were served by the officers of the Service at the time of their entry into the premises on the aforementioned days. The orders for investigation were identical for each investigation. The content of each one was as below (*the bold letters are now added with the hope that they will be useful for this case note*):

"Ex-officio investigation of the CPC Service for the possible violation of Article 4 and/or Article 6 of Law 207/89, as amended by ExxonMobil Cyprus Ltd.

The Commission for the Protection of Competition ("CPC"), at the meeting held on October 20th, 2005, decided that the Service conducts research locally, starting on 11th November, 2005, in the premises of the company: Exxon Mobil Cyprus Ltd.

In the context of the above investigation, and based on the powers provided by Article 25 of Law 207/89, the CPC authorises, with this letter, the officers and advisors of its Service, Mrs. xxxx Kyriakidi (Identity No. xxxx) and Mrs. xxxx Koursarou (ID No. xxxx) and Mr. xxxx Kampanella (ID No. xxxxx), to conduct an on-site search at the offices, premises and facilities of the headquarters of ExxonMobil Cyprus Ltd. for the following purposes:

(a) Checking books and other business documents, in written or electronic form, located at the Company's offices, including decisions, accounts, invoices, contracts, correspondence, the business diaries of executives and / or business meetings, and the receipt of relevant copies or extracts of the above.

(b) Clarifications of issues related to the operating structure of the company, and other issues that may arise during the investigation.

(c) Clarifications on the internal procedure that is followed for the determination of charges.

Following repeated changes to the composition of the Commission, as well as a decision in 2008 to revoke the proceedings, due to a judgment of the Supreme Court (in relation to other cases) that the composition of the Commission was illegal, since one of its member, Mr Efstathiou, could not be appointed as a member, as he was, at the time of his appointment, the Mayor of a village, the Commission (in its new composition) decided, on 6/8/2009, that the four oil companies had operated, during the period in question, on the basis of a concerted practice, thus knowingly violating the competition rules, in breach of Article 3(1)(a) of the National Law. The Commission also concluded that the four companies, through pricing mechanisms and the monitoring of the implementation, in practice, of their circulars/announcements to service stations, had operated, as the case may be, at the vertical level, in violation of Article 3(1)(a) of the same Law. On 24/9/2009, a decision was therefore issued to impose administrative penalties.

Recourses Nos. 1544/09, 1545/09, 1596/09 and 1601/09 were lodged against the above decision by the said companies. The Supreme Court ruled, on 25/5/2011, that the appointment of the Chairman of the Committee, Mr. K. Christoforou, who was appointed after 2008, was illegal, and it issued a judgment for the annulment of the decision of the Commission. (see Cases Nos. 1544/09 and others, *Exxon Mobil Cyprus Ltd. and others v. Republic*).

On 3/9/2012, the Commission (with a new composition, and under a new President), proceeded to examine the case. The Officers of the Service were instructed to conduct the investigation on the basis of the actual and legal status that was in force at the time that the relevant decision was issued (due to the review) and *to use the material in the relevant administrative file*, adopting an earlier Commission decision, dated 1/11/2008, with the same content.

On 7/2/2014, the Commission met to consider the further handling of the *ex officio* investigation, after its composition was again changed. After examining all the facts before it, it decided, unanimously, to re-adopt the decision of the Commission, dated 3/9/2012, under its previous composition, and to conduct the *ex officio* investigation using the material in the file. On 13/8/2014, the Service, acting on the basis of the instructions of the Commission, submitted to it the relevant information Note. On 14/10/2014, the Commission, after taking into account the content of the administrative file on the case and the Note of the Service, dated 13/8/2014, unanimously decided that there were, at first sight, probable violations: (a) of Article 3(1)(a) of the Law, as a result of the concerted practice between the above oil companies, and, (b) of Article 3 (1)(a) of the Law, by those companies, as a result of the agreements between each of the oil companies with their service station owners.

Based on the above, the Committee unanimously decided, on the basis of Article 17(2) of the National Law, to prepare a Complaints Reports regarding the above *prima facie* violations and, at the meeting of 8/12/2014, after examining them, decided to adopt and approve them, as well as to notify the companies under investigation.

On 3/12/2015, after the hearings, the Commission decided unanimously that, during the essential time, i.e., from 1/10/2004 to 22/12/2006, the oil companies: Petrolina, ExxonMobil, EKO and Lukoil, individually, violated the provisions of Article 3(1)(a) of the Law, due to vertical partnerships with their service stations, for the direct or indirect determination of the retail price for unleaded 95 octane gasoline, 98 octane unleaded gasoline and diesel LS, which had, as their object or effect, the prevention, restriction or distortion of competition within the Republic, noting that such infringements extended until 12/03/2015, since, from the evidence before the Commission, it did not appear that they had not ceased.

New hearings followed on the handling of the case in the light of a judgment of the Administrative Court, in Recourse no. 5651/2013, Cyprus Telecommunications Authority and Others v. the Republic, dated 29/1/2016, in which the administrative decision on that case was annulled due to the illegality of the appointment of a member of the Commission, as he was, at the time of his appointment, a member of a political party. This judgment was overturned by the Plenary Session of the Supreme Court on Appeal no. 2/2016, dated 3/3/2017.

On 30/6/2017, the Committee met again, with a new composition (with the participation of a new member). Following the decision of the Commission, dated 3/12/2015, the new member stated that he agreed, and the majority decision of the Commission, dated 3/12/2015, was adopted. Furthermore, the new Member of the Commission agreed that the Companies should be immediately notified of the Commission's intention to impose an administrative fine in relation to the violation of Article 3 (1) (a) of the Law.

Finally, on 30/10/2017, after an oral hearing, the Commission gave a final decision: that the companies, during the period 1/10/2004-22/12/2006, violated the provisions of Article 3(1)(a) of the Law, due to the vertical cartels with their service stations for the direct or indirect retail sale of 95-octane unleaded petrol, 98-octane unleaded petrol and LS diesel. Additionally, that the infringement by the companies extended until 3/12/2015, given that the evidence before the Commission showed that the infringement had not ceased. The Commission then decided, by a majority, to impose an administrative fine of 2.5% on the 2005 annual turnover of each company. The Commission also unanimously decided to oblige the Companies to immediately desist from the detected infringements, and, in the future, to order them to avoid the repetition of such practices, and/or actions that violate the principles of free competition.

The judicial proceedings

The Applicants

Two grounds for annulment were heard as a priority by the Court:

The Applicants claimed that the order for an enquiry at the Companies' premises was illegally decided upon on 11/10/2005 by the President of the Commission, instead of the Commission, as the Law that was in force at that time gave no authority to the President to act on the Commission's behalf.

Further, the Applicants claimed that the order for investigation was illegal, as it was in violation of Article 25 of the Law, because the search warrant violated the requirements of Article 25(3), of the Law, since it did not specify "*precisely*", or at all, "*the object and purpose of the investigation*".

In view of this, all of the actions, including the final decision to impose the administrative fine in question, were also illegal, and they should be annulled.

The Respondents' arguments

The Respondents disagreed. They suggested that the order for investigation was decided by the Commission, acting through its President.

Secondly, they suggested that no illegality had occurred, because the Commission's powers were legally transferred to the Commission's President by authorization, under Law 24/62, on the Assignment of the Exercise of the Powers Authorized by Law.

Further, they suggested that, although all the material and documents from the investigation were part of the administrative file on the cases, these documents were not used in the final decision of the Commission, as the same legal arguments were put by the Applicants on the hearing of the cases. The reasoning of the Commission's decision was based on the material before them, which had been extracted from other research tools, i.e., the search for information from both the Applicants and the gas stations to whom *questionnaires* were sent. So, since the Commission, in its decision, finally, explicitly *stated that it did not use* this material, even if it had been obtained illegally, as the Applicants' relevant submissions, the contested decision should not be annulled. This material may have been registered in the administrative file but, in their view, the folders in which they were placed were visible, as they were 10 "box files", which differed from the others.

Ruling of the Court

The Court ruled that the Law on the Protection of Competition (Law 207/89) does not give any authority to the Commission to transfer this competence to the President. It follows, from all the provisions of the Law, that the responsibilities of the President and the Commission are distinct from one another. Furthermore, the Legislator, where he wanted to allow the Commission to be able to transfer its responsibilities, explicitly provided for this with a relevant provision in the Law. This provision does not concern the President of the Commission, but the Subcommittees that have members: the members of the Commission, and no one else. As provided for in the Law on the General Principles of Administrative Law (L.158 (I) / 99), (Article 17), the competent body is obliged to exercise its responsibilities according to the provisions *of the law that grants them and is not allowed to transfer them to any other body, except where expressly provided by the law.*

General Law 23/62 could also not apply to the responsibilities of the Commission, and the subsequent Special Law 207/89, (which was amended after the accession of Cyprus to the European Union, in order to comply with European Law and Principles) does not provide for the possibility to transfer powers to the President.

This argument from the respondents does not, in any way, take into account the *retroactive revocation* of all of the decisions of the Commission, in this case, (including that dated 20/10/2005, by which the President was authorized to decide whether a sudden investigation would be carried out, and when), during the session of 11/1/2008, based on the relevant opinion of the Attorney General, which was dated 20/12/2007, after the judgment of the Supreme Court in *A.E. 3902, Cyprus Telecommunication Authority, date 4/12/2007 (above)*.

The search warrant was issued, for all the reasons mentioned above, by an incompetent body (the President of the Committee) and was therefore illegal. From the text of the order of enquiry, it appears that the purpose of the investigation was to investigate whether Articles 4 and/or 6 of the Law have been violated. This generality is so broad and vague that it does not meet the provisions of the Law. Article 25(3) of Law 207/89 corresponds to Article 20(3) of Regulation 1/2003, (Council Regulation (EC) No 1/2003 of 16th December, 2002) according to which: "3. *Officials and other accompanying persons authorized by the Commission to carry out an inspection shall exercise their powers after having given a written order specifying the subject-matter and purpose of the inspection.*"

In C-37/2013 Nexans France, EU: C:214: 2030, Paragraph 35, it was decided by the Court of Justice that the Commission should "*clearly state the facts concerning its suspicions, which it intends to ascertain* (Dow Chemical Ibérica and Others v. Commission, 97/87 to 99/87, EU: C: 1989: 380, Paragraph 45)".

In C- 46/87 and 227/88 Hoechst, EU: C:1989: 337, Paragraph 29, it was decided by the Court of Justice, that: *"In this regard, the Commission' s obligation to state the subject and purpose of the audit must first be pointed out. This obligation is a fundamental condition, not only for the justification of the intervention under consideration within the undertakings concerned to be established, but also for the latter to be able to realize the extent of the co-operation duty while retaining their rights of defence."*

Bearing in mind the findings of the case law of the CJEU, but also the letter of Article 25(3) of the Law, which requires a precise definition ("exactly"), in relation to the text of the order for investigation, the Court concluded that the search warrant did not specify the purpose of the investigation, violating the wording of the law, which protects against arbitrary interference with the right to asylum, of residence, and guarantees the right of defence of controlled companies. The fundamental right to asylum applies not only in relation to citizens' residences, but also to the premises or offices of companies (see *Decision of the ECtHR: Nemitz v. Germany App. No. 1370/88 και 31* and *Decision of CJEU Société Colas Est and Others v. France, App. No. 37971/97, 16/4/2002*).

In the case before the Court, the contested search warrant had not stated that the Applicants could challenge its legality in the Supreme Court. The Applicants were therefore unaware of their right to challenge a decision, which is an independent administrative act, but also part of a complex administrative action, which is challenged at the end of the proceedings (C-583/13, P, *Deutsche Bahn AG v. EU Commission:C: 2015: 404, T-289/11, Deutsche Bahn AG v. Commission EU :T:2013:404 Paragraphs 74-100*, where it was decided that the right to an effective remedy is not infringed if the victim *ex-post* challenges the infringement of his/her fundamental rights under Article 8 of the ECHR and Article 7 of the Charter.

As to the allegations of the Respondents that the Commission relied *on other* research tools, such as the *questionnaires* prepared, sent, completed and returned to the Commission, which, in their view, do *not suffer* any illegality, they were rejected, due to the fact that the decision of the Commission, in 2006, to prepare those questionnaires, was also revoked retrospectively, in 2008, as above-mentioned, and for the same reasons, (the participation at the meeting of the Commission of the member, Mr. Efstathiou).

Comment

The Court had to decide on many issues concerning facts that began in 2005 and ended in 2017. One may conclude that, if there were a preference in the Law that the companies could challenge the legality of the orders for investigations in their premises as from the time of their issuance and service, and not only after the final decision of the Commission to impose the fines, nothing of what followed in the cases would have happened. The same, of course, would be the case if the investigation and the decisions of the Commission concluded as soon as possible. It is obvious that the delay may cause problems, as from the changes to the composition of the Commission, for various reasons.

Maria De Fátima Reis Silva, Lisbon Court of Appeal

Name of the parties: SUPER BOCK BEBIDAS, S.A., National Portuguese Competition Authority

Case No. 74/19.0YQSTR

Court – Lisbon Appeal Court (confirming a decision by the First Instance Court - Competition, Regulation and Supervision Court)

Date – 31st March, 2020

Object

The present case deals with the use of confidential information in sanctioning procedures, and how Courts deal with the Defence's strategies in relation to confidential documents.

Background

In June, 2016, the Portuguese Competition Authority (AdC) opened an investigation into restrictive competition practices that had been carried out by Super Bock Bebidas, SA (Super Bock), in the distribution markets for beer, water, soft drinks, iced tea, still wines, sangrias and ciders, in hotels, restaurants and cafes (HORECA Channel) in Portugal.

The AdC concluded that Super Bock, for approximately 11 years, had established minimum prices and had interfered in other transaction conditions that were applicable to its products in the HORECA Channel, resulting in a restriction of competition that was prohibited by Articles 9, of the Portuguese Competition Law, and 101 of the TFEU, which limited the capacity of independent distributors to compete with each other, allowing the elimination of competition and distorting the free functioning of the market, with resultant prejudice to consumers.

Within these proceedings, AdC conducted inspections in the Defendant's business premises, and at related sites, and gathered a large number of documents that were carried into the proceedings, and that ultimately supported the final decision.

The Defendant filed a number (four) of interlocutory appeals challenging decisions that were related to the inspections and confidentiality, and either the First Instance Court or the Appeal Court upheld the AdC's decisions.

Meanwhile, the Defendant formally requested that the AdC stay proceedings, and prevent a final ruling until one of the previously mentioned appeals was definitively decided upon. The AdC denied this request, and the decision was appealed, but the Competition Court sustained the AdC's decision.

By a decision of July 24th, 2019, the AdC decided to demand from Super Bock, a director, and a director of the company, fines with a global value of €24 million for fixing resale prices and other transaction conditions, under Article 9, Paragraph 1, Subparagraph (a), Article 68, Paragraph 1, Subparagraphs (a) and (b), and Article 73, Paragraph 6 of the Portuguese Competition Law, as well as Article 101(1)(a) TFEU.

Appeal procedures and a collective redress action (follow-on action), that were based on this decision, are pending in the Competition Court.

The case

After a final decision was reached, the Defendant lodged a preliminary injunction against the AdC, under administrative law, requesting that the Court impose on the national authority an obligation not to publicize any documents, elements or information that had been used in the main proceedings, thus preventing third parties from having access to the main procedure, and, effectively, to adopt behaviour that assures secrecy. The main reasons, they argued, were the (reasoned) disagreement with the AdC's decisions regarding confidentiality throughout the procedure, and the existence of trade secrets that should be protected under the legal regime for trade secrets (the Industrial Property Code).

The Competition, Regulation and Supervision Court (First Instance) initially rejected the request. The Court stated, as legal grounds, that the legal regime of the administrative regulatory proceedings (to apply sanctions) is self-sufficient, and it contains all the needed solutions, and the common administrative law (to which the AdC is also subject) cannot be used to by-pass the specific rules that are applicable to the administrative authorities when conducting sanctioning proceedings. The Lisbon Appeal Court (specialized chamber), upheld this decision.

The ruling of the Court

Super Bock appealed, stating as grounds that:

- the Competition Court had made a legal mistake by their misinterpretation of the applicable law. Specifically, that there was an argument in relation to the application of the general legislation on access to administrative documents after the investigation and prosecution phase in competition infringement proceedings;
- the Competition Court failed to apply the trade secrets' legal regime, which was applicable, regardless of the nature of the proceedings.

The Appeal Court analysed the arguments that had been brought by the Appellant, and concluded that:

- the general legislation on access to administrative documents is not applicable in competition proceedings – competition legislation is self-sufficient and, when subsidiary law has to be applied, there is a closer connection to criminal procedural law, due to the nature of the infringements;
- the Appellant ultimately seeks to stop third parties accessing documents and information in the infringement procedure;
- Competition Law provides a clear, protective and sufficient regime that covers all kinds of secrets, including trade secrets.

As a result, the Appeal was dismissed.

Comment

This is a very simple “procedural” case, in which a preliminary injunction was rejected “*in limine*” by the Court.

Both the First Instance Court and the Appeal Court pointed out (not in so many words) the fact that the Appellant, and the Defendant in the main proceedings, were trying to by-pass the specific rules regarding confidentiality and access to documents in competition infringement investigations. Being both a regulator and an administrative entity subjects NCAs to both specific and general administrative rules, some of which do not fit the goals and activities carried out.

Since 2003, the Portuguese Competition Law states the application of administrative law and competition law, without a clear distinction between the fields. This creates several difficulties and proportionate strategic defences, as in this case.

However, since 2003, the same Court decides on both administrative and other procedures and appeals, as long as they are related to competition cases. This probably explains the clear vision that both Courts had, cutting down the Defendant’s strategy quickly and briefly, and this was clearly designed to avoid the use of certain documents and information in the main proceedings.

Just after the law entered into force, in 2003, I remember that, in a merger control case, the Defendants lodged a preliminary injunction, under administrative law, asking the Court to order the termination of the ongoing investigation, arguing that the merger complied with all of the merger control requirements. The Court also rejected this request *in limine*, basically because allowing the Authority to keep investigating was the right (and only) way to know whether this merger was legitimate, and the Defendants were not entitled “not to be investigated”.

This bifurcated strategy, here illustrated by a simple case, has the potential to disturb or hamper a complex investigation, and shows how important court specialization is, even in purely procedural matters.

DECISIONS OF ASSOCIATIONS OF UNDERTAKINGS

Dzintra Amerika, Supreme Court of Latvia

The Automotive Association v. The Competition Council – Restriction of Competition "by object"; the Judgment of the Supreme Court (Senate) of Latvia (Department of Administrative Cases) (21st May, 2021, Case No. SKA-7/2021)

Facts of the case

The Automotive Association unites the producers of motor vehicles, motor vehicle component and/or part producers, and/or sellers, importers, authorised car dealers, authorised and independent motor vehicle repairers and maintenance service providers (information from the webpage of the Automotive Association, which was not highlighted in the decision of the Competition Council). At the time of the alleged infringement, 45 members had joined the Association.

1. Members of the Automotive Association discussed the following issues at their meetings (from 2009 to 2012) concerning insurance companies: the issue of the insurance companies' practice of paying out insurance reimbursements in cash; the realisation of concerted practices with lessors, in the case of leased car insurance costs; the basic principles for calculating standard hours (normal-hours), and a "*corridor*" allowing price fluctuations in normal-hour rates. No agreement was reached on these issues with the insurance companies.

The issue of insurance companies paying out insurance reimbursements in cash had been discussed because car holders agree to receive insurance reimbursements in cash that do not cover the car repair costs and, as a result of this practice, cars are not repaired. This is detrimental to a company that has made a commitment to repurchase a car at a certain price at the end of the lease term.

At the meetings of the members of the Automotive Association, opinions were expressed that there is a need for an agreement on the basic principles for calculating the normal-hours (price level of repair costs) and on the "*corridor*", which, by allowing price fluctuations, are grounds for suspecting that taxes are not paid and that the costs are not documented correctly.

Members also expressed that, when concluding contracts with insurance companies, it should be provided that the car will be repaired by the dealer throughout the operating lease, in order to ensure that the required repairs are adequately carried out.

It is clear from the Minutes of the meetings of the members of the Automotive Association and the Association Council that negotiations have taken place with leasing companies on the principles of cooperation with insurance companies, and in regard to the maximum sum that can be paid out in cash as an insurance reimbursement.

The Minutes of the meetings of the members of the Automotive Association, as well as the meetings of the Association Council, show that the Association is negotiating with insurance companies, and a draft of a cooperation project with the insurance companies has been prepared (on the above-mentioned issues), although this has yet to be discussed with the Competition Council.

2. Members of the Automotive Association, together with the Latvian Leasing Association, in 2009 and 2010, negotiated the following conditions for the provision of car leasing services to individuals: in the case of an operating lease, maintenance and repairs must be performed by using the services of an authorised representative of the respective car brand. The Automotive Association and the Latvian Leasing Association also formed a joint strategy and a plan for cooperation with the insurance companies.

Such an agreement was reached so as to maintain the repurchase value of the leased object (the car). It follows from the meeting's Minutes that, in the case of an operating lease, the owner of the car is a leasing company, which is entitled to determine where its property can be repaired. Since, at the end of the leasing period, the company undertakes an obligation to repurchase the car, and the repurchase value is determined based on the car's maintenance period, and in compliance with the technical requirements, the automobile user's desire to perform maintenance and repairs at a particular service station should also be agreed with the aforementioned company.

