



COMPETITION LAW AND POLICY

LEGISLATIVE CHANGES 3RD QUARTER 2017

Below, you will find the edition of the Competition Law and Policy Newsletter for the 3rd quarter of 2017, which compiles the most significant news in this area.

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PORTUGAL

I. PORTUGUESE COMPETITION AUTHORITY

In 2017, the Portuguese Competition Authority has already carried out dawn raids at 35 premises and 36 companies

According to the Portuguese Competition Authority (PCA) press releases, since the beginning of the year, the PCA has already conducted dawn raids at 35 premises and 36 companies, in the transportation, driving schools, retail, insurance and railway maintenance sectors.

These inspections are a means to obtain evidence of anticompetitive practices, which may lead to the imposition of fines of up to 10% of the overall annual turnover of the company involved and to sanctions being imposed on the managers and directors, of up to 10% of their annual salary.

Portuguese Competition Authority carries out dawn raids at railway maintenance companies

In July of this year, the Portuguese Competition Authority (PCA) carried out dawn raids at seven premises of nine companies located in Lisbon and Oporto, following suspicions of a cartel in the railway maintenance sector.

According to the PCA press release, the suspicions resulted from a complaint filed in the context of the "Fighting Bid-Rigging in Public Procurement" campaign that the PCA has been carrying out since 2016, with contracting authorities and supervision entities.

Publication of a draft law reinforcing private enforcement in Portuguese Competition Law

Draft law no. 599/XIII was published in the official Portuguese gazette *Diário da República* on 3 August 2017. This draft law reinforces the enforcement of competition law and regulates the possibility of having civil claim for damages based on violations of competition law - "private enforcement".

The draft law seeks to make it easier for anyone that suffers losses resulting from competition Law violations to obtain compensation, and to provide a link between the public and private enforcement of competition law. It enacts Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 and was preceded by another draft and a period of public consultation organised by the PCA.

Portuguese Competition Authority fines Portuguese Driving Schools Association for fixing minimum prices

The Portuguese Competition Authority (PCA) fined the Portuguese Driving School Association (APEC) for anticompetitive practices by fixing the minimum price for obtaining a driving licence. The conduct harmed competition within the driving schools market in the Greater Lisbon and Setubal areas.

The President of the Association was also found guilty of an infringement because he was aware of the practice and took no action to prevent it or put an end to it.

The fine amounted to €413,776.71.

Since the beginning of the year, the Competition Authority has already carried out searches and seizure operations at 35 premises of 36 companies.

The Portuguese Association of specialised consumer credit providers offers commitments to the Portuguese Competition Authority to eliminate the restrictive potential of the information exchange system in the market for specialised credit

The Portuguese Association of Specialised Consumer Credit Providers (ASFAC) offered a set of commitments, as an answer to the concerns of the PCA concerning the restrictive potential of the information exchange system in the market for specialised credit.

On 23 April 2015, the PCA opened proceedings against ASFAC and 37 of its associate members, because of indications of infringements of competition rules, specifically the existence of a system for the exchange of sensitive strategic information organised by ASFAC and its associated companies.

The highlights among the set of commitments offered by ASFAC, which will be monitored by the PCA, are i) strengthening of requirements of age of the data exchanged between the associated companies, reducing its strategic value and, hence, its restrictive potential; ii) the provision of full access to such data not only to the associated companies, but also to non-member companies which request it on the basis of their interest in preparing for entry into the market.

The commitments were published on the PCA website site on 13 September 2017 and subject to public consultation.

Under the Competition Law, the PCA may accept commitments proposed by investigated companies if they are likely to eliminate the anticompetitive effects of the practices in question, and this leads to a dismissal of the ongoing proceedings.



