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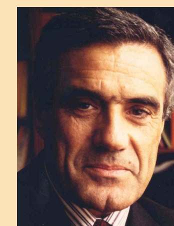
Editorial

EU And Competition Law
The European Dimension of Company Law



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Twenty years after Portugal's accession to the European Community, it has begun to be understood in Portugal that membership of the EU does not merely constitute for us a source of subsidies and aids of any kind, increasingly less so since the latest enlargement from fifteen to twenty-five Member States. It is, rather, a source of regulation for companies (and directly or indirectly for consumers) in a wide range of economic areas.

The most striking example is the sectors which are being privatised and opened to competition, ranging from telecommunications, energy and public transport to water supply and even the post office. The opening of such sectors to market logic has taken place gradually, with greater or lesser degrees of difficulty, but at any rate always fostered by the European Commission. It is the Commission which has lent initiative to the opening and liberalisation programmes which generated successive directives that paved the way from public monopolies to competition between public and private entities. Community legislation made ever-greater encroachments (until it was stopped in its tracks by a stricter interpretation of the principle of subsidiarity) into new areas of social and economic life, where it was thought that the European perspective was the appropriate level for finding solutions for economic and social problems.

Environment, health, the protection of consumers, workers and shareholders, tax, intellectual property, education, scientific research, sport and the media became other areas in which Brussels and Strasbourg amassed as much weight as national governments and parliaments.

Furthermore, membership of the EU obliged business-people and managers to a change in thinking, in which our inward-looking domestic market perspective steadily gave way to a new view, not only of commercial integration but of economic, financial and monetary integration as well. The area in which our competitiveness shall be gauged ceased to be our own domestic economy and moved onto the European scale, within the boundaries of what came to be known after 1986 (the year of Portugal's accession) and the Single European Act as the great barrier-free internal market.

Of course the long-term view underpinning the launch of the single market programme in 1992, along with the European Monetary Union and the Single Currency introduced at Maastricht, has sometimes clashed with clear trends towards a renationalisation of policies and blatant protectionism.

As it is incumbent on the Commission to look out for the common interest using the powers conferred upon it for this purpose by the Treaty, it is not to wondered at in such circumstances that it has often locked horns with some national governments which are less sensitive to the logic of integration and more inclined to create new protectionist barriers inspired by a short-term nationalism.

It makes little sense, however, to talk about national champions at a time when even the building of giant European companies has failed to tilt decisively the balance of intercontinental economic relations in favour of Europe. Yet the overwhelming success of certain European business projects, often supported by national governments, shows that it is only at a European level that the size necessary for success in certain markets can be achieved. The best example is probably the success of Airbus vis-à-vis its greatest rival Boeing.

In any case, the simple truth is that the European dimension has become an unavoidable reality in almost all social and economic fields. Companies today are increasingly facing this reality in the course of their day-to-day business in matters as diverse as distribution, supply and representation agreements and major strategic decisions to invest in a certain market or to take control of another company or group.

The creation of a Community-wide competition law framework, the gradual spread of the need for such a legal framework in all Member States, and the establishment in each State of an independent authority charged with enforcing these new laws, has brought about a new and particularly demanding branch of law to which companies must now adapt.

In Portugal, the establishment of the Competition Authority in 2003 and the simultaneous enactment of the new Competition Law (Law 18/2003) are part of this structural transformation, which is vital to the modernisation of an economy scarred by decades of corporatism, protectionism and statist socialism.

At the same time, Community competition law has undergone a true revolution with the introduction through Regulation 1/2003 of a

decentralised model of application for community competition rules, which poses new challenges for companies and domestic courts. Community rules on the control of concentrations have also seen major change as a result of Regulation 139/2004, while the framework on abuse of a dominant position is currently under debate and Commission policy on State aid is being reformulated.

The new Competition Authority has been trying to enforce the new rules and to diffuse what is commonly referred to in Portugal as a "competition culture". We must not, however, forget that it avails nothing to kill the patient with huge doses of sometimes untested remedies which, if applied theoretically across the board without considering the reality of the companies for whom they are destined, are capable of creating serious flaws in the fabric of the economy.

In this context, the possibility of recourse to a sound, effective, quick and competent judicial control mechanism is absolutely essential for the protection of company rights and the control of legality. Unfortunately, we are still very far from being able to take advantage of this possibility, a possibility which must be embraced as indispensable to bolstering the rule of law in this country and not viewed simply as a luxury for wealthy countries, to which we have no right to aspire.

In this newsletter, the EU and Competition Law Department offers its clients, and any others who may read it, some ideas on current interest topics in the areas it works with. I hope that it will help to increase awareness of the problems faced by companies in this field and instil a willingness to adapt actively to a legal environment where the ship of change is well under way. ■

Court of First Instance Upholds Prohibition of GE/Honeywell Merger

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In a long-awaited judgment, the Court of First Instance of the European Communities ("CFI") partially upheld on December 14, 2005, the European Commission's decision of July 3, 2001 to block the proposed acquisition of Honeywell International Inc. ("Honeywell") by General Electric Company ("GE").

