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EU AND COMPETITION LAW

**News - Competition law and policy
2nd quarter 2019**

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PORTUGAL

I. Portuguese Competition Authority

Portuguese Competition Authority fines the companies Mota-Engil – Engenharia e Construção and Futrifer – Indústrias Ferroviárias, S.A.

On 12 April 2019, the Portuguese Competition Authority (PCA) fined the company Mota-Engil – Engenharia e Construção, S.A and one of its managers a total of EUR 906,000 for allegedly participating in a five-company cartel that acted in public tenders launched by Infraestruturas de Portugal in the railway maintenance sector. This collusion culminated in higher costs for the public entities as the bids were presented above the base-price. According to the PCA, during 2014 and 2015, the companies involved also agreed to share the different lots of a public tender between them.

On 28 June 2019, the company Futrifer – Indústrias Ferroviárias, S.A and one of its board members were also fined a total of EUR 300,000 for the infractions mentioned above.

Issuing a Statement of Objections in September 2018, the PCA concluded the proceedings against these Defendants under settlement procedures in which the latter admitted the facts and accepted their responsibility. This procedural mechanism had already been used in these investigations and made it possible to reach a finding against the company Sacyr Neopul, S.A. and its general production director.

The investigation is still on-going regarding the remaining two undertakings and their board members and managers.

Portuguese Competition Authority carries out dawn raids at healthcare companies

On 10 May 2019, the Portuguese Competition Authority announced that it had carried out dawn raids at nine healthcare companies following suspicions of alleged anticompetitive practices harmful to consumers' freedom of choice.

The PCA ordered that the investigations should be subject to secrecy, but it did announce that the dawn raids were carried out in the Lisbon, Porto and Algarve areas.

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Portuguese Competition Authority decides to open an in-depth investigation into the proposed acquisition of the Hospital São Gonçalo de Lagos by the Grupo Hospitalar Particular do Algarve

On 22 May 2019, the Portuguese Competition Authority (PCA) decided to open an in-depth investigation (Phase II) into the acquisition of Hospital São Gonçalo de Lagos (HSGL) by Grupo Hospital Particular do Algarve (HPA Group).

This notification to the PCA was issued on 9 November 2018, following an inquiry by the PCA, even though the merger at stake had already been implemented in late 2017.

In the PCA's view, the HPA Group, a market leader in the provision of medical services in private hospitals in the Algarve region, will strengthen its position with this acquisition. Furthermore, significant impediments to effective competition in the affected markets cannot be ruled out, particularly in terms of the provision of medical services in private hospitals in the Algarve, as well in the provision of medical consultations in the areas of influence of the HSGL.

Portuguese Competition Authority imposes a legally-binding obligation on the association of manufacturers of bread and pastries to abstain from public declarations about commercial conditions

On 6 June 2019, the Portuguese Competition Authority (PCA) adopted a decision to terminate the ongoing proceedings against Northern Association of Manufacturers of Bread, Pastries and Similar Products (AIPAN). The proceedings were terminated in exchange for a commitment from the AIPAN not to provide statements or information concerning prices and other commercial conditions that might promote coordination between the associates. Furthermore, the AIPAN has made a commitment to inform its associates that prices and other commercial conditions are to be autonomously defined by them.

The decision is the final step in the proceedings launched in August 2018 when the PCA identified competitive concerns relating to the statements made by the President of the AIPAN. In the PCA's view, these statements could amount to an interference in the commercial autonomy that is granted to the associates and, for that reason, harming consumers.

At the end of the public consultation on the commitments offered by the AIPAN, the PCA considered that they were sufficient to eliminate the competitive concerns.

EUROPEAN UNION

I. Courts

Court of Justice asserts that a competition authority can apply two fines to the same company for infringement of both national and competition law

On 3 April 2019, the Court of Justice of the European Union (CJEU) found that a competition authority can simultaneously impose two different fines on the same company in the same proceeding for infringing both national and European Union rules, provided that the total fine is proportional to the infraction.

In this case, two fines were applied to the same company - Powszechny Zakład Ubezpieczeń na Życie ("PZU"), a large insurance company that was previously accused of abusing of its dominance from 2001 to 2007.

The Polish Competition Authority applied a fine of PLN 33,022,892.77 (approximately EUR 7,664,000) for violating Polish competition rules between 1 May 2001 and 25 October 2007. Secondly, a fine of PLN 17,358,187.23 (approximately EUR 4,033,000) was imposed for the violation of Article 82 EC (now 102 TFEU) between 1 May of 2004, the date on which Poland joined the European Union, and 25 October 2007.

Arguing that the company in question had not previously been investigated, the CJEU rejected the application of the principle that guarantees that no one can be prosecuted more than once for the same offence (*ne bis in idem*). To this extent, the CJEU outlined that the European Union and national rules on competition matters can apply in parallel, insofar they view the restraint conduct from different angles and their areas of application do not coincide.