The Findings and the Decision of the Competition Council

The Competition Council, in its decision of 14th July, 2014, concluded that the Automotive Association had discussed the issues, and/or reached agreements, on matters that have to be decided individually and independently by each undertaking. Consequently, the Automotive Association has infringed Section 11, Paragraph 1 of the Competition Law (*see below*). The decision concludes that the activities of the Association are restrictive of competition by object.

The Competition Council acknowledged that members of the Automotive Association (competitors), which are the largest dealers in new cars and car maintenance and repairers in Latvia, by agreeing on the development and application of common commercial rules, reduced competition amongst the Automotive Association's members on the terms of their co-operation with insurance companies and the Latvian Leasing Association, as regards reimbursement, the basic principles for the calculation of normal-hours, and the "*corridor*" for permissible repair price fluctuations. Such an agreement between the Automotive Association's members aimed to reduce the insurance companies' ability to exert competitive pressure on the prices for the services provided by the Automotive Association's members. When assessing the impact on competition, the Competition Council took into account not only the actual, but also the potential, competition, indicating that independent car services have the potential to create competition for authorised car services. The rules that maintenance and repairs should be carried out only in the car services of the authorised car servicers of the relevant car brands are therefore aimed at excluding other undertakings (independent car services) from the market, and at restricting new entry to the market, which corresponds with the situation that is referred to in Section 11, Paragraph 1, Clause 7, of the Competition Law.

The Competition Council emphasises that if such an agreement were implemented, it could provide authorised car services with the exclusive opportunity to provide maintenance and repair services, and to close the market for independent car services for leased vehicles. Furthermore, the exclusion of competition between the authorised and the independent car services could lead to an increase in the prices for maintenance and repair services for both the consumers and the insurance companies, which may indirectly lead to an increase in car insurance premiums, even if there were no agreement between the Automotive Association and the insurance companies. If such an agreement were thus to be implemented, it could have significantly negative effects on competition in a number of relevant markets, therefore affecting the final consumer through increasing prices, and possibly also causing a deterioration in the quality of service as a result of a lack of competition.

The Competition Council points out that agreements of a recommendatory nature are also potentially restrictive if recommendations are intended to determine the behaviour of undertakings, which must be determined individually by each market participant. Given that the agreement leads to a distortion of competition, it does not matter that such actions were intended to protect the consumer.

The Competition Council imposed a fine of € 10.429 on the Automotive Association.

Competition Law

Section 11. Prohibited Agreements and Agreements which are Considered to be in Effect

(1) Agreements between market participants, which have as their object or effect the hindrance, restriction or distortion of competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into, including agreements regarding:

7) action (inaction), due to which another market participant is forced to leave a relevant market or the entry of a potential market participant into a relevant market is made difficult.

The Judgment of the Administrative Court of Appeal

The Administrative Court of Appeal (the First Instance Court for the decisions of the Competition Council), in its judgment of 30th May, 2017, annulled the decision of the Competition Council on the basis of the following considerations.

- The Administrative Court of Appeal acknowledged that the Competition Council had not provided adequate grounds for concluding that the agreement at issue caused sufficient damage to competition and could be assessed as being restrictive of competition "by object". In order to justify the infringement of competition law, the opinion of the authority is not sufficient grounds. Objective economic and legal assessment of market conditions is also required.
- In the context of negotiations between the members of the Automotive Association regarding the insurance companies, the Administrative Court of Appeal concluded that the Minutes of the Association's meetings did not indicate that there was any consultation between the members of the Association that would allow the finding of a cartel agreement "by object". The members of the Association had not been discussing issues related to the business of a particular member, but issues that were specific to the industry as a whole, which also require a common industry solution. Given that there was no evidence in the case that the members of Association had discussed the individualised commercial aspects of a particular member's business, or the sensitive commercial information of members, or "classic" cartel issues, such as prices or market distribution, the Administrative Court of Appeal acknowledged that the Competition Council had not proven that the Association's activities – discussing issues of cooperation with insurance companies – is a cartel agreement "by object".
- The Administrative Court of Appeal admitted that, in general, an agreement with the Latvian Leasing Association, on the conditions of the provision of car leasing services to individuals (that, in the case of operating a lease, the maintenance and repairs should be carried out in the car servicers of the authorised representative of the relevant car brands) that this might affect the conditions of competition in a relevant market. However, in order to be sure of this, it is necessary to gain the legal and economic data that is relevant to the market.

Section 11, Paragraph one, Clause 7 of the Competition Law *expressis verbis* requires that at least the relevant market is defined. Moreover, according to the case-law referred to by the Competition Council, it is also necessary to establish that the addressees of the Association's decision (recommendations) have a significant impact on the competition in the relevant market. However, the Competition Council did not define the relevant market that may have been affected by the agreement under consideration. The decision, referring to the information published on the website of the Association, merely states that there are 45 members of the Association, and that they are the largest dealers in new cars and car maintenance and repairs in Latvia.

The Administrative Court of Appeal stated that the agreement doesn't affect the distribution market for new car sales, and the Court also found that there is no data in the case regarding the significant influence of the Association's members in the car maintenance and repair market. The Administrative Court of Appeal acknowledged that the Competition Council also did not assess the conditions that might describe the conditions of competition between members of the Association and independent repairers, such as the existing guarantees, the quality criteria for repair companies, access to the necessary technical information, the high cost of entering the relevant market, and the fact that there is also competition in the repair market between authorised repairers for the repairing of cars made by other brands.

The Appeal

The Competition Council appealed the judgment of the Administrative Court of Appeal to the Supreme Court. The Competition Council, among other arguments, pointed out that:

1. The Court had applied an incorrect standard of proof relating to the restriction of competition "by object";
2. The Court had pointed to the relevance of both market definition and market definition's impact on qualification. In doing so, the Court deviated from previous case-law in prohibited agreement cases, without providing adequate reasoning;
3. The Court has unreasonably narrowed the concept of an agreement that limits competition by object.

The Judgment of the Supreme Court

The Supreme Court acknowledged that the considerations of the Administrative Court of Appeal comply with the case-law of both the Supreme Court and the Court of Justice of the European Union (CJEU). In particular, in order to conclude that the agreement has a competition-restrictive objective, it is necessary to take into account the content of the agreement, its objectives, and the current or planned economic and legal context of the application, as well as the actual behaviour and the behaviour of the parties in the market. When assessing the economic and legal context, the nature of the goods or services affected, as well as the actual operating and structural conditions of the relevant market or markets, should be taken into account equally. The Supreme Court admitted that, in the case of practices which are qualified as restrictions "by object", there is no need to investigate their effects, nor, *a fortiori*, to demonstrate their effects on competition, in order to classify them as restrictions of competition, in so far as experience shows that such behaviour leads to falls in production and price increases, resulting in the poor allocation of resources to the detriment, in particular, of consumers. Concerning such practices, all that is required is the demonstration that they can, in fact, be classified as restrictions "by object", although mere unsubstantiated allegations are insufficient.

The Supreme Court also agreed with the Administrative Court of Appeal that the Competition Council had to define the relevant market. In order to establish whether competition is restricted, delayed or distorted, it is not sufficient to identify only the entities themselves, it is also necessary to establish whether there is a competitive relationship between them, namely, whether they are competitors, and this can only be concluded by clarifying with what they are in competition. The necessity to define the relevant market *expressis verbis* stems from Section 11, Paragraph 1, Clause 7, of the Competition Law. The requirement to define the relevant market does not contradict the previous Supreme Court case-law. Furthermore, the Supreme Court did not rule out the need to clarify the market share, as it is one of the elements of the relevant market. Market share could also be used to determine whether the level of harm to competition is sufficient to find a prohibited agreement. This is also where the economic and legal context should be assessed, including the actual operating and structuring conditions of the relevant market or markets.

The Supreme Court agreed with the Competition Council that the concept of an agreement that limits competition "by object" should not be overly narrowed. Despite the fact that the concept of the competition restrictions "by object" must be interpreted narrowly, this does not mean that it applies only to cartels, namely, those agreements focusing on market distribution, price-fixing, bid-rigging. However, the Supreme Court noted that the reasoning of the Administrative Court of Appeal as to why it did not consider that the Competition Council had proven a prohibited agreement (in relation to insurance companies) "by object", is based on an assessment of the content of the agreement, rather than on a finding that there was no cartel in this case.

Personal comment

This case, on the one hand, is relevant, because the Supreme Court, in its judgment, applied CJEU case-law (*please, see the judgment*) (having regard to the fact that the national law is substantially similar to Article 101 of the Treaty on the Functioning of the European Union (TFEU), (*see also, inter alia, the judgment in Allianz Hungária Biztosító and Others, C32/11, EU:C:2013:160, Paragraph 20*)). On the other hand, in my opinion, it is also interesting, because it raised a number of questions. As is seen from the above, this case is about the very basics of how to apply competition law. Still, it was difficult to find answers to questions in the CJEU case-law and legal literature, which came up during the process of decision making. For example, how much analysis should be undertaken when determining whether an agreement restricts competition "by object"? Is this analysis very similar to analysis that has to be undertaken when determining whether an agreement restricts competition "by effect"? Does such analysis contradict the concept of "obvious restrictions of competition", and does it narrow the approach to how to determine restrictions "by object", etc? In my opinion, it must be concluded that the case law of the CJEU highlights the fact that there are rather vague borders on this issue, which results in disputes over the extent of the assessment needed to reach conclusions on the issue of restrictions "by object".

Sanna Holkeri, Supreme Court of Finland

Finnish Competition and the Consumer Authority's Proposal to the Market Court 25.1.2016

Market Court's Decision 14.12.2017 MAO:781/17

Supreme Administrative Court's Decision 20.8.2019 KHO:2019:98

Background

The case stems from the opening of the bus transport services to competition, in Finland in 2009, and the reaction of the existing service providers thereto.

Previously, providing a bus transport service in Finland had required an authorization, which was subject to a necessity assessment by a relevant authority. In the assessment, the statement of opinion from the Finnish Bus Association and thus, in practice, its member companies, played an important role, and the applications were typically decided in accordance with the statement. In general, authorization meant an exclusive right to provide bus services on a certain route for a period of 10 years, with what was practically an automatic renewal option.

The change in the legislation that entered into force in December, 2009, was due to requirements that had been imposed by the EU Regulation (EC) No 1370/2007 on public passenger transport services by rail and road transportation. The new legislation opened bus transport services to competition (with the exception of internal municipal transportation). Although operating on a certain bus route still required an authorization, it was to be granted if the company met the standard requirements. The authorization thus no longer depended on the existing market situation, or on the opinion of the Bus Association.

There was a transition period (2009-2019), during which the old operators could either continue running the routes under their existing authorizations, or apply for a new market-based authorization. During the transition period, the "old" authorizations no longer provided an exclusive right to a certain route, but any other operator could apply for an authorization to start a competitive route.

During the transition period, the subsidised tickets, in accordance with the "old system", could still be used as payment on those routes that were run under the old authorizations, whereas this could not be done on the new market-based routes.

FCCA's proposal to the Market Court

In 2016, the Finnish Competition and Consumer Authority (FCCA) submitted a proposal to the Market Court to impose penalty payments on several bus companies, the Bus Association and Oy Matkahuolto Ab. The amount of the penalty payments claimed varied among the different undertakings and, in total, amounted to over €30,000,000.

Matkahuolto is a bus traffic service and marketing company, which administers a nationwide network of bus stations, systems for timetable information and ticket sales, as well as a parcel transportation service. Matkahuolto's Board was composed of representatives of the bus companies from all of the Bus Association's local divisions.

The FCCA argued that the said undertakings had infringed Articles 4 and 5 of the Finnish Competition Act, as well as Article 101 TFEU, by prohibited cooperation that had started in the fall of 2008. There had been a cartel that aimed to prevent or delay the opening of the bus services to competition. The FCCA argued that the central players on the bus transportation market had, *inter alia*, reached an agreement on the means through which to limit the supply, and to exclude the new competing market-based bus routes from Matkahuolto's services.

The undertakings had agreed on, and unified, their course of action as regards not applying for authorizations that would increase supply during the transition period. There was also a mutual understanding to cancel Matkahuolto's existing service agreements and to formulate new agreements in such a manner that it would prevent the potential new, competing bus service providers from access to Matkahuolto's services. There had also been efforts to persuade the operators that had acquired the new authorizations for the transition period to refrain from starting the competing services.

The FCCA stated that the undertakings had already discussed the legislative initiative in question as being a threat to the profitability of their businesses, at the Bus Association's Board meetings in May and August, 2008. Although lobbying, in the context of the legislative process, had been considered as a primary means with which to tackle the issue, and also Matkahuolto's contract model had already been discussed at that time as an alternative means with which to intervene in the changing situation. The Bus Association's central role, as regards the ground rules and the opportunity to give statements, at least regarding "market disturbances", was considered important. The FCCA considered that these measures had already meant that there were prohibited agreements, decisions and concerted practices, that led to the market exclusion of the new routes.

The possibility to use Matkahuolto's service contracts as a means to control the market situation had been further discussed at the Bus Association's meetings and seminars in September and October, 2008. The course of events, and the comments of those persons involved (*inter alia*, the Board members of the Bus Association), indicated that the aim was to keep the market entry under the control of the "old" players. The FCCA argued that, in addition to legitimate lobbying, the undertakings aimed to change Matkahuolto's service contracts to enable their use for blocking access to Matkahuolto's services by the new operators. Access to these services was very important for undertakings entering the market. It was likely that they, particularly the smallest undertakings, would refrain from applying for authorizations and entering the market in the case that these services were not available to them.

According to the FCCA, the agreement on market sharing and supply restrictions had been reached at the Bus Association's Board meeting in August, 2009, and was realized as concrete actions in late 2010 and 2011.

Regardless of the agreement, some of the bus companies had applied for the new, market-based authorizations in May and June, 2010. As it became clear that the authorizations could be granted, the cartel undertakings decided to react by using Matkahuolto's service contracts. In May, 2010, Matkahuolto's Board decided to terminate the existing service contracts by the end of 2010. In this context, Matkahuolto introduced new contracts, ones that included a term that made the access to central services subject to Matkahuolto's necessity assessment.

After the first new authorization for a competing route had been granted, in August, 2010, the undertakings immediately started preparations (discussions, etc.) to exclude this route from Matkahuolto's services. As a result, the information on the new route, which had already been included in Matkahuolto's systems, was deleted for a short period of time. As the operator in question had an existing contract with Matkahuolto, on the grounds of its "old" routes, that was still in force during the term of notice, *i.e.*, until the end of 2010, the information was restored until the expiry of the old contract.

The undertakings arrived at a "legitimate" ground for excluding the new routes from Matkahuolto's services in October, 2010. They (through Matkahuolto) claimed that the new routes could not be included in the system simultaneously with the existing routes. Matkahuolto's reasoning for this was that the subsidized tickets, in accordance with the "old system", could still, during the transition period, be used as payment on the existing routes, whereas this could not be done on the new market-based routes. Matkahuolto argued that the only way to prevent the use of subsidized tickets on the new routes was to exclude them from Matkahuolto's timetable and their other services.

The FCCA disagreed, and stated that the objective of the mentioned conduct was to restrict competition. The problem with the subsidized tickets could be handled, e.g., by informing the customers about the different routes and the tickets that were applicable. In addition, there were no reasons, from the viewpoint of Matkahuolto's own business interests, to include such a necessity assessment clause in its contracts, and thus to exclude the new bus routes from its services.

The FCCA argued that the agreement on market sharing and supply restrictions had also been realized through direct contacts between the undertakings.

The Market Court's Decision

The Market Court evaluated the concept of the representation of interests (lobbying) that is not prohibited *per se*. The Market Court considered that legitimate lobbying basically covered all of the meetings, seminars and discussions that aimed to influence the authorities in their enacting and interpreting of the legislation.

Matkahuolto's Board meetings and seminars in August-October, 2008, were considered as legitimate lobbying, although there had been suggestions of potentially competition restricting measures. However, no agreement had been reached on the issue. The lobbying and different discussions that had taken place at that time (in part, at the initiative of the authorities), and before the new legislation entered into force, thus did not constitute a restriction of competition.

The Market Court stated that the decision to revise Matkahuolto's contract terms and to terminate the existing contracts, during spring, 2010, or the discussions that followed during the summer, did not, as such, constitute restrictive practices. The termination of the contracts did, however, provide a possibility to interpret the contract terms in some way that might lead to restrictive practices.

The Market Court further stated that the discussions between the undertakings, and the short-term removal of one operator's timetable information from Matkahuolto's systems during the fall of 2010, did not constitute a prohibited restraint of competition. The Market Court stated that this was more like a "quick-tempered reaction" to the changing situation, and that the undertakings had not, at that stage, yet reached an understanding of how the operators of the new routes would be treated, as Matkahuolto's customers, and about hampering their business activities.

The Market Court found that the agreement to refuse most of Matkahuolto's services to the new operators had been reached in email correspondence between Matkahuolto's Board's members on 27th December, 2010, and, at the latest, at Matkahuolto's Board Meeting in January, 2011. This agreement was subsequently put into action by Matkahuolto through its refusal to run its relevant services as of 1st January, 2011, on all of the market-based routes. The Market Court considered this to be prohibited market sharing, which was a severe restriction of competition by object, and thus meant an infringement of the Competition Act and Article 101 TFEU.

The Market Court found no grounds for exempting the conduct from the prohibition. Any claimed efficiency benefits for consumers, or any other third parties outside the cartel, had not been established. The prohibited conduct had not been due either to relevant national or EU legislation, and the issue relating to the use of subsidized tickets could have been solved by using non-restrictive measures.

The Market Court imposed a penalty payment of €100.000 on each undertaking.

Supreme Administrative Court's decision

The Supreme Administrative Court (SAC) substantially judged the existence and the nature of the cartel in the same way as the Market Court had. There was, however, some divergence, *inter alia*, as to the starting point of the restrictive practices.

As to the period before the new legislation that entered into force in December, 2009, SAC noted that the undertakings had already, during 2008, recognized Matkahuolto's contracts as potential means with which to react to the coming changes in the market conditions. There had also, however, been discussions about other, alternative ways to react, such as adaptation to the new competitive situation. The SAC took notice of the fact that the lack of competition in 2008-2009 was caused by the current legislation and authorization practices. The SAC stated that the undertakings did not, during the old legislation, have (or even might have had) an overall plan to exclude the future market-based routes from Matkahuolto's services, and thus to distort competition within the internal market.

The SAC found, however, that the nature of the discussions changed after the first market-based authorization had been granted on 25th August, 2010. The information of the operator in question was even removed from Matkahuolto's system for a short period of time. Subsequent discussions indicated that there was an intention to restrict the possibilities of the operators of the market-based routes entering into a contract with Matkahuolto by applying the case-by-case assessment that was provided for by the new contract terms. The SAC found that this constituted actions that had formed part of an overall plan, with the object of distorting competition within the internal market. The object of the undertakings was to reach concerted practices that aimed to eliminate new competition by blocking access to Matkahuolto's service contracts. The infringement became concrete as a result of the decisions of Matkahuolto's Board in December, 2010, – November, 2011, and it ended, as far as the timetable services were concerned, in summer, 2012, and for ticket sales -services in September, 2012. For parcel services, it ended in November, 2015.

The SAC criticized, *inter alia*, the Market Court's decision to impose a similar penalty payment on all of the undertakings in question, regardless of their different roles in the cartel, as well as their significantly different financial situations.

Reflections

How the Courts evaluated the starting point of the prohibited conduct in the context of the opening markets, on a scale from legitimate outbursts of concern and lobbying as regards the legislative process, to the point in December, 2010 – January, 2011, when the understanding of the blocking of the relevant services from the market-based routes was confirmed, is interesting.

Preventing the emerging competition was clearly a purpose that was present from the very beginning. I agree with the Supreme Administrative Court that, at the latest, the conduct against the holder of the first market-based authorization, in August, 2010, and discussions at that time, show a mutual understanding and acts that hamper the market entry of the new operators, although all of the details as regards the exact realization of the plan were not yet confirmed. The Market Court seems to have required this, as a condition for the infringement of an agreement, or for the confirmation of the exact tools that would be used against the new operators.

ACCESS TO DATA

Ana Paula Lobo, Supreme Administrative Court of Portugal

Case 36/16.0YUSTR.L1 - Lisbon Court of Appeal (Third Chamber Judgment, June 14th, 2017)

1. A brief summary of the facts of the dispute

The process was opened on 17.09.2009, following complaints from IMS and Apifarma, through which it was stated that the ANF – the National Association of Pharmacies - had closed the market for data from pharmacies, and for market studies based on these data.

ANF is a nationwide employers' association representing the owners of pharmacies, which aggregates about 97% of Portuguese pharmacies. It has a holding of 90.26% in Farminveste SGPS, which, in turn, holds 100% of Farminveste IPG, the latter directly or indirectly holding more than ten companies, which operate in different sectors of activity. HMR, one of those 10 companies, started its activity in June, 2009, and has the purpose of a "*consortium and preparation of market studies, quantitative and qualitative, in the ark of health, namely, studies related to the industry and trade of pharmaceutical specialties, parapharmacies, dermocosmetics and veterinarians*".

ANF/Farminveste IPG have managed to obtain (centrally, remotely, automatically and daily) commercial data for 81.5% of all of the pharmacies in Portugal. The ANF Group manages/controls the IT systems, and the communication network of the pharmacies, with Sifarma and Farmalink.