In its decision, the Commission had considered that the merger should be blocked for three sets of reasons. First, GE's existing dominant position in the market for large commercial jet aircraft engines would be strengthened and, furthermore, the merged entity would become a monopolist in the market for large regional jet aircraft engines. Second, the proposed merger would give the merged entity a dominant position in the markets for corporate jet aircraft engines and for small marine gas turbines. Finally, the Commission was of the view that the merger would create conglomerate effects leading to the creation of dominant positions for the merged entity in the markets for avionics products and non-avionics products.

The CFI acknowledged that the Commission had been right in considering that the merger would create a dominant position in the markets for large regional aircraft jet engines, corporate jet aircraft engines and small marine gas turbines, which constituted sufficient justification for the prohibition decision.

The CFI noted, however, that certain aspects of the Commission's decision did not stand scrutiny and could, therefore, not be upheld.

It considered, first, that the Commission's finding that the Parties would be able to vertically integrate their respective engine and engine starter businesses, which would result in the strengthening of GE's existing dominant position in the large commercial aircraft jet engine market, was not sufficiently substantiated. In the CFI's view, in assessing whether future anti-competitive conduct of the merged entity is likely, the Commission should not only consider the incentives to such conduct but also the disincentives thereto.

In accordance with such general principle, the CFI ruled that, although there would indeed be incentives for GE to disrupt or delay supplies of engine starters to its competitors in order to foreclose the market, it was nonetheless true that such conduct would fall under the scope of Article 82 EC, which would have the effect of deterring GE from adopting it. By having failed to take this disincentive into account, the Commission had come to erroneous conclusions on the effects of the merger in this regard.

Secondly, the CFI took the view that the Commission had not provided a sufficient demonstration that the merger would create conglomerate effects in the avionics and non-avionics markets.

In its decision, the Commission had concluded that after the merger GE would have been able to use the financial strength of GE Capital and the commercial leverage of GE Capital Aviation Services to increase Honeywell's strength in the avionics and non-avionics markets. The CFI took the view that, although the Commission had demonstrated to sufficient standard that the merged entity would have had the ability to exert market power in the avionics and non-avionics markets, it had failed to establish that (i) it was likely that the merged entity would indeed adopt such course of action and that, (ii) as a result of such behavior, a dominant position would have been created in such markets in a relatively near future.

Regarding the alleged creation of conglomerate effects as a result of the bundling of GE's engine products with Honeywell's avionics products, the CFI noted that were practical barriers to bundling since the end buyers of the two products were generally different and purchased the products at different stages of the manufacturing process. The Commission's findings were therefore flawed.

In short, the CFI, in line with its own judgment and that of the ECJ in the *Tetra Laval* case, confirmed the validity of the conglomerate effects theory of harm, but made clear that the evidentiary burden which the Commission will be called upon to discharge when applying such theory will be high. The Commission's interpretation of this aspect of the judgment will likely be reflected in the upcoming guidelines on non-horizontal mergers, which are now even more eagerly awaited. ■

Merger Control: The First Ever Two Prohibition Decisions in Portugal

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Since its creation by Decree-Law No. 10/2003 of January 18, the new Portuguese Competition Authority ("PCA") has analysed more than 150 concentrations. It is said to analyse around 5 concentrations a month. In 2004 and 2005, the PCA reported 130 notified concentrations, 125 of which had issued decisions and 11 cases in which said decisions were reached following second phase proceedings. In 9 of said decisions, the PCA imposed conditions for the approval of the underlying concentrations and adopted, for the first time, two decisions opposing notified concentrations.

BARRAQUEIRO/ARRIVA

On November 2005, the PCA adopted its first ever decision opposing a notified concentration, by prohibiting the concentration that involved the acquisition of joint control of the company *Arriva Transportes da Margem Sul* (*ATMS*) by the *Barraqueiro* and the *Arriva* Groups on the grounds that it would be liable to create or reinforce a dominant position that could result in significant barriers to competition in the market for public road and rail passenger transport covering all the Setúbal/Lisbon routes crossing the "25 de Abril" bridge *(*bridge over the Tagus River).

The post-merger scenario envisaged that the Barraqueiro and Arriva Groups would acquire joint control of ATMS, to which they would transfer undertakings from both Groups, engaged in public transport sector activities, namely Fertagus and TST (Transportes Sul do Tejo).

The PCA considered that the two involved undertakings competed, prior to the transaction, with each other (Fertagus has a market share of 73% and TST has nearly 22%, while Carris holds the remaining 5%).

In addition, the PCA considered the existence of a related market for public road passenger transport on the south bank of the Tagus River, with services that do not cross the bridge. These are operated by TST (Transportes Colectivos do Barreiro) and the SulFertagus service. TST was considered by the PCA has holding a dominant position in said market.

Hence, the PCA considered that if the concentration was to take place, the situation would change from one in which, essentially, two undertakings were active (Fertagus and TST) to one in which there would be an effective quasi-monopoly situation, with a single operator that would have a 96% share of the relevant market, with an average of 73,600 passengers per day.

Also, said the PCA, in view of the severe entry barriers to the relevant market, the scenario of a near-monopoly could prove to be particularly oppressive since a single operator would have the ability to influence service quality and the formation of prices in a way that could harm consumers.

The PCA also reported that the notifying parties presented both behavioural and structural commitments, including an undertaking to disinvest. However, the PCA argued that the latter proposal not only arrived late in the day (at a second preliminary hearing, which is not required by law) but contained no demonstration that it would effectively prevent the dominant position predicted by the envisaged merger.

Since the PCA was of the opinion that it was up to the notifying parties to produce proof of said demonstration, it ruled that they had not shown that the commitments proposed would remove the competition concerns resulting from the operation.

Thus, it was the PCA's understanding that the consequences of this merger would be potentially serious for both road passengers (TST) and rail passengers (Fertagus) across the bridge, given that the new entity resulting from the merger would not be subject to competitive pressure and could manipulate fares and the regularity of routes as well as the timetables of the trains and would no longer have the incentive to improve service quality, clearly to the detriment of consumer's well being.

Having regard to the aforesaid, the PCA decided to prohibit the concentration, on the grounds that it had not been shown that the commitments proposed would remove the its competition concerns, specifically regarding the total elimination of effective competition, which would culminate in the creation of a dominant position in the relevant market that would be liable to create significant barriers to competition.

There are several aspects of this decision that do not seem to have been properly taken under consideration by the PCA and seem thus questionable. First and foremost, the fact that the road and rail transport sectors are heavy regulated markets and subject to both EC and national policies which could mitigate significantly the application of competition law. Secondly, the relevant and related market definitions seem to differ from the EC case-law in transport cases, which usually refer to relevant routes by reference to points-of-origin/points-of-destination. And finally, to what extent the remedies offered by the Parties were submitted in due course (as the Competition Act does not set any time-limits for their submission) and indeed could settle all competition law issues raised by the PCA, also due to the fact that the case-law of the EC courts seems to contravene the PCA's understanding that it was up to the Parties to prove that the remedies would effectively prevent the creation or reinforcement of a dominant position by way of the envisaged merger.

In any event, it remains to be seen whether this first time decision will be judicially confirmed since the *Barraqueiro* group has publicly announced that if filled an appeal against the PCA's decision in the Lisbon's Commercial Court, sustained, as publicly announced, by legal opinions of PLMJ's senior partner José Luís da Cruz Vilaça and Carlos Botelho Moniz, senior partner of MLGT.

GALP/ESSO

The PCA also issued, in December 2005, another decision prohibiting Galp's acquisition of the coloured diesel-fuel service stations held by Esso on the grounds that it would be liable to create or reinforce a

dominant position from which could result significant barriers to competition in the markets for the sale of coloured diesel fuel at fuel stations in the relevant markets of the fishing ports of Matosinhos, Figueira da Foz, Peniche, Lisbon, Portimão and Olhão.

Galp planned to acquire, by transfer, all the equipment, customers and credit, certain contracts related with the establishments, and all the other elements that are legally part of the establishments in relation to port services stations in Matosinhos, Figueira da Foz and Peniche, as well as in Lisbon-Pedrouços, Portimão and Olhão.

The PCA concluded that in the relevant markets, Galp would obtain a dominant position that could result in barriers to competition since:

- Galp, a vertically integrated company, supplies over 90% of the fuel consumed by the national market and occupies a privileged position in the fuel import, storage, refining, distribution and marketing chain in the national market;
- As a result of the merger, Galp's market share on four of the relevant markets would exceed 50% and would be over 60%, 70% and 80% in three of these markets;
- In four of the six relevant markets, only one other competitor besides Galp would remain as an operator, a situation that would aggravate the already high degree of concentration in these markets;
- In general, Galp's list prices are already above those of its closest competitors;
- There was a great loyalty to the company among Galp's direct customers as a result of the trading conditions available, in particular as regards terms of payment with longer average delay periods. This indicated that Galp enjoys a significant capacity to act independently of its competitors and, therefore, wields substantial market power;
- Galp's upstream position in the fuel market is unique and cannot possibly be duplicated by a competitor, a fact that represents a formidable barrier to entry in the relevant markets.

These decisions are the first ever by a Portuguese Competition Authority blocking concentrations, thereby showing that the recently instituted PCA is more and more willing to scrutinise thoroughly mergers, exercise to the full extent its powers under the new Competition Act and fearless of the repercussions. Undertakings and their legal advisers should therefore be more aware of the competition issues resulting from the transactions they wish to pursue and carefully and in advance prepare the notifications of operations, in particular of those where competition concerns are bound to arise. ■

"Who's afraid of the big bad wolf?" The Portuguese Competition Authority recent activity

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The Portuguese legal system has had a competition law regime in force for more than two decades. Nonetheless, only recently did economic agents begin to show more awareness towards its existence, that is to say, to feel its effects.

Certain factors have strongly contributed to the aforementioned circumstance, namely, the level, without precedent, of the investigation and sanctioning powers granted to the Portuguese Competition Authority (*Autoridade da Concorrência*, hereinafter "AC") and the fact that, during the three years of its young existence, this entity has not shown any hesitation to make vigorous use of them.

Just to mention a few examples:

- In 2004 and 2005, the AC applied the highest penalties ever in Portuguese competition law history (it should be noted that the penalties are now calculated, such as in EC Competition Law, on the basis to the annual turnover of the companies involved and can amount up to 10% of such value). A number of pharmaceutical companies were fined in more than nineteen million euros, for alleged price fixing within hospital tenders (one of those companies was even applied the maximum fine). The grinding industry was also targeted by the AC, with the application of a penalty of approximately nine million euros.
- Last December, several companies of the Pharmacy's National Association were subject to simultaneous inspections by the AC's agents. The first company to receive a visit of the AC (commonly known as "dawn raid", because it usually happens without prior notice, at the first crack of light) had been "Portugal Telecom", in 2004, due to suspicions of abusive practices in relation to interconnection prices.
- The AC rejected two concentrations, because they were deemed to create or strengthen dominant positions that could significantly restrict competition on the national market, as regards passengers' collective transports and fuel supply in ports, respectively.
- In addition, the AC has promoted the organization of in-depth sectorial studies on markets regarded as essential for the national economy, so as to guide its future actions in that respect (such as energy, telecommunications, distribution of fast moving consumer goods, cement, wood pulp, liberal professions and supply of medicines).
- As to markets where the lack of competition dynamics is more due to the legal framework than to companies' behaviour, the AC has issued a set of recommendations to the Government, in order that administrative or legislative measures, which are further in accordance with the principle of a free market economy, are adopted (v.g. fuels, supermarkets, gas, pharmacies, etc.)

Besides the intensive work illustrated above, the ability revealed by the AC to publicise its activity, which has even led it to reinforce its resources in communication and press assistance, has certainly contributed to bring competition to the spotlight, not only to companies but also to the general public.

In a country characterized by a significant deficit of competition culture, one might say that these are just the first steps. Certain conducts currently qualified as hardcore anticompetitive practices – such as price fixing or quota allocation between competitors – have been, in a not too distant past, encouraged or promoted by the economic intervention of the State itself (which simply decided who was supposed to produce what and at which price). Such measures were regarded as beneficial to the social welfare, since they were deemed to promote "desirable market stabilization". Such past has left vicious habits in multiple sectors.

The announced future approval of a "leniency program" in Portugal will further increase the likelihood of detection of serious anticompetitive arrangements, since such program will encourage the involved parties themselves to denounce such arrangements to the AC, in exchange for immunity from fines. The program will thus constitute a strong instrument in the AC's fight against the most pernicious forms of competition law infringements and, usually, also the most difficult to detect – secret cartels.

In short, the effective enforcement of a competition policy in Portugal requires economic agents to carry out a serious self-evaluation of their commercial practices, unless they rather be one day caught off guard by the visit of the "big bad wolf". ▪

Distribution Franchise in Portugal

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A distribution franchise agreement allows a producer of goods or services (the "Franchisor") to transfer to another entity (the "Franchisee"), in return of a fee, the commercialisation of such products under the Franchisor's trade mark(s) and distinctive signs, in conformity with its uniform business method and upon the provision, by the Franchisor to the Franchisee, of technical know-how and regular assistance.

The main idea behind such type of agreements is to allow the Franchisor to expand its business without investing its own capital, in a controlled way, ensuring, through the imposition of strict obligations identical for all Franchisees, that its image and the quality of its goods or services are preserved.

To gain time and reduce the capital involved in the development of their brand in a new country/geographical zone, Franchisors are often advised to enter into a Master Franchise Agreement. By doing so, they will benefit from the local experience of the chosen "Master Franchisor" which will be transferred the exclusive right to develop the franchise in that particular territory. It will thus be responsible for opening up franchise units by recruiting the individual sub-franchisees and providing them with support and training both initially and on an ongoing basis. It may also open and operate franchise units itself. The number of units to be opened may be fixed in advance between the parties as an objective to be achieved by the Master Franchisor within a given period.

Like in most EU Member States (except France and Spain for instance), there are no specific legal provisions regulating franchise agreements in Portugal.

The general legal provisions on contracts (Civil and Commercial Codes) and on standard contractual clauses (Decree-Law No. 446/85 of 25 October, as amended) shall apply. In so far as these agreements contain licences of intellectual property rights and detailed clauses governing the scope of the Franchisee's use of the Franchisor's trade-marks and know-how, the Industrial Property Code is applicable. Decree-Law nº 383/89 of 6 November as amended, on the objective responsibility of the producer and Decree-Law nº 178/86 of 3 July as amended, on Agency (in particular provisions on termination and clientele indemnity), may also be of relevance.

Because they often contain restrictions to competition (exclusivity, selectivity and non-compete clauses for example), franchise agreements may raise various issues under competition law and be ultimately considered as null and void (see Article 81(1) and (2) of the EC Treaty and corresponding Article 4(1) and (2) of Law 18/2003 of 11 June).