"The Court of Justice outlined that the European Union and national rules on competition matters can apply in parallel, insofar they view the restraint conduct from different angles and their areas of application do not coincide."

General Court determines that a company that did not appeal against fine cannot claim its reimbursement even though the decision against it was annulled

On 8 May 2019, the General Court of the European Union (GC) denied the possibility of a producer of reinforced steel, Lucchini, to obtain reimbursement of a fine as a consequence of European Commission (EC)'s decision that was considered partially annulled by the Court of Justice of the European Union (CJEU).

According to the reasoning, this reimbursement cannot be granted because this company did not appeal against the EC's decision and also because the CJEU's ruling only applies to the appellants.

In 2002, the EC fined six companies a total of EUR 85 million for bid-rigging the market for concrete rebar. In 2007, the former Court of First Instance annulled this decision on procedural grounds. Later, the EC applied the same fines without allowing the companies to be heard. All companies but Lucchini lodged an appeal and the CJEU annulled this second EC's decision.

Following this annulment, the company Lucchini asked the GC for reimbursement of the amount already paid and to be invited to participate in future hearing procedures launched by the EC regarding the cartel. The GC rejected both requests because the CJEU did not find anything in the EC's decision that could lead to it being fully invalid.

II. European Commission

European Commission issues a Statement of Objections against the companies BMW, Daimler and Volkswagen for allegedly restraining competition in emission cleaning technology development

On 5 April 2019, the European Commission (EC) issued a Statement of Objections against the companies BMW, Daimler and Volkswagen (which comprises the brands Volkswagen, Audi and Porsche) for allegedly having participated in a collusive scheme to restrain competition among them in the development of emission cleaning technology for diesel and petrol vehicles.

According to the EC, between the years 2006 and 2014, these companies pursued a strategy to limit the development and roll out of this technology, depriving the consumers of more environmentally efficient products. In the EC's view, this collusion occurred in the framework of the car manufacturers' so-called "circle of five" technical meetings.

European Commission sends a Statement of Objections against a game distribution platform and five videogame publishers for an alleged geo-blocking implementation

On 5 April 2019, the European Commission (EC) issued a Statement of Objections against the companies Valve (video game distribution platform), Bandai Namco, Capcom, Focus Home, Koch Media e Zenimax (video game publishers) for allegedly agreeing on rules that prevented cross-border sales between the Member States.

According to the EC, these videogame publishers had entered into agreements with Valve that prevented them from exporting their products to other distributors. Additionally, the publishers used activation keys that only made it possible to activate the videogames in a certain territory, thus blocking purchases made by customers located in different Member States.

The European Union's rules prohibit sales restrictions that could lead to a partitioning of the single market. Instead, these rules guarantee that consumers can benefit fully from the advantages of online commerce.

The defendants now have the opportunity to exercise their rights of defence.

European Commission fines General Electric EUR 52 million for allegedly giving incorrect information during a merger control

On 8 April 2019, the European Commission (EC) fined the company General Electric (GE) EUR 52 million for allegedly having negligently provided the EC with incorrect information on a merger control concerning the acquisition of the company LM Wind.

During this merger control procedure, GE has informed that it was not developing any higher power output wind turbine for offshore applications. However, the CE was later told by a third party that GE was offering these turbines to its potential clients.

Even though GE withdrew the notification and later presented a new one, in which it included the missing information, the EC considered that this company had violated its procedural obligations to provide accurate information to allow the Commission to evaluate the merger in a timely and effective manner.

European Commission makes the commitments proposed by VISA and MasterCard legally-binding

On 29 April 2019, the European Commission (EC) approved a decision to terminate the ongoing proceedings against the companies MasterCard and Visa, making the commitments of a significant reduction (around of 40 %) in their inter-regional interchange fees legally binding. These commitments will lead to a cut in the prices paid by consumer.

The multilateral inter-regional exchange fees are applied to payments made in the European Economic Area (EEA) with consumer debit and credit cards issued outside the EEA. MasterCard and Visa networks set the level of these values to be applied by the banks between them. In the absence of bilateral agreements concluded between the banks, the level of the fees set by MasterCard and Visa's network will be applied by default, in a situation where neither the retailer nor the consumer can influence this price.

In addition to reducing the fees, these two companies gave commitments not to put into practice equivalent measures aiming to increase prices, and to publish the fees covered by the commitments on their sites in a clearly visible way.

This decision can be seen as the last step in a long-running process that has comprised multiple EC decisions and the approval of regulations on these fees.

