INFORMATIVE NOTE

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EU AND COMPETITION LAW

NEWS - COMPETITION LAW AND POLICY 2ND QUARTER 2018

Below you will find the edition of the Competition Law and Policy Newsletter for the 2nd quarter of 2018, which compiles the most significant news in this area.

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PORTUGAL

I. PORTUGUESE COMPETITION AUTHORITY

Portuguese Competition Authority analyses road fuel sector

The Portuguese Competition Authority (PCA) has concluded the road fuel price analysis requested by the Portuguese Government in June 2018.

In this analysis, the PCA has concluded that almost half of its previous recommendations to promote competition in this sector have not been implemented or have only been partially implemented.

The PCA has identified a high degree of concentration in this sector and the existence of barriers to entry in the refining and storage activities, as well as the failure to implement the measures recommended by the PCA for sub-concession contracts of service stations on motorway, especially with respect to award procedures and length of contracts.

The PCA notes that taxes are the most significant component of the final prices of road fuel and that their relative weight has increased significantly since 2004. Consequently, road fuel price competitiveness in Portugal is significantly lower than the level in Spain.

Finally, the PCA has confirmed the relative stability of the absolute gross margins in the sector.

After this analysis, the PCA presented a "4th Package" of recommendations to the Portuguese Government aimed at promoting competition and providing more competitive offers to consumers in the road fuel sector. Among others, the PCA has urged the completion of the pipeline connection between the Galp refinery and the port of Sines, which remains incomplete and restricts third-party use of the road fuel storage facility (CLC) and access to competitive imports.

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Portuguese Competition Authority creates mechanism for public decision-makers to assess impact of public policies on competition

The Portuguese Competition Authority (PCA) has drawn up Guidelines for Competition Impact Assessment of Public Policies to assist public decision-makers in assessing the impact of public policy measures (legal acts, regulations and/or decisions) on competition.

These Guidelines will assist public decision-makers in identifying any potential negative impacts on competition of the public policy measures they intend to implement.

To achieve this, the public body will use a checklist included in these Guidelines that enables it to identify potential negative impacts on competition. If this is the case, the public body should refer to the PCA for further analysis. The PCA will then duly scrutinise those effects, in order to issue an opinion suggesting alternatives which could be less harmful to competition, while still safeguarding the policy and its objectives.

President of the Portuguese Competition Authority presents Plan of Activities for 2018 to the Parliament

On 20 June 2018, Margarida Matos Rosa, President of the Portuguese Competition Authority (PCA), presented to the Committee on Economy, Innovation and Public Works of the Portuguese Parliament the Plan of Activities for 2018 and reported on the work carried out in 2017 and the first semester of 2018. Regarding past activities, the President emphasised the reinforcement of investigations into anticompetitive practices and recent studies in the energy sector, in particular regarding road fuel.

In general terms, in 2018, the PCA intends to increase its own capacity to detect and investigate serious competition law infringements, also using ex officio mechanisms for that purpose.

Furthermore, in 2018, the PCA now has the recently created online complaints page and intends to increase the use of the leniency programme.

Finally, the PCA intends to ensure, with speed and efficiency, shorter periods to evaluate merger cases. It also intends to continue with its policy of detecting mergers that have not been reported.

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EUROPEAN UNION

I. COURTS

General Court partially rejects European Commission decision in Lufthansa case

The General Court (GC), in its judgment of 16 May 2018, partially annulled the decision of the European Commission (EC) to maintain Lufthansa's obligation to have to periodically lower its fares for flights between Zurich and Stockholm.

This requirement was part of the set of commitments on pricing imposed by the EC to enable it to clear the planned acquisition of Swiss by Lufthansa in 2005.

In November 2013, Lufthansa/Swiss submitted a request to the EC seeking a waiver of the fare commitments in question, arguing that: (i) the joint venture agreement entered into between Lufthansa and Scandinavian Airlines System (SAS) had been terminated; (ii) that there had, in the meantime, been a change in the EC's policy with respect to the treatment of alliance partners in the context of merger review; and (iii) lastly, that there was competition between, on the one hand, Swiss and, on the other, SAS and LOT Polish.

In its judgment, the GC clarified that the EC had to carry out a careful examination of the application submitted by the airline and, if necessary, conduct an investigation to enable it to arrive at informed conclusions, which was not the case according to the GC.

In 2016, the EC rejected that request, claiming that the fact that the joint venture agreement had ended was irrelevant because Lufthansa and SAS were the only undertakings operating the Zurich-Stockholm flights. Furthermore, the two airlines had a codeshare agreement that lead to reduced competition.