Therefore, a competition law analysis in the light of Regulation nº 2790/1999 of the European Commission (the "Vertical Agreements Block Exemption" that provides for exemption of such type agreements) is strongly advised. Such analysis appears all the more necessary further to the recent declaration by Mr. Abel Mateus, chairman of the Competition Authority, that commercial distribution is likely to be investigated by the Authority.

The preliminary step in conducting such analysis is always to assess whether the market shares of the parties do not exceed certain minimum thresholds. If it is the case, the agreement may be covered by the De Minimis Notice and escape the Article 81(1) prohibition. If it is not, it shall be determined whether the Block Exemption applies.

There are two main conditions for achieving exemption under the Vertical Agreements Block Exemption.

First, the supplier's market share on the relevant product/services market shall be inferior to 30% (the buyer's market share will have to be taken into account only where the agreement contains an exclusive supply obligation). As a provider of a business method, the franchisor shall calculate its market share by taking into account the providers of other competing franchised business methods and also the suppliers of substitutable goods or services that do not operate under franchising-type structures.

Second, the agreement must not contain any "hardcore restrictions". These refer for example to clauses in which the Franchisor intends to fix its Franchisees' resale price or to those aiming at conferring absolute territorial protection to the Franchisees.

Overall, clauses that tend to protect the "essential elements" of the franchise agreement such as the maintenance of the identity and reputation of the Franchisor's network or the protection of the Franchisor's know-how or trade-mark should in general not fall under Article 81(1). A Franchisor may for example, impose non-compete obligations on its Franchisees to prevent them from entering into a second franchise agreement with a competing franchisor or from selling competing products or even products that are not supplied by the Franchisor or by its selected suppliers. It may also require its Franchisees not to use or disclose secrets or substantial know-how, even after the expiry of the agreement.

Franchising has proved to be a very successful way to distribute products especially in Portugal. Companies should however always make sure that their franchise agreements are in line with competition law and other relevant provisions.

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Distribution , Agency and Competition
Self management of efficiencies and risks

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1. Introduction.

The commercial distribution of goods and services developed with the dynamics between sophisticated global markets, where the European Internal Market is integrated, with traditional markets of a local character or national dimension. The type of contract adopted by the producers or importer companies in order for their products or services to reach, through the commercial intermediaries, the final users – consumers or not – i. e. the distribution agreements in abroad sense, varies according to several considerations of an economic nature. For this purpose, the enterprises have many solutions at their disposal: agency agreements, concession, franchising, commission, mediation, commercial mandate, authorized distribution, selective distribution or other atypical contracts aiming that same general function. These contractual figures are typified in the international commercial practice, although they are typified only in the legislation of some countries. Regarding Agency, the EU adopted harmonization rules in order to approximate the most relevant matters of the Member States respective legislation[1].

2. Distribution and Agency in Portugal – doctrine definitions and use of analogy by jurisprudence

In Portugal, the distribution contract typified in law and more used is the Agency[2]. The Portuguese doctrine and jurisprudence have been applying on a case to case basis the Agency juridical regime to other distribution agreements, in cases where analogy justifies it, namely concerning the termination of those agreements. In this context, it has been particularly important the goodwill compensation regime, i. e. the compensation earned by the agent in the end of the contract because of the clients gained or developed on the behalf of the principal and that the former will continue to benefit after the end of the contract. The application of this regime to concession or franchising agreements is justified only in case of mixed contracts or contracts where the concessionaire or the franchisee perform functions of clients caption similar to the agent and the concessor or franchisor benefit from those clients after the end of the contract.

Return of international contracts to the Portuguese legislation – termination regime

In the context of international trade, is particularly relevant the regime of territorial application of law foreseen in the Agency DL.: to the Agency agreements mainly executed in Portugal will apply a legal regime different from the Portuguese one only in cases where the foreign legislation reveals to be more favorable to the agent, being this rule considered to be mandatory and prevailing over forum or arbitration clauses foreseen in the contractual relation.

3. The problem in the competition context – economic management of efficiencies and risks.

The definition of juridical and contractual figures instrument to commercial distribution has particular importance in the context of competition law, where the tendency to equalize distribution agreements should be contradicted, namely because Article 81 (1) of the ECT, regarding certain limitations drawing agreements, decisions of associations and concerted practices of a vertical nature, do not apply to genuine Agency agreements[3], because of the high level of integration within the principal's distribution net and the assumption of low levels of economic and financial risk. Article 81 (1) of the ECT will apply to Agency agreements considered to be "not genuine", as to the other distribution agreements, being applicable the Commission Regulation No. 2790/1999, on the application of Article 81 (3) of the ECT to categories of vertical agreements and concerted practices[4]. Being so, and in the actual context of *self-assessment* (after Modernization of May 2004), the choice of one or another type of contract demands from the companies a deeper study of their practical and economic virtues, where it should be included the risk factors related with the prevention, restriction or distortion of competition.

4. Distribution and Agency – main differences and economic ratio for selection

While the agent has powers to negotiate and conclude agreements on behalf of the principal (agency with representation), the distributor buys to the supplier to resale on its own expenses and risks. The risks the distributor assumes – and the agent not - are: (i) commercial risks (customers performance; damage caused by products; after Sales services) e (ii) financial (market specific investments, promotion and marketing contributions). The economic reason to choose an agent is usually related with better results (the commission paid to the agent is usually inferior to the distributor margin); a straighter control of the marketing and its budget; the principal keeps direct contact with the clients, when he keeps being a party to the agreements concluded. The choice of an agent tests the capacity of the supplier to penetrate directly the market, also with a straighter control regarding fixing prices and clients' allocation. On the other hand, the economical reason to choose a distributor is related with the assumption of minor risks by the supplier when expanding to new markets, since that risk is transferred to the distributor who acquires the ownership of the goods he resells. The supplier can obtain advantages out of the management of one single account instead of multiple accounts related with the direct contact with clients. Finally, when assuming the risks of the business the distributor tents to be more motivated to its success. Added to these factors usually are associated tax benefits, because of the higher independence of the distributor. One should note that, in practice, these characteristics can be mingled in order to create a certain level of confusion concerning the agreements nature, being necessary in each case to go beyond the agreement's name towards its substance and prevailing notes. An agent that assumes contractual risks will fall within the scope of competition law, cases where the possibility to control the agent by the supplier will be considerably less. Article 81 of the ECT usually will not apply to the obligations imposed to agents concerning contracts negotiated or concluded on the principal's behalf, namely when there is no transfer of ownership to the agent or he does not himself provide the services envisaged[5].

Finally, the suppliers with market shares around 40% request even more attention, since practices such as, e. g. price discrimination and refusal to supply may easily fall within the scope of Article 82 of the ECT, on abuse of a dominant position. The payment or not of a goodwill indemnity (which can be of a considerable value) in the end of the contract can also become a decisive factor to consider while choosing between the use of an agency agreement or a distribution agreement (if analogy with agency does not apply, as seen above).

Problematic clauses used in practice – control and concerted practices vs. costs/benefits evaluation

Regarding distribution agreements falling in the scope of Article 81 of the ECT, the clauses more problematic that raise from the practice – that the suppliers should be careful while drawing the contracts – are the non competition clauses (which should be limited to 5 years); obligations to provide information on sensitive commercial data of competitor enterprises; fixing resale prices or minimum resale prices (it can be substituted by fixing maximum resale prices or by recommended resale prices), which should not be confused with the obligation to provide sales' prices tables[6]; prohibition of passive sales; disproportional minimum purchases obligations, etc. ▪

[1]Council Directive No. 86/653/CEE, of 18.12.1986, on the coordination of the laws of the Member States related to self employed commercial agents.

[2]Decree – Law No. 178/86, of 03.07.86, as amended by Decree – Law No. 118/93, of 13.04.93 (hereinafter "Agency DL.").

[3]Commission Notice "Guidelines on Vertical Guidelines", Para. 12 to 20.

[4]Applicable according to Article 5 (3) of Law No. 18/2003, of 11.06.03, or the Competition Regime.

[5]However, and regardless of the fact legal limitations are lesser regarding Agency, certain practical factors may preclude the supplier to perform a broader control of the agent as he could wish, being the agent able to accumulate a considerable bargaining power.

[6]Article 2 (1) of Decree – Law No. 370/93, of 29.10.93, on individual practices restrictive of commerce, as amended by Decree – Law No. 140/98, of 16.05.98.

Ticket Arrangements for Sport Events and EC Law

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One of the essential components of organizing sport events is the ticketing system. Usually implemented by the Organizing Committees (OC), it is not unusual that these agreements contravene EC Law.

In the Italy 1990 World Cup, the OC entered into a worldwide exclusive agreement of ground entrance tickets with a single tour travel agency for the purpose of putting together package tours for the event. Besides the violation of the freedom to provide services (Article 49 of the EC Treaty), OC abused its dominant position on the "market for sale of package tours to the World Cup" (Article 82 ECT), by restricting both competition between tour operators and competition between travel agents, thus making it impossible to find sources of supply other than the exclusive travel agency.

On the occasion of 1992 Barcelona Olympic Games, the OC signed ticket distribution agreements with a single agent per country, which was obliged to resell only within the respective country. This monopoly restricted competition among resellers of all the EU member states (Article 81 ECT), in clear detriment of end consumers.

The 1998 World Cup in France was a paradigmatic case of protectionism, undermining the principle of non discrimination on grounds of nationality (Article 12 ECT), due to a ticket reservation system (through phone, mail or internet) which made it much easier for French citizens and French residents to get a ticket.

For Euro 1996 and Euro 2000, a system of quota allocation of ticket for each country was set. The European Commission stated that unless it was proved that there would be no less restrictive means to achieve the objectives – such as assuring equitable sells, the loyalty and close support of the fans or the separation of the spectators in the stadia for safety reasons – said quota system would be prohibited.

In 2004, the European Commission ordered that ticket sales through the Internet for the Athens Olympic Games should include other means of payment than only VisaCards. As to Euro 2004 of football, which took place in Portugal, there were no reported cases of EC rules infringements.

In spite of the continuous scrutiny of the European Commission, the 2006 "FIFA World Cup Germany" also involves infringements of EC Law.

Due to the successful complaint of a UK consumer organisation, it was possible to change the original exclusivity agreement signed between MasterCard, the German football association (DFB) and FIFA – an agreement between one "undertaking" and two "association of undertakings", in the sense of Article 81 EC - which initially only allowed fans to acquire tickets (i) through a MasterCard credit card; (ii) by payment from a German bank account; and/or (iii) by way of an international bank transfer requiring additional expenses mainly for the non-Eurozone countries, related to the cross-border bank transfers into Euros.

One legal action initiated in a Frankfurt court by a German consumer's organisation as well as a complaint presented by two MEP to the European Commission's DG Competition, alleging violation of Article 82 EC were also decisive for obtaining an agreement. Some original rules were incompatible with the common market, namely the following: (i) just for their inscriptions at the waiting list, applicants were required to pay in full and in advance without knowing whether they would get the tickets, *i.e*, they were obliged to pay for a service that eventually would not be offered; (ii) applicants not eligible to get tickets would only be reimbursed after the tournament, and a non-refundable fee of 5 euros for presumed "administrative costs" would be retained.

In the framework of this brief article, and taking into account the above mentioned, it must be emphasised that one must assess sport events ticket selling activities as one do for sport activities themselves: both activities must have a free, wide, equitable and non-discriminatory legal access, and also fair, transparent and objective selection criteria. ▪

And When the European Commission Plays the Monopoly?

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Microsoft case (Part I): *Bundling*

«*Dominant companies have special responsibility to ensure that the way they do business doesn't prevent competition on the merits and does not harm consumers and innovation*», said European Competition Commissioner Mário Monti, regarding the Commission's Microsoft decision dated March 24th, 2004.

The European Commission has considered that Microsoft Corporation has neglected the above mentioned special responsibility and levied a 497 million euros fine for abusing its near monopoly position in the personal computers (PC) operating system market, risking eliminating competition in the markets for work group server operating systems and for media players.

As far as the latter is concerned, the Commission concluded that Microsoft's behavior consisting on *tying* or *bundling* its Windows Media Player (WMP) with its Windows operating system (which equips the majority of the worlds PC), *(i)* weakens competition on the media player market and *(ii)* harms consumer welfare.

In the light of the above, the Commission asserted that, by tying its WMP to Windows, the software giant will be empowered to control related markets in the media digital sector since it both *(i)* artificially reduces incentives of competitors that create programs for playing digital music and videos, acting as a brake on innovation; and *(ii)* causes prejudice to consumers, who ultimately end up with fewer choice and facing higher prices.

The purchase of the tied product - the WMP - should reflect what consumers want as opposed to what Microsoft imposes. Therefore, Microsoft has been ordered to avoid commercial, technological or business practices that would make the unbundled version of Windows appear less attractive or performing to consumer.

It seems clear that the final answer to the issues in discussion must grant the triumph of european policies regarding incentives to innovate in the industry and of the consumer's welfare. However, a special attention should be given to the analysis of economic factors within the so called *new technologies*, as well as to its effects in the future.

The Commission's decision holds no economic evidence that tying WMP with Windows has harmed consumer welfare. In addition, on a primary approach, it is possible to assert that savings regarding distribution and having the guarantee of compatibility between the two products may reduce its cost to consumers.

Microsoft's case gives the opportunity to go deeper in analyzing the suitable degree of protection granted to competitors in the markets involved. In fact, one should ask whether it is really appropriate to dismiss consumer welfare in the name of preserving competition.

The merits of the 2004 decision are being reviewed by the European Court of First Instance, whose final decision will determine the relevancy of the use of traditional concepts of competition law (such as bundling, monopoly, among others) in software industry, in the same way they have been applied to sectors of the so called "traditional economy".

The adoption of rules of conduct within the market of *new technologies* in the perspective stated by the European Commission may distort the logics of European competition policy since harming successful companies, not only reduces incentives to innovate, but finally, also prejudices consumer freedom of choice.

It is finally relevant to add that, as a result of the Commission's remedy, Microsoft has in the meantime made available an unbundled version of Windows without the WMP software.

Microsoft is currently scheduled to stand in front of the European Court in Luxembourg between April 24 and 28. Until the present day, the facts concerning the respect of the un-tying remedy imposed by the Commission seem to indicate that the orders of the un-bundled version of Windows are insignificant. Available data shows that consumers still prefer the tied version of WMP with Windows. We are looking forward for the Courts verdict… ▪

And When the European Commission Plays the Monopoly?

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Microsoft case (part II): from competition law to intellectual property

The interoperability information on *Microsoft's* decision deserves special attention by the undertakings that have a dominant position in the market.

Intellectual property rights, granted as an incentive for the creation of innovation and as a tool to recoup the investments made by companies, used to be understood as providing several rights to its owners. Among those specific rights it was possible to identify: a) the exclusive right to produce the products under intellectual property protection; b) the exclusive right to commercialize the products under such protection; c) the right to refuse or to grant licenses, limited in time and region, with some restrictions on exploring them; d) the right to put products in the market similar to those protected by intellectual property rights and to extend the protection to the new products; e) the right to get a protection on the developments made on those products under intellectual property rights.

Therefore, it used to be common sense that intellectual property rights would constrain competitor's behaviour since the competitors' actions were bounded not to infringe intellectual property rights.

However, the European Commission has been meddling with these ideas. In *Microsoft* case, the European Commission has ruled *Microsoft's* decision on refusal to license interoperability information to competitors as illegal, based on the fact that it limits the production of compatible software, able to run on Windows operating system. This conduct was qualified as abusive by limiting the production of new software and by hindering technical developments to the prejudice of consumers.

After several attempts to offer the interoperability information, by creating and filing over 12,000 pages of detailed technical documents and two independent expert reports by software system engineering professors, the European Commission disregarded this effort.

As any good corporate decision based on risk assessment, *Microsoft* went further than required by the European Commission and announced its will to licence the Windows Server source code for the technologies covered by the European Commission's Decision of March 2004.

Regardless of the justice of this decision, which is being reviewed by the European Court of First Instance, and its long term risks, especially in what concerns lack of incentive to invest in intellectual property by undertakings, one lesson has to be taken: the need to act cautiously by undertakings in a dominant position.

The European Commission started acting more aggressively, restricting intellectual property rights of undertakings in a dominant position whenever it reaches the conclusion that the possible negative impact on the incentives to innovate by limiting intellectual property rights of a certain undertaking is outweighed by its positive impact on the level of innovation of the whole industry.

Nowadays, when setting the company's strategy, competition law deserves the same level of attention as budget drafting, hiring policies, marketing strategy and client management, thus all of them will play a significant role on the success or failure of a company. ▪

Green Paper on Damages Actions for Breach of the EC Antitrust Rules

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Antitrust rules are provided for by articles 81 and 82 EC Treaty, which ban restrictive business practices and abuses of dominant positions. These articles are applied both by the European Commission and by the national competition authorities. The mentioned articles may also be applied by the national courts in civil disputes, through which the agreements or decisions can be declared void, injunctive relief can be adopted, and compensation can be awarded to those who have suffered a loss caused by an infringement of the antitrust rules.

On September 20, 2001, the European Court of Justice held that *"the full effectiveness of Article 85* [81] *of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1)* [81(1)] *would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*." It also took the view that actions for damages could make a significant contribution to the maintenance of effective competition in the Community, but recalled that in the absence of Community rules governing the matter, it should be for the domestic legal system of each Member State to designate the courts having jurisdiction and to lay down the detailed procedural rules governing the judicial disputes at issue[1].

Further to this judgment, the European Commission launched a tender for a comparative study on the national regulations applicable to such actions for damages, which came to be published in 2004. This study, for which PLMJ prepared the Portuguese chapter, was the basis for the preparation of the Green Paper on damages actions for breach of the EC antitrust rules (the "Green Paper"[2]), which identifies the main obstacles to an efficient system of the actions for damages, and provides for several options to solve such difficulties.

According to the European Commission, private actions for damages have several advantages for companies and consumers since, in the first place, they allow the victims of illegal anticompetitive behaviour to be compensated for losses suffered. Moreover, courts will be able to address a specific competition issue in the context of a broader commercial dispute, and will always have to hear cases brought before them, while administrative authorities have discretion to investigate or not a particular case. The European Commission points to other advantages of the actions for damages, such as their role of deterrence against infringements, their contribution for the development of a "competition culture" and for the awareness of the relevant rules and, in special, their utility in fulfilling the gaps resulting from the fact that the Commission and the national competition authorities do not have the time or the resources to deal with all the cases of anticompetitive behaviour[3]. In this sense, account must be taken of the fact that the actions for damages are not limited to those cases where a previous declaration of infringement by a competition authority exists (follow-on actions), but can also be brought where no such decision has been taken (stand-alone actions).

The Green Paper deals, amongst others, with issues such as (i) *access to evidence*, since this is one of the major obstacles of the actions for damages, as evidence is often held by the party committing the infringement; (ii) the need for a *fault requirement*, or, on the contrary, the sufficiency of the proof of the infringement (strict liability); (iii) the *definition of damages* (compensatory nature or recovery of the amount illegally gained by the infringer) and the *method used for calculating its quantum*; (iv) the possibility for bringing *collective actions*; (v) the existence of special rules on the *payment of costs of actions*.

In order to decide on the need and adequacy of taking action at Community level to improve the conditions for actions for damages, the European Commission is currently receiving comments on the Green Paper. All interested parties may send their contribution until April 21, 2006, for the email or address mentioned at the end of the Green Paper. ■

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[1] See Case C-453/99 *Courage/Crehan*, judgment of the ECJ of September 20, 2001, paras. 26, 27 and 29.

[2] Green Paper - Damages actions for breach of the EC antitrust rules, in: http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf

[3] European Commission Green Paper on damages actions for breach of EC Treaty anti-trust rules – FAQ, in:

http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=0&language=EN&guiLanguage=en

Carlos Afonso Dias
British Museum, Londres, 1960
Gelatin Silver Print
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