GARRIGUES

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INDEX

EUROPEAN UNION

LEGISLATION

A. The European Commission adopts a new block exemption regulation for maritime transport consortia

B. The European Commission published an ECN Report on the State of Leniency Convergence

COMMISSION DECISIONS

The Commission rules on the tax amortization of financial goodwill

RECENT CASE LAW

A. The CFI reduces by 10% the fine imposed on Hoechst for participating in a concerted practice

B. The ECJ reviews the compatibility of obstacles to parallel trade of pharmaceuticals with Article 81 EC

SPAIN

LEGISLATION

The CNC President appears before the Spanish Congress

DECISIONS

A. The CNC fines different associations in the food sector

B. The CNC resolves the case initiated against UNESA for bringing judicial review proceedings against a Ministerial Order

C. The CNC fines insurance companies in a cartel for 10-year building insurance policies

D. The CNC fines a business association and three trade unions for signing and implementing a sectoral collective bargaining agreement

RECENT CASE LAW

A. The AN limits the inspections carried out by the CNC

B. The TS annuls a TDC decision for incorrectly applying the rules of evidence

C. The *Audiencia Provincial* of Valladolid orders ACOR to pay damages for engaging in price fixing

D. The AN admits a passive sales restriction when it is *de minimis*

PORTUGAL

DECISIONS OF THE COMPETITION AUTHORITY

A. Portuguese Authority opposes TAP/SPdH merger

B. Portuguese Authority instructs company active in the tomato processing market to stop tying practices

EUROPEAN UNION

LEGISLATION

A. The European Commission adopts a new block exemption regulation for maritime transport consortia

Since 1995, liner shipping consortia (cooperation agreements between shipowners offering joint services for the transport of goods) have enjoyed an exemption from the prohibition contained in the EC Treaty ("EC") on restrictive commercial practices, provided that they comply with the requirements and obligations laid down in the applicable block exemption Regulation. The reasons for this are the rationalization of the activities carried out by shipowners and the achievement of economies of scale.

On April 25, 2010 Regulation 823/2000[1] will expire and the new Regulation, which extends the current exemption for a further five years until April 2015, will come into force. The most important new features of the new Regulation are summarized below.

- The scope of the Regulation is broadened to include all maritime transport of goods, whether or not containers are used. In addition, the list of exempt activities has been adjusted to bring it into line with current market practices.

- The maximum market threshold pursuant to which the block exemption applies to consortia has been reduced from 35% to 30%. In addition, the parameters used to calculate it are now clearer.

- Exit clauses and lock-in periods applicable to consortia members who wish to leave have been prolonged, maintaining the flexibility of carriers and reflecting current market prices.

- The necessary amendments are made following the repeal in 2006 of the block exemption Regulation for liner conferences.

- The Regulation clarifies that the fact that a consortia does not satisfy the conditions of the Regulation (i.e. the maximum thresholds) does not necessarily mean that said cooperation agreement will be held to be illegal. It is for the parties in each case to assess the compatibility of consortia with competition rules.

- Similarly, as is commonplace in block exemption regulations, the European Commission ("the Commission") reserves the right to withdraw the benefit of the exemption from a consortium where, although it complies with the conditions of the Regulation, it does not comply with the exemption conditions.

Luis Ortiz Blanco / Carlos Arroyo Baudet (Madrid)

B. The European Commission published an ECN Report on the State of Leniency Convergence

On 13 October 2009, the European Competition Network ("ECN") issued a report that reviews the state of convergence of the leniency programs of the ECN members – Commission and national

[1] Commission Regulation (EC), of April 19, 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia). OJ L 100 of 20.4.2000, p. 24-30.

competition authorities ("NCAs") - with regard to the provisions of the ECN Model Leniency Program ("Model Program") launched in September 2006[2].

Whilst not legally binding, the Model Program was meant to harmonise leniency policies of the ECN members, in particular with a view to enhancing the effectiveness of leniency programs and to simplifying the burden for applicants and authorities in cases of multiples filings. Most notably, the Model Program provided for summary applications in cases where the European Commission is "*particularly well placed*" to deal with the case. The possibility of summary applications should make it easier for applicants to make immunity applications and authorities to process them, in cases where it is likely that the cartel has effects in more than three Member States and the Commission will deal with the case. Rather than having to file full and complete applications with the relevant authorities, NCAs could agree to receive only a short description of the cartel that has been reported to the Commission. It therefore allows the applicants to secure its place in the queue before the NCA.

The report concludes that the ECN has been a major catalyst in encouraging Member States to introduce leniency programs and in promoting convergence between them. 25 Member States and the Commission currently operate leniency programs and the convergence process is still on-going: reforms of existing leniency programs are pending in five Member States (Cyprus, Greece, Estonia, Finland and Luxembourg.) while Slovenia is in the process of introducing its first leniency program.

Elements for which the Model Program has facilitated convergence include the exclusion of certain applicants from immunity, conditions for leniency, the maximum percentage and threshold for reduction of fines and the scope of leniency programs. Yet some differences remain: for example, some programs do not, like the Model Program, contain a list of the information and evidence to be provided for so-called "Type A" immunity (full immunity for the first undertaking to come forward where it provides the evidence to enable the authority a targeted inspection).

Despite much scepticism the Model Program has proved to be a valuable tool to promote harmonisation of leniency policies. Convergence is an on-going process, i.e., there have been revisions and complete reconstructions of excising programmes. This does not mean that one can expect a total uniform European Union ("EU")-wide leniency policy. This may arguably not be necessary. It is for each authority to implement the programme in a manner that fits its own enforcement system. A harmonized leniency policy that ensures that immunity applicants know what they can expect from the different authorities in terms of the evidence to be provided and the cooperation and assistance they may have to give is a major achievement. From this perspective, it is fair to say that the Model Programme has already produced some of its intended results.

Konstantin Joergens (Madrid)

[2] See ECN Model Leniency Program – Report on Assessment of the State of Convergence, October 2009, available at http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf ; see also European Commission Memo of October 15, 2009 (MEMO/09/456), available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/456&format=HTML&aged=0&language=EN&guiLanguage=en.