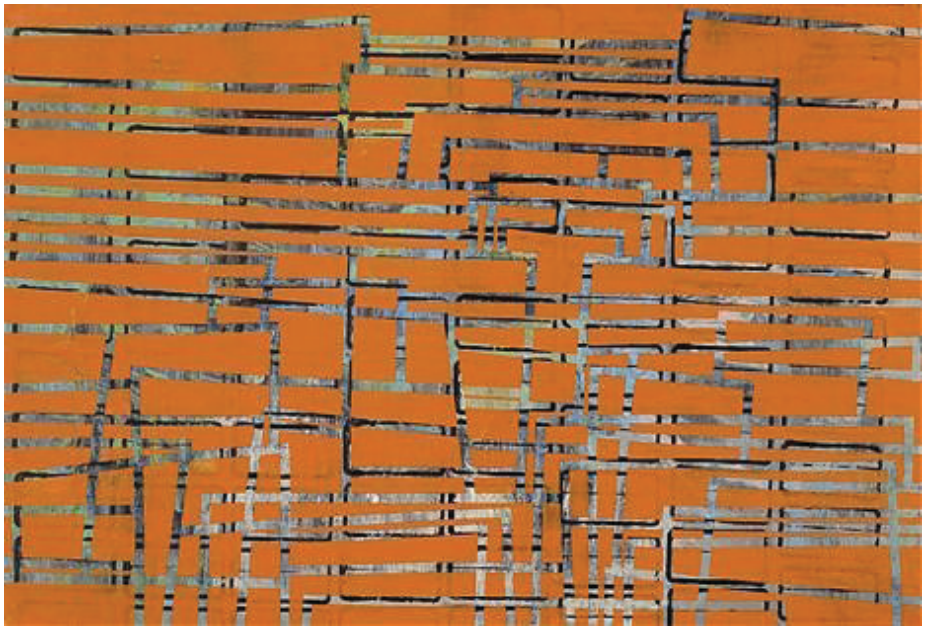
Lufthansa appealed against the EC's decision before the GC, claiming that the contractual change stemming from the end of the joint venture agreement with SAS would require the condition of the periodic reduction in fares to be lifted. Lufthansa also maintained that the number of passengers between 2005 and 2014 had doubled while fares had decreased significantly. In other words, these two points would have to be framed in a medium and long-term market evolution, which would require a change in the conditions previously imposed by the EC.

In its judgment, the GC clarified that the EC had to carry out a careful examination of the application submitted by the airline and, if necessary, conduct an investigation to enable it to arrive at informed conclusions, which was not the case according to the GC.

The GC considered that the EC (i) did not examine the impact on competition of the end of the joint venture agreement between Lufthansa and SAS, basing its findings only on hypothetical considerations; (ii) did not respond adequately to the argument about the change in policy given by it in parallel issues; and (iii) did not set out the reasons why codeshare agreements between undertakings could actually reduce or eliminate competition between airlines, even if in abstract such an effect could occur.

In other words, according to the GC, the EC failed to fulfil its duty to examine carefully all the relevant information available, making a manifest error of assessment and providing itself not capable of justifying the maintenance of the obligation imposed on Lufthansa/Swiss for the Zurich-Stockholm route.

On the other hand, the GC upheld the EC's decision on the Zurich-Warsaw route, because the contractual relationship between Lufthansa/Swiss and LOT Polish had not changed since the decision adopted by the EC in 2005.



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ANA VIDIGAL
S/título,1998 *(detail)*
Acrílico e esmalte s/tela, 130 x 195 cm
From the Collection of the PLMJ Foundation

Court of Justice clarifies the concept of gun-jumping by requiring a permanent change of control in the target undertaking

In November 2013, KPMG Denmark entered into a merger agreement with Ernst & Young. Under this merger agreement, KPMG Denmark was required to terminate the cooperation agreement with KPMG International.

In accordance, on the day of the conclusion of the merger agreement with Ernst & Young, KPMG Denmark gave notice to terminate the cooperation agreement with KPMG International. Three days after the termination of the agreement, KPMG Denmark and Ernst & Young began the pre-notification procedure before the Danish Competition Authority.

Although this concentration was authorised by the Danish authorities, the Danish Competition Council held that KPMG Denmark had breached the competition rules requiring the suspension of the concentration until a final decision has been taken by the responsible entity.

In the view of the Danish authority, a gun-jumping situation had occurred because, prior to that decision to approve the merger by the Danish Competition Authority, KPMG Denmark had terminated the cooperation agreement with KPMG International as previously agreed with Ernst & Young in their merger agreement. Furthermore, the termination of the cooperation agreement would be likely to affect the Danish auditing market.

The CJEU concluded that, even in the case of mergers which do not cause significant economic effects on the market, if the gun-jumping rules are breached – requiring a permanent change in control of the target undertaking – there is always unlawful conduct on the part of the undertakings.

By means of a preliminary ruling reference from a Danish court, the Court of Justice of the European Union (CJEU) ruled by judgment of 31 May 2018 that the termination of the agreement could not be regarded as a breach of the rules on gun-jumping, because Ernst & Young would not be able to exert any influence on KPMG Denmark, despite the termination of the cooperation agreement.
On the other hand, the CJUE argued that the assessment of economic effects should not count towards the assessment of the standstill obligation.

The CJEU concluded that, even in the case of mergers which do not cause significant economic effects on the market, if the gun-jumping rules are breached – requiring a permanent change in control of the target undertaking – there is always unlawful conduct on the part of the undertakings.

Court of Justice rejects claim for damages caused by a decision of the Court itself

On 7 June 2018, the Court of Justice of the European Union (CJUE) rejected an appeal against the decision of the General Court dismissing the claim for damages brought by Ori Martin against the CJUE.

At issue in the main proceedings was a possible violation of fundamental rights which would have caused the undertaking losses of more than €13 million, which was the amount of the fine that was imposed jointly and severally on Ori Martin for the acts committed by a subsidiary of the undertaking for participation in a cartel with the aim of fixing prices and dividing the steel market. The fine was imposed jointly and severally on the parent company (Ori Martin) since the latter failed to rebut the presumption that it had exercised a decisive influence on its subsidiary.

In June 2017, the GC had rejected the claim for damages for lack of legal support for the claim.

In July 2017, Ori Martin appealed against the decision of the GC, claiming that the Court had distorted the substance of its claim for damages, because it did not wish to revisit the question of the presumption and of the fine that was imposed jointly and severally on the undertaking, but rather the inadequate reasoning in the GC's judgment.

In its judgment of June 2018, the CJUE considered that the alleged irregularities relied on by the undertaking were not established, since both the CJUE and the GC gave the reasons why the presumption could not be rebutted and did not have to examine the various claims and pleas submitted by the applicants.

II. EUROPEAN COMMISSION

Gazprom avoids payment of fine in exchange for compliance with commitments

By a decision of 24 May 2018, the European Commission (EC) imposed legally-binding obligations on Gazprom which enable the free flow of gas in Central and Eastern Europe gas markets at competitive prices.

This decision of the EC ends the investigation concerning possible antitrust violations.

In 2015, the EC issued a Statement of Objections to Gazprom for allegedly pursuing an overall strategy to partition the gas market along national borders in eight Member States. This strategy may have enabled Gazprom to charge higher gas prices, by reducing its customers' ability to resell the gas across borders. The EC also accused Gazprom of attempting an unfair pricing policy in five Member States, charging prices significantly higher to wholesalers compared to Gazprom's costs or to benchmark prices.
To avoid the fine, Gazprom has agreed, on the one hand, to remove any restrictions placed on customers' contracts that disincentivise or prohibit cross-border gas resale and, on the other hand, to enable gas flows to and from markets still isolated due to a lack of interconnectors.

Furthermore, Gazprom agreed to give its long-term customers (contracts with a duration of at least 18 months) an effective tool to make sure their gas price reflects the price level in competitive Western European gas markets. Finally, Gazprom is prohibited from leveraging its dominant market position in the gas supply market to obtain advantages with regard to access to or control of gas infrastructure.

If the Russian undertaking fails to comply with any of these obligations, the EC can impose a fine of up to 10% of the Gazprom's worldwide turnover, without having to prove an infringement of EU antitrust rules.

European Parliament and Council provisionally approve ECN+ Directive

The European Parliament and the Council of the European Union (Council), European institutions with legislative powers, have reached a provisional political agreement after negotiation on the Directive proposed by the European Commission (EC) in March 2017, which introduces new rules within the framework of ECN (European Competition Network) to enable Member States' competition authorities to be more effective enforcers of EU antitrust rules.

These goals are the following: independence and impartiality of the national competition authorities, adequate financial and human resources available to carry out their enforcement activities and extension of admissible evidence (the authorities will be able to collect evidence from mobile phones, laptops and tablets).

Furthermore, the Directive seeks to introduce coordinated leniency programmes throughout the European Union and introduce new rules on parent company liability and succession to address loopholes in national laws, which currently allow companies to avoid or minimise fines.

The legal text still needs to be formally approved by the European Parliament and Council, and this is expected by the end of 2018.

After the publication of the Directive in the Official Journal of the European Union, Member States have, in principle, two years to implement the Directive into their respective national law, taking into account the Directive's goals.

European Commission confirms unannounced inspections in the styrene sector

The European Commission (EC) has confirmed that it has carried out inspections at the premises of styrene monomer purchasers on suspicion of collusion. This solvent is used for the manufacture of plastic, with special emphasis on the production of PVC pipes.

These inspections took place on 5 June 2018 at the premises of several undertakings located in different Member States and were accompanied by the respective national competition authorities.

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European Commission opens in-depth investigation into proposed acquisition of Solvay's nylon business by BASF

The European Commission (EC) has decided to open an in-depth investigation to assess whether BASF's proposed acquisition of Solvay's nylon business complies with competition requirements.

These two companies are producers of nylon and of the compounds used for its production. Nylon plays a major role in the European economy as it has a wide range of applications.

According to the EC, this acquisition of Solvay could reduce competition and increase prices in this market. The EC is apprehensive about BASF's increased market power post-merger, because Solvay is currently the only manufacturer in the European Economic Area with production assets at all levels of the nylon production chain.

In addition, apart from the absence of any player active at all levels of the production chain, BASF's market share post-merger would be double the market share of its closest competitor if the acquisition was to take place.

In the EC's view, this might lead to a scenario where BASF's competitors would have to rely on the supply by BASF of essential components for the final production of these products. In addition, it is unlikely that new competitors could restore the previous competition environment.

The EC has until 31 October 2018 to complete its review of the deal.