Until 2008, the ANF provided IMS with the commercial data from pharmacies, and IMS have exploited these data, as a monopoly provider in the Portuguese market.

At that time, they signed a new contract, in which a higher price was fixed for the supply of data, maintaining the previous possibility of ANF being able to sell these data to other companies, but IMS did not comply with this, thus stopping the supply of data. However, an arbitration decision was issued that determined a reduction in the price of data supply, but IMS never demanded compliance with this decision, nor did it request the supply of data again, and they presented the complaint that started this process.

ANF began selling pharmacies' data to HMR at the price that had been contracted with the IMS, and the latter started to carry out market studies at a price lower than that charged until then by IMS, causing great satisfaction to the pharmacies that bought them.

By a decision of 22.12.2015, the Portuguese Competition Authority condemned each of the Defendants for the practice of a serious infringement of Article 11 of Law No. 19/2012 and Article 102 of the TFEU.

The Defendant, ANF, was fined in the amount of € 635,000.00;

The Defendant, Farminveste SGPS S.A, was fined in the amount of €9,080,000.00;

Farminveste IPG was fined in the amount of €360,000;

The Defendant H, Ld^a was fined €265,000.00.

2. Summary of the judicial proceedings

The Defendants challenged the conviction, which was confirmed by the Competition, Regulation and Supervision Court, for having undertaken, in the years 2010 to 2013 recurrent practices of margin squeeze. The Court upheld the claim, but it reduced the amount of the fine imposed.

3. The ruling of the Court

The Defendants challenged that decision on multiple grounds:

The Appellate Court of Lisbon – file 36/16.0YUSTR-L1 - ruled on 14/06/2017, that:

1. The legal inadmissibility of Farminveste SGPS' liability for default is imposed, in summary, for three reasons:
2. Farminveste SGPS does not assume the position of guarantor, so it cannot be held liable, by way of omission, for the contravention of an abuse of position by the companies controlled by it: Farminveste IPG and HmR;
3. Farminveste SGPS does not have *de facto* power to prevent the abuse of the dominant position by its subsidiaries, Farminveste IPO and HmR (given its specific position within the ANF-dominated business group);
4. Its inertia (or omission) does not have a causal relevance to the infringement in question (in terms of a proper causality);
5. The filing by the Defendants, ANF, Farminveste IPG and HMR, of the type of offence that is provided for in Article 102 of the TFEU – the abuse of a dominant position, is a permanent offence that resulted, therefore, at the same time:
 - a. In the artificial and inequitable increase in the purchase price of commercial data from a representative panel of pharmacies (market amount) from €100 to €255 per month/pharmacy, in the upstream market (This elevation is carried out by the ANF through Farminveste IPG;)
 - b. By making it difficult for the only competitor (IMS) to access this Marketplace;
 - c. Compressing/suppressing profit margins on the sale of studies of the market that are based on these data (the downstream market), in terms that are such that a competitor who is as efficient as the ANF Group could only compete in this last market by bearing or making losses.
6. A price-cutting strategy for market studies provided by the HMR company (such as that found in the present case) is not incompatible with an exclusion strategy, which is intended to allow them to increase, as soon as potential or actual competitors are excluded from the market by virtue of that price decrease.
7. The conviction of the Defendants - Art. 102/1 and 2, of the Tratado de Funcionamento da União Europeia (TFUE) and Art. 68/1 al. b) of the Novo Regime Jurídico da Concorrência - to pay the following fines:

The Defendant, ANF, was given a fine in the amount of €409,741.30;

The Defendant, Farminveste IPG, was given a fine in the amount of €233,530.80;

The Defendant, HMR, Lda, was given a fine of €171,767.20.

4. Personal comment

I think the decision raises two important issues:

The Appeal Court did not discuss the competition law concept of a single economic unit in regard to the parent company's liability as an author of the behaviour by omission.

In this case, the issue is the data from pharmacies that the Association that brings them together to pursue the pharmacies' own interests, sells, so that studies are prepared and sold to these pharmacies. Pharmacies are the suppliers of the data and the purchasers of the studies carried out with that data.

The ownership of these data, and their use, belongs to the pharmacies. If, through their Association, they understood that it was better to create a company, which is fully controlled by their Association, to process these data and to carry out the studies they need, then I have doubts about this interference with competition rules on the use of pharmacy data.

Stefan Schlotter, Court of Frankfurt

Case Note

In its judgment of 8th April, 2021 (Case No. 16 O 73/21 Kart), the Berlin Regional Court (LG) prohibited Immoscout, the leading online real estate brokerage portal in Germany, from using its system of list-first discounts in its interim proceedings.

These are discounts that the agent receives if he offers his properties exclusively on Immoscout's site within a fixed period of time. This was the first time that a court had applied Section 20 (3a) GWB (the "tipping paragraph"), which was introduced as part of the 10th GWB amendment, and that came into force at the beginning of this year.

According to this provision, it constitutes an unfair restraint if an undertaking with superior market power on a market, within the meaning of Section 18 (3a), impedes the independent achievement of network effects by competitors, and thereby creates a serious risk that competition on the merits is restricted to a not inconsiderable extent. On the basis of this standard, the cartel authorities can prohibit the relevant conduct; competitors can also claim injunctive relief against competitors with superior market power.

In the preliminary proceedings before the Berlin Regional Court, the online brokerage portals Immowelt, as Plaintiff, and Immoscout, as Defendant, faced each other. Two discount systems for estate agents that had been introduced by Immoscout were challenged:

List-All discount: Here, the broker receives a discount if at least 95 % of the total properties published by him online appear on Immoscout.

List-first rebates: here, the agent receives a rebate if 95 % of the properties he publishes online are offered exclusively on Immoscout, or on his own site, in the first seven days.

While the judges found the List-all rebates to be in compliance with anti-trust law, they found, in a summary examination, with regard to the List-first rebates, that they posed a serious threat to competition on the merits, within the meaning of Section 20 (3a) GWB.

The Court based its decision on the fact that the period of seven days of exclusively offering properties on the Immoscout website *de facto* led to exclusivity. and an accompanying market foreclosure for the competitor, Immowelt.

The Court based this conviction on the fact that 56 percent of all contacts take place in the first week, and 30 percent of the advertisements - especially in highly competitive markets in metropolitan areas, such as Berlin - are already no longer on the net after one week.

Furthermore, within the first three months after the introduction of the rebate, Immoscout had shown a sharp increase in advertisements, while the numbers on the Applicant's Immowelt site had declined.

It is to be expected that competitors will use the new legal basis to attack strong platforms in the future. The Bundeskartellamt had already identified tipping risks in some previous decisions (25th June, 2015, B6 - 39/15 - Immowelt/Immonet, 6th February, 2019, B6 - 22/16 - Facebook, 4th December, 2017, B6 - 132/14-2 - CTS Eventim). Attacks are not only to be expected against dominant companies, as such a position is not required under the new rule. The display of superior market power is sufficient.

PRIVATE ENFORCEMENT OF COMPETITION LAW

Enrique Sanjuán-Muñoz, Málaga Court of Appeal

Brief summary of the facts of the dispute

Following the transposition to Spain of Directive (EU) 2014/104, private claims arising from the decisions of both European and national competition agencies have been activated.

In Spain, the control and protection of infringements is divided into two different jurisdictions. On the one hand, the control of the agencies' decisions is carried out through the administrative courts. On the other, the exercise of private actions is heard by the Commercial Courts that specialise in such matters, which is where I am.

A common problem that has arisen in both jurisdictions is the assessment of damages when, in cases of competition infringement, we find cartels in which the infringers exchange information.

In both jurisdictions, the Courts have emphasised that a cartel in which only information is transmitted between the cartel participants can also affect the market, and can therefore produce damages that are susceptible to private claims.

In this sense, this has been resolved (in the decisions on which we are commenting) in different decisions by the Spanish Supreme Court:

- STS, Contencioso Section 3 of 20th April, 2021 (ROJ: STS 1795/2021-ECLI:ES:TS:2021:1795))
- STS, Contencioso Section 3 of 6th May, 2021 (ROJ: STS 1878/2021-ECLI:ES:TS:2021:1878))
- STS, Contencioso Section 3 of 13th May, 2021 (ROJ: STS 2020/2021-ECLI:ES:TS:2021:2020))
- STS, Contencioso Section 3 of 13th May, 2021 (ROJ: STS 2040/2021-ECLI:ES:TS:2021:2040))
- STS, Contencioso section 3 of 17th May, 2021 (ROJ: STS 2021/2021-ECLI:ES:TS:2021:2021))

In private matters, two judgments of the Provincial Court of Málaga (Section 6) of 1st July, 2021 (Cases 693/21 and 760/21), have also ruled along the same lines.

What the Supreme Court of Spain is ultimately saying is the following:

- The assessment of the anti-competitive effects of an information-sharing agreement between competing undertakings requires taking into consideration the conditions and circumstances in which the practices take place and, in particular, the specific framework in which the agreements take place, the economic and legal context in which the undertakings operate, the nature of the goods and services covered, as well as the structure and actual operating conditions of the markets concerned.
- The qualification of an information exchange agreement as an infringement "by object", requires that it is duly established that it has a sufficient degree of harmfulness to the competition by examining the relevant aspects, in accordance with the case law of the CJEU.
- Exchanges of information on elements that condition, integrate or affect prices in a relevant way, even if they do not directly relate to final prices, constitute an infringement by object and can therefore be considered to make up a cartel.

- Its practical application in the Commercial Courts occurs because, once the conduct has been sanctioned, those affected will be able to claim damages as a result. Once a follow-on claim has been brought before these Courts, one of the common allegations from the Defendants is that the exchange of information can be considered a collusive practice but, in reality, it does not produce any damage since, in the chain following the offending companies, there will be their own transaction costs, discounts and, finally, a net price that depends exclusively on them, and therefore there has been no repercussion of damages from those who exchanged information to those that follow them in the chain.

Summary of the judicial proceedings

After two lawsuits were filed before the Commercial Court of Málaga concerning a private claim for damages arising from a decision of the European Commission sanctioning different truck producers, the Court ruled that there was a repercussion of the damage arising from the cartel for those who were the purchasers of the trucks during the period of the cartel.

The Defendants argued that this was only an exchange of information, as the European Commission stated in its decision, and that this did not affect the downstream market, but simply amounted to conduct by object, where no account was taken of the harm or effect to be sanctioned.

The Commercial Court ruled that, in these cartels, there can also be damage that is derived from the effect on prices that were conditioned by this exchange of information.

On appeal, the Court of Appeal of Málaga also ruled that there had been an exchange of information and that this had affected the market price, which was susceptible to economic assessment.

The ruling of the Court

The reasoning in the Appeal, in order to resolve the issue, is as follows:

With regard to the first of the pleas, its construction is based on the consideration that the Commission's sanction was in respect of collusive practices, and not in respect of specific price-fixing agreements, which means that it is not hard-core conduct, consisting of the exchange of information. It follows that *'what the manufacturers were doing was essentially exchanging non-systematic information on their planning with respect to list prices'*. Furthermore, the Commission's decision does not analyse or establish the effects of the sanctioned conduct, since it is an infringement by object. and not by effect. Next, it considers that the conduct that was penalised relates to 'list prices' and not to transaction prices. It is those, it states, and not the latter, which are the subject of the sanction. In the second of the elements or grounds that were analysed by the Appellant, it is stated that the binding nature of the sanctioning decision would lead us to consider that it did not include the existence of a price-fixing agreement, or effects on prices, and that the effects on trade (which it again states) arising from that conduct would not imply either that there were any, or that they were resulting negative effects.

From the consideration above and the summary of what has been alleged, what the Appellant claims is that there was anti-competitive conduct in the market, for which it, amongst others, was penalised, but that, as it was a "mere" coordination of list prices (or the gross prices that it identifies), this does not imply the existence of damage that is transferred to the next level of the chain (the dealer) and from there to the end user or buyer. In order to do so, it has had to make three essential arguments: On the one hand, that the decision states that there is only an agreement consisting of the coordination of list prices. Secondly, that it is a conduct by object and not by effect, and therefore does not involve any analysis by the Commission as to the damage that has been caused. Thirdly, that as it does not affect transaction prices, either in general or in particular, in the specific case of the Appellant, there would have been no damage whatsoever. Of these three reasons, only the third would exclude the existence of damages by means of sufficient proof.

In other words, whoever tells us that the sanctioned conduct does not produce concrete damage because, in his business model, this is impossible; because the system of the supply-demand configuration of his own independent trucks is established, cannot make this assertion depend on the Decision or the sanctioned conduct, as it is clear that he was sanctioned, and that the independent model must be proven and justified in the specific case with which we are dealing. The first two reasons, according to the party's argumentation, would not exclude the existence of damage since, in reality, what is theoretically said (and what we must theoretically resolve), is that, in itself, as sanctioned by the Commission and as described, this is conduct by object, which, in itself, is characterised as such because *"[i]n terms of anti-competitive conduct falling within the scope of Article 101 TFEU, certain types of coordination between undertakings reveal the fact that the Commission has sanctioned the conduct in question and has described it as such, certain types of coordination between undertakings reveal a sufficient degree of harm to competition to render examination of their effects unnecessary."* (Case T 472/13 H. Lundbeck A/S of 8th September, 2016) What appears to follow in its argumentation is that this harmfulness, which has been sanctioned, must distinguish the fact from the concrete damage that may be generated by the conduct (which it understands to be different from an agreement, in that what is involved is merely the exchange of information, within the scope of Art. 101 TFEU), and that it would be different to consider 'the effects on trade' that are caused by such conduct, and the negative effects that may be produced, which would not be the case for the Appellant. As the Contentious-Administrative Chamber of the Supreme Court has stated, *'The assessment of the anti-competitive effects of an information exchange agreement between competing undertakings requires the taking into consideration of the conditions and circumstances in which the practices take place, in particular, the specific framework in which the agreements take place, the economic and legal context in which the undertakings operate, the nature of the goods and services contemplated, as well as the structure and the actual operating conditions of the markets concerned.'*

The classification of an information exchange agreement as an infringement 'by object' requires that it is duly established that it has a sufficient degree of harmfulness to competition through the examination of the relevant aspects, in accordance with the case law of the CJEU. Exchanges of information on elements that condition, integrate or affect prices in a relevant manner, although they do not directly refer to final prices, constitute an infringement by object, and can be considered to be a cartel, in accordance with the considerations that are set out in Legal Ground 5 of the aforementioned judgment.

In the translation of the official version of the decision (Summary of the Commission Decision of 27th September, 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824) The infringement consisted of collusive agreements on prices and gross price increases for trucks in the EEA; and the timing and passing on of costs for the introduction of the emission technologies that are required by the EURO 3 to 6 standards for medium and heavy duty trucks. 2. These collusive arrangements included agreements or concerted practices on prices and gross price increases, in order to harmonise gross prices in the EEA and the timing and cost pass-through for the introduction of the emission technologies that are required by the EURO 3 to 6 standards. The English version is certainly not what the Appellant deduces from the translation of the decision either: 'The infringement consisted of collusive arrangements on pricing and gross price increases in the EEA for trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks that is required by EURO 3 to 6 standards. The addressees' headquarters were directly involved in the discussions on prices, price increases and the introduction of new emission standards, until 2004. From at least August, 2002, onwards, discussions took place via German subsidiaries which, to varying degrees, reported to their Headquarters.

The exchange was operated both on a multilateral and on a bilateral level. These collusive arrangements included agreements and/or concerted practices on pricing and gross price increases in order to align the gross prices in the EEA, and the timing and the passing on of costs for the introduction of the emission technologies that are required by EURO 3 to 6 standards. To deny that the sanctioned conduct is sanctioned (reference to Point 6.2 of the decision), both for the price increase and for the gross prices which will subsequently be given to the dealers, and on the basis of which they will fix the net price to the purchaser, is therefore contradictory to the decision. In this respect, Point 7.2.3.4. sets out the Commission's conclusion, and hence the decision to impose penalties:

In the light of the above, the concerted practices and/or agreements that are referred to in Recital 6.2 have, as their object, the restriction and/or distortion of competition through collusion, with respect to pricing and gross price increases in the EEA for medium and heavy trucks, and the timing and the passing on of the costs for the introduction of emission technologies for medium and heavy trucks that are required by EURO 3 to 6 standards.

When undertakings, as in this case, are in direct contact with competitors, even if they merely receive information concerning the commercially sensitive future conduct of competitors, they can be considered to have taken part in a concerted practice, since the receiving undertaking could not fail to take into account, whether directly or indirectly, the information that has been obtained, in order to determine the policy which it intended to pursue on the market.

In fact, the allegations made by the Appellant are identical, in terms of their justification, to those given by another of those sanctioned in the non-confidential version that was published on 27/09/2017 (Paragraphs 289 *et seq.*), which was rejected with strong arguments by the Commission itself. They were also rejected in all the cases, both in the decisions and in the summaries of the same, where they always refer to "Price coordination agreements". Not only that, but in that same Commission decision, which belongs to the same sanctioning procedure, but which is different in that it was appealed, and which belongs to one of the cartelised companies, it is already pointed out that this variation either does not exist or it may be minimal. We quote the reference to Paragraph 48 of the same decision in English for the purposes of its official version: "Customers buying trucks from Dealers pay the customer price. The customer price is the Dealer net price plus the Scania Dealer's margin and any costs for the further customisation of the vehicle, minus discounts and promotions offered to the customer. The actual impact of a price change on a particular sale will depend on a significant number of factors that, to a large extent, will be determined by the negotiations with the end-user. It is therefore possible that a change in a particular price level will, in the end, have no, or only a minimal, effect on the final customer price."

The Appellant has justified its conduct on the ground that it is impossible for the conduct sanctioned by the Commission to be conduct which could, both by its nature and by the system of negotiation which they operated internally, possibly cause any damage whatsoever, since it does not affect prices or price increases. However, this is contradicted both by the decision, in the terms set out above, and by the evidentiary defect, insofar as it is based on this denial.

Let us add even more: that justifying the game of "gross prices", "gross price lists" and "transaction prices", and the different terminology used by the Commission's decision, falls outside the logic in which an exchange of information that fixes gross price lists conditions the market downwards, as the one from which the concessionaires start to fix theirs, and therefore the conduct is punishable by object, and not by effects. In this game of gross and net prices, only the existence of discounts (which may go up or down) is taken into account, but not the increase that may occur due to indirect costs, which basically go back to those first ones that are already cartelised, from the sum of these indirect costs, the profit, and this possible discount which, in the present case, might have been justified, but which is necessarily integrated into the dealer's profit, as the rest would be a sale at a loss.

The base price is therefore the cartelised price. If there were also a regime of applying discounts on the gross prices to the initial supplier or manufacturer, we should also consider that this is so, not only because it is based on the gross price, but also because the net price and the profit have been implemented, otherwise we would fall back into a loss-making regime, i.e., the discount is necessarily reduced from the profit and not from the cartelised base price. It would be different if this were taken into account for the specific calculation of the amount of this damage, but not of the conduct.

Paragraphs 59 and 60 of the decision leave no room for doubt that there were meetings, in the specific case on which we are now ruling, which led to this sanction and which were evidenced by an increase in gross prices, since the initial request for information to the subsidiaries. The gross price was cartelised.

Personal comment

The essential idea underlying all of this seems to start from an initial error of assessment. It is considered that, as the conduct is punishable by object, it is not necessary for it to produce effects but, in reality, the conduct by object itself entails a significant degree of harmfulness that leads precisely to the presumption of damage, rather than to its exclusion.

From this point onwards, the effect on a market that is derived from an exchange of information may or may not produce damage, if we consider the elements highlighted by the Supreme Court in the judgments mentioned above:

- The conditions and circumstances in which the practices take place,
- The specific framework in which the agreements take place.
- The economic and legal context in which the companies operate.
- The nature of the goods and services covered.
- The structure and actual operating conditions of the markets affected.

Jesús Ángel Suarez Ramos, Court of Las Palmas

Pre-litigation disclosure of evidence in a follow-on case

CASE NOTE on R-484/20 (Las Palmas Court of Appeal, Secc 4ª)

1. Background: The Trucks cartel

In this Decision of 19th July, 2016, Case AT.39824, the Commission:

- Found an Article 101 infringement consisting of:
- (1) collusive arrangements on pricing and gross price increases in the EEA for trucks; and
- (2) on the timing and the passing-on of costs for the introduction of emission technologies for medium and heavy trucks.
- It Imposed fines on: CNH INDUSTRIAL N.V., FIAT CHRYSLER AUTOMOBILES N.V., IVECO S.P.A, IVECO MAGIRUS AG (and 9 other undertakings).

2. The Case

TRANSPORTES ISLAS CANARIAS 2015, SLU ("TRANSPORTES") is a firm in the transport industry, operating in the Canary Islands. In 1999, TRANSPORTES bought two IVECO trucks. Intending to start a follow-on action claiming damages, TRANSPORTES filed an application to obtain pre-process disclosure of evidence and access to the sources of evidence, in order to produce an expert report:

The motion was filed against CNH INDUSTRIAL N.V., FIAT CHRYSLER AUTOMOBILES N.V., IVECO S.P.A, and IVECO MAGIRUS AG.

On the basis provided by Spanish Real Decreto Ley 9/2017, de 26 de mayo, which implements Directive 2014/104/EU, introduced into Spanish Civil Procedural Law Article 283 bis a).

With the aim of proving damages arising from the infringement relating to overcharging, it requests the discovery of:

- A list of truck models made by IVECO, in the period January, 1990, to June, 2018.
- The total delivery cost of each model.
- A list of transfer prices applied to the Spanish importer.