European Commission decides to open an in-depth investigation into the acquisition of Bonnier Broadcasting by Telia Company

On 10 May 2019, the European Commission (EC) opened an in-depth investigation into the proposed acquisition of the company Bonnier Broadcasting by the company Telia Company. Telia Company is a retailer of different channels, such as the ones produced by Bonnier Broadcasting. Consequently, this operation would create a vertically integrated undertaking in the audio-visual sector in Denmark, Finland, Norway and Sweden.

In the EC's view, with this acquisition, Telia could deny access to Bonnier Broadcasting's channels to its competitors. This would result in a weakening of the competition in the retail sector, associated with an increase in prices or less choice for consumers, bearing in mind that the Bonnier Broadcasting channels have an important role in the Finnish and Swedish markets.

Furthermore, the EC fears that the company Telia could harm its competitors in the retail mobile telecommunication, fixed internet and TV services by denying access to Bonnier Broadcasting's TV advertising space, and by cutting access to its streaming application to customers supplied by Telia's competitors for the market of internet providers.

The Commission now has 90 working days to take a final decision.

European Commission fines the company AB InBev EUR 200 million for alleged cross-border sell restrictions

On 13 May 2019, the European Commission (EC) fined Ab InBev EUR 200,400,00 for allegedly abusing its dominant position in the Belgian beer market, from 2009 to 2016, by pursuing a deliberate strategy to restrict the possibility for Belgian supermarkets and wholesalers to import its product, Jupiler Beer, which is also produced in the Netherlands.

"In the European Commission's view, with this acquisition, Telia could deny access to Bonnier Broadcasting's channels to its competitors."

According to the EC, this company sought to limit imports by using four different mechanisms: (i) changing the packaging of the products and the mandatory information for the products sold to the Dutch wholesalers in order to make them harder to sell in Belgium; (ii) limiting the volumes of Jupiler Beer supplied to Dutch wholesalers to restrict the numbers of cross-border sales; (iii) only selling products considered essential to Belgian retailers that undertook to reduce the volume of imports of Jupiter Beer coming from the Netherlands; (iv) supporting customer promotions offered by Dutch retailers as long as those retailers did not reflect them in cross-borders sales to Belgium.

Due to the fact that the company cooperated with the Commission beyond its legal obligation to do so, acknowledging its participation in the infringement and proposing a commitment to provide mandatory food information in both French and Dutch on the packaging of its products which was made legally-binding, a 15% fine reduction was granted.

European Commission fines five banks a total of more than EUR 1 billion for allegedly participating in a foreign exchange spot trading cartel

On 16 May 2019, the European Commission (EC) imposed fines in two different procedures on the banks Barclays, The Royal Bank of Scotland, Citigroup, JPMorgan and MUFG Bank. The fines totalled more than EUR 1 billion and were for allegedly engaging in collusion in the spot foreign exchange market for eleven currencies. The bank UBS received full immunity as it has revealed the existence of the cartels to the EC.

According to the EC, some bank traders exchanged sensitive information (such as the customers' requests, prices of each transaction and their trading plans) and occasionally coordinated their market conduct. To do so, the traders communicated through online chat rooms.

All the above banks except MUFG Bank applied for leniency, cooperating with the EC's investigation. Additionally, these banks agreed on a settlement, acknowledging both their participation in the infringement and their responsibilities. Therefore, the EC's procedures against these banks were concluded and the fines imposed reduced.

The procedures go on against the remaining defendant banks, namely Credit Suisse, HSBC and Deutsche Bank.

European Commission carries out dawn raids in the French grocery sector

On 20 May 2019, the European Commission (EC) carried out dawn raids at two French retailers, based on suspicion of breaching of competition rules prohibiting cartels and restrictive conducts.

The EC was assisted by the French Competition Authority.

European Commission prohibits the creation of a joint venture between Tata Steel and ThyssenKrupp

On 11 June 2019, following an in-depth investigation (Phase II), the European Commission (EC) decided not to authorise the creation of a joint venture between the companies Tata Steel and ThyssenKrupp, which would have combined the production of flat carbon steel and electrical steel in the European Economic Area (EEA).

Both companies are significant producers of these goods, as well as of others steel components and for that reason, this operation would lead to a more limited choice of suppliers and higher prices. It would therefore affect customers in the automotive and packaging sectors. This concern was shared by market players in a public consultation carried out by the EC on this merger.

Considering the fact that European Union companies might not be able to find the same volume of products through imports from outside of the EEA, this operation would essentially affect both the buyers of metallic coated steel, with the creation a market leader in a highly concentrated industry, but also the purchasers of hot dip galvanised steel in an EEA market with a few suppliers with the ability to sell significant production volumes.

Even though the companies proposed some disinvestment to tackle the competitive concerns, the EC, with the support of the market players heard in the consultation process, prohibited the creation of this joint venture because those commitments fell short in the EC's view.