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BENEDITA KENDAL

S/ título, 2004 (detail)

Acrílico sobre Tela - 100 x 100 cm

From the Collection of the PLMJ Foundation



HUGO CANOILAS
Light #2, 2001 (detail)

Óleo s/papel
50 x 70 cm

From the Collection of the PLMJ Foundation

EUROPEAN UNION

I. COURTS

EU Court of Justice sets aside the judgment of the General Court which had upheld the fine of €1.06 billion imposed on Intel by the Commission for abuse of dominant position

By a judgment of 6 September, in the Intel case, the European Court of Justice (ECJ) set aside the judgment of the General Court (GC) which had upheld the fine of €1.06 billion imposed on Intel by the European Commission.

The European Commission (EC) had imposed a fine of €1.06 billion on Intel for abuse of a dominant position in the central processing unit (CPU) market. The company gave rebates to four of the major computer manufacturers on condition that they purchased all, or almost all, of their x86 processors from Intel. Intel had also made payments to a European distributor of microelectronic devices, in exchange for which it would exclusively sell computers that incorporated the above mentioned processor. According to the EC, Intel had thus drawn up a strategy that sought to eliminate its only competitor, Advanced Micro Devices.

The ECJ set aside the decision of the GC, on the basis that the latter needed to consider the effects that of exclusivity rebates offered by companies with a dominant market position, before holding them to be restrictive. The case has now been sent back to the GC, so that it can examine whether the rebates in question are capable of restricting competition.

The judgment comes in the wake of a long discussion regarding abusive practices and lays down a clear vision of the need to analyse the effects, including from an economic point of view, of the practices that companies in a dominant position engage in.

In the Intel judgment, the EU Court of Justice overturned the decision of the General Court, basing its position on the need to consider the effects of exclusivity discounts used by companies in a dominant position.

Advocate General Wahl issues his opinion on the Coty case on the sale of luxury products through online third-party platforms

Coty Germany wants to prohibit Parfümerie Akzente, an authorised retailer, from selling its products on the Amazon platform.

In the context of the dispute, the Superior Regional Court of Frankfurt-am-Main has made a reference for a preliminary ruling to the European Court of Justice (ECJ), asking whether the prohibition would be compatible with EU competition law.

On 26 July 2017, Advocate General Nils Wahl (AG) presented his conclusions, according to which he argues that distribution systems that seek to preserve the prestige of “luxury products” may escape the application of the prohibition on anticompetitive agreements, provided they meet three conditions: the prohibition (i) is driven by the nature of the product; (ii) be determined uniformly and applied indistinctively; and (iii) does not exceed what is necessary to achieve its aim.

The ECJ must now give judgment on the matter. Given that the question was raised in the context of a preliminary ruling, that the final decision will be left to the German courts.

The ECJ now has the chance to clarify the scope of previous decisions on the matter, namely the Pierre Fabre judgment, by taking a position on the scope of the restriction of online sales that may be legitimately applied by luxury product brands on their distributors.

Abuses of dominant position and “excessive pricing”: EU Court of Justice rules on the rates charged by collective copyright management entities

On 14 September 2017, in the context of a preliminary ruling presented by the Supreme Court of Latvia, the European Court of Justice (ECJ) set out the criteria that must be taken into account when analysing whether a copyright management entity is applying unfair prices.

The ECJ has clarified the conditions in which it would be appropriate to compare the rates of a certain copyright management entity with the rates applicable in other Member States. The Court emphasised that the difference between the compared rates must be taken as considerable if it is consistent and persistent.

Portuguese Competition Authority opposes the acquisition by SIBS of UNICRE’s assets

The Portuguese Competition Authority (PCA) issued a draft decision prohibiting the acquisition of UNICRE’s payment card acceptance business unit by SIBS. According to the PCA, this acquisition would reinforce market entry barriers, harm market competition and it could, ultimately, lead to a monopoly in the Portuguese payment system.

Throughout the process, SIBS had presented a set of commitments. However, the PCA considered them insufficient and inadequate.

After the draft decision prohibiting the made an application, SIBS filed a request to withdraw from the planned operation, following which the PCA declared the dismissal of proceedings on 20 July 2017.