This was intended to prove damages arising from the infringement relating to an excess of petrol consumption, it requests the discovery of:

- Official Certificates of emissions, and Reports on the consumption test made during the development of the engines.
- The detailed petrol consumption of each model.
- The product planning and consumption roadmaps.

A hearing was scheduled. The Defendants made their appearance and opposed the motion on the following grounds:

- CNH INDUSTRIAL N.V. and Iveco Magirus AG were fined by the Commission for collusive practices that took place after the purchase of the trucks by the Applicant.

- A limitation period of 1 year for follow-on actions, according to Spanish general provisions on tort.
- A lack of proportionality (the information requested is too old and is not kept by the Defendants; it relates to different models that are not considered in the decisión); a lack of detail (the documents did not previously exist, and they have to be produced specially for this case); a lack of necessity (there is available information in specialised magazines and engine consumption depends on many variables).

Judgment of the First Instance Court (Commercial Court), 9th December, 2019:

- The application against CNH INDUSTRIAL N.V. and Iveco Magirus AG was dismissed, because their involvement in the collusive practices took place after the purchase of the trucks, so the Decision did not consider them to be responsible.
- The limitation period defence was rejected (on the grounds that the issue should have been addressed in the main litigation).
- Requests related to the over pricing were granted, reasoning that they were essential for the experts to produce a report creating a counter-factual scenario.
- Requests related to the excess of consumption were rejected: In the decision, there is no mention of that type of harm, and the fact that a schedule to introduce new technology was made by the Defendants, do not necessarily constitute a "delay".

The Court of Appeal Judgment, April 9th, 2021, partially overturns the Court of First Instance (appealed by both parties), stating that:

- According to Spanish legislation and Article 5.1 of the Directive, the disclosure of evidence can be requested not only of the Defendant in a follow-on case, but also of a third party (Recital 14). It is thus not necessary to assess it now when the existence of an anti-competitive infringement committed by each and every one of the Defendants has been agreed.
- It is not relevant whether the Defendant is the firm that fabricated or sold the trucks in Spain, since it is common ground that all of them are members of the same group of undertakings (as the parent company or as subsidiaries).
- As to the standing of the Applicant, there is reasonable justification for the ownership of the trucks with the official licences for the trucks being produced under the name of the Applicants. The price paid for their purchase, or the contract form used to acquire the products is of no relevance now. There is no need for the Claimant to disclose all the evidence that it plans to use in the subsequent proceedings (Recital 14).
- The defence of there being a limitation period is not mature, and it cannot be analysed when discussing the pre-trial discovery, since the law suit has not yet been substantiated and its grounds (tort or breach of contract) and particulars are not yet known.
- Contrary to the submissions of the Defendants, the Court affirms that the rebuttable presumption, in Article 17.2 of the Directive, is applicable, since it must be understood as a general guideline for how to assess the evidence. So it should be considered a procedural provision, and not a substantive one. It is not affected by Article 22.1 of the Directive (even though it was not transposed into Spanish legislation in a timely way). In addition to that, in Spanish case-law, the presumption of damages *in re ipsa* is well established. The Court rejects the submission of the Defendant that the motion lacks proportionality because it seeks to create or elaborate new reports, instead of obtaining previously existing documents.

The Directive, and also Spanish legislation, allows for the search for "specified items of evidence or relevant categories of evidence", or according to Recital (45) ... Quantifying 'harm' in competition law cases ... "is often very costly, and claimants have difficulties in obtaining the data". So it is data, and not just documents, which are relevant when it comes to disclosure (Recital 15).

- The Court is satisfied that the petition is proportionate. In terms of the time period, it is relevant to use a period that is long enough (even longer than the frame considered in the decision) to analyse the impact of the infringement into prices. Even though it seeks for information on the prices of other models, this always falls within the framework of the same engine type.
- The Court highlights the fact that there is a previous decision on infringement, so as to consider the petition as being reasonably justified. It takes into account, also, the possibility to jointly substantiate a standalone action against other undertakings, apart from those that were fined. It is also possible to file a standalone action against the same undertakings, with regard to infringements other than those considered in the decision, that are related to different models of engine or a different period of time. For that reason, the Court accepts that CNH INDUSTRIAL N.V. and Iveco Magirus AG are also subject to the disclosure order.
- Regarding the data about the petrol consumption, it is stated that the concerted delay in implementing the use of new technology can be considered an anti-competitive behaviour, because it prevented the claimants from buying trucks with that technology at a reasonable price. This fact has a direct effect on the costs of the claimant's business, so it is proportionate to disclose the data in order to assess the effect that the new technology could have had on the trucks' consumption. The Court thus overturned the previous-judgment on this point also, ordering the disclosure of the reports on the petrol consumption of the engines that were made during the fabrication process. This was done without prejudice to the final decision about the reality of the damage.

Relevance of the case: practical implementation of Directive 2014/104/EU

- A. Interaction between public and private enforcement (*Recital 6 of the Directive*): the Court emphasises the compatibility of joint follow-on and standalone actions. In the presence of an infringement, which has been established by the Commission or the NCA, private enforcement could take advantage of the presumptions to prove: (1) further infringements committed by the same parties (behaviour not the object of the previous decision); and (2) the same behaviour made by other undertakings than those addressed in the Decision.
- B. Importance of the gathering of relevant data to make expert reports in follow-on actions (*Article 5.8*). Spanish legislation, in addition to implementing the Directive, creates new pre-proceedings tools for the parties that help them to prepare a strong case.
- C. Broad concept of evidence and information (*Recital 13 and 17, and Article 2*). It is not restricted to "documents", but it comprises all types of means of proof that are admissible before the National Court being seized, in particular, documents and all other objects containing information, irrespective of the medium on which the information is stored.
- D. Damage may arise from all types of infringement (*Article 2.14*): not only price fixing, but also concerted practices delaying the introduction of new technology, that may harm consumers, or harm competition in the relevant market.

Emanuela Germano & Gian Paolo Macagno, Turin Court of Appeal

Mangione Antonio Natale et al. v. Veneto Banca SPA - Flaminia SPV SRL - Court of Appeal of Turin, 264/2021, 08.03.2021, R.G.C. 682/2019

First background - The Supervisory Authority's decision

The ABI - Associazione Bancaria Italiana (Italian Banking Association), a voluntary association of banks and financial intermediaries, is an association that is unrelated to the banking activity carried out by its members. It does not possess databases relating to banking relations with customers, and it does not receive any communication from the authorities, but, as it includes all the nation's credit institutions, it holds a position of considerable influence, which it exercises, as far as is relevant here, with the aim of also standardising the contractual schemes that are applied by banks.

In 2002, the ABI prepared an *omnibus* surety contractual scheme, which was circulated and recommended to member banks and communicated to the Bank of Italy, in the belief that it complied with the provisions of the Italian Competition Act (Law No. 287 of 10th October, 1990).

In November, 2003, following its examination of the contractual scheme drawn up by the ABI, the Bank of Italy (which then held the function of being the competition authority) launched a probe – pursuant to Articles 2 and 14 of the Competition Act – to ascertain whether or not the said scheme might constitute a concerted practice restricting competition, due to its possible widespread adoption by the banks, and which was not balanced by an adequate balancing of the interests of the parties involved.

At the end of the proceedings, the Bank of Italy declared that Articles 2, 6 and 8 of the contractual guarantee scheme drawn up by the ABI were contrary to Article 2(II)(a) of Law No 287/1990, which aimed to set “uniform trading conditions”:

- the so-called "reviviscence" clause, on the basis of which "*the guarantor is obliged to reimburse the bank for any sums collected by the bank in payment of guaranteed obligations, which must be returned following the cancellation, ineffectiveness or revocation of such payments, or for any other reason*" (Article 2 of the ABI scheme);
- the "survival clause", providing for the survival of the surety in the event that the guaranteed obligations are declared invalid. The guarantor would therefore have to repay the sums disbursed as a performance of the principal debt that had been declared invalid (Art. 6 of the ABI scheme);
- the "waiver clause", by which the guarantor waives the time limitation provided in its favour by Art. 1957(1) of the Italian Civil Code, providing that the bank must act against the debtor within six months from the maturity of the principal obligation (Art. 8 of the ABI scheme).

The Bank's assessment was based on the consideration that such a scheme might lead to a situation of standardisation, resulting from the adoption of uniform general terms and conditions, which could become anti-competitive if they contained clauses affecting significant aspects of the agreement, such as preventing a balance of the involved parties' interests. It held that such clauses had the "*main purpose of imposing on the guarantor the negative consequences arising from the bank's failure to comply with its obligations of diligence, or from the invalidity or ineffectiveness of the principal obligation and of the acts extinguishing it.*" The Bank of Italy issued Decision no. 55 of 2nd May, 2005, establishing that the alleged contractual model of *omnibus* surety that had been drawn up by the ABI amounted to a concerted practice that was contrary to Article 2 of the Italian Competition Act.

In particular, in view of the potential harm to competition resulting from the use of the ABI scheme, the Bank of Italy found that Articles 2, 6 and 8 of the scheme *"contain provisions which, to the extent that they are applied uniformly, are contrary to Article 2(2)(a) of Law No 287/90"*.

However, the Authority's decision did not entail any significant consequences for a long period of time, and ABI member banks (as mentioned above, most of the credit institutions operating in Italy) continued to use the contractual scheme, including the anti-competitive clauses, despite the Bank of Italy's indications.

Even in terms of private enforcement, few initiatives were taken, despite an initial intervention by the Corte di Cassazione (the Italian Supreme Court) in 2005 (N. 2207 of 2005). However, a subsequent ruling (Order No. 29810 of 2017 of the Court of Cassation) opened a wide-ranging dispute between the banks and the guarantors, as this decision did not clarify all the doubts regarding the effects of the Authority's decision.

Second background - The Court of Cassation's first intervention.

The Supreme Court's ruling favoured, at first, the thesis of the voidness of the entire guarantee agreement, which is inferred in a passage of the Decision, which states that *"the anti-competitive wrongful act committed prior to the conclusion of the surety bond which is the subject of the present dispute cannot but affect the transaction concluded "downstream", because of the violation of the principles and provisions regulating the matter"*. From this statement, the consequence was inferred – not directly addressed, by the Court of Cassation – that the entire contract, and not only the single clauses, had to be declared void.

The central issue related to the relationship between the Authority's decision and the fate of downstream contracts, which constitute the implementation of the "upstream" anti-competitive agreements. This is currently one of the most debated topics in the Italian case law concerning the guarantees that are based on the ABI scheme.

In the present case, the matter was peculiar, as the subject of the proceedings was "downstream" contracts that entered into the Bank of Italy's decision. The Venice Court of Appeal, in the judgment appealed before the Court of Cassation, wrongly attributed a regulatory nature to the measure, stating that it could exclusively lead to the unlawfulness of contracts entered into in accordance with the ABI scheme after Decision No. 55/2005, and not previously.

With regard to the "privileged evidence" nature of the finding contained in the Bank of Italy's decision, the Supreme Court considered that the uniform use of the disputed clauses was proven even before 2005.

From this standpoint, the evidentiary value of the Competition Authority's decisions has been a central issue on which the Court of Cassation has dwelt at length, taking into account also the regulatory gap that stems from the non-applicability of the discipline of Legislative Decree no. 3/2017 (which transposed Directive 2014/104/EU) to the earlier litigation: in particular, being in a factual context in which such a decree was not yet applicable, the jurisprudence of legitimacy made extensive use of the so-called privileged evidence - a criterion that has aroused a few critical issues due, if nothing else, to the lack of an unambiguous meaning.

This profile, which also affects the issue of the civil judge's margin of discretion, as well as the relationship between civil proceedings and the effectiveness of an administrative measure, made it essential to understand whether the 'privileged' nature of this evidence had a binding value or, on the contrary, was merely a sort of suggestion.

This second hypothesis, at first, was the most preferred, in view also of the tendential autonomy of the civil and administrative proceedings. It is worth recalling, in this regard, Judgment No. 3640 of 13.02.2009, which, in stating that *"the conclusions adopted by the Guarantor Authority for Competition and the Market, as well as the decisions of the administrative judge which may have confirmed or reformed those decisions, constitute privileged evidence, in relation to the existence of the conduct ascertained or of the position held on the market and of its possible abuse, even if this does not exclude the possibility that the parties offer evidence in support of such ascertainment or contrary thereto"*, appeared to endorse this orientation.

This direction, however, gradually underwent a change of course, which materialised more significantly on the occasion of the transposition of European Directive No. 104 of 2014, by means of Legislative Decree No. 3/2017. The latter came to recognise administrative decisions that have become unobjectionable or that have been confirmed by a final judgment with a binding effect, with reference to the establishment of the offence in private enforcement.

As is well known, *private enforcement*, concerning the application of competition rules by National Courts, includes two types of actions that are characterised by a different burden of proof: the so-called "follow-on" actions, which are based on an unlawful violation of the anti-trust rules that had already been ascertained by a national anti-trust authority or the European Commission, and the so-called "standalone" actions, which, conversely, are brought in the absence of any prior finding of infringement by an anti-trust authority. It is clear that, in the case of standalone actions, the burden of proof is much heavier for the Plaintiff, who is required to prove all the constituent elements of the claim, whereas, in the case of follow-on actions, where the Authority's finding constitutes "privileged evidence" of an infringement of the law, the Plaintiff has only the burden of proving the remaining elements of his claim.

Private enforcement, as a system of safeguards envisaged by the ECJ already in the 1970s, with the *BRT/Sabam* judgment, is aimed at recognizing the possibility for private parties to bring actions before National Courts to obtain compensation for damages suffered for breach of competition rules. It has, however, been considered a less important tool than public enforcement, where the European Commission and national competition authorities, are the main actors in bringing the relevant actions. It was only around the year 2000, and, in particular, following the European Court of Justice's landmark judgment in the *Courage/Crehan* case, that the direct effectiveness of Articles 101 and 102 TFEU, and the right of any person harmed by an infringement of these rules, bringing an action were reaffirmed, and private enforcement was expressly recognised as playing a major role in the enforcement of competition provisions.

This role was further enhanced by Regulation (EC) No. 1/2003 which, in view of the existence of parallel competence in the application of the competition rules by the Competition Authorities, on the one hand, and by the National Courts, on the other, laid down specific provisions for the purpose of coordinating the relationship between the decisions of the European Commission, those of a National Competition Authority and those of a National Courts, in the event of Community anti-trust rules being applied to the same case. Without prejudice to the binding nature of the Commission's infringement decisions, provided for by Article 16 of Regulation 1/2003, Article 9 of Directive 104/2014 has provided that *"Member States shall ensure that an infringement of competition law found by a final decision of a National Competition Authority or a Court of Appeal is deemed to have been finally established for the purposes of an action for damages brought before their National Court under Article 101 or 102 TFEU, or under national competition law"*.

As regards the effect of decisions issued by the competition authorities of other Member States, the second paragraph of the same provision stated that *"Member States shall ensure that a final decision, within the meaning of Paragraph 1, adopted in another Member State may, in accordance with their national law, be presented before their courts, at least as prima facie evidence that an infringement of competition law has taken place and may, where appropriate, be assessed together with other evidence submitted by the parties"*. Finally, in the third paragraph, by providing that *"This Article shall be without prejudice to the rights and obligations of National Courts under Article 267 TFEU"* reaffirmed the role of the Court of Justice as the final interpreter of European law.

By way of example, it may therefore be said that this provision has established an important distinction, by virtue of which an infringement of competition law found in a final decision of a National Competition Authority, or in the final judgment of an administrative court must be regarded as having definitively established the matter for civil lawsuits purposes. Indeed, after the Directive's transposition, the latter no longer merely constitutes 'privileged evidence' but it has instead acquired binding force, albeit exclusively in relation to the existence of the anti-trust infringement, and not also in relation to the assessment of both the damage and the causal link. Where, on the other hand, the aforementioned final decision has been adopted in another Member State, it may be relied upon before the National Courts *"at least as prima facie evidence"*, with the result that it may, in any event, be overridden by any typical or atypical evidence acquired during the proceedings according to the rules of the domestic legal system.

Third antecedent - The second intervention of the Court of Cassation

What has been said up to now concerning the probative effectiveness of the assessment of the Competition Authority in civil proceedings constitutes a central theme in the well-known Ruling of the Court of Cassation No. 24044 of 2019, which distinguished itself for having directly addressed the question regarding the nature, partial or total, of the voidness of the contracts of omnibus surety stipulated on the basis of the standard scheme that was drafted by the ABI. Taking Ordinance No. 29810/2017 as a starting point, the Supreme Court affirmed, in the cited judgment, that it constitutes a mere legal precedent with nomophylactic value, denying that it would bear any evidentiary binding value, mainly with regard to the profile of the voidness of contracts concluded prior to Decision No. 55/2005 of the Bank of Italy.

The Court of Cassation also clarified that the soundness of the voidness request - far from automatically determining the invalidity of the entire contract – must be subject to the assessment by the judge of the relevance and decisiveness of the void clauses for the conclusion of the contract. This principle will be applicable also in a case where it is ascertained that the expunction of the single anti-competitive clauses does not affect the balance of interests at stake.

In this respect, the application of Art. 1419 of the Civil Code is relevant. This provision enucleates a general principle of contract law, according to which *"the partial voidness of a contract, or the voidness of individual clauses, entails the voidness of the whole contract, if it appears that the parties would not have concluded the contract without that part of its content which is affected by the voidness"*.

It is precisely by relying on this provision that, in the judgment in question, the Supreme Court held that *"since the administrative authority has limited the assessment of illegality to certain specific clauses, this does not exclude, nor is it incompatible with the fact that in practice the voidness of the downstream contract must be assessed by the court in accordance with Articles 1418 et seq. of the Civil Code and that Article 1419 of the Civil Code may be applied, where the balance of interests at stake is not affected by a ruling of partial voidness, limited to the clauses deriving from the unlawful agreements"*.

The verification of the will of the parties has thus assumed pre-eminent importance, since the Court was called to assess, pursuant to Art. 1419(1) of the Civil Code, whether, in the absence of the invalid clauses, the parties would have concluded the contract in any event. It is on the outcome of this assessment that the fate of the contract and the consequent declaration of invalidity – both total and partial – depends.

In light of this interpretation, the Court of Cassation rejected the guarantors' appeal on the ground that it was impossible to hold that, in the absence of such clauses, the contract would not have been concluded, or that the Bank itself would have waived the given guarantee. In conclusion, therefore, it must be accepted that, according to this interpretation, which prevails today, it is deemed preferable to opt for the less afflictive remedy of partial voidness, except in a case in which the parties would not have entered into the agreement without the void clauses. In this particular scenario, full voidness can still be declared. Indeed, in general, total voidness is considered to be an excessive sanction, if compared to what is necessary to ensure the protection of the interests of the parties involved.

Fourth antecedent - Persistence of divergent case law.

Despite the stance taken by the Court of Cassation in Decision No. 24044 of 26th September 2019, the jurisprudential landscape remains full of uncertainties and, in particular, different orientations persist:

- A first orientation holds that an action for the invalidity of the surety agreement is admissible, based on the following consideration: if undertakings were allowed to implement the restrictive agreement by concluding valid downstream contracts, then the invalidity of the upstream agreement alone would be reduced to a merely formal sanction;
- This guideline also arrives at different solutions with regard to identifying the type of voidness that is to be applied: voidness for the infringement of mandatory rules or for the unlawfulness of the contract's consideration; voidness for the unlawfulness of the object (which is limited to the advantage that the company has derived from the conclusion of the downstream contract); derivative voidness (which is traceable to that of the upstream cartel, by virtue of the functional link that exists with the downstream contract), or protective voidness (which provided for the protection of the party damaged by the cartel and therefore, exclusively the latter may raise such an objection);
- A second approach questions the possibility of the contract's entire voidness on account of the difference between the parties in regard of the downstream contract and those of the upstream agreement, and the consequent difficulty in establishing whether the former would also have given its consent without the clauses reproducing the content of the agreement;
- A third orientation that highlights the difference between upstream agreements, i.e., agreements between entrepreneurs, subject to an assessment as to their unlawfulness for the breaching of anti-trust law, and sanctioned by voidness - and contracts entered into downstream, in relation to which the action for damages may be exercised: the final consumer, who suffers damage from a negotiation that does not admit alternatives due to the effect of collusion "upstream", may, even if s/he is not a participant in a competitive relationship with the entrepreneurs who are the authors of the collusion, bring an action to ascertain the voidness of the agreement and to obtain compensation for damages according to Article 33 of Law No 287 of 1990 (the Italian Competition Act).

The decision of the Court of Appeal of Turin - Judgment No 264 of 8th March, 2021 - proc. No. R.G.C. 682/2019

The case here presented, which was decided by the Turin Court of Appeal, is part of the saga described above, with some peculiarities.

At the First Instance, before the Court of First Instance of Verbania, A.M. and L.M. raised several objections to the V.B. bank's claim. The bank was seeking to enforce the guarantee they had provided in favour of a company, which owed the bank the sum of €182,822.38.

These objections were also directed at obtaining the declaration of the relevant surety agreement's voidness, which included the clauses that were found to be in conflict with competition law. Such requests were rejected by the Court of First Instance, both because they were not adequately sustained by evidence (since the Authority's decision was not produced in court), and because the general principle that is laid down in Article 1419, Paragraph 1, of the Italian Civil Code (which provides that the voidness of individual contractual clauses does not necessarily entail the full voidness of the contract) was invoked.

As the Court ordered A.M. and L.M. to pay, they challenged the judgment before the Court of Appeal of Turin, reiterating the argument that there had been a breach of the legislation on the protection of the market and competition, and claiming that the Court of Verbania was mistaken in not declaring the omnibus surety contract null and void, because:

- the Court of First Instance wrongly disregarded the innovative scope of the Court of Cassation's Ruling No. 29810/2017, which granted consumers the opportunity to benefit from so-called privileged evidence, relieving them of the burden of proving anti-competitive conduct, as, for this purpose, the assessment carried out by the Bank of Italy in 2005, on the advice of the AGCM, was sufficient;
- the surety bond prepared by the bank contains the clauses indicated by the Bank of Italy, and therefore the scheme prepared by the bank, which conforms to that of the ABI, shall also be censored: the orientation expressed by the S.C. should be interpreted as meaning that the surety bond contract is null and void.

The Turin Court of Appeal, recalling the judgment of Court of Cassation Cass. No. 24044/2019, found the second of the objections to be unfounded, observing:

- that there is no reason to hold that the presence in the guarantee of clauses which are contrary to anti-trust legislation, on the basis of the decision of the Bank of Italy, should entail the voidness of the entire guarantee and not merely the removal of the defective clauses and their replacement by legal rules;
- that it is therefore necessary to verify the will of the parties, pursuant to Articles 1418 and 1419 of the Civil Code, and that, in this respect, the clauses resulting from unlawful agreements do not affect the structure and cause of the contract, and cannot prejudice the position of the guarantors, who are better protected, precisely because of the declaration of partial voidness;
- that the voidness should therefore, in theory, not extend to the whole guarantee, since such a reasoning does not comply with the principle of the preservation of contract, in so far as it corresponds to the lawful intention of the parties;
- that, in the present case, it was not disputed that the parties had intended to strengthen the bank's claim by means of the guarantee and that the guarantee would therefore have been intended, even in the absence of the unlawful clauses, and would in any event have served the contractual interests of both parties;

- that, finally, not only was the voidness of the specific incriminated clauses (clauses derogating from the provisions of Article 1957 of the Civil Code) not objected to, but the Appellants themselves had acknowledged that they had not been applied, thus highlighting their own lack of interest in assessing the partial voidness.

Conclusions and future perspectives.

As we have seen, despite the stance taken by the Court of Cassation in Decision No.24044 of 26th September, 2019, which was followed substantially by the Court of Appeal's judgment, the jurisprudential landscape remains full of uncertainties.

Recently, the First Civil Section of the Supreme Court, with Interlocutory Order No. 11486 of 30/04/2021, referred to the United Sections of the Supreme Court the question concerning the voidness of bank sureties drafted in accordance with the ABI's uniform conditions and, in particular, this Order is directed at clarifying:

- a. whether the total or partial coincidence with the above conditions justifies a declaration that the clauses accepted by the guarantor are void, or only justifies an action for damages;
- b. in the first case, which rules are applicable to an action for voidness, from the point of view of the type of defect and the legal standing to enforce such a decision;
- c. whether a declaration of the partial invalidity of the guarantee is admissible;
- d. whether the investigation required for that purpose must focus on the potential willingness of the parties to consent to the provision of the security, or on the exclusion of a change in the structure of interests resulting from the contract?

In the background, there is an even more radical thesis, which is based on the objection to the Bank of Italy's assessment, especially with regard to the following:

- a. the identification of the relevant market;
- b. the identification of the 'anti-competitive harm' that is to be suffered by the guarantor.

By approaching the issue from a completely different perspective than that of traditional case law, one can arrive at the radical exclusion of the possibility of applying anti-trust law to sureties that comply with the ABI scheme.

Indeed, it can be seriously doubted whether the standardised form of the terms and conditions of the omnibus surety bond is capable of impairing the guarantor's right to 'effective choice' between competing products, since such a right of choice between 'competing products' does not exist at all for the guarantor.

The guarantor is a third party to the credit relationship and is therefore not a client of the bank. The guarantor is a third party to the credit relationship and is not, therefore, a client of the bank. For these reasons, that the active surety, i.e., the surety issued to a bank by a third party, natural or legal person or entity, constitutes a banking contract, is thus excluded.

Freedom of choice and respect for competition must thus be protected *vis-à-vis* the client, and not *vis-à-vis* the guarantor, who is a third party to the banking relationship and does not operate in a strictly competitive market.

It must therefore be doubted whether there can be a "market in surety bonds" to which the scope of anti-trust protection refers, given that the only model of guarantee that will not be refused by that bank is the one that the bank itself considers most suitable to guarantee the satisfaction of its credit: in essence, therefore, a right to choose between competing products does not exist.

Consequently, it becomes difficult to identify the anti-competitive harm to the guarantor: moreover, a hypothetical elimination of the strengthening of the guarantee ensured by the offending clauses would, paradoxically, lead to a worsening of the position of the guaranteed debtor, who would then obtain from the bank a loan on less advantageous economic terms or, more likely, would not obtain one at all.

PARENT-SUBSIDIARY LIABILITY

Birgit Burm-Herregodts, Brussels Commercial Court

Court of Appeal Ghent (Belgium), 7th Chamber, 2019/AR/1255 & 1393, Decision of
1st March, 2021

I. Brief summary of the facts of the dispute.

BVTR is a private company with limited liability that is registered in Belgium. The company's activities concern road transport. BVTR bought, and buys on a regular basis, trucks for its activities. Allegedly, BVTR bought 19 MAN trucks, 2 Scania trucks and 1 Volvo truck between 1999 and 2011.

NV Volvo Group Belgium is the Belgian division of the Volvo-group. AB Volvo is the alleged Swedish parent company for the Volvo-group.

NV Man Truck & Bus is the Belgium registered company that operates as the Belgian branch of the Man Group. Man SE is the Germany based alleged parent company for the Man-Group.

The Belgian divisions had allegedly acted as the importers of the trucks into Belgium that were later sold by third companies to BVTR.

The European Commission had received information that different truck constructors and producers had colluded to fix prices and to pass on certain costs. The investigation led to a Decision of the European Commission of 19th July, 2016³⁴. The Commission had adopted this decision relating to a proceeding under Article 101 of the TFEU³⁵ and Article 53 of the EEA agreement³⁶.

II. Summary of the judicial proceedings

BVTR filed a complaint against both the Belgian-based Volvo division and the local Man Truck & Bus division. After the first summons, BVTR took the initiative to have a second summons served on both of the alleged parent companies of the already implicated Belgian companies. BVTR claimed compensation for damages from all parties, stating that it had suffered damages. The cause for these damages was to be found in the cartel of sellers of trucks and, mainly, the price-fixing that was being imposed by this cartel on the market, and on the buyers of these trucks. BVTR claimed an amount of €343,106.75 of damages for the 22 trucks. This amount corresponded with 20% of the price that BVTR had paid when buying the trucks.

BVTR had introduced its claims before the Court of Enterprises in Ghent. It had based its complaints on the Decision of the European Commission of 19th July, 2016, and on the applicability of Directive 2014/104/EU³⁷.

The Commission had addressed both Man SE and Volvo, together with other constructors, in its decision, and had withheld infringements committed by these parties that consisted of "*collusive arrangements on pricing and gross price increases in the EEA for trucks*", as well as "*the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards.*" MAN SE was granted immunity by the Commission, due to its cooperation with the Commission during the investigation.

³⁴ [Summary of Commission Decision of 19th July, 2016, relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement \(Case AT.39824 — Trucks\) \(notified under document C\(2016\) 4673\) \(europa.eu\)](#), Official Journal of the European Union, C 108/06, 06.04.2017.

³⁵ Art. 101 Treaty on the Functioning of the European Union, [EUR-Lex - 12008E101 - EN - EUR-Lex \(europa.eu\)](#).

³⁶ Art. 53 Agreement on the European Economic Area, [EUR-Lex - 21994A0103\(74\) - EN - EUR-Lex \(europa.eu\)](#)

³⁷ 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 the infringements of the competition law provisions of the Member States and of the European Union Text, with EEA relevance, [EUR-Lex - 32014L0104 - EN - EUR-Lex \(europa.eu\)](#)

The main points of law that were discussed by the parties before the Court of Enterprises of Ghent (Belgium) concerned the transposition of the Directive 2014/104/EU into national law, and the applicability of this law, the alleged liability of the parent companies for their subsidiaries and the estimation of the damages.

The Court decided, in a judgment of 22nd November, 2018, that the claims against the Belgian companies were to be dismissed.

The claims that BVTR had introduced against MAN SE, the German parent, and Volvo AB, the Swedish parent company, were declared admissible. The Court did not decide on the merits of the case against these two companies, but decided, as a preliminary ruling, to appoint a financial expert in order to examine whether the net acquisition prices of the trucks that were put on the Belgian market in the period of 5 years prior to 17th January, 1997, and the 5 years beyond 18th January, 2011, were significantly different from the prices that would have been paid for similar trucks in the period from 17th January, 1997,- 18th January, 2011.

III. Ruling of the Court of Appeal of Ghent of 1st March, 2021.

MAN SE and Volvo AB decided not to wait for the final outcome of the report and the findings of the expert, and decided to appeal the judgment of 22nd November, 2018. The financial expert had already communicated his preliminary findings to the parties. BVTR appealed the judgment to the Court of Appeal. The latter Court decided that the appeal of Man SE and Volvo AB was justified. The Belgian based companies of Man and Volvo did not intervene in the appeal proceedings.

The Court of Appeal of Ghent heard the case and it is this decision that will be discussed in this paper.

The Court of Appeal of Ghent rendered a judgment on 1st March, 2021. The Court decided to partially annul the judgment of 22nd November, 2018, and declared the claims that BVTR had brought against Man SE and Volvo AB to be admissible, but unjustified.

The Court of Appeal decided on the transposition of the Directive 2014/104/EU into national law and the applicability of this law (III.1), the alleged liability of the parent companies for their subsidiaries (III.2) and the estimation of the damages (III.3).

III.1 The transposition of the Directive 2014/104/EU.

Directive 2014/104/EU had been implemented in Belgian national law by the transposition law of 6th June, 2017³⁸. The Court of Appeal referred to the decision of the First Court, that had decided not to apply the Directive or national law and confirmed this decision on the following grounds.

The Belgian transposition law entered into force on 22nd June 2017. This law provides that it is not applicable, when claims are concerned, based upon facts that took place before 22nd June 2017. The first judge and the Court of Appeal decided that both the cartel itself, which, according to the Decision of the Commission, ended on 18th January 2011, as well as the Decision of the Commission rendered on 19th July, 2016, were matters of fact that took place before the transposition law entered into force. As a consequence, thereof, the Directive and the law could not be applied in this case, which formally began with the summons of 13th April, 2017.

³⁸ The law of the 6th June, 2017, in Dutch, 6 JUNI 2017. - *Wet houdende invoeging van een Titel 3 " De rechtsvordering tot schadevergoeding wegens inbreuken op het mededingingsrecht " in Boek XVII van het Wetboek van economisch recht, houdende invoeging van definities eigen aan Boek XVII, Titel 3 in Boek I en houdende diverse wijzigingen van het Wetboek van economisch recht*, had been published in the *Official Journal* on June 12th. This law entered into force ten days later, on the 22nd of June, 2017.

For BVTR this meant that it could not rely on either the Directive or the transposition law, nor on the legal presumptions that were embodied in both the Directive and Belgian national law. The presumption that cartels cause damages, unless the contrary is proven, could therefore not be invoked by BVTR. Moreover, the fact that the Directive was already implemented prevented the Court from interpreting national law according to the Directive, the Court of Appeal stated.

The Court of Appeal decided that the burden of the proof that the Cartel had caused any damages, lay upon BVTR, and had to be considered as purely a matter of national law. According to Article 1382 of the Belgian Civil Code, the organisation of a cartel could be considered as being a wrongful act, which could lead to damages for a claimant, if this claimant proves that the cartel is a wrongful act which has caused the damages s/he suffered, and when he proves that the cause of the damages is, beyond reasonable doubt, the cartel itself, or the behaviour of the cartel, e.g., the price fixing/ the timing and the passing on of costs for the introduction of emission technologies.

In its decision, the Court agreed with BVTR that the Decision of the European Commission of 19th July, 2016, is binding for the National Courts, and it proves the existence of the violation of Article 101 TFEU, and is therefore to be considered a wrongful act.

III.2 The alleged liability of the parent companies for their daughters.

The Court of Appeal decided that the Decision of the European Commission of 19th July, 2016, explicitly mentioned Man SE and Volvo AB as being parent companies, with decisive influence on the activities of their subsidiaries and as having committed the infringements of the EU anti-trust rules. The Court of Appeal referred to the Skanska Industrial Solutions case³⁹ in its reasoning, so as to conclude that parent companies can be liable for the acts of one of the companies of which they are the parent. The Court of Appeal found that, in this case, both Man SE and Volvo had committed wrongful acts by infringing anti-trust rules by organizing a cartel.

III.3 The damages.

The Court of Appeal decided that BVTR had not proven that the alleged damages were damages that BVTR had really suffered. BVTR had not complied with the need to provide the burden of proof and had brought no evidence before the Court that it had paid more for the trucks she bought during the time lapse when the cartel was considered to be active. There was thus no justification for damages being awarded, and the claims of BVTR were dismissed.

IV. Personal comment

This case is relevant for several reasons.

1. I think this case is relevant because it refers explicitly to 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. This Directive aimed to create a legal framework for the benefit of those parties that suffered damages that were caused by unlawful competition.

As shown in this case, it becomes very difficult for claimants, who cannot rely on the Directive to prove the damages that they have suffered. The question is whether, for claimants, they will be able to rely, through national law, on the Directive, and whether it will become easier to prove the damages they have suffered.

³⁹ CJEU, 14 March 2019, C-724/17, Skanska Industrial Solutions, www.curia.eu, ECLI:EU:C:2019:204

2. The Court of Appeal of Ghent confirmed that the Decisions of the European Commission are binding on the National Courts, and that the parties that are explicitly mentioned by the Commission in its Decision cannot escape legal responsibility and liability in civil proceedings. The Court accepted that the Decision of the Commission constituted the proof of a wrongful act.

The entry into force of the Directive has helped those victims who will, in future proceedings, not need to prove any wrongful act. In the Directive, there is the presumption that cartels do cause harm to other competitors and to participants on the market. This presumption shifts the burden of proof from the victims to the infringers. The presumption should encourage claimants to introduce more claims in order to be compensated for their damages.

3. The difficulties that arise in civil proceedings concern the proof of the damages. The Commission is bound to consider its files, and the investigation, to be confidential, without the possibility that victims can easily access those files. Only with the intervention of the Court that hears the case, and that might decide to ask the Commission for access to those files, would it be possible for victims to rely on, and make use of, documents that might actually prove their damages.
4. The Commission has published communications and passed on guidelines. The aim of these communications is to help the national judges to estimate the antitrust harm that is being suffered in a specific case.

The Courts deciding on civil cases seem not to be very willing to take these *guidelines* as a primary source of law, and will only consider these guidelines to be of practical relevance in a specific case, when the parties can clearly define how these guidelines can be applied to the case brought before the judge.

Civil proceedings in which the Claimants are seeking compensation for their damages can, in Belgium, be brought before different courts, mainly Courts of Enterprises. Taking into account that there are not many cases, and that those judges do have to hear other cases, it becomes very difficult to have a profound knowledge of competition law. The guidelines and communications may become more relevant, and might be applied more, if damages-cases were to be centralized in one or two courts that would have more specialized judges.

5. The question is whether this Directive has met the goals that it had been set. It is true, and very positive, that this Directive has created a legal framework that effectively allows for compensation. It is true that the presumption that cartels do cause harm to other competitors and participants on the market shifts the burden of proof from the victims to the infringers, and that this presumption should encourage claimants to introduce more claims in order to have their damages compensated.

The quantification of the harm suffered by the victim was, and still is, the biggest problem that the Claimant has to overcome. According to national law it is the Claimant that has to bring the evidence to the court that should allow that court to quantify the harm that has been done. The first judge, in this case, did decide to rely on the findings of an expert in order to quantify the alleged harm. The Court of Appeal dismissed the case and overruled the decision to designate an expert, thus making it impossible for the Claimant to prove his losses.

Based upon research I did in national databases of jurisprudence, I could identify only one other judgment⁴⁰ that concerned the compensation for damages suffered due to a cartel. This shows that the Directive, although its aim is admirable, has not (yet) led to an increase in the number of proceedings that have come before the (Belgian) National Courts, and to relief for those parties and companies that have suffered damages.

⁴⁰ Court of Enterprises Brussels, 24th of December 2019 / Kh.Brussel (NI.) 24 december 2019, NJW 2020, afl. 427, 642, noot SCHOLAERT, V.SCHOLLAERT, V., [Aansprakelijkheidsvordering voor Kartelschade \(kluwer.be\)](https://www.kluwer.be).

Eduardo Pastor Martínez, Valencia Commercial Court

Decision: SJM No. 3 of Valencia, 20th February, 2019 (Trucks)

Abstract

The judgment of Commercial Court No. 3 of Valencia, of 20th February, 2019, for which I was the judge rapporteur, was one of the first pronouncements of the Spanish jurisdiction in the follow-on actions brought against the principal European truck manufacturing companies (European Commission Decision of 19th July, 2016, Case AT.39824-Trucks). This judgment was ground-breaking, due to the interpretation of the transitional Damages Directive's rules of law, the admission of the imputation of the liability of the subsidiary company to which the Decision was not addressed, the application of the presumptions of damage, and the development of the judicial power to estimate damages based on information asymmetries between the parties.

The facts of the dispute: the truck cartel

Mr. Octavio (i.e., a pseudonym), a Spanish citizen, bought a MAN truck in 2003. The sale was made through an official MAN dealer in the region of Valencia. In parallel, MAN coordinated with five other European truck manufacturers, between 1997 and 2011, to set sales prices and to delay the market introduction of new technologies, as an anti-competitive infringement which was found by the European Commission on 19th July, 2016. The infringement consisted of the fixing and increasing of the gross prices of trucks, and the passing on of the costs for the introduction of the new pollutant emission control technologies. The addressees' headquarters were directly involved in the price discussion and negotiations were held through German subsidiaries. The truck purchased by Mr Octavio was of the type and characteristics of those involved in the infringing conduct. However, MAN's Spanish subsidiary (MAN SPAIN) was not an addressee of the decision.

Summary of the judicial proceeding.

Mr. Octavio filed a follow-on claim, exclusively invoking Spanish tort law. This legislation is contained in Art. 1902 CC, which establishes the liability for damage by any agent who causes damage, by action or omission, if a causal link can be established between such conduct and the damage claimed, which, as a general rule, must be quantified by the person who claims to have suffered the damage. Mr. Octavio offered, as proof of quantification, an expert report based on statistical approximations.

MAN SPAIN answered the claim for dismissal. Like Mr Octavio, MAN SPAIN insisted that the case had to be decided only on the basis of Spanish law, stating that the action brought was time-barred under that national regime, that a follow-on action could not be brought against a company which was not an addressee of the Decision, even if it were the subsidiary of an addressee, and that the expert report submitted was unsuitable for the quantification of the damage that had possibly been suffered by the Claimant. In particular, MAN SPAIN submitted an expert report which attempted to analyse the characteristics of the truck's market, which would have prevented the effects of the infringement, and criticised the report submitted by the Plaintiff. However, the study did not develop any econometric method, nor did it provide specific data relating to MAN SPAIN's business in Spain.

Following the end of the proceeding, the Court handed down a judgment that considered the following relevant milestones for the resolution of the case: (i) the application to the solution of the case of European legislation and case law and, in particular, of the Directive on damages, by way of the principle of conforming interpretation; (ii) the validity of the action brought; (iii) the passive standing of MAN SPAIN in supporting the bringing of a follow-on action, which is based on the content of the European Commission's Decision; (iv) the jurisdictional power to interpret the relevant content of that Decision; (v) the application to the case of the presumptions of damage caused by the cartel, and (vi) the exercise of an alternative power for the judicial assessment of damages.

The ruling of the Court

The Court started from an analysis of the applicable law, considering that the proposal of the two sides was reductionist. The Court accepted that, until the transposition into Spanish law of the Damages Directive, there was no clear procedural framework for bringing a follow-on claim. However, none of this prevented it from accepting the application to the solution of the case of European case law which, in an interpretation of Art. 101 TFEU, had the occasion to assess the effectiveness of the right of the injured party to obtain sufficient compensation (Courage case, Case C-453/99, and the Manfredi case, joined cases C-295/04 to C-298/04).

In addition, the Court considered that the previous position of the Spanish Supreme Court made it possible to extend the general rule of liability for damage with relevant aspects for the solution of the case. In particular, the Spanish case law on the matter (STS, 1st, No. 651/2013, of 7th November, 2013), allowed for the application of a rebuttable presumption to prove the existence of the damage. Then, the quantification of the damage was also facilitated by the particular conditions of the application of this right, which is indicated by the case law interpretation, and which recognised as a sufficient quantification effort the recreation of a hypothetical, but reasonable, estimated scenario.

However, one of the most doubtful questions was whether the Damages Directive was directly or indirectly applicable to the settlement of the case. In particular, the acquisition of the truck that is referred to in the complaint had taken place before the entry into force of the Directive, the adoption of the Decision by the Commission had taken place after its entry into force, but before the end of the national deadline for the transposition of the rule and, finally, Spain had missed the transposition deadline, so that the publication of the non-confidential version of the Decision had taken place before the entry into force of the national transposition rule.

The Court considered the application of the principle of the conformity of interpretation on the basis of the European case law that has been established to that effect (Konstantinos Adeneler (C-212/04) AS.80 /86 Kolpinguis Nijmegen BV and the then well-known conclusions of the AG Kokott Cogeco, C-637/17), considering that the Damages Directive was in force at the time of the imposition of the penalty, that this should be the time to determine the legal regime that is applicable to the solution of the case, and that this option did not contravene the prohibition of the retroactive application of the Directive (Arts. 21-23).

Precisely on the basis of that rule of the conformity of interpretation, the Court considered that the action brought was not affected by any limitation period at all. The rule of interpretation did not authorise the substitution of the national limitation period by the Community limitation period, but it did authorise a more flexible interpretation of the rules on counting.

However, the really important questions concerned the assessment of the liability of a subsidiary for acts that have been committed by its parent company, and the application of the judicial assessment of the damages suffered by the Plaintiff.

As regards the first aspect, the Court held MAN SPAIN liable for the facts described in the Decision, according to the principle of binding effect, the concepts of unity and economic continuity that are inherent to competition law, as a category of overcoming the classic canons of personal liability, the characteristics of the infringement found, and the corporate configuration of MAN Spain. The Court considered that there was no negative dimension resulting from the principle of the binding effect, so that the National Court always retains its freedom to decide on the damage assessment (considering the Otis judgment of 6th November, 2012). Next, the Court pointed out that the only rule for the imputation of liability that is specific to competition law is the rule of economic unity. For this doctrine, what is relevant is the determination of an undertaking, with an impact on the commission of the infringement, irrespective of the different legal persons that compose it, because its formulation is economically inspired.

For this reason, European case law had accepted the holding of the parent company liable for infringements committed by its subsidiary (C-170/83, Hydrotherm; C-97/08, Azko Nobel; or even in cases where there is a transfer of undertakings (the conclusions of the Skanska case being known at the time). Finally, the Court found that it was clear, from the content of the decision and the evidence adduced in the proceedings, that MAN SPAIN had participated in the dissemination of the economic effects of the infringement on the Spanish market.

As regards the second aspect, the Court considered the quantification report submitted by the Claimant to be insufficient. However, it found that the Defendant had merely provided a generalised report, which simply criticised the report submitted by the Plaintiff, without providing any relevant data relating to the infringement described in the decision. It therefore considered that the presumption of damage had not been rebutted and, finally, ruled that an alternative assessment of the damage suffered by the Plaintiff, based on statistical studies published by the European Commission and applied in prudent terms, in order to provide a minimum quantification, should be applied.

A little bit later: a personal commentary

The Court's decision was subsequently overturned by the Valencia High Court, which took a conservative view and considered that there were no precedents in Community case law that would have established the possibility of holding the subsidiary liable for the infringing conduct that had been committed by its parent company. The case is currently pending review by the Supreme Court.

However, this innovative stance by the Court prompted other Spanish judges to reflect on this problem and its importance for the resolution of similar cases. In particular, the Barcelona Provincial Court asked four different questions (Case C-882/19, Sumal S.L. v. Mercedes Benz Trucks España S.L.), which were as follows:

1. *"Does the doctrine of economic unity, which flows from the European Court's own doctrine, justify the extension of the parent company's liability to the subsidiary, or does that doctrine apply only to the extension of the liability of subsidiaries to the parent company?"*
2. *Must the concept of economic unity be extended in the context of intra-group relations solely on the basis of control factors, or may it also be based on other criteria, including whether the subsidiary may have benefited from the acts of infringement?"*
3. *If the possibility of extending the parent company's liability to the subsidiary is admissible, what are the conditions which would make it possible?"*
4. *If the answer to the above questions is in favour of accepting the extension of liability to subsidiaries for acts of parent companies, would a national rule such as Article 71(2) of the Law on the Defence of Competition, which only provides for the possibility of extending the liability of the subsidiary to the parent company and provided that there is a situation of control by the parent company over the subsidiary, be compatible with that Community doctrine?"*

On 15th April, 2021, the opinion of Advocate General Pitruzzella was published, with a position very close to that defended by the Commercial Court of Valencia. Mr. Pitruzzella considered that the principle of personal liability and liability for fault that is inherent to the theory of damage, applies to the offending economic unit and not to the companies that compose it. Next, that, in the public application of competition law, the inclusion of one or more companies among those mentioned as addressees of the Decision responds to the criteria of opportunity, and not of the limitation of the perimeter of the infringing economic unit. From here, the application of the economic unity doctrine can be bottom-up (by control), top-down (by the propagation of effects) or horizontal (by economic continuity).

Ana Isabel de Matos Mascarenhas Pessoa, Lisbon Court of Appeal

Judgment of the Lisbon Court of Appeal of 06.04.2021. Proc. 322/17.8YUSTR.L1

I. The Dispute in the main proceedings and the request for a preliminary ruling under Article 267 TFEU

In these proceedings, the Competition Authority (AdC) imputed to the Defendants, here the Appellants - and the First Instance Court confirmed this imputation - an infringement of Article 9, Paragraph 1, Subparagraph c), and Article 68, Paragraph 1, Subparagraph a), both of the Portuguese Competition Law, in the version introduced by Law no. 19/2012 (New Legal Regime for Competition, hereinafter the NRJC), which practically reproduces Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Both the AdC and the First Instance Court considered that within the scope of a Partnership Agreement, the Parties entered into a "non-competition pact", which they understood to consubstantiate an agreement restricting competition by object, an agreement provided for in clauses 12.1.a) and 12.2.a) of the same agreement, which was in force between January 5th, 2012, and December 31st, 2013, and consequently, with the exception of Sxxxxx, SA (which was not fined, due to the lack of turnover), after the judgment hearing was held at the Competition, Regulation and Supervision Court, and that Court imposed upon the aforementioned Appellants the following penalties or fines:

- €2,610,000.00 - Exxxx SA;
- €23,220,000.00 - EDxxxxx SA;
- €2,520,000.00 - Sxxxx lxxxx SGPS S.A; and
- €6,120,000.00 - Mxxxx S.A.

The Competition Authority appealed against this decision, seeking the increase of the fines, and the Defendant's appeal, as they understand that no offence was committed, thus seeking acquittal.

II. The relevant facts

A. On January 5th, 2012, the Targeted Exxxx and Mxxxxxxs entered into the Partnership Agreement that determines the terms and conditions relating to the so called "E/Cxxxx Plan".

B. In Clause 2.1., the Partnership Agreement determined that its object and scope were to: *"foster the development of electricity commercialization activities under the free regime, by Exxxx, and the retail distribution of food and non-food products, by Mxxxx, in hypermarkets and supermarkets "Cxxxx", "CxxxxMxxxx" and "Cxxxx Bxx Dxx", as well as in commercial establishments operated by other companies in which Sxxxxx, SGPS, SA participates, in addition to Mxxxx Cxxxx, namely, the Wxxx and Bxxxx Bxxxx establishments, and, eventually, in commercial establishments of other brands (current and future), hereinafter referred to only as Establishments"*;

C. The Partnership Agreement lasted for one year, and was in force until December 31st, 2012, although the period for consumers to join the ECxxx Plan lasted only between January 9th, 2012, and March 4th, 2012.

D. From a commercial point of view, the ECxxxx Plan involved the attribution of discounts exclusively to the holders of the "Cxxxxx Card", a discount card owned by Mxx as part of the loyalty program it had created;

E. In addition to the ownership of the "Cxxx Card", customers wishing to join the ECxxxx Plan would have to sign a contract with Exx Cxxxxl for the supply of low voltage electricity for the liberalized market in Portugal.

F. By joining the ECxxx Plan, customers benefited from a 10% discount on their electricity consumption and contracted power in the month or months immediately preceding the issuance of the respective discount voucher.

G. The discount vouchers were credited to the Cxxxx Card, and were activated on purchases made at the Merchants.

H. The Partnership Agreement contains Clause 12, epigraphed "Exclusivity", under the terms of which:

"12.1 During the term of this Agreement, and for a period of 1 (one) year after its expiration, MCxxxxx undertakes:

a. not to develop, directly or through a company majority-owned by Sxxxxx, SGPS, SA, the activity of commercialization of electricity and natural gas in mainland Portugal;

b. not to negotiate or establish, with any supplier of electric energy or natural gas that is not in a controlling or group relationship with Exx Cxxxx [...], partnership agreements, joint ventures, agreements in principle, advertising campaigns or others, which have as their object or effect the granting of discounts or others' equity advantages related to electricity or natural gas, whatever their terms.

12.2 During the term of this Agreement, and for a period of 1 (one) year after its expiration, Exxx Cxxx undertakes to: a. not to develop, directly or through a company majority-owned by Exxx Cxxx, the retail distribution of foodstuffs in mainland Portugal; b. not to negotiate or establish, with any food retail distributor, [...], which is not in a controlling or group relationship with Mxxx Cxxx [...], partnership agreements, joint ventures, agreements in principle, advertising campaigns or others, which have as their object or effect the granting of discounts or other equity benefits related to electricity or natural gas, whatever their terms. Please indicate the reference to this document in the response [...]"

I. The aforementioned clause was established for a period of two years, and was in force during the term of the Partnership Agreement and for a period of one year after its expiry (that is, between January 5th, 2012, and December 31st, 2013);

J. Those targeted comprise two Portuguese corporate conglomerates, the Exx Group and the Sxxx Group.

K. The parties were not, at the time of entering into the Partnership Agreement, current competitors in the food-based retail market, or in the natural gas trading market.

L. The Appellate Court considered it sufficient to conclude that there was a restriction agreement by object between potential competitors in the electricity supply market, established in the aforementioned Clause 12.1 a), in the context of the Partnership Agreement between Sxxxxx and Exxx, three circumstances:

a. the creation of a partnership between a company of the Sxxxx group and ENsssA (namely, through the creation of the Sxxxxsa joint venture);

b. the creation of a partnership between MXX and GXXX;

c. the exercise of activities in the electricity production market by MXX and other companies belonging to the corporate conglomerate of which MXX is part.

M. Neither of the first two circumstances refer to the moment of the signing of the Partnership Agreement in question, nor to the period in which the clause was in force: at the time of the signing of the Partnership Agreement, the partnership with ENxxxA had been extinct for several years, and the partnership with GXXX was exclusively related to the retail distribution of fuel for vehicles, not resulting in any type of benefit that was likely to facilitate its entry into the relevant market for the sale of electricity at the time of the Agreement.

N. There are several markets for the production of electricity and its sale to end customers.

O. The Partnership Agreement states that its purpose was to promote the development of electricity commercialization activities under the free regime, by Exx Cxxxxl, and retail distribution of food and non-food goods, by Mxx, in the "Cxxxxte" hypermarkets and supermarkets "Cxxxxte Mxxxlo" and "Cxxxxx Bxx Dxxx", as well as in commercial establishments, operated by other companies, in which Slxxxxxs, SGPS, SA participates, in addition to Mxx, namely, the Wxxx's and Bxx Bxxxx establishments, and, eventually, in the commercial establishments of other brands (current and future), hereinafter referred to as Merchants" and that Mxx would share a proportion of the discounts granted.

P. It was also demonstrated that:

1. The ECxxxx Plan was a pioneering initiative, as a partnership between an electricity supplier and a food retail operator which aimed to attract customers, to promote sales, and to allow the attribution of discounts to consumers;
2. The subscription to electricity supply contracts became possible in a network of 180 commercial spaces that were operated by Mxxx, whose supply was shared by Exx Cxxxxl and Mxxx;
3. Under this Plan, the parties established an exclusive and free contact line, with a specific associated telephone number, created a website dedicated to the campaign and implemented advertising and marketing initiatives, which were based on a communication plan for all the channels;
4. Pursuant to Clause 6.2. of the Partnership Agreement, adherent customers received vouchers corresponding to 10 percent of the value of their electricity consumption and contracted power for the previous month or months, which could be discounted on Mxx banners and on the spaces of Slxxxx's subsidiaries;
5. To control the issue and the use of discount vouchers, an information flow system was established between ECxxxxl and Mxx, within which ECxxx sent a computer file with customer information on a daily basis to Mxx. This contained identification, address, respective discount, and Mxx, until the 10th of each month; sent ECxxxxl a file indicating the activated discount vouchers;
6. 146,775 customers joined the Cxxxxx Plan, of which 137,144 remained contractually linked to ECxxxxl during and after the end of the campaign;
7. The sum of the discounts enjoyed by the ECxxxx Plan's members amounted to €6,907,354.00, with the total voucher activation fee reaching around €6,024,252.00;
8. From that amount, € 1,795,912.00 was supported by Mxx.
9. As for the costs of the partnership incurred through advertising, marketing, communication and defence against sanctioning processes related to the partnership initiatives, they were borne or supported, in equal parts, by the Target Companies ECxxxxl and Mxxxx Ccccc.

10. Customers covered by the ECxxxx Plan who effectively adhered to it, were free to change supplier whenever they wanted and, at the end of the campaign for that Plan, they could choose between remaining with ECxxxxl or switching to a competing supplier.

III. Content of national provisions likely to apply in this specific case

The infringement in question is typified in Article 9, Paragraph 1, of Law No. 19/2012, which reads as follows: *"Agreements between companies, concerted practices between companies and companies, decisions of associations of companies whose object or effect is to prevent, distort or sensitively restrict competition in whole or in part of the national market, are prohibited (...)"*.

Articles 4 and 9 of D.L. No. 178/86, of July 3rd, which approved the legal regime of the Agency Contract, are also relevant. According to Article 4 of this law, *"within the same zone or the same circle of customers, neither can the agent carry out activities that are in competition with those of the other party, nor can the other party use other agents for the respective field of activity, except if there is an agreement to the contrary, formulated in writing"*.

Article 9 of the same decree provides: *"1 - The agreement must be written in a document establishing the obligation of the agent not to carry out, after the termination of the contract, activities that are in competition with those of the other party. 2 - The non-compete obligation can only be agreed for a maximum period of two years and is limited to the area or circle of customers entrusted to the agent."*

Reasons for the decision of Lisbon's Court of Appeal to stay the proceedings and refer to the European Court of Justice questions for a preliminary ruling. as well as the link found between national and European legislation. The relevance of the case.

The Appellant companies are charged with an infringement of Article 9(1) of Law No. 19/2012, the content of which substantially converges with the content of Article 101(1) of the TFEU, within a framework of approximation and harmonization with the regime that is in force in the European Union for practices that are likely to affect trade between Member States in a sensitive way, and basing, moreover, national competition law, in general, almost entirely on the corresponding rules of European competition law, so the CJEU is competent to hear the request for a preliminary ruling (cf. Act of 26.11.2015 - "SAI Maxima Latvija c. Konkurences Padome", case C-345/14, EU:C:2015: 784)

Whether non-compete obligations, such as those contained in Clause 12.1, are in accordance with the spirit and the economic-social purpose of agency contracts, respect the law (Articles 4 and 9 of Decree -Law No. 178/86) and Directive 86/653/EEC (Arts. 7, Paragraphs 2 and 20), and are customary in contracts of this nature, was also discussed.

In this case, as the Appellant Companies traditionally integrate companies/groups- and at the date of the Partnership Agreement – that are linked to different markets, it is important to determine whether these groups integrate the concept of "relevant company" for the purposes of Article 101 of the TFEU, if there is a situation of "economic unit" and of "decisive influence" (Group Liability for Anti-trust Infringements), and also to determine whether the target companies' ability to enter the market can be defined by the simple fact of being part of an economic group with some size in the market. For the decision on this appeal, it is therefore necessary to try to answer the questions about whether the companies targeted by the AdC's decision should be seen as potential competitors, and if the obligation provided for in Clause 12. of the Partnership Agreement that was entered into between Mxx and ECxxxl, namely, in that part which refers to the electricity supply market in Mainland Portugal, can be considered to be a restriction by object.

The Judgments handed down by the CJUE that are referred to in the Judgment [Portugal Telecom c. Commission (T-208/13), E.ON Ruhrgas c. Commission (T-360/09), Lundbeck (T-473/13) and Generics (C-307/18)], do not relate to situations that are exactly parallel to those in this proceedings, in which companies develop activities in markets that are not only geographically distinct, or that are for different products in the same market (as in the cases of “Pay for Delay”, in which the companies involved carry out their respective activities in the pharmaceutical products market, for example).

It is also important to clarify whether the pro-competitive effects and the benefits to the consumers that were demonstrated in the proceedings raise reasonable doubts that characterize the Agreements as being sufficiently harmful to competition, so that the investigation of its effects is not necessary, in the characterization of such an agreement, as being “restrictive by object”, or if those positive effects should be taken into account in that operations (Cf. Judgment “Generics” already mentioned, §103 to 108 and Judgment “Budapest Bank”, rendered on 04.02.2020, in Case Nos. C-228/18, § 33 to 55, 74 to 86).

It is also fundamental to ascertain in this case, whether, in addition to the companies that signed the Agreement, the other Appellant Companies must be condemned, as a result of the shareholding they hold in the Companies that subscribed to the Agreement, since the concept of company that is adopted by the TJUE, namely, in the “Stora” Judgments delivered on 11.16.200, in Case C-286/98P “Akzo Nobel” (of 09.10.2009, given in Case C-97/08. And of 27.04.2017, given in Case C516/15 P), in the Judgment “Vantaan kaupunki / Skanska Industrial Solutions Oy”, rendered in Case No. C-724/17, and in the others mentioned in the Judgment, has not been fully accepted by Portuguese Courts, as is shown in the Judgment of this Court of 06.14.2017, rendered in Case 36 /16.0YUSTR. L1.

For all of the above reasons, the preliminary questions that arise below are relevant to the proper decision on the case, and it is most of all convenience, given the seriousness of the alleged offenses and the sanctions applied, that the CJEU interprets the legal dispositions in question so that the Court of Appeal of Lisbon can then apply the national legislation that is win question, safely and in accordance with the jurisprudence of the European Union.

V. The questions asked

1. Article 101 of the TFEU, from which Article 9 of the NRJC (Law 19/2012) is inspired, must be interpreted in order to allow for the classification of a non-competition clause with the content of those inserted in the Articles 12.1 and 12.2 (cf. Point 15 of the Proven Facts) of the Partnership Agreement, as a restriction agreement by object, entered into between an electricity supplier and a food retailer that operates hypermarkets and supermarkets, aiming to grant discounts to customers who simultaneously adhere to a given Energy Tariff Plan of the electricity supplier, which is available in mainland Portugal, and who hold a loyalty card from the food retailer, discounts that can only be deducted on the purchases of goods in the latter's establishments or those from associated companies, when that agreement contains other clauses that state that the purpose of the agreement was to promote the development of the activities of the international companies (cf. Points 2 to 8, 270 to 274 of the proven facts), and proven benefits for consumers (cf. Proven facts 275 to 278), without an analysis of the actual harmful effects on competition that have resulted from the aforementioned Clauses 12.1 and 12. 2?

2. Can Article 101(1) TFEU be interpreted as meaning that an agreement not to carry out certain economic activities that correspond to an alleged sharing of markets between two undertakings and that may be considered to restrict competition by object when the sharing is entered into between entities that are not current or potential competitors in any of the markets covered by the aforementioned obligation, even if the markets covered by the obligation can be considered to be liberalized, or to be without insurmountable legal barriers to entry?
3. Can Article 101, Paragraph 1 of the TFEU be interpreted as meaning that potential competitors should be considered as, for instance, an electricity supplier and a food retailer that operates hypermarkets and supermarkets, and who have concluded the Agreement between them, with the aim of mutually promoting their business and increasing counter-party sales (and, in the case of the food retailer, where the company is majority owned by its parent company), when the food retailer and the latter companies related to it had not developed, at the date of the conclusion of the Agreement, the activity of electricity supplier, in the geographical market in question, or in any other market, and when it was not demonstrated in the process that they intended to carry out that activity there, or that they had taken any preparatory diligence to prepare the exercise thereof?
4. The answer to the previous question holds if another company that is majority-owned by the parent company of the food retailer that is party to the Agreement (but neither of those two entities has been accused or convicted by the National Competition Authority nor has either company been party to the proceedings in this Court), which was not covered by the subjective scope of the application of the non-competition obligation, but held a 50% stake in a third party that carried out electricity commercialization activities in Portugal/ However, these activities had ended three and a half years earlier than the conclusion of the Agreement, by the latter's dissolution?
5. The answer to the previous question will be identical if the retail company that is party to the Agreement produces electricity through mini-generation and micro-generation installations that are located on the roofs of its establishments, but in which all of the energy produced is delivered, at regulated prices, to the Last Resort Supplier?
6. The answer to the fourth question remains if the retail company that is party to the Agreement has, eight years before the date of this Agreement entered into another commercial cooperation contract with a third party, a supplier of liquid fuels, which was aimed at the attribution of cross discounts, referring to the purchase of these products and products sold in the company's hypermarkets and supermarkets, in which the counterpart company, in turn, in addition to marketing liquid fuels, is also a supplier of electricity in mainland Portugal, since it has not been demonstrated that the parties, at the time of signing the Agreement, had the intention, or had adopted, any preparation to extend the said contract to the commercialization of electricity?
7. The answer to the fourth question remains if another company is majority owned by the parent company of the food retailer that is party to the Agreement (but neither of those two entities has been accused or convicted by the National Competition Authority, and neither is party to the proceedings in this Court). The proceedings did not cover the subjective scope of application of the non-competition obligation, electricity produced in a co-generation plant but, according to the agreement, all the energy produced was delivered, at regulated prices, to the Last Resort Merchant?

8. In the case of a positive answer to the above questions, Article 101(1) of the TFEU must be interpreted as meaning that a clause that prevents the aforementioned food retailer may be considered restrictive for the period of validity of the Agreement and in the year that follows, in relation to it carrying out electricity commercialization activities itself, or when this is done by a company that is majority-owned by its parent company which is the subject of the process, in the territory covered by the Agreement?
9. Can the concept of a “potential competitor”, within the meaning of Article 101 TFEU, Article 1(1) of Commission Regulation (EU) No 330/2010 of 20th April, 2010, on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, and of Paragraph 27 of the European Commission Guidelines on Vertical Restraints (2010 / C 130/01), be interpreted as covering a company that is bound by a non-competition clause that is present in a product market entirely different to that of the counter-party to the agreement, when there is no concrete evidence in the file before the National Court (of, for instance, projects, investments or other preparations) that, before and in the absence of this clause, the company in question was likely to, within a short period, enter the other party's market. Nor has it been demonstrated that this company was, before and in the absence of such a clause, perceived by the counterparty to the agreement to be a potential competitor in the market in question?
10. Article 101, n. Paragraph 1 of the TFEU is interpreted as meaning that the simple fact of a partnership agreement between a company that is active in the sale of electricity, and a company that is active in the retail sale of both food and non-food products for consumption in the home, for the cross promotion of their respective activities (under which, among other things, the first company grants discounts to its customers on their electricity consumption, discounts which the second company deducts from the cost of purchases by those customers in their retail establishments), contain a clause in which both parties undertake not to compete with each other and not to enter into similar agreements with each other's competitors, meaning that the object of this clause is to restrict competition within the meaning of Article 101(1) TFEU, even if the temporal scope of the clause in question (the one year term of the agreement, plus another year) coincides with the period defined in the same agreement, during which the parties are not authorized to use it to identify trade secrets, or the know-how acquired in the context of implementing the partnership in projects with third parties; the geographical scope of the clause is limited to the geographical scope of the agreement; - the subjective scope of the clause is limited to the parties to the agreement and to companies in which it holds a majority interest, and to other companies of the same group that also own and/or operate retail establishments that are covered by the agreement; the subjective scope of the clause excludes the vast majority of the companies belonging to the same economic group as the parties, which are, therefore, not bound by the clause, and they may compete with the counter-party both during and after the term of the agreement; the companies covered by the non-compete clause are present in entirely different product markets, and it has not been demonstrated that, at the time of the signing of the agreement, they had developed any projects or plans, or carried out investments or other preparations, in order to enter the market for the product of the other party?

11. Should the concept of “vertical agreement”, within the meaning of Article 101(1) TFEU, Article 1(1) of Commission Regulation (EU) No 330/2010 of 20th April, 2010, on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, and Paragraph 25 of the European Commission's Guidelines on Vertical Constraints (2010/C 130/01), be interpreted as covering an agreement with the characteristics described in the preceding questions, within which the parties are present in entirely different product markets and it has not been demonstrated that they have made, before and in the absence of the agreement, any projects, investments or plans to enter the other party's product market, but under which the parties, for the purposes of the agreement in question, make available to each other their respective commercial networks, sales forces and know-how to promote, attract and grow the other party's clientele and business?

COMPETITION AND REGULATION IN THE TELECOM AND MEDIA SECTOR

Rosa Perna, Regional Administrative Court of Latium

Italian Competition Authority (ICA) Decision 19.4.2016, n. 25966 (I790 Vendita Diritti Televisivi Serie A 2015–2018).

Latium Administrative Tribunal (TAR) Decisions 23.12.2016, nn. 12811, 12812, 12814 and 12816.

Council of State, Decisions 20.12.2020, n. 8358, 8533, 8535.

Introduction

The case at stake is relevant because it concerns a major Italian controversy resulting from The charging, by the Italian Competition Authority (“ICA”), of a huge fine (over 66 million euros) on the main television operators in the pay-tv market: Sky and RTI/Mediaset Premium, and on the Italian Football League (“Lega Calcio”) and its advisor, Infront (the “Parties”), for an alleged violation of Art. 101 TFEU, consisting in entering into a bid-rigging agreement relating to the award of the Italian Premier League “Serie A” broadcasting rights for the years 2015-2018, and altering the outcome of the tenders for the A, B and D lots, following the presentation of their bids on 5th June 2018.

It is a topical case because it involves the fabulous world of football, and it is also about the digital pay-tv market and the television platforms and, more generally, communication platforms, since the procedure for awarding the rights was organized on a “platform basis” criterion.

The legal framework of the case

Legislative Decree No. 9/2008 has introduced a centralized marketing system for the media rights that are related to the sport events organized by the Italian Football League which, according to the European Commission, is not in violation of the rules on competition on the condition that a commitment is taken to put up diversified packages of rights for auction, so as to let more than one operator enter the market.

“Lega Calcio” has the exclusive right to sell the League’s media rights and it is required to offer them to all media companies, and for all communication platforms, by means of open tender procedures. To this end, “Lega Calcio” must predetermine the guidelines for the commercialization of the media rights.

The Italian Competition Authority and the Italian Authority for Communications, each for its own area of competence, must verify that the proposed guidelines comply with the rules set by Legislative Decree No. 9/2008.

Unless specifically authorized, the winner of the bid cannot sublicense the broadcasting rights.

The case

Against this peculiar legal background, “Lega Calcio” decided to make a mixed offer: by platform and by product, offering five Packages of rights.⁴¹

On the first round of bids, only four bidders participated (Sky, Fox, Eurosport and RTI/Mediaset).

Sky and Fox made bids for Packages A, B, C and D.

41 Package A comprised the audio-visual rights relative to the matches of eight major clubs (248 events) for the satellite, internet, IPTV and mobile platforms. Package B contained the media rights for the same platforms. major clubs, but relative to digital tv, internet, IPTV and mobile. Package C included the ancillary rights to the above-mentioned matches, such as interviews and images from the locker rooms. Package D consisted of the broadcasting rights on all platforms for the remaining clubs (132 matches). Package E comprised the right to broadcast 3 matches, which were to be chosen from among the events held on Sundays, over the internet.

Eurosport only made a bid for Package D.

RTI/Mediaset made bids for Packages A, B and D. However, it made conditional bids.

No bids were made for Package E.

As a result, Sky's unconditional bids for Packages A and B were the highest bids, except for Mediaset's conditional bid for Package B.

However, the rules of the tender procedure did not allow conditional offers. As to Sky's unconditional bids, "Lega Calcio" and Infront believed that awarding Packages A and B to the same operator would be against the rules on competition, as it might create concentration in the market. "Lega Calcio" did not therefore immediately award packages A and B to Sky.

In brief, "Lega Calcio" - advised and supported by Infront - engaged in negotiation with the bidders, aiming to alter the outcome of the tender. The negotiation resulted in an agreement between Sky and Mediaset that mirrored the distribution of media rights that was in place during the years 2012-2015. "Lega Calcio" awarded Package A to Sky, Package B was awarded to Mediaset, Package D was awarded to Mediaset, with the understanding that some of the rights in the package would be sublicensed to Sky.

In support of the agreement, "Lega Calcio" authorized the sublicense and committed to seeking the required authorizations from AGCOM and AGCM. During the negotiation, Infront played an important role in brokering the deal.

The ICA's decision

In its decision, the ICA found that:

- the broadcasting rights related to the football matches of national club teams that are regularly held over the year, such as Serie A (Serie B, Coppa Italia, European League or Champions League) constitute a single product market;
- this market was different from the one of other sports' broadcasting rights that relate to events that are not held on a regular basis (such as the World Cup);
- the geographical market was identified with the nation, as consumers traditionally follow the tournaments of their national club teams;
- two of the four companies were not competing in the same market, nor were they operating in markets that are upstream or downstream one to the other: Infront is an advisory company and Lega Calcio is the association that has the exclusive right to commercialise Serie A's media rights. Nevertheless, this did not prevent it from considering that there was the existence of a cartel among the 4 companies.

The ICA stated that:

- the anti-competitive agreement, in as far as it altered the outcome of the tender, thus thwarted the procedures that were set up by Decree No. 9/2008, which affected the allocation of strategic resources in the pay TV and advertising markets. The agreement was thus deemed to be restrictive by object and to be very serious, in line with both national and European case law.
- the agreement led to the apportioning of the relevant market between the two incumbents, thus frustrating the objectives pursued by the legislator through the provision of a competitive procedure;

- although the case referred to a restriction by object, and did not require any proof of the effects of the agreement on the market, nevertheless, the result was that: at present, both the incumbents were awarded television rights and new market entry was foreclosed (since Eurosport could otherwise compete for the award of Package D). In the future, there would be a reputational barrier (as bid-rigging negatively affects the credibility of future calls for tenders and, therefore, potential new market entry, thus discouraging competition on the merits).

TAR decisions N. 12811, 12812, 12814, 12816 /2016

After the closure of the proceeding, all the Parties appealed the ICA's final decision. TAR upheld such appeals on the following grounds:

- i. the Authority failed to observe the mandatory time-limit that is allowed in order to contest the alleged conduct;
- ii. the Authority erred in considering the alleged conduct as a market sharing agreement;
- iii. furthermore, the Authority also erred in considering the agreement to be a restriction “by object.” In particular, the Authority had not carried out a thorough analysis of the relevant market, and had not followed the recent European case law, according to which “*in order to determine whether an agreement between undertakings reveals sufficient degree of harm that may be considered a ‘restriction of competition by object’ within the meaning of Article 101 (1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part*” (Court of Justice of European Union, Case C- 373/14 P, Toshiba Corporation v. European Commission, 20th January, 2016);
- iv. the alleged conduct was not a market sharing agreement, since it had prolonged competition, which would not have survived had the best packages been awarded to SKY;
- v. the Authority had not proved that the agreement revealed a sufficient degree of harm in terms of market sharing – the market being characterised by the absorbing presence of Sky and RTI/Mediaset (97% of the market) – considering that the market share of each participant had not been ascertained *ex ante*, and the customers were fully contestable;
- vi. the reasons for sublicensing package D were fully lawful, as it was aimed at avoiding future litigation, stalling in the market, and further inconvenience for customers, maintaining effective competition in case new operators who were really interested in entering the specific market should lack the opportunity;
- vii. the Authority had not shown elements to back up the conviction that, in the absence of the contested conduct, the market would benefit from an increase in competition, in broader terms, than those effectively realised, with corresponding benefits for both the League and the consumers;
- viii. the final asset seemed to respect the legal framework.

The Council of State’s decisions Nos. 8358, 8533, 8535/2020

On 28th December, 2020, the Italian Council of State, on the appeal of the ICA, issued a judgment marking the last act in the national judicial dispute that was related to the assignment of the Italian Premier League “Serie A” broadcasting rights.

The Council of State upheld the First Instance judgments, on the following grounds:

- ix. the AGCM did not take into due account the fact that the League's choice not to proceed with the assignment of packages A and B to the same operator (SKY) was an obligatory choice, in light of the provisions of Legislative Decree No. 9/2008, which prohibits the "acquisition by a single entity of the television rights to live matches";
- x. the agreement was favoured by the League who, as the entity with the main responsibility for the bid procedure, had to ensure that the factual outcome of the bid was in line with the spirit of the law, i.e., maintaining the competitiveness of the relevant market and ensuring that the consumers would not face a price increase;
- xi. that the agreement in question constituted a market-access barrier had to be excluded, as the only competitor that it was supposed had been damaged, according to the AGCM, had submitted a peculiar bid, which would have excluded it from the market, notwithstanding the existence of the agreement;
- xii. in also taking into account the principles governing the assessment of an anti-competitive agreement "by object", the AGCM should have considered that the restriction was linked not only to the parties' behaviours, but to the peculiarities of the market and the nature of the resource (which was *per se* restricted), which cannot be assigned to a single operator, even if this latter makes an offer for the resource as a whole;
- xiii. the erroneous interpretation of the normative and factual data has invalidated both the judgment on the violation of the award procedure – which is non-existent, by reason of the provisions of the Decree - and the judgment on the real content of the double agreement; the common intent of the parties – which is manifested in the agreements – and which was created only after the League decided unilaterally to change the ranking, in order to comply with the Decree, which is why the hypothesis of an agreement among the operators has to be excluded.

Conclusions and points to take away

In this specific case, the result of the auction would have led to the awarding of the best Packages (A and B) to the same operator, and thus the creation of a thick market concentration. It is also worth mentioning that no bids were made for Package E.

The contested conduct of the Parties was a sort of remedy to the failure of the auction, with these platforms as an object and a parameter of reference.

I am sorry to have to conclude that, at a time when digital markets are being promoted, the recourse to open tender procedures with "platforms" as an object for the commercialization of the media rights, has proven to be a failure.

The ICA, in assessing the alleged anti-competitive agreement between Sky and Mediaset on the broadcasting rights for the Serie A seasons 2015/2018, failed to take into account the peculiarities of the relevant market (the assignment of broadcasting rights for sporting events in Italy), including the underlying regulatory regime. Indeed, the Italian regulation governing the allocation of broadcasting rights for sports events imposes specific competitive bid procedures, forbidding the assignment of the totality of the broadcasting rights to a single operator so as to avoid the creation of a dominant position.

The ICA failed to demonstrate the common interest of the parties. The alleged anti-competitive agreements were actually the result of the independent intervention of the "Lega Calcio" Serie A, which was responsible for the correct application of the sector regulation that is highlighted above.

Restrictions “by object” must be strictly interpreted. Once again, the ICA should have considered the factual and legal background against which the agreement took place, and the nature of the service, which is *per se* limited in nature.

Competing broadcasters were not excluded from the market as a result of the anti-competitive agreement, as they were not, in the first place, able to make competitive bids.

Gianmario Palligiano, Regional Administrative Court of Campania

Introduction

The question being examined concerns the so-called *beauty contest*, a procedure that is banned in the assignment of the television frequencies of the "digital dividend", which is governed by the Authority's Resolution No. 497/10/CONS

Brief summary of the facts of the dispute.

1. With Sentence No. 5929 of 16th October, 2018, the Council of State, the Second Instance administrative judge in Italy, *partially* upheld the appeals that were filed by Persidera S.p.A. and Europa Way S.r.l., for the reform of the sentences of the TAR (the Regional Administrative Tribunal) Lazio, Rome, Nos. 9981 and 9982 of 2015, for violation of the European Union principles of the autonomy and independence of the National Regulation Authority, referring to Article 3, Paragraphs 3 and 3-bis, and Article 8 of Directive 2002/21/EC (the "framework directive"), declaring all other claims, both for cancellation and compensation, that had been proposed by the aforementioned companies, inadmissible and/or unfounded.
2. The administrative judge has since led to the obligation to set aside the provision of Article 3- *quinquies* of the Law and, as a result, to quash all the derivative acts that had been adopted by the Authority for Communications Guarantees (AGCOM), in reason, and as a consequence of, the illegitimate intervention of the legislator in the replacement of the free of charge procedure with an onerous one.
3. The Council of State, on the other hand, has not canceled either the call for tender of 7th February, 2014, on the assignment of the rights to use the frequencies referenced in Resolution No. 277/13/CONS, nor the subsequent acts, including the ministerial provision for the award of Lot L3 to Cairo Network S.r.l., and for the assignment of the rights to the use of the relative frequencies.

The administrative judge specified that the complete cancellation of all of the acts of the onerous tender would not allow the Authority to be able to choose "*to conclude free tender, ex abrupto interrupted by legislative intervention, or instead to make its own content, criteria, conditions and results of the onerous tender then held*" (§ 58.4). This is because the Authority - even if it were re-determined in the sense of greater convenience, for the public interest, of an onerous tender - could not announce a new one that is different from the one that had been carried out and then concluded, due to the changed historical conditions of the market, which would result in upsetting the entire structure of the audiovisual market.

4. In the light of the above, the Council of State has ordered that it is the responsibility of the Authority "*to determine whether to cancel autonomously the acts of the "beauty contest", or those of the onerous procedure, then held, by observing the following principles : the Authority, following the cancellation, will evaluate in a justified way whether the carrying out of the free or onerous procedure is more responsive to the public interest, of which it is the owner and guarantor and, therefore, whether to confirm the acts of the "beauty contest", as a result of their revival consequent to this ruling, or to proceed autonomously with their cancellation and confirmation of the acts of the subsequent onerous procedure, which was then concluded; [...] where it is determined [...] for the replacement of the onerous procedure with the free one in the re- exercise of power, the Authority will check [...] whether the replacement of the free procedure with the onerous one, [which] in itself is not prohibited by European Union law, and the concrete development of this has been based on the criteria of objectivity, transparency and non-discrimination that have favoured, and not discouraged, the entry of new entrants or small operators to the television market [...]*" (§ 61).

5. The Administrative Judge specified that, as clarified by the Court of Justice in the judgment of 26th July, 2017 (C-560/15), the replacement of the free procedure with the onerous one is not in itself illegitimate, but must be carried out independently, and without undue influence, by the National Regulatory Authority, on the basis of its own technical assessments; so that from the cancellation of Resolution No. 277/13/CONS, the Authority does not have an unconditional obligation to necessarily reactivate the free procedure, but "*to review the entire regulatory framework and to assess whether it is, or would have been, possible to maintain the conduct of the free procedure, or if it is more convenient for the public interest, of which AGCOM is the guardian, to replace it with the onerous procedure, then actually carried out, and then to confirm the resulting determination by the tender [...]*" (§ 42.2).

The regulatory context

1. With Sentence No. 5929 of 16th October, 2018, the Council of State handed over to the Authority the power to review "now by then", in the light of the entire regulatory framework, in the fullness and independence of its functions, the greater compliance with the public interest of the free procedure referred to in Resolution No. 497/10/CONS, or the onerous procedure referred to in Resolution no. 277/13/CONS.
2. In the review activity mandated by the Council of State, the Authority cannot fail to take into account the spectrum management policy guidelines that are provided by the Law which, in order to ensure the efficient use and economic enhancement of the frequency resource, has provided for the carrying out of an onerous procedure: moreover, not infrequently, when the specific procedure is of particular national interest with repercussions for industrial policy, the legislator provides the Authority with indications relating to the specific economic objective that is to be pursued in the context of the transfer of the rights to the use of frequency resources (think, for example, of the *refarming* of the 800 MHz band, which is provided for by law no. 220/2010, or the auctioning of 5G services pursuant to law no. 205/2017).
3. In light of this specific public finance objective set by the legislator in the exercise of its legitimate prerogatives, the free procedure, pursuant to Resolution no. 497/10/CONS, cannot, in the present case, be confirmed by the Authority. This conviction is also reached in consideration of the fact that the composition of the lots that are subject to this procedure has been substantially reformulated by the same Authority through Resolution No. 277/13/CONS by removing and consequently reconfiguring the lots put up for tender from 6 to 3.
4. As for the onerous procedure, pursuant to resolution no. 277/13/CONS, the Authority - following a renewed review of the relevant factual and legal circumstances, as well as of all the contributions acquired during the extensive public consultation, pursuant to Resolution No. 550/12/CONS - confirms that it responds to the public interest of which the Authority is the guardian and that, in particular, it is suitable for guaranteeing the achievement of the pro-competitive objectives that are pursued by those measures agreed with the European Commission for closing the infringement procedure n. 2005/5086, still pending. The Authority therefore believes that the replacement of the free procedure with that for consideration can be confirmed.
5. Upon the outcome of the further specific verification commissioned by the Council of State, the Authority also notes that the conditions established by the procedure for consideration, pursuant to Resolution No. 277/13/CONS, are widely suited to guaranteeing the participation of competitors who are inspired by the principles of objectivity, transparency, non-discrimination and proportionality and, therefore, will allow the effective entry of new operators in the digital television market, without unduly benefiting those that are already present in the analogue or digital television markets.

Personal comment

1. Upon the outcome of the renewed examination and verifications entrusted to it by the Council of State, the Authority confirmed the procedure for consideration, pursuant to Resolution No. 277/13/CONS.
2. According to the European Court of Justice, for the purpose of converting existing analogue networks into digital networks, it is necessary to consider that, illegitimately operated analogue networks had to be taken into account, since they led to the prolonging, or even the strengthening, of an undue competitive advantage.
3. Moreover, in the light of the principles of non-discrimination and proportionality, a reduction in the number of digital networks assigned could not be made with respect to the number of analogue networks, which operated in a higher numbers than that imposed on its competitors, unless the related provision is not objectively justified and proportionate to its objective, and that, in this light, the continuity of the television offer constitutes a legitimate objective that is capable of justifying such a difference in treatment.
4. A provision that would lead to assigning, to those operators who are already present in the market, a number of digital radio frequencies that is higher than the number that would be sufficient to ensure the continuity of their television offer, and which would go beyond what is necessary to achieve the aforementioned objective, therefore, being disproportionate in number.

UNFAIR COMPETITION AND STATE AID LAW

Svetlana Belajeva, Riga Regional Court

Case: ECLI:LV:AT:2020:0630.C29387415.5.S (Latvian Case))

Three court instances in Latvia examined and rejected a claim for recognition of the infringement of the prohibition of unfair competition and loss recovery. The claim was initiated by a television translation agency – a limited liability company (LLC) “AML” (the Claimant) v. A State agency with limited liability (SALL) “LT”(Respondent).