COMMISSION DECISIONS

The Commission rules on the tax amortization of financial goodwill

On October 28, 2009, the Commission adopted a decision that partially brings to an end the administrative procedure in the State aid case C45/2007. This case, initiated against Spain on October 10, 2007, relates to the tax depreciation of financial goodwill in the purchases of stakes in foreign companies on the basis of Article 12.5 of the Amended Company Tax Law ("TRLIS") (the "Decision")[3].

Article 12(5) of the TRLIS, in force since 2002, allows for the depreciation, over 20 years, of financial goodwill arising as a result of acquiring a significant shareholding (>5%) in a foreign company, provided that certain requirements related to the activity and location of the company in question are complied with. The TRLIS does not allow the depreciation of goodwill in purchases of Spanish companies when only shares are bought but it does allow depreciation when the domestic company merges with the purchaser or when the latter directly acquires the former's assets.

The Decision solely concerns the application of Article 12(5) of the TRLIS to intra-EU acquisitions; a separate, later decision will examine the question of its application to third countries.

The Commission takes the view that Article 12(5) of the TRLIS is a selective advantage, since it only applies to the purchase of shares abroad and not to similar acquisitions in Spain[4]. This is a restrictive interpretation of the criterion of selectivity, since any company established in Spain may, *de jure* or *de facto*, carry out an acquisition abroad and take advantage of the provision. In addition, such commercial operations are not reserved to specific sectors or types of company – both large companies and Small and Medium Enterprises ("SMEs") qualify. Further, given that *de facto* (and, occasionally, *de iure*) it is difficult to merge with companies from other countries, the deduction referred to in Article 12 of the TRLIS could be seen as treating in the same way, from a functional point of view, the tax deductions allowed for domestic mergers with those arising in relation to significant purchases of sales in foreign companies.

In any event, the Commission found that, in relation to purchases within the EU, the deduction allowed under Article 12(5) of the TRLIS amounts to State aid and rejects the possibility of it being considered to be compatible with the EC.

In principle, this declaration should automatically entail the obligation to repay the aid in question. However, the Commission also found that undertakings may have had legitimate expectations that Article 12(5) of the TRILS did not constitute aid. This conclusion is reached in particular on the basis of the Commission's different answers to parliamentary questions. Applying the principle of legitimate expectations, the Commission has chosen not to demand the recovery of

[3] Said decision to initiate the procedure was published in the OJ on December 21, 2007, which the Commission has fixed as the date from which operations are subject to the recovery of the aid granted.

[4] Note that for the deduction of goodwill in domestic operations what is required is not the purchase of significant stakes but rather a full-blown merger (Article 89(3) of the TRLIS), or the purchase for value of assets in the company (including goodwill itself, Article 12(6) of the TRLIS).

aid[5] granted in operations closed before the publication of the decision to initiate the procedure in the Official Journal on December 21, 2007. By contrast, intra-EU transactions carried out after this date shall be subject to recovery.

It is surprising that the Commission has accepted the existence of legitimate expectations from the date of publication of the decision initiating the procedure in the Official Journal of the European Union ("OJ"), since Community case law has recognized that the mere opening of formal proceedings does not prejudge the nature of the final decision[6]. If this case law were followed, the legitimate expectation of economic operators should exist until the date of publication of the Decision.

An appeal of some nature against the Decision is likely. The complainant could challenge the time limitation imposed on the scope of the recovery order; alternatively, the Member State or any of the beneficiary companies concerned may appeal against the measure being defined as aid and the time limit imposed on the application of the principle of legitimate expectations. Until the appeal process has been exhausted and the Decision has become final, the debate about the selective nature of Article 12(5) of the TRLIS will continue to run.

José Luis Buendía / María Muñoz de Juan (Brussels)

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[5] Article 14 of the Council Regulation No 659/1999 of March 22, 1999 laying down detailed rules for the application of Article 93 (now Article 88) EC. OJ L 83/1 of 27.03.1999, p. 1-9, requires recovery except where this is contrary to a general principle of Community Law, such as the protection of legitimate expectations.

[6] CFI Judgment of September 12, 2007 in Case T-348/03, *Koninklijke Friesland Foods*, pending publication.

RECENT CASE LAW

A. The CFI reduces by 10% the fine imposed on Hoechst for participating in a concerted practice

By Decision dated January 19, 2005[7] the Commission fined[8] different companies for cartel activities in the market for monochloroacetic acid ("MCAA"), consisting in a system for allocating sales volumes and clients among the different companies.

Hoechst appealed the Commission Decision to the Court of First Instance ("CFI")[9], raising various arguments, including that since it had recognized the facts of the infringement, the Commission should have reduced its fine by at least 10%, in accordance with the provisions of Section D.2.2 of the 1996 Leniency Notice[10]. Hoechst also submitted that the fact that it

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[7] Commission Decision of January 19, 2005, 2006/897/EC, OJ L 353 of 13.12.2006, p. 12-15.

[8] The fines totaled 216.91million Euros (Akzo 84.38 million Euros, Hoechst 74.03million Euros, Elf and Arkema (jointly and severally) 45 million Euros and Arkema 13.5million Euros. The companies in the Clariant Group were given full immunity.

[9] The CFI changes its name "General Court" alter the modification introduced by Article 2 of the Treaty of Lisbon, Section 1 (A), which modifies teh Treaty on European Union ("TEU") and the EC Treaty, which is now named "Treaty on the Functioning of the European Union ("TFEU"). Consolidated versions of TEU and TFEU, OJ of 9.5.2008, p. 1-388.

[10] Commission Notice on the non-imposition or reduction of fines in cartel cases OJ C 207, 18.07.1996 p. 4-6.

had reserved the right to arrive at a legal assessment of the facts that differed from the Commission's interpretation did not detract from the foregoing.

In reply, the Commission alleged that: i) no formal request for leniency under Section E of the Notice had been filed; ii) the contents of the Notice on leniency did not apply when the facts are admitted generally but the proposed legal assessment is rejected; and iii) the company was incapable of making any submissions on the details of the infringement since it had sold its MCAA division in 1997.

In its judgment of September 30, 2009[11] the CFI accepted its right to a 10% reduction for the reasons specified above, while rejecting all the other arguments raised by Hoechst, declaring that *"[a]n objection to the Commission's legal assessment of certain facts cannot indeed be treated in the same way as a challenge to the very existence of those facts"*. The CFI recalled how useful it was for the Commission when the parties cooperated in the procedure, pointing out that, while the company "*did not help the Commission to clarify the applicant's participation in the cartel by providing it with evidence which it did not have*", its recognition of the facts *"could not but facilitate the Commission's task"*. Thus, the Commission was able to refer to all of facts contained in the statement of objections in its final Decision, without having to take further steps to prove their existence.