Any such difference will constitute an indication that there may be an abuse of dominant position. If that happens, it is incumbent on the copyright management entity to demonstrate that its prices are fair and based on objective criteria taking into account the managing expenses and the remuneration paid to copyright holders.

Exploitative pricing abuses by dominant undertakings have been publicly condemned by Commissioner Margrethe Vestager, as shown in the Gazprom case.

The Court of Justice now has the possibility to clarify the scope of the previous case law by taking a position on the coverage of the restrictions on online sales.

Ireland faces the EU Court of Justice over failure to recover €13 billion in alleged state aid in the Apple case

The European Commission (EC) referred Ireland to the European Court of Justice (ECJ), insofar as Ireland has not implemented the order to recover €13 billion allegedly given as state aid from Apple.

The EC adopted a decision on August 2016, ordering Ireland to recover the amount in question from Apple, which resulted from the concession of tax benefits allegedly incompatible with competition rules on state aid.

In the meantime, the Irish State has challenged this EC decision by bringing an action for annulment. However, bringing this action for annulment against the EC this does not suspend the obligation on the Member State to recover the state aid held to be illegal.

II. EUROPEAN COMMISSION

European commission considers that Luxembourg granted tax advantages to Amazon of approximately €250 million that are incompatible with EU state aid rules

According to the European Commission (EC), Luxembourg has given Amazon illegal tax benefits worth around €250 million, by adopting a tax measure that allowed the company to reduce its taxable profits considerably.

The EC held that this decision allowed a transfer of the vast majority of the profits from one company of the group subject to taxation in Luxembourg to one that was not subject to such taxation, Amazon Europe Holding Technologies. According to the EC, the decision has allowed that Amazon was subject to a lower payment than other companies under to the same tax rules. It went on to conclude that there was a selective economical advantage.

Particularly since 2013, the EC has been investigating tax practices of the different Member States.

Scania fined over €880 million for participating in trucks cartel

The European Commission (EC) has fined Scania approximately €880 million for participating in a cartel, together with five other heavy truck manufacturers, MAN, DAF, Daimler, Iveco and Volvo/Renault. In July 2016, the latter four companies had admitted their involvement in the cartel and reached a settlement resulting in record high fines of €2.93 billion.

The companies were found to have engaged in price coordination practices and passing on to clients of the of the costs arising from compliance with stricter environmental rules.

European Commission sends Statement of Objections to Teva on “pay for delay” pharma agreement

Teva and Cephalon concluded an agreement under which the former would commit not to market a cheaper generic version of the drug for sleep disorders, modafinil, owned by latter.

In its Statement of Objections, the European Commission (EC) informed Teva that the practice in question constitutes a violation of competition rules, given that the amounts transferred from Cephalon to Teva amount to a pay-for-delay agreement, which creates obstacles to competition regarding the production and marketing of the product.

This decision is in line with other decisions of the Commission – Lundbeck (2013), Johnson & Johnson (2013), Servier (2014).

European Commission fines three car lighting system producers €27 million in cartel settlement

The European Commission (EC) has fined three car lighting system producers – Automotive Lighting, Hella and Valeo – for participating in an automotive lighting cartel by fixing prices and other commercial conditions in the supply of car lighting systems.

Automotive Lighting and Hella were ordered to pay a fine totalling €26 744 million.

The leniency policy is a crucial instrument in the detection of cartels. It allows the company involved in the anticompetitive practice to obtain immunity and that was what happened with Valeo, which presented a leniency request and, as a result, it was exempt from paying any fine.

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Iberian Law Firm of the Year
The Lawyer European Awards, 2015-2012

Portuguese Law Firm of the Year
Who's Who Legal, 2016, 2015, 2011-2006
Chambers European Excellence Awards, 2014, 2012, 2009

Top 50 - Most Innovative Law Firm in Continental Europe
Financial Times - Innovative Lawyers Awards, 2014-2011