The Claimant has requested:

1. The recognition that SALL has infringed LLC’s copyrights for the broadcast “900 seconds” format.
2. The recognition of the infringement of the prohibition of unfair competition, according to Article 18 of Competition Law.
3. The imposition of the obligation on SALL to conclude with LLC a licensing agreement as regards the usage of the broadcast format “900 seconds”, thus creating its own broadcast programme: “Rīta Panorāma”.
4. The claiming of the right to the recovery, from SALL to LLC, for the infringement of unlawful competition, at the discretion of the Court, but for no less than €5000, and to establish the rights to receive interest, according to the law, before the enforcement of the judgment.

Factual circumstances

Broadcast by the Applicant “900 seconds” which has been broadcast by the TV channel “LNT” since 2004, is led by two journalist- moderators, who are there for two hours of different news, interviews and issues that are related to topical questions for the society to whom the programme is presented.

On the other hand, since 2013, the Respondent “LTV 1” has broadcast the morning programme “Rīta Panorāma”, which is identical to “900 seconds”, and which is led, identically, for 2 hours 7 minutes by two journalist – moderators, with news, interviews and issues that are related to questions that are topical in the society to whom they are presented.

Besides that, in 2014, the Respondent included a new section in his TV broadcast (in this section, an interview with two politicians is presented as a “duel”). The Claimant has had the same section, which has been broadcast since 2009.

The Claimant considers that, firstly, between the parties’ in competition there are legal relations. Secondly, the action by the Respondent is brought against the fair industrial and commercial customs: since the Respondent uses and imitates elements/signs introduced by the Claimant. Thirdly, that the channel is deceptive as regards its identity, and this provides the possibility to be misunderstood.

The Claimant and the Respondent are competitors on the Latvian market that distribute free-to-air content, and that also broadcast advertisements. In both markets, it is important to ensure the audience of viewers. As the Respondent has taken over the audience for the morning broadcast, copying both the concept and format (the main elements) of the morning programme. There is thus a basis for the notion that there is unfair competition.

In addition, there is evidence that the broadcasts provide misunderstandings, not only among the average audience, but also among media professionals.

An amount of losses is claimed which is attached to the factual decrease in income (as it is for the advertisements) from September, 2013 (when the audience and ratings of the broadcast programme, “900 seconds”, decreased).

The respondent does not recognize the claim.

The Court of First Instance refused it.

The Court of Appeal refused the claim too. The judgment is based on the following arguments:

According to Article 18 of Competition Law (Second Section) result of such the legal acts or customs related to economic activity that are infringed is that they are recognised as being unfair competition. Additionally, in the third section of Article 18, actions are defined in terms of, when unfair competition may arise: 1) the use or imitation of a legally used name, the distinguishing marks or other features of another market participant (whether it exists, has ceased its activities, or has been reorganised) if such use may be misleading as regards the identity of the market participant; 2) the imitation of the name, the external appearance, labelling, or packaging of the products produced or sold by another market participant, or the use of trademarks, if such an imitation or use may be misleading as regards the product's origin.

The Legislator, within the framework of Article 18 of the Competition Law, has not identified all of the actions that might disrupt fair and free competition, similarly, it has not defined the term “fair commercial activity customs”. This means that the Court, when examining each individual case, should decide whether the action concerned corresponds to a general clause as being unfair competition.

The concept of the broadcast that is presented by the Applicant is typical of a morning news programme. Both programmes correspond to existing world standards (they contain elements that are typical of news programs). The Court evaluated the practice and content of other news programs (in the US, UK, France, Germany: “La Matinale”, “Premiere Edition Tranche”, “BBC Breakfast”, “NBC Today” and “DR 2 Morgen”) and did not find that the Applicant had an original approach and that there was a difference from the standard morning program.

The Court assessed the evidence according to the study by the Format Recognition and Protection Association, and considered the following criteria: the creator of the format has gained a reputation in the relevant geographical region, and in others.

In this case, there is no evidence that the Respondent has provided an impression that the programme, “Rīta Panorāma”, is an imitation of the programme, “900 seconds”, which is broadcast by the Applicant.

The Court did not find that the new programme was the reason for the decrease in the numbers of viewers in the audience and in the paid for advertising. At first, each new programme establishes the interest of its consumers. Secondly, the programmes made by the Respondent since 1995 have gained the trust of the audience. Thirdly, the ratings of the TV channel, “LNT”, had decreased since 2011, when the programme made by the Applicant had not yet been broadcast.

The Supreme Court has upheld the judgment given by the previous Instances.

According to Civil Procedure Law, the Supreme Court examine the Appeal Instance decision only if the substantive and procedural law are incorrectly interpreted or implemented.

The Supreme Court has indicated, that according to Article 18 of the Competition Law (which is the legal basis for the claim), and in the context of Article 2 of the Law – the main purpose of the prohibition of unfair competition is to ensure free, fair and equal competition, not the general protection of any object that is subject to authorial and intellectual property rights.

The Supreme Court has defined the cumulative questions to be answered within the framework of this case so as to clarify the signs of the infringement of the prohibition of unfair competition:

- The existence of competitive relationships
- Does the TV broadcast framework make up 'the goods', and is it of a specific nature
- Is the respondent's broadcast identical, or does it include some elements of the Claimant's broadcast
- Are the Competition Rights breached and have damages been caused as a result?

The Supreme Court evaluated the term 'goods' in Section 3 of Article 18 of the Competition Law, and recognised that, by this term, TV programmes are understood as being dissociated things.

The Supreme Court has indicated that elements which are typical of the respective programme are not subject to the protection that ensures free and equal competition that can be used in every format.

The Supreme Court mentioned that evidence presented in the case that is related to the opinion of the average audience is only recommended, and the court must formulate its own opinion. With reference to the judgment of the Supreme Court, as for 17th May, 2010. No. SKA-168/2010 (A43002109) (Paragraph 9), the Supreme Court has indicated that the Applicant does not have to prove that, as a result of the actions of the Respondent, there has in fact been an infringement of competition but, this is based on logical arguments to justify the decision that the mentioned actions might have such consequences.

After the evaluation of the arguments, the Supreme Court has recognized that legal norms are interpreted as action that is contrary to Article 2 of the Competition Law, however, if the average audience recognizes that the programme broadcast later is similar to the earlier broadcast, then it will be considered that there is an infringement.

The Court has assessed this point in connection with the reduction in the Claimant's income and it didn't find that this had been influenced by the Respondent, since it found no evidence that the Respondent had misled the audience about the origin of its broadcasts' framework.

Conclusions

The presented case is important at the national level as case law, as it states the criteria needed for the evaluation of the format for TV programmes in the area of competition law, as well as interpreting national Competition Law relating to competition forms (which is something that is not fulfilled by the legislator), and this case has determined how far it is necessary to prove the subject matter.

Aleksandra Rutkowska, Warsaw Regional Court

Wrocław Regional Court on 4th January 2012, File No. X GC 308/11

Unfair trade practices in the case X GC 308/11

The judgment was made on 20th November, 2011

The Claimant, "Pragma Incasso (Joint Stock Company in Wrocław), in a claim against Anna K., who conducts the business activity that is registered in Wrocław as "Pragma Lex", sought an order to forbid the use of the name, and any names, that resemble the name of the Claimant

Moreover, they sought for the immediate deletion of the domain <http://pragma-lex.com>.

In their statement, the Claimant stated that the main activity of the jointstock company Pragma Incasso is the trading of receivables and debt collections. The activity of the Claimant on the market started in 2002, firstly, as a limited liability company in Wrocław and, after 2007, as a joint stock company with a broader activity on the entire territory of Poland. Furthermore, the Claimant is the parent company of the capital group of Pragma Incasso J-S, and it includes as subsidiaries companies like "Pragma Collect", a limited liability company in Wrocław, and "Pragma Factoring", all the subsidiaries of the Claimant use the name "Pragma".

The Defendant, Anna K., is a businesswoman who pursues business activities as a debt collection office, which is registered as the debt-collection office "Pragma – Lex". The range of that activity is mostly the same as that of the Claimant, however, on a smaller scale.

In the response, the Defendant maintained that similar names are not mistaken for each other by anybody, and the Claimant did not prove this to be fact.

Under the decision of the Patent Office, which was taken on 25th March, 2008, the name of the Claimant is protected.

The witnesses, who were clients of the Defendant, claimed in their testimonies that they were convinced that the Defendant and the Claimant cooperated with each other, or that this was the same company.

National law

The definition of an act of unfair competition is contained in Art. 5 of the Act on Combating Unfair Competition (Official publication: Dziennik Ustaw (Journal of Laws); Number: 1993/47/211; Publication date: 01/01/1001). The above-mentioned regulation provides that the designation of an undertaking in such a way that it may mislead customers in relation to its identity, due to the use of a trademark, name, emblem, abbreviation to letters, or some other characteristic symbol that is already lawfully used to indicate another undertaking, shall be considered an act of unfair competition.

Pursuant to Art. 433 of the Polish Civil Code (Distinction of business name)

§ 1. The entrepreneur's name should differ sufficiently from the names of other entrepreneurs conducting activity on the same market.

§ 2. A business name cannot be misleading, particularly regarding the identity of the entrepreneur, its objects, place of activity, or supply sources.

Well established case law of the Supreme Court and the Appeal Courts states that if the entrepreneurs are using names whose descriptive elements are distinctive, but they have the same typical elements, this is enough to recognise that there is an activity relating to unfair competition. There is no need to use the entire name, it is enough that there is a characteristic element that is typical of the name.

The entrepreneurs must differ from each other by name, and the name of a new one must be different from those that have been already registered.

According to the case law, protection depends on the priority of the name in use in the trade market, and among the same type of clients.

Taking everything into account, the Court decided to ban the Defendant from using the name "Pragma".

Mirella Delia, Court of Bari**Ancona Court: Judgment 12th May, 2021, No. 637****Complainant: ASSOCIAZIONE AMBITO TERRITORIALE DI CACCIA ANCONA 2,****Defendant: AZIENDA AGRICOLA ARPINI CHIARA and REGIONE MARCHE****Subject: State Aid – Compensation for damage - de minimis disbursement****The circumstances giving rise to the litigious situation**

The Applicant is a company operating in the agricultural sector within the territory of the Marche region. It submitted an instance to the competent public authority - the ATC- in order to obtain full compensation for the damages caused to its own cultivation because of a raid by wildlife.

In Italy the management of wildlife is carried out through regional laws. In the Marche Region, the matter falls within the specific regulation that is contained in Regional Law No. 7/1995, from which the amounts of the sums due for this type of damage to the Applicant farms can be drawn. The preparatory phase of the related practices has always been entrusted, and it still is, to Territorial Areas of Hunting.

The Marche Region has only adopted, by Resolution No.103/2016, conformity with the Community legislation which is contemplated in the Treaty on the Functioning of the European Union's - Third Part: Union Policies and Internal Actions - Title VII: Common Rules on Competition, and included the prohibitions, and the notification obligations Art. 108 TFUE, and, which is what matters here, the limits to the applicability of the regime of *de minimis* to State aid.

Starting from 2016, in particular, the regional authority established the use, for the restoration of the damage concerned, *de minimis* aid, which limits the right to a maximum refund for each company, to the amount of €15,000 over a three-year period.

However, in order to access the forms for compensation, the requests must be supported by specific documentation and be submitted for the evaluation of the ATC, in accordance with Article 2 of Resolution of the Regional Government No 316/13 of 12th March, 2013, with which the Regional Regulation was approved concerning compensation for damages caused by wildlife to human activities, or by hunting activity to implement Article 34 of the Regional Law No 7 of 5th January, 1995.

The ATC, in order to carry out the task entrusted to them by the Regional authority, moreover, must work on its own resources, in case those made available by the Region run out, pursuant to Article 41 of the Regional Law No. 7/1995, which establishes the regional fund for damages caused by wildlife to agricultural production and works on the cultivated lands, which is provided for by Article 26 of Italian law No 157/1992, by way of prevention and compensation.

Regional Decision No. 316/2013 controls the procedure for the submission and content of the claim for compensation, the administrative process to ascertain the damage, and the pro-file for the estimation and quantification of the damage. The application for refunds must be submitted by the parties concerned within fifteen days of the event being verified, under penalty of forfeiture, exclusively using the forms prepared by the Province or the ATC.

Only after the entry into force of European legislation and, above all, as a result of an articulated internal and jurisprudential path, and additionally with numerous cases of litigation under the jurisdiction of the Administrative Court, the Marche Region has definitively recognized the applicability of the European State Aid Regulation to the damages caused to crops by wildlife.

The uncertainty that this internal regulatory and jurisprudential framework has created among those farms that are interested in accessing reimbursement has been manifested in the specific manner in which claims for compensation are made, as they have not always adapted quickly to innovations, even on the point that was introduced by the Community Legislator.

Summary of the judicial proceedings

1. First Instance Judgment

Claimant's position

In 2016, Aziends Agricola Arpini obtained an injunction from the Justice of the Peace of Jesi, for a sum in compensation for the damage to their crops that had been caused by wildlife.

The Azienda stated that it had drawn up its claim for compensation on a timely and regular basis. In 2015, the Applicant submitted an instance to the public authority – the ATC – which has the competence of supervising the regional territory in the investigation of all similar re-funding requests, and of liquidating the sums allocated for this purpose and made available by the Marche Region.

The ATC denied the payment, and the farm applied to the judge to obtain an order for payment.

Complainant's position

The ATC opposed the order for payment, and asked the Judge to come to the decision that it is not required to compensate the farm. The opponent asserted that, on the regulation of compensation for damage caused to crops by wildlife, the European Union Regulation no 1048/2013 applied, and it was transposed to the Marche Region through the Deliberation of the Regional Committee No. 103/2016, thus classifying the compensation in question as "State aid" and fixing "the limit of €15.000,00, as a ceiling for the amount that can be settled for each agricultural enterprise" during the three-year observation period under the "*de minimis* scheme, but, above all, by imposing a burden on the undertakings requesting certain requirements, including the obligation to self-certify the right to compensation within the limits of the law". They must self-certify that, in relation to the event, the damage had not been carried out by the Applicant.

Decision of the first Judge

The first Judge, in a judgment uttered in 2018, Sub-number 39, justified the failure of the Farm "on the basis of Regional Decision No. 309/2017, and not considering instead the D.G.R. 103/2016, which, explicitly recalling EU Regulation No. 1048/2013, explicitly provided for the "*inadmissibility/non-applicability of the claim for compensation*" in the case of the failure of the above-mentioned self-certification obligation under the European regulation.

2. Appeal proceedings

The ATC appealed to the Ancona Court, seeking the revocation of this decision, and requested a new interpretation of the Articles of European Regulation No. 1046/2013 (which entered into force on 1st January, 2014), and also of the Deliberation of the Regional Committee No. 103/2016, upon which the decision was grounded.

According to the Complainant, the conclusion of the first judge, who had excluded any charge on the agricultural farm, was wrong, even though the agricultural farm had not produced the self-certification request, noting that the documentation "*was not a condition sine qua non*" for the provision of compensation. On the contrary, the liquidation obligation arose under the ATC only after the self-certification has been deposited, in accordance with the charges laid down in the European legislation that are directly applicable, because they are self-executing. In this case, despite the various and repeated calls for the appropriate *de minimis* forms, the farm did not provide them.

The Appellant complained that the sums allocated by the Marche Region for payment of compensation, "*were never*" - indeed - "*received for the availability of the ATC*". Alternatively, the ATC concluded that the Marche Region was liable for its failure to fulfill its obligations, as a result of its failure to comply with the payments made under the Fund that had been established ex Art. 4 Regional Law No. 7/1995.

Positions of the other parties involved:

The Commercial Farm Arpini Chiara appeared before the Appeal Court, by means of the legal representative *pro tempore*, asking for the rejection of the appeal that had been proposed by the ATC, "*because it was unfounded in fact and in law*". In the alternative, it insisted on the condemnation of Regione Marche to pay the compensation "*in favour of the Commercial Farm*", and ordered the Defendant to pay the court costs.

Regione Marche has also appeared, by means of the President *pro tempore*, who asked for a declaratory judgment of inadmissibility, that is, the refusal of the appeal due to its groundlessness, and ordered the Defendant to pay the court costs.

The ATC and Commercial Farm Arpini were heard, and they acquired the documentation produced by all the parties - the Court decided, in a judgment uttered on 12th May, 2021, to confirm the appealed decision.

3. The Court ruled that they had to:

- clarify the exact compensatory legal nature of the amounts of money demanded by the owners of the damaged companies, and the absence of the obligation to pay full restoration to those injured, the result is that such compensation is classified as State aid. Requests from interested parties must be submitted on the prohibitions and notification obligations, pursuant to Art. 108 TFEU and, as far as this is concerned, to the applicability of the *de minimis* regime (Council of State, Sez. III, 26th June, 2019, No. 4411).
- that the regional legislation in force in 2015, at the time of the application for compensation by the Agricultural Holding that appealed, did not contain any reference to European Legislation No. 1048/2013, but they were required to submit the request "*using, exceptionally, the forms prepared by the Province or the ATC, without the need for self-certification in respect of any aid received in the pre-financial years under the de minimis scheme, and, exclusively, with reference to any benefits received for "compensation" for the damage*;
- that the essential condition for the continued payment of the State Aid only resides in the investigation of the documentation that is made available to the ATC, in a timely manner, following the application procedure that was introduced by the regional regulation which was approved by Internal Resolution No.316/2013, which was effective and valid at the time of the request;
- that the alleged indemnity in question has been, in any case, confirmed in the expert report on the assessment of the damage that was drawn up by the professional who was "appointed" by the ATC, after the inspection, and there were no formal deficiencies in the application;
- that the damaged party, therefore, had a legitimate expectation in respect of the regional legislation that was in force at the time of the application, and therefore it is not important that they did not self-certify;
- that the ATC did not infer, or prove, that the farm, which is the Applicant, actually benefited - in previous financial years - from further aid, so that any irregularity or substantial infringement of European law must be ruled out.

Final remarks

In the light of the above, the regional government issued Decision No. 103/2016, establishing the State Aid Scheme, in conformity with Community legislation, in order to access the forms relating to compensation for wildlife damages to agriculture.

As a criterion for the determination of compensation, Regione Marche decided to apply the *de minimis* scheme, providing that each holding is entitled to a maximum reimbursement of €15,000.00 within a three-year period.

However, at the application level, the regional regulatory framework has generated confusion and uncertainty.

The National Court intended to introduce a new interpretation.

The case presented is important since, in one of its key parts, the judicial review was based on the assertion that the condition for obtaining state aids must be concretely ascertained in court, and they must not be focused on formal aspects, such as the attachment of the self-certification .

Failure to submit self-certification does not determine any competitive advantage for the Applicant if it is concretely ascertained that it has not benefited from state aids for amounts exceeding the permitted threshold.

This conclusion respects the rationale of the EU law on State aid, which aims to avoid State contributions in any way altering the free play of competition.

LIST OF JUDGES PARTICIPATING IN ENTRANCE 2021

- Dzintra Amerika Supreme Court of Latvia.
- Svetlana Belajeva, Regional Court of Riga.
- Nathalie Bonhomme-Louck, Commercial Court of Liège.
- Marc Bosmans, Market Court of Brussels.
- Ema Brdovčak, Commercial Court of Rijeka.
- Birgit Burm-Herregodts, Brussels Commercial Court.
- Ana Cvitkovic, High Commercial Court of Croatia.
- Jelena Čuveljak, High Commercial Court of Croatia.
- Mirella Delia, Court of Bari.
- Ildikó Figula, Supreme Court of Hungary.
- Antonino Geraci, Court of Viterbo.
- Emanuela Germano, Court of Appeal of Turin.
- Sanna Holkeri, Supreme Court of Finland.
- Christiane Kaiser, Vienna Commercial Court.
- Alma Kodraliu, District Court of Tirana.
- Anna Kowalik, District Court of Warsaw.
- Ana Paula Lobo, Supreme Administrative Court of Portugal.
- Gian Paolo Macagno, Court of Appeal of Turin.
- Ivana Manestar, Commercial Court of Zagreb.
- Andrea Marchidan, Supreme Court of Romania.
- Lucie Mikulikova, Municipal Court of Prague.
- Tiia Nurm, Administrative Court of Tallinn.
- Ioana Oltean, First Instance Court of Constanța.
- Gianmario Palliggiano, Regional Administrative Court of Campania.
- Marika Papathoma Kalligerou, Administrative Court of Cyprus.
- Eduardo Pastor Martínez, Commercial Court of Valencia.
- Engert Pellumbi, Supreme Court of Albania.
- Rosa Perna, Regional Administrative Court of Latium.
- Ana Pessoa, Lisbon Court of Appeal.
- Maria De Fátima Reis Silva, Lisbon Court of Appeal.
- Aleksandra Rutkowska, Regional Court of Warsaw.

- Enrique Sanjuán-Muñoz, Court of Appeal of Málaga.
- Karlien Schatteman, Brussels Commercial Court.
- Stefan Schlotter, Court of Frankfurt.
- Denitsa Slavova, Regional Court of Varna.
- Jesús Ángel Suarez Ramos, Court of Las Palmas.
- Alice Thibaud, French National School for the Judiciary.
- Maja Valušnig, Administrative Court of Zagreb.
- Anne-Marie Witters, Brussels Court of Appeal.

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