Consequently, the CFI held that the fine should have been reduced and fixed the percentage reduction at 10%, leading to the fine being cut from €74.03m to €66,627,000.

The CFI judgment forms part of an interesting line of cases which began before the first Leniency Notice. These cases are authority for the proposition that a company expressly declaring that it does not contest the facts alleged by the Commission can be considered to have facilitated the latter's task.[12].

The case was assessed in the light of the 1996 Leniency Notice; a similar ruling under the current Notice[13] would appear unlikely in view of the different criteria now used to establish eligibility to a fine reduction (based on an active role of those requesting leniency and the usefulness and added value of the information provided by them). Under the current legal framework, acceptance of the facts alleged may be more easily defined as a mitigating circumstance under paragraph 29 (fourth hyphen) of the 2006 Guidelines[14].

Jose Manuel Panero (Brussels)

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[11] CFI Judgment of September 30, 2009, in Case T-161/05 *Hoechst Gmbh v. Commission*, pending publication.

[12] See *inter alia*, CFI Judgment of May 14, 1998 in Case T-347/94 *Mayr-Melnhof v. Commission,* E.C.R II-1751, para.309, CFI Judgment of October 25, 2005, in Case T-38/02, *Danone v. Commission*, E.C.R II-4407 para. 505.

[13] Commission Notice on immunity of fines and reduction of fines in cartel cases, OJ C 298 of 8.12.2006 p. 17-22.

[14] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 OJ C 210/2 1.9.2006.

B. The ECJ reviews the compatibility of obstacles to parallel trade of pharmaceuticals with Article 81 EC

The judgment of the European Court of Justice ("ECJ") of October 6, 2009 in *GlaxoSmithKline Services v. Commission*[15] (the "Judgment") has largely upheld the contested judgment of the CFI of 27 September 2006[16], which in turn partially annulled the well-known Commission Decision[17] prohibiting GlaxoSmithKline ("GSK")'s dual-pricing scheme. Main arguments are as follows:

a) Obstacles to parallel trade are restrictions of competition by object.

The ECJ corrected an important point of the CFI's assessment. According to the Judgment, all restriction on parallel trade, as long as they involve a restriction on the internal market, are restrictions on competition by object. The ECJ makes it clear that:

- There is no need to demonstrate that systems restricting parallel trade entail disadvantages for final consumers. European competition law protects the market's competitive structure as well as the other objectives of the Treaty and not only final consumers or competitors[18].

- The specific features of the pharmaceuticals sector do not call into question the finding of a restriction of competition by object[19]. However, as can be seen below, they might affect the application of Article 81(3) EC.

- According to the CFI's judgment, the Commission failed to take into account the specific features of the sector concerned, which, in the case of the pharmaceuticals sector, is characterized by price regulation. The ECJ however takes a less strict view and declares that the analysis of a request for an exemption under Article 81(3) "*may require the nature and specific features of the sector concerned to be taken into account if its nature and those specific features are decisive for the outcome of the analysis*".

The Judgment states this is not related to the burden of proof but merely ensures that the examination of the request for an exception is conducted in the light of the appropriate factual framework.

[15] ECJ judgment of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services v. Commission*, pending publication.

[16] CFI judgment of 27 September 2006 in Case T-168/01, *GlaxoSmithKline Services v. Commission*, E.C.R p. II-2969.

[17] OJ L 302 of 17.11.2001, p. 1-43.

[18] As shown by the case law quoted in the Judgment, which goes back to 1977, this is not the most original statement. It is really surprising that the CFI ignored the above-mentioned case law and introduced in a clear and novel manner the Chicago school theory of the "rule of reason" as the cornerstone of EC competition law.

[19] See paragraph 55 to 64.

b) Balancing the advantages offered by the agreement and the restriction on competition.

The Judgment states that, with respect to Article 81(3) EC, it is sufficient for the Commission to arrive – on the basis of the evidence before it – at the conclusion that the occurrence of appreciable objective advantages is "*sufficiently likely*" in order to presume that the agreement entails such an advantage.

It is true that the ECJ takes the view that once it is established that an agreement is anti-competitive, it is incumbent on the laboratory to prove that said agreement produces positive objective efficiencies and that the cumulative conditions of Article 81(3) EC are satisfied. Nevertheless, the Judgment declares that the Commission also has to analyze the degree of probability of the efficiencies claimed by the firm actually existing. This means that if the firm claims significant and credible efficiencies that, after a prospective analysis could reasonably justify the agreement, it is the Commission's task to analyze whether they are plausible enough and compare them with the damage on competition.

The ECJ's decision that an agreement whose purpose is to limit parallel trade has an anti-competitive *object*, irrespective of whether or not it is in fact detrimental to final consumers, will no doubt give a boost to future complaints against laboratories. Nonetheless, the ECJ has left the door open to pharmaceutical companies to demonstrate that an agreement to limit parallel trade may satisfy the first condition of Article 81(3) EC.

In any case, the Judgment must be read with caution. It mainly deals with the degree of reasoning that must be given by the Commission when assessing requests under Article 81(3) but it does not go into much detail regarding the substance of the conditions established in said Article. Indeed, while the CFI's Judgment explicitly accepted the contention that the pharmaceutical industry exhibited special and specific features which deserve a somewhat particular treatment, the ECJ's reasoning is less sector-specific driven. It mainly stresses the Commission's failure to thoroughly deal with the arguments and evidence put forward by GSK, regardless of the particular sector at stake. Interestingly, the specific features of the pharmaceutical industry were recently examined – and found to be of little specific relevance – by the full chamber of the ECJ and by AG Ruiz Jarabo in *Lelos (Glaxo Greece)*[20].

Furthermore, accepting that restrictions of competition might be justified on the basis that the higher profits obtained would be reinvested in R&D is an extremely dangerous approach for the Commission to take. Powerful companies that are present in other sectors characterized by "innovation" could also make similar allegations to justify anticompetitive behavior. In any event, it is worth noting that the CFI rejected such arguments in *Microsoft*[21].

Angel Givaja (Brussels)

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[20] ECJ Judgment of September 16, 2008 in Joined Cases C-468/06 a C-478/06, *Sot. Lélos kai Sia and others*, E.C.R p. I-7939.

[21] CFI Judgment of 17.9.2007 in Case T-201/04, *Microsoft v. Commission* 2007 ECR II 3601 paras. 697 et seq.

SPAIN

LEGISLATION

The CNC President appears before the Spanish Congress

Last December 1, 2009, Luis Berenguer, the President of the Spanish National Competition Commission ("CNC"), appeared before the Economic and Tax Affairs Committee of the Spanish Congress to inform it about the CNC's work and present the new Action Plan 2010-2012 entitled "A New Boost" (the "Action Plan").

During his appearance, Berenguer analyzed the CNC's actions in the last year, highlighting the increased emphasis on the fight against cartels, a result of the strengthening of the competition authority following the reform of the Spanish Competition Law ("LDC")[22]. Berenguer also noted the widespread dissemination of the CNC reports published as part of its work in promoting competition.

The Action Plan defines the CNC's priorities for the next three years. The scope of action and the tasks assigned to each area are as follows:

- Boost the CNC's analytical capacity, strengthening efficiency and internal coherence by relying more on economic assessment in CNC decisions and ex-post evaluation of the impact of such decisions.
- Prepare notifications about LDC procedures, such as the leniency regime, confidentiality declarations or termination by settlement, with a view to increasing legal certainty and transparency.
- Improve communication and training, using information technologies to deal with more procedures electronically and reduce the administrative burden. Create a database of webpage subscribers so that they can be kept informed of new matters on a periodical basis.
- Promote a genuine culture of competition in Spain by monitoring the CNC's decisions and reports in order to understand their impact on society as a whole. In addition, set up better procedures to inform companies about Competition legislation and create new channels of communication with consumer associations and universities.
- Promote the concept of "market uniformity" laid down by the Spanish Constitutional Court ("TC"), through active cooperation and coordination with regional competition authorities. This will entail strengthening communications channels and joint inspections and entering into agreements.
- Monitor the way in which the courts interpret judgments on competition matters passed by the National Appeals Court or Audiencia Nacional ("AN"), the Supreme Court or Tribunal Supremo ("TS") and the ECJ.
- Invest in staff, encouraging the training of CNC personnel and exchanges with employees of other EU competition authorities.

[22] Competition Law 15/2007, of July 3. BOE no. 159, p. 28848-28872.

- Increase the CNC's international profile, both in other Member States and outside the EU. To this end, the Spanish Presidency of the EU in the first six months of 2010 will include the holding of a European Competition Day in Spain.

Zenaida de la Plaza (Madrid)

DECISIONS

A. The CNC fines different associations in the food sector

In a number of its recent decisions[23], the National Competition Commission ("CNC") has fined different associations belonging to the food sector for having allegedly made collective recommendations contrary to article 1 of the former Spanish Competition Law, Law 16/1989 of July 17 ("former LDC")[24], whose objective was to facilitate the passing on to the final consumer of the price increases in the raw materials used to make their products.

While the behavior analyzed in these decisions is not identical, there are certain common elements. Thus, all of the cases concern public declarations regarding the possible effect on the price of their respective products caused by the increase in the price of the raw materials used to prepare them.

Thus, in *Pan de Asturias* the CNC found that the declarations made by the President of an association of bread manufacturers in a general circulation newspaper regarding the effect on the price of bread in Asturias of the increase in price of the raw materials amounted to a collective recommendation. Secondly, the conduct sanctioned by the CNC in *Inprovo* was the issue of two press releases referring to the concern existing in the sector caused by the rise in the prices of raw materials used to manufacture animal feed. Third, in *Propollo*, the facts examined by the CNC were, in addition to the issuing of a press release, statements made by various of the association's management bodies, that were published in different media, regarding the expected increase in the price of chicken as a result of the increase in price of the relevant raw materials. Finally, in *Fiab y Asociados* y *Ceopán,* the sanctioned conduct was the preparation and circulation of a series of press releases by the entities in question concerning the increases in the prices of raw materials, which would presumably affect the prices of final products, all within the context of an alleged strategy of communication and exchange of information between the fined companies.

The CNC decided that the conduct described in all of the above cases amounted to a collective recommendation in violation of the former LDC. In its view, the purpose of issuing such messages was to standardize the behavior of companies, encouraging them to pass on the increased prices of raw materials to each of the links in the production chain so that, ultimately, the final consumer would be saddled with such increases. According to the CNC, the issuing of such press releases as well as, where applicable, the declarations made by management bodies, amount to behavior that objectively restricts competition, since it has the effect of standardizing the conduct of competing firms, whether or not

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[23] CNC Decisions of September 24, 2009 in Case S/0046/09, *Pan de Asturias;* of September 28, 2009 in Case S/0055/08, *Inprovo,* of September 29, 2009 in Case S/0044/08, *Propollo*, and of October 14, 2009 in Case S/0053/08, *Fiab y Asociados y Ceopán*

[24] Law 16/1989 of July 17 applies to these cases since the behavior in question took place before the enactment of the new Spanish Competition Law (Law 15/2007, of July 3), which repealed the former Law.

they are members of the associations in question. The CNC reached these conclusions without any analysis of whether the behavior in question had produced effects on the respective markets affected.

It is also worth noting that through these decisions, the CNC has broadened the meaning of "collective recommendation". While there is no doubt about the anticompetitive nature of issuing press releases or making public declarations or the like in which an entity recommends a given type of behavior, in the cases referred to here the associations limited themselves to voicing the concern existing in the sector as a result of the spectacular and constant increase in the price of raw materials (using for this purpose data exclusively taken from public sources), and the foreseeable need to pass on this increase in the price of their products, but without recommending or establishing any type of standard behavior.

In addition, these decisions set a precedent that limits the room for maneuver enjoyed by different sectoral associations when expressing their opinions, thus restricting their ability to inform consumers and other economic operators about the real situation of the sectors that they represent.

Stefan Rating / Joan Torrelles (Barcelona)

B. The CNC resolves the case initiated against UNESA for bringing judicial review proceedings against a Ministerial Order

Last November 2, the CNC adopted its long-awaited Decision in the case initiated against the Spanish Association for the Electric Industry ("UNESA") for bringing an action for judicial review against a Ministerial Order.

UNESA brought an action before the AN (National Appeals Court) for judicial review of the third additional provision of Ministerial Order ITC/3860/2007, of December, 28 ("the Ministerial Order") regarding the review of electricity tariffs from January 1, 2008, on the grounds that it contravened article 11 of the Data Protection Organic Law. The Ministerial Order imposed an obligation on all electricity distributors to allow suppliers to have unconditional access to their data on customers included in the Information System on Points of Supply ("SIPS")[25]. UNESA considered the data contained in databases to be personal in nature and, therefore, the prior consent of consumers for the transfer of such information was required.

The AN found in favor of UNESA. In its ruling of February 13, 2008, it provisionally suspended the provision in question, on the basis that, UNESA had, *prima facie*, a good case. Notwithstanding this ruling, the CNC's Investigation Directorate initiated formal proceedings. Subsequently, in March, Ministerial Order ITC/694/2008 was published, which expressly included the right of individuals to oppose the transfer of their data. This led the AN to remove the suspension on the provision.

The only allegation made against UNESA was, therefore, the fact that it had brought

[25] The SIPS regulation is part of a package of measures taken in order to guarantee the effective liberalization of the supply of electricity. The SIPS is a system composed of a database covering all points of supply connected to the networks of the distribution companies and the transport networks of their areas. It became part of Spanish law through article 7 of Royal Decree 1435/2002, of December 27 regulating the fundamental terms and conditions of contracts for the purchase of energy and access to low-voltage networks. For more information, see Antitrust Newsletter no. 16 of May 2009.

an action for judicial review. Thus, in the Decision of November 2, the Investigation Directorate proposed to the Council that it should find "*the existence of collusive conduct on the basis of the decision taken by UNESA on January 15, 2008, consisting in taking action in the ordinary courts against the validity of the third additional provision of Order ITC/3860/2007, of December, 28, requesting the provisional suspension thereof.*"

In Spain, private operators have a constitutional right to bring proceedings to determine the compatibility of administrative provisions with the law. And, more specifically, associations representing private interests have legal standing to bring class actions. Given this, it is hard to understand the circumstances in which the right to effective access to the courts could amount to an anticompetitive practice.

Despite the highly unusual nature of the allegation, the Decision does not clarify how the bringing of an appeal by an association could breach the competition rules. Without ruling out this latter possibility, the Decision merely states that "*the Council does not consider it necessary to decide whether UNESA's conduct consisting in the bringing of an appeal* […] *could be defined as constituting an infringement within the meaning of article 1 of the LDC.*"

Nevertheless, the CNC ruled that there was evidence to suggest that the facts analyzed "*point to a prior understanding among the electricity company members of UNESA (…) whose purpose would have been to establish a joint strategy of obstructing or restricting competition in the electricity market,*" and asked the Investigation Directorate to study the possibility of initiating a sanctions procedure in this regard.

The Decision therefore did not find UNESA liable for bringing the action for judicial review, declaring "*the non-existence of administrative liability on the part of UNESA on the terms proposed by the Investigation Directorate, since the facts that could amount to an infringement of article 1 of the Spanish Antitrust Law are not those which have been attributed to* [UNESA]*.*"

Finally, the Decision includes critical references to UNESA itself, stating that it has a "*singular nature*", being the "*common home for part of the sector*," within which "*positions are agreed on matters of great importance*", given that UNESA has "*powers to coordinate the commercial behavior and interests of its electricity supplier members.*" According to the Decision, this type of behavior could "*cross the boundary of legality and violate article 1 of* the LDC *if it is capable of standardizing the behavior of its members, altering the normal functioning of the market*."

Three days after adopting this Decision, the Investigation Directorate carried out a search of UNESA's main office. No formal proceedings have been initiated yet.

The Decision is, without doubt, atypical. Apart from the fact that it contains no express declaration of the fact that no prohibited behavior has been found to exist, it is critical of the actions, and even the very existence, of UNESA.

Susana Cabrera (Madrid)

C. The CNC fines insurance companies in a cartel for 10-year building insurance policies

The CNC Council has fined ASEFA, Mapfre Empresas/Mapfre Re, Caser, Suiza/Swiss Re, Scor and Münchener a total of €120,728,000 for engaging in practices described by the CNC as an agreement to fix minimum prices in the market for 10-year building insurance in Spain between 2002 to 2007[26].

The conduct investigated concerned the first few months of the application of the Building Law (Law 38/1999) of November 5, which obliged developers of new residential buildings to take out insurance guaranteeing that damage to the building caused by defects that originate in or affect the foundations and the structure of the building, directly threatening its mechanical resistance and stability. Insurance cover must commence from the moment that the works are delivered and remain in force for 10 years.

Given the lack of statistical information on the potential number of claims arising in relation to this insurance and the significant losses previously sustained by insurers under similar policies in France, the insurers and reinsurers who decided to offer ten-insurance building insurance policies in Spain once the Building Law came into force agreed to exchange technical and statistical information under the block exemption Regulation for the insurance sector existing at that time[27].

In the CNC's opinion, however, the scope of the cooperation between insurers and reinsurers went beyond that which was permitted. Specifically, in the second six-month period of 2001 they had agreed on what the CNC referred to as a minimum price of ten-year building insurance to apply from the beginning of 2002. In addition, this minimum price had then been imposed by the reinsurers involved in this arrangement on all other insurers operating in Spain. Finally, between 2002 and 2007 some of the insurers and reinsurers involved had engaged in retaliatory measures and boycotts in order to ensure the application of the minimum price throughout the market.

The Decision is controversial given that (i) in a previous Decision dated April 7, 1997 (Case 388/96 *Seguros Empresas Transportistas*) the Spanish Competition Authorities had found that essentially identical conduct did not breach the competition rules and the CNC did not explain satisfactorily why it did not follow this precedent; (ii) it is the biggest fine imposed by the CNC to date and yet the companies concerned were not given the chance to defend themselves at a hearing, despite the fact that this opportunity has been afforded to firms in cases involving much lower sums of money; and (iii) the CNC Vice President voted against the Decision, since, in his view, no infringement of the antitrust rules existed.

Alberto Escudero (Madrid)

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[26] CNC Decision of Noviembre12, 2009 in Case S/0037/08 *Compañías de Seguro Decenal.*

[27] Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.

D. The CNC fines a business association and three trade unions for signing and implementing a sectoral collective bargaining agreement

Last September 24, the "CNC" adopted a Decision fining a business association - *la Asociación Nacional de Empresas Estibadoras y Consignatarias de Buques* ("ANESCO") - and three trade unions - *la Coordinadora Estatal de Trabajadores del Mar* ("CETM"), *la Confederación Intersindical Galega* ("CIG") and *Langile Abertzaleen Batzordeak* ("LAB") - for breach of article 1 of the Spanish Competition Law 16/1989, of July 17, (the "former LDC") and Article 81 EC[28], consisting in the signature and implementation of the sectoral collective bargaining agreement entitled "IV Agreement for the regulation of Labor Relations in the Port Work Sector" (the "IV Agreement").

The CNC found that the IV Agreement, which applies to labor relations between undertakings and their employees in commercial ports throughout Spanish territory, contained provisions extending their application to other undertakings and non-port workers, thus preventing or obstructing their entering the market for ancillary services in ports. Specifically, the restriction on competition would affect the activities connected to the transit, deposit, loading, unloading, and transfer of goods carried on in the ports.

The sanctioned parties' main argument was that the competition rules did not apply to the IV Agreement. As a collective bargaining agreement, an agreement between trade unions and firms that lays down employment rights and obligations could not possibly be considered to be an agreement between undertakings. In short, the agreement came within the field of social policy and collective bargaining and any inherently restrictive effects were justified.

The CNC Council found, however, that there was no a *per se* exemption of collective bargaining agreements from the competition rules. Depending on the nature and object of such agreements and a case-by-case analysis, the rules may apply. In this case, the Council decided that the IV Agreement went beyond the bounds of employment relations between companies and port workers and directly affected the relations of other undertaking with their employees, competitors of stevedoring companies and final clients, since it imposed the obligations of the Agreement on other undertakings and their employees, which excluded, or could exclude, these companies from the market for ancillary services.

There was one dissenting vote among the members of the CNC Council, which questioned whether the fine imposed on ANESCO complied with general fining principles. Specifically, it was submitted that the Decision discriminated against ANESCO, did not comply with the principle of the same fine for the same conduct and was clearly arbitrary in the fixing the fine amounts, given that ANESCO was fined 901,518 Euros, compared to the other fines imposed for the same conduct: 168,000 Euros on CETM, 3,900 Euros on CIG and 3,000 Euros on LAB.

The application of the competition rules to collective bargaining agreements is still relatively new ground that is not exempt from controversy. The first national Decision in this area was taken by the former Spanish Competition Tribunal ("TDC") in January 2007, in which it was found that the negotiation and establishment of a collective bargaining

28 Current Article 101 of the TFEU.

agreement of a minimum price at which companies in the home-help service sector in Cantabria must tender their services breached the competition rules. Both *Comisiones Obreras de Cantabria* and *la Asociación de Servicios de Ayuda a Domicilio en Cantabria* were fined as a result[29].

More recently, the CNC has taken decisions accepting termination by settlement in two sanctions proceedings related to collective bargaining agreements[30]. In addition, some regional competition authorities have also proved active in this area.

Desiré Martín (Madrid)

RECENT CASE LAW

A. The AN limits the inspections carried out by the CNC

Last September 30, the AN passed judgment in the appeal brought by STANPA, the Spanish perfumery and cosmetics association, against the Decision of the "CNC" of October 3, 2008 (the "Decision"). The judgment is of particular importance since it is the first judicial ruling on inspections carried out by the CNC since the LDC came into force. The judgment was handed down approximately 10 months after proceedings were commenced.

The Decision had rejected STANPA's application for judicial review of the actions of the CNC's Investigation Directorate ("DI") in the investigation which took place at the association's premises on June 19, 2008. The Order of the CNC's Director of Investigation of June 10, 2008 had authorized a search of STANPA's premises by inspectors in order to gather data about the possible commission of a breach of article 1 of the LDC. The alleged infringement consisted in coordinating and fixing the sales conditions of professional hairdressing products through the exchange of information between members of the association.

The CNC copied all of the hard disks of the computers of a number of the association's employees. STANPA alleged that the CNC had breached various fundamental rights by going beyond the purpose of the inspection, which should have been limited to gathering data relating to the professional hairdressing sector. Specifically, STANPA alleged breach of the right to the inviolability of premises (Article 18(2) of the Spanish Constitution or "CE"), lawyer-client professional privilege (part of the defense rights contained in article 24 CE and the right to privacy and the confidentiality of the communications of the claimant's employees (Article 18(1) and 18(3) CE).

As regards breach of Article 18(2) CE, the judgment states that the Investigation Directorate saved onto a DVD data relating to matters such as "selectivity", "professional aesthetics", "traffic accident" "Caser", "bag complaint", "Irene", "certificate of education", "sending of template" or "employees' mail". The judgment found that these concepts "have no connection with professional hairdressing" and confirmed that the Administration had gone beyond its powers in the search and had thus breached Article 18(2) of the Spanish Constitution. Consequently, it ordered the return of the

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[29] TDC Decision of January 29, 2007 in Case 607/06 *Ayuda a domicilio*.

[30] In addition to the actions referred to, the CNC has adopted two decisions agreeing to the termination by settlement of both sanction procedures related to collective bargaining procedures, the first dated March 16, 2009 in Case S/0076/08 *Convenio Contact Center* and the second dated March 17, 2009 in Case S/0077/08 *Convenio Seguridad*.

seized material. The AN also held that the search criteria used by officials when selecting documentation in the computers, which were not disclosed to STANPA staff, "can never be confidential for the interested party since they determine the means of finding the documents to be copied or seized."

The judgment upheld the Decision and the inspection carried out to the extent that it was limited to documentation concerning the professional hairdressing sector. It also highlighted the fact that even the data unconnected to the professional hairdressing sector did not yet amount to proof, technically speaking, but rather mere factual elements, since they had not been added to the administrative file, nor did they constitute the factual grounds on which a decision imposing a sanction could be based. Accordingly, the AN held that, contrary to the request made by STANPA, it was inappropriate to declare all of the evidence obtained during the inspections to be invalid.

The judgment rejected the existence of an infringement of lawyer/client professional privilege, since the action *"does not amount to the irregular use of the information obtained in the search and therefore cannot cause a breach of the defendant's right to a fair defense"*. In the same way, the AN did not find any infringement of the right to privacy and the secrecy of employees' communications, considering that, while there had been an irregular search, under no circumstances did this involve any administrative action regarding employees' personal documents or mail. Such action was found not to be aimed at gathering the personal documents of employees in particular but rather all documents.

Crisanto Pérez-Abad (Madrid)

B. The TS annuls a TDC decision for incorrectly applying the rules of evidence

Through three judgments dated October 3, 2009[31], the TS annulled the Decision[32] of the TDC of July 22, 2004, due to an incorrect application of the rules on circumstantial evidence.

This Decision had imposed a fine of €250,000 respectively on the pharmaceutical firms Amersham Health, S.A., Tyco Healthcare Spain, S.L., Nucliber, S.A., and Schering España, S.A. for bid rigging in two tenders called by the Gregorio Marañón General University Hospital for the purchase of radiopharmaceuticals in 2002. According to the TDC, the collusive conduct was evidenced by the coincidence of the prices offered by the companies in the tenders in question and, above all, in the common tendency of all of the firms involved to make bids that exceeded the maximum bid price fixed by the hospital. Three of the companies sanctioned[33] challenged the TDC Decision by bringing an action for judicial review before the AN, which, by judgments dated April 11 and 17 and May 23, 2007, confirmed the TDC Decision.

By contrast, the TS upheld the three appeals on a point of law brought against the judgments of the AN. The Court held that it could not be deduced that the companies concerned had reached an agreement to restrict competition on the basis of the circumstantial evidence of collusion which the TDC had found to exist (the

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[31] Supreme Court Judgment (Judicial Review Division, Section 3) of October 3, 2009 in appeals on a point of law no. 3984/2006, no. 315/2008 and no. 3556/2007.

[32] Case 565/2003 *Materiales Radioactivos.*

[33] Amersham Health, S.A., Tyco Healthcare Spain, S.L. and Nucliber, S.A.

coincidence in the bid prices and the general tendency to exceed the maximum tender prices allowed). According to the TS, a series of factual matters should have been taken into account when analyzing the conduct in question. These matters showed that both pieces of circumstantial evidence could be explained other than by finding collusion to exist between the companies.

In the TS's view, the TDC (and, subsequently, the AN) erred in not taking into account the fact that the bid price fixed by the hospital did not coincide with the real market conditions at that time, since it was significantly lower than the prices established in previous tenders and with those set by other hospitals for the acquisition of the same products. The TS therefore ruled that it was reasonable for companies bidding at the same time in various tender processes to tend to present bids for the same products that were similar to those that they had made in other processes in order to maintain the market prices and although this meant exceeding the maximum bid price in the case of the Gregorio Marañón General University Hospital. The TS also took into account the transparency of the tender market, where it was easy for companies to be aware of the bids made by their competitors and the prices of winning bids in previous tenders. These circumstances allowed all companies to adjust their bids to the point that their terms were very similar.

On the basis of the above, the TS found that the rules relating to circumstantial evidence had not been correctly applied, upheld the appeals on a point of law and annulled the TDC Decision.

Enrique J. Fernández Picazo (Madrid)

C. The *Audiencia Provincial* of Valladolid orders ACOR to pay damages for engaging in price fixing

Last October 9 2009 the *Audiencia Provincial* of Valladolid (Provincial Appeal Court or “APV”) upheld the appeal of nine companies operating in the agrifood sector (including *Nestlé*, *La Bella Easo* and *Lacasa*). These companies had appealed against the judgment of the Court of First Instance of Valladolid, dated February 20, 2009, which had dismissed their claim for damages for the loss suffered due to price fixing engaged in by ACOR and other sugar producers between September 1, 1995 and May 1, 1996.

On April 15, 1999 the TDC declared the existence of a price fixing agreement between ACOR and other sugar producers, which had raised the market prices of sugar for industrial use paid by *agrifood* companies in the relevant period and took the corresponding administrative measures including the imposition of fines. This decision was upheld by both the and the TS.

There being no further appeal possible against the TDC decision[34], the food companies which had suffered loss as a result of the anticompetitive practices brought damages actions. To this end, they produced an expert report that, through the relevant calculations, established the level of loss suffered by their businesses as a consequence of the ACOR's anticompetitive practices.

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[34] Although under the current LDC (Law 15/2007, of July 3), it is not necessary for the appeal procedure against decisions of the National Competition Commission to have been exhausted before damages actions may be brought in the civil courts, under article 13 of the former LDC (Law 16/1989 of 17 July), this was required.

In November 2007, the Court of First Instance of Valladolid allowed the action to proceed since ACOR's registered office was located in this province. However, despite recognizing in its judgment that ACOR had been sanctioned by the TDC decision for having participated in price-fixing practices and that this decision had been confirmed by the AN and the TS, the Court held that "*no causal relationship can be found between any of the three conducts that led to an administrative sanction being imposed and the loss or damage that the plaintiff companies allege that they have suffered*."

By contrast, the APV focused mainly on the economic assessment of the loss suffered by the plaintiffs. It found that once the competition authority recognized that ACOR had engaged in a prohibited practice - stating, moreover, that in this case the loss suffered by the *agrifood* companies "was extremely serious given that it involved an essential and basic raw material for the industry" - it was for the ordinary courts to determine the loss suffered as a result of such practices being engaged in.

The APV judgment criticized the fact that despite the former TDC, the AN and the TS having expressly stated that horizontal price fixing had led to extremely serious loss being sustained, the ACOR expert had still considered that such loss should be valued at zero. As the Court put it, "*the valuation [of loss] may be higher or lower, but it can never be said that no loss was suffered. This is what has led us to concentrate on the export report submitted by the [other] parties*."

Thus, given the problems of establishing the exact loss, since it was impossible to know what the market price of sugar would have been if the restrictive practice in question had not existed, the APV based its findings on the only calculations available to it, namely those proposed by the appellants, and found ACOR liable to pay more than 1million Euros in damages to those affected.

Accordingly, although the LDC does not now require the appeals procedure against CNC decisions to be exhausted before damages actions can be brought, it appears that once no further appeal is possible against a CNC decision, both the ordinary courts and the parties to the action must focus on quantifying the loss that the anti-competitive conduct entailed. It should be added that this conclusion applies, in any event, to any behavior with an anticompetitive effect, as in the case of price fixing.

Maria Sala-Vive Campana/Stefan Rating/Mireia Martínez (Barcelona)

D. The AN admits a passive sales restriction when it is *de minimis*

Last October 29, 2009 the Judicial Review Section of the AN handed down its third judgment in the *Haller* case. As in the previous judgments[35], the Court annulled the Decision of the CNC Council dated July 21, 2008[36] on the grounds that it had erred in law. Adopting one of the arguments raised by the appellant, the German company Haller Umweltsysteme & Co (Haller), the Court ruled that the conduct analyzed by the CNC was of minor importance and, therefore, no fine should have been imposed.

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[35] Judgments of the *Audiencia Nacional* of September 17, 2009 in Appeal 405/08 brought by *C.L.G. Haller, S.A.* and of October 20, 2009 in Appeal 407/2008 brought by *Vehículos Equipamientos y Carrocerías Prieto Puga, S.L.*

[36] CNC Decision of July 21, 2009 in Case 634/07, *MDC Ingeniería / Productos Haller*.

In its decision of July 21, 2008, the CNC found that the exclusively clauses contained in the technology license agreements entered into by Haller and its licensees in Spain and Portugal, together with the behavior of the parties in applying these clauses, infringed Article 1 of the LDC and Article 81 EC[37], on the basis that their object and effect was to restrict indefinitely passive sales outside of the territory assigned to each distributor.

However, the AN disagreed with the findings of the CNC Council and ruled in all three judgments that *"the behavior described in the proven facts section of the decision appealed against are insufficient to restrict competition in an appreciable manner, and the decision to impose the fine is therefore wrong in law*." The Court therefore adopted one of the arguments raised by the appellants – in the latest case, by Haller itself – namely that the European Commission's *de minimis* Notice[38] should apply to the case in hand, principally because of the licensor's reduced market share – less than 5% in both Europe and Spain.

These judgments of the *Audiencia Nacional* break new ground, since they appear to oblige the competition authorities to apply the *de minimis* Notice in any event, analyzing solely the parties' market shares. With regard to this interpretation, while it is true that in *Haller* none of the thresholds laid down in the Notice were exceeded (5, 10 or 15%, depending on the case), the Notice itself excludes from its scope particularly serious restrictions. Yet the *Audiencia Nacional* did not examine the actual existence of the restriction – the limit passive sales – or whether or not it was particularly serious.

In short, the recent judgment of the AN appears, like the others before it, to favor the automatic application of the *de minimis* Notice, regardless of the anticompetitive nature of the conduct in question. On this basis, if the parties' market share is below the thresholds stated in the Notice, no behavior exists that may appreciably restrict competition – even where the restriction in question is a particularly serious one – and, therefore, the Spanish competition authorities cannot investigate and sanction such conduct.

In short, one of the risks that academics drew attention to once the European Commission began to apply the thresholds system in all areas has materialized: the automatic application of the system, without considering the objective for which the thresholds were fixed or examining the circumstances of each case, even where particularly serious restrictions exist.

Stefan Rating / Yolanda Martínez (Barcelona)

PORTUGAL

DECISIONS OF THE COMPETITION AUTHORITY

A. Portuguese Authority opposes TAP/SPdH merger

The Portuguese Competition Authority (the "Portuguese Authority") has opposed the acquisition of exclusive control by Transportes Aéreos Portugueses, S.A. (TAP) over Serviços Portugueses de Handling, S.A. (SPdH) through the purchase of 50.1% of the shares in the latter, following an in-depth investigation of the concentration.

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[37] Now Article 101 of TFEU.

[38] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ C 368, 22.12.2001, p. 13-15 (*de minimis* Notice).

In its assessment, the Authority focused on the relevant markets for the provision of handling services in the airports of Lisbon, Oporto, Faro, Funchal and Porto Santo, as well as on the related markets for air passenger transport on the routes to and from said airports and for transport of cargo by air.

The Portuguese Authority took into account the fact that TAP's sole shareholder (Parpública) is also the parent company of ANA, which controls Portway, SpdH's competitor in the market for the provision of handling services.

In this regard, the Portuguese Authority concluded that the notified concentration would be capable of strengthening SPdH's dominant position in the market for the provision of handling services at the airports where both SPdH and Portway operate (Lisbon, Oporto, Faro and Funchal).

In addition, the Portuguese Authority considered that the TAP Group would have the capacity and the incentive to provide competing air carriers with worse access conditions to handling services, thereby creating, maintaining or reinforcing its market power in air passenger transport on a set of routes to and from the airports of Lisbon, Oporto, Funchal and Porto Santo.

The Portuguese Authority also noted that this concentration could undermine the accomplishment of the aim of Council Directive No. 96/67/EC of October 15, 1996 to liberalize the sector and create conditions for competition between airport handling service providers.

Carla de Abreu Lopes (Lisbon)

B. Portuguese Authority instructs company active in the tomato processing market to stop tying practices

The Portuguese Authority has considered that a company active in the tomato processing market abused its dominant position by imposing tied purchases in its agreements with tomato growers. After considering that such behavior restricted competition in the market and was not justified by efficiency gains, the Portuguese Authority instructed the company to put an end to its anti-competitive practices.

The company - a dominant undertaking in the market for the primary processing of tomatoes -inserted a contractual obligation into its agreements with industrial tomato growers making the acquisition of fresh tomatoes (the tying product) from such growers conditional on the use of a specific kind of seed in their production (the tied product).

In particular, the tomato growers were obliged to acquire a specific kind of tomato seed from an undertaking belonging to the company's group in order to be able to sell their tomatoes to the company.

However, as a result of the company giving a commitment to put an end to these anti-competitive practices in its agreements with the tomato growers, the Portuguese Authority discontinued the case.

In particular, the company agreed to fulfill the following commitments: (i) remove the contractual clause on the preference for tomatoes of a specific seed variety; (ii) adjust its agreements in the light of the imminent merger with another enterprise in the food industry and the consequences of such a transaction; (iii) send out a circular to the growers' organizations, informing them of the removal of the preference for tomatoes of a specific seed variety.

Carla de Abreu Lopes (Lisbon)

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