GARRIGUES

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EUROPEAN COMMISSION DECISIONS

A. The Commission adopts a package of four decisions on aid granted by Germany, Belgium, France and Greece to their postal service companies

The postal sector has been progressively liberalized through three directives of the European Union ('the EU').[1] Under the Third Postal Directive (Directive 2008/06/EC), 16 Member States had to guarantee that the market was fully open to competition by the end of 2010, while another 11 Member States were given until the end of 2012 to achieve this goal. In this regard, the European Commission ('the Commission') has declared that the liberalization process has three goals:[2] *'to ensure a level playing field for postal operators, to promote competition between them, and to ensure that high quality postal services can continue to be delivered at affordable prices.'* The main question is working out how to liberalize the market without endangering the provision of universal services and/or services of general economic interest ('SGEIs') enjoyed by EU citizens.

Before the full liberalization of the sector, Member States granted State aid to postal service providers, generally incumbents, as compensation for the public services imposed on them. The Commission closely monitored the situation to ensure that such aid was proportionate, being limited to the minimum amount necessary.

This monitoring power of the Commission is based on Article 106(2) of the Treaty on the Functioning of the European Union ('the TFEU'), under which the compensation for costs derived from the provision of an SGEI may be compatible with the internal market, yet the overcompensation of costs would be incompatible State aid, recoverable from the beneficiary.

In this context, on January 25, 2012 the Commission adopted four decisions on State aid, evaluating the costs incurred in the provision of the SGEIs by Belgian Post ('BPost'), Deutsche Post, French La Poste and the Greek entity, ELTA.

With respect to BPost (MEMO/12/38), the Commission declared that both the compensation for the high pension costs of BPost employees on changing their status from civil servants to employees and the capital injections carried out by Belgium were compatible with the State aid rules. However, it considered that BPost had received excessive compensation for the cost of the newspaper and magazine delivery service and ordered the recovery of €417 million of incompatible State aid.

As regards Deutsche Post (MEMO/12/37), the Commission found that no overcompensation whatsoever had been paid for postal services provided between 1990 and 1995. However, it ordered the recovery of between €500 million and €1000 million in relation to compensation granted after 1995 on the basis that part of the costs incurred had already been compensated through the increased price of the stamps.

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[1] First Postal Directive (97/67/EC), Second Postal Directive (2002/39/EC) and Third Postal Directive (2008/06/EC).

[2] Technical MEMO on the Postal Sector accompanying the state aid decisions regarding *Deutsche Post /Belgian Post (BPost) / French La Poste /Hellenic Post (ELTA)*. MEMO/12/43 of January 25, 2012.

La Poste (MEMO/12/36) was also paid compensation of €1200 million for the costs incurred in transporting and delivering the press between 2008 and 2012, which the Commission declared to be compatible aid. Nor did it consider overcompensation to exist with respect to the €764 million tax relief granted for the cost of maintaining a high density of post offices in rural areas.

Finally, ELTA (MEMO/12/39) received €52 million for modernizing its infrastructure and improving the quality of its services. Here, the Commission also took the view that no overcompensation existed.

The four cases were examined in the light of the Framework adopted by the Commission in 2005,[3] which laid down the rules on the compatibility of aid for the provision of SGEIs (part of the 'Monti Package'). These guidelines have been recently revised in the 'Almunia Package',[4] which have made certain amendments (in some cases significant ones) to the compatibility criteria.

In general terms, the key issue continues to be guaranteeing the absence of excessive compensation but other procedural and substantive requirements have also been included such as the nature of efficiency requirements, the characteristics of the award act or the fact that the SGEI provider must be selected through a public tender process.

The question that arises is whether this type of measure in favor of incumbents will continue to be compatible under the new legal framework. This will depend on the Commission's future practice, but a stricter analysis of compatibility is to be expected, at least for aid to SGEIs of great economic value and those provided by dominant operators.

María Muñoz (Brussels)

B. The Commission prohibits the merger between Deutsche Börse and NYSE Euronext

On February 1, 2012, the European Commission prohibited the merger between Deutsche Börse and NYSE Euronext on the basis of Article 2(3) of the Merger Regulation.[5] Prior to the adoption of this decision, the parties offered divestment commitments with respect to specific areas but the Commission considered that these were clearly insufficient in view of the possible competition problems which implementation of the merger would cause.

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3 OJEU 29.11.2005, C 297/4.

4 The 'Almunia Package' includes: (i) Communication for the Commission on the application of the EU State aid rules to compensations granted for the provision of SGEI (EU Communications on SGEI) - OJ 11.1.2012 C 8/4, (ii) Commission decision on the application of Article 106 (2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI ('EU Decision on SGEI') - OJ 11.1.2012 L 7/3; (iii) Communication of the Commission EU framework for State aid in the form of public service compensation ('EI Framework on SGEI') - OJ 11.1.2012 C 8/15; and (iv) draft Commission Regulation (EU (on the application of Article 107 and 108 of the TFEU to *de minimis* aid granted to undertakings providing SGEI ('draft SGEI *de minimis* Regulation') - OJ 11.1.2012 C 8/23.

5 Council Regulation (EC) No. 139/2004 of 20 January 2004, on the control of concentrations between undertakings ('the EC Merger Regulation'), OJEU L 024, p. 1-22.

In its Decision, the Commission particularly emphasized the possible effects of the operation on the financial derivatives market. After a detailed investigation of this market, the Commission concluded that the negotiated financial derivatives (ETDs) did not belong to the same market as those negotiated outside of these markets (OTCs).

With respect to financial derivatives based on European underlyings, the *Eurex* (operated by Deutsche Börse) and *Liffe* (operated by NYSE-Euronext) platforms currently hold a joint position in the market which cannot be challenged by any other operator. The Commission considered that allowing a merger between them would have led to the creation of a quasi monopoly, to the detriment of the final consumers of these products and healthy competition. Contrary to the parties' arguments that the merger would create a more secure environment with greater financial liquidity, the Commission found that the approval of the operation would lead to firms being excluded from the market, higher commissions and the creation of significant barriers to entry as a result of the market structure.

In relation to the possibly entry of competitors, the Commission considered that this would be difficult for two reasons: (i) the marketing of a financial product requires access to the license of the underlying, which is ultimately granted by the same Stock Exchange Operator that manages these contracts; and (ii) possible competitors would have to convince the companies marketing the products to increase their collateral assignment to be able to create a new clearing house or, alternatively, request access to that of the already established operator. Unfortunately, market practice suggests that this would be difficult to achieve since the network effects and the strategies of the two main existing operators would not allow it to happen.

That said, the Commission did recognize that the proposed merger could give rise to efficiencies, although it considered that these were minor and not enough to offset the possible damage that it would cause to final consumers if cleared.

This merger was approved by the US competition authorities in December 2011. Deutsche Börse has announced that it will appeal to the General Court of the European Union ('the GC').

Gonzalo García (Brussels)

C. The Commission clears the acquisition of Motorola Mobility by Google

On February 13, 2012, the Commission published,[6] in compliance with the EU merger control rules, its decision not to oppose the acquisition of Motorola Mobility Holdings, Inc., ('Motorola Mobility') by Google Inc. ('Google'), both US companies.

The purchasing company, Google, offers online search and advertising services, while also being the owner of Android, the Operating System ('OS') for mobile devices. In turn, Motorola Mobility manufactures mobile devices and has a wide portfolio of the standard essential patents[7] ('SEPs') used in the telecommunications industry.

[6] Commission Decision of February 13, 2012, in *Google/Motorola Mobility*, COMP/M.6381, available online at: http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf .

[7] SEPs are defined by the European Telecommunications Standards Institute ('ETSI') as those patents in relation to which '*it is not possible on technical* […] *grounds,*

The Decision mainly analyses the effect that the merger would have on vertical relationships in two EU markets: that of OS mobiles and that of SEPs, analyzed in other Decisions.[8]

With respect to the OS mobile market, the Commission examined whether Google could, as a result of the merger, impede access to Android for manufacturers who currently load this key input onto their devices, thus obtaining Motorola Mobility devices at a relatively lower price. The Commission found that although Google could restrict access to Android, this capacity would not arise as a result of the integration process in question. In addition, the regulator underlined the fact that Google had little to gain from engaging in this practice, since 96% of its income came from the online advertising business, rather than via Android. Moreover, faced with a possible attempt to restrict access to Android, manufacturers of mobile devices could respond by using an alternative OS. In fact, between 60 and 70% of the manufacturers who install Android on their mobile devices do not do so on an exclusive basis; instead, their portfolio of products contains models which use an alternative OS.

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taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate equipment or methods which comply with a standard without infringing that IPR.' Commission Decision of February 13, 2012, in *Google/Motorola Mobility*, COMP/M.6381, para 52.

[8] Commission Decision of July 2, 2008, in Case *Nokia/Navteq*, COMP/M.4942, paras 137 and 139.

As regards the effect that the merger could have on the SEP market, the Commission recognized that prior to the concentration, Google did not own any of these patents, and therefore the transaction objectively increased the possibility of the acquiring party distorting the market. For example, Google could increase, in an abusive manner, the royalties which Motorola Mobility previously charged, oblige the operators which needed the SEPs owned by Google to enter into cross license agreements or simply refuse to grant SEP licenses to certain operators to exclude them from the market.

However, although Google would purchase a significant portfolio of SEPs, the number involved was relatively small compared to the total quantity of patents in the market (and, also, compared to the SEP portfolio owned by some competitors, such as Microsoft, Oracle, HP or Sony). In addition, Google had previously publicly stated in writing[9] that it undertook to maintain the conditions of the SEP license agreements existing prior to the concentration, and to foster new license agreements with conditions similar to the old ones on fair, reasonable and non-discriminatory terms.

Accordingly, the Commission cleared Google's purchase of Motorola Mobility on the basis that it did not, *per se*, obstruct free competition in the internal market.

Miquel López (Barcelona)

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[9] Open letter from Google to Standardization Organizations and the European Commission, online at: http://www.google.com/press/motorola/patents.

RECENT CASE LAW

A. Cisco and Messagenet challenge the Commission Decision clearing the purchase of Skype by Microsoft without commitments

On February 15, 2012 Cisco Systems (‘Cisco’) and Messagenet filed an action for annulment with the General Court against the Commission Decision clearing the purchase of Skype by Microsoft in the first phase without commitments.[10] The applicants alleged that the Commission had incurred in a manifest error of assessment by concluding that, even on the basis of the narrowest possible market definition, no reasonable doubt existed as to whether the operation could give rise to competition concerns in the unified communications sector.

On April 14, 2012 a formal summary of the allegations raised by Cisco and Messagenet was published in the Official Journal of the European Union (‘OJEU’). Essentially, the applicants claimed that the Decision erred in not appreciating the existence of strong network effects in the market and, therefore, for failing to analyze the incidence of these network effects on Microsoft’s incentives to guarantee the interoperability required to ensure the existence of competition on the merits.

First, the applicants pointed out that the merger gave rise to a joint market share of 80-90% in the narrowest possible market examined in the Decision (video-call services for consumers on Windows-based PCs). Cisco and Messagenet pointed out that this high market share, combined with the powerful network effects which benefited the widest installed base of users and Microsoft’s control of the Windows operating system and other connected applications, would strengthen the dominant position and eliminate any incentive which the merged entity may have to offer interoperability with competitors’ products.

The Commission denied the existence of any risk to competition, relying on the argument that network effects were not relevant in the market, since consumers tended to communicate in reduced groups, and therefore a given group of consumers would not face high switching costs if it wished to abandon the network which offered a greater number of connections. In their application, Cisco and Messagenet rejected this reasoning, explaining why it was incorrect to claim that consumers communicated in so-called autarkic nodules. According to the applicants, if the Commission had not made this mistake it would have reached the conclusion that the merger did, in fact, pose a threat to effective competition.

Second, Cisco and Messagenet highlighted the fact that the Commission also committed a manifest error of assessment when finding that the concentration would undoubtedly not give rise to any anticompetitive effect in the enterprise unified communications market. The applicants alleged that, given the increasing popularity of unified communications services for consumers (such as Skype or Windows Live Messenger), companies wished to connect with consumers through such services. In this regard, the strengthening of Microsoft/Skype’s position in the consumer segment would affect this company’s capacity and incentives to guarantee that users of Lync (Microsoft’s unified communications product for enterprises) had exclusive or privileged access to the Skype and Windows Live Messenger user base. The effects of exclusion which would arise from a

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[10] Commission Decision of October 7, 2011 in *Microsoft Corporation and Skype Sarl*, OJEU C 341, p. 2.

strategy of reducing interoperability of this type would also be strengthened by Microsoft's dominant position in relation to connected products, such as OS and applications for enterprises (Office, Outlook etc).

The applicants also noted that the challenged Decision was a radical departure from the Commission's decision-making practice and the case law of the Court of Justice of the European Union ('CJEU') in relation to the importance of network effects in the technological and communications markets and the need to ensure interoperability to preserve consumers' effective choice when such network effects exist. On a subsidiary basis, Cisco and Messagenet also alleged that the Commission had failed to give sufficient grounds for diverging from the relevant precedents.

Gonzalo García (Brussels)

B. The GC partially annuls a Commission Decision declaring aid granted by the Netherlands to ING to be compatible with the common market

On March 2, 2012, the GC passed judgment in the joined cases The Netherlands v Commission and ING Groep NV v. Commission ('the Judgment').[11]

The Judgment resolved the actions for annulment brought by the Netherlands and ING against the Commission Decision of November 18, 2009, in which the Commission declared that the bank had received State aid compatible with the internal market ('the appealed Decision').[12]

The Commission found that State aid existed, inter alia, because ING was able to repay the aid received (which had been previously approved by the Commission[13]) on better conditions than those initially contained in the Commission decision approving its recapitalization.

Thus, based on the terms initially agreed by the bank and the Dutch State, the securities issued could be: (i) repurchased by ING at a price of €15 per security (representing a redemption premium of 50% over the issue price of €10 per security) or; (ii) converted into ordinary shares on a one-for-one basis. If ING chose the second option, the Dutch State would, in any event, have the right to receive the face value of the securities issued (€10 per security) plus accrued interest. In any event, a coupon on the securities would only be paid to the Dutch State if ING paid a dividend to the holders of ordinary shares.

Subsequently, these repurchase terms were amended and notified to the Commission. Under the new terms, the Dutch State and ING agreed that the latter would repurchase half of the securities issued at their face value, plus the interest accrued at an annual rate of 8.5%, and a share premium if ING shares were valued at more than €10 each. This operation allowed the Dutch State to

[11] Judgment of the General Court (First Chamber) of March 2, 2012 in Joined Cases T-29/10 and T-33/10, *Kingdom of the Netherlands* (T-29/10) and *ING Groep NV* (T-33/10) *v. Commission*, pending publication.

[12] Commission Decision 2010/608/EC, of 18 November 2009, on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan, OJEU no. L 274, of 19/10/2010, p.139.

[13] Commission Decision C(2008) 6936, of 12 November 2008 in Case N 528/08, on State aid granted by the Kingdom of Netherlands to ING.

obtain an internal rate of return on its investment of 15%. However, according to the appealed Decision, these new terms could amount to fresh aid to ING, which the Commission calculated as amounting to approximately €2,000 million.

An action for annulment was brought against the Commission's Decision by both ING and the Dutch State. The main grounds for the appeal were that, with respect to the repurchase conditions, the Commission had not assessed whether the behavior of the State would have been equally acceptable if engaged in by a private investor who found himself in the same position (and therefore there would not be aid on the basis of the 'private investor principle'). In addition, ING contested the price leadership ban imposed on it, as well as other measures contained in its restructuring plan, on the basis that they were disproportionate since they went beyond what could be required of ING under the restructuring Communication.[14]

According to the GC, the Commission failed to show sufficiently that the modification of the terms for repayment of the capital injection received did not constitute an advantage which a private investor placed in the same situation as the Dutch State would not also have been granted. As the GC pointed out, this was particularly so since the initial terms of the issue only granted ING the option to repurchase on payment of a 50% redemption premium, rather than a right in favor of the State.

[14] Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules OJEU no. C 195 19/08/2009 p. 9.

Consequently, the GC annulled the Decision to the extent that it was based on the finding that the modification of the terms for repurchasing the securities issued amounted to additional aid to ING of €2 billion. Since ING was successful on the main ground of its appeal, the GC did not examine the additional issues raised by the bank regarding whether the conditions imposed on its restructuring plan complied with the proportionality principle.

Jose Manuel Panero (Brussels)

C. The GC declares inadmissible the annulment action brought by Iberdrola against the Commission Decision declaring article 12.5 of the Spanish Corporate Tax Law to be illegal and incompatible aid

On March 8, 2012, the GC passed judgment in Case T-221/10 declaring the inadmissibility of the annulment action brought by Iberdrola against Commission Decision 2011/5/EC, of October 28, 2009, on the tax amortization of financial goodwill for foreign shareholding acquisitions ('the Decision').[15] This judgment came about as a result of the plea of inadmissibility raised by the Commission in this case.

According to the Commission, the defendant failed to show that it was individually concerned by the Decision (since, in principle, it concerned an aid scheme) or that it had a legal interest in bringing the action.

Iberdrola alleged that it was individually concerned since it had been a beneficiary of the aid scheme which had been declared

[15] No. C 45/2007 (ex NN 51/2007, ex CP 9/2007), which give rise to Case T-221/10.

incompatible, since in 2008 and 2009 it had acquired shares in a Greek company and prior to December 21, 2007 (date on which the Commission recognized the legitimate expectations in its Decision) it had acquired shares in a British company as well as a Greek one. Accordingly, the applicant considered that both of these circumstances brought it within the closed class of beneficiaries under the scheme, as required by the case law of the European courts. In addition, Iberdrola emphasized the fact that it had been actively involved in the administrative procedure before the Commission. Finally, it also relied on Article 263(4) *in fine* of the TFEU, when alleging that, since the challenged Decision was a regulatory act which did not include implementing measures, it was not necessary to show that it was individually concerned.

However, GC rejected all of the arguments put forward by the applicant and upheld the Commission's plea.

Thus, as regards whether the applicant belonged to a closed class of beneficiaries of the scheme, the GC found that, with respect to the operations carried out in 2008 and 2009, Iberdrola had not shown in its application that it had applied the aid scheme since, despite having carried out the operations, in its tax declarations it had not deducted the amortization allowed by article 12.5 of the Amended Text of the Spanish Corporate Tax Law (*Texto Refundido de la Ley del Impuesto de Sociedades* or 'TRLIS'), and therefore it would merely be a potential beneficiary of that scheme and, as such, according to the case law, not individually concerned.

With regard to the operations carried out prior to December 21, 2007, the GC noted that these would be covered by the legitimate expectations recognized in the Decision and that the fact that the declaration on legitimate expectations had also been appealed against by Deutsche Telekom (who brought the action against the Commission in Case T-207/10), even when it was more a question of legal interest to bring the action than of individual concern, was not sufficient to differentiate Iberdrola from other operators. In addition, the GC recalled that the inadmissibility of its action, despite the claim brought by Deutsche Telekom or the existence of possible claims at a national level, did not amount to any breach of its right to effective legal protection since in any national legal proceedings, Iberdrola could ask the national judge to make a reference for a preliminary ruling to the CJEU regarding the validity of the Decision, under Article 267 of the TFEU.

Moreover, the GC held that Iberdrola's involvement in the administrative procedure did not give it *per se* a legal interest to bring an action, since such involvement did not differentiate it from other operators either.

Finally, the GC decided on the possible application of Article 263(4) *in fine* of the TFEU to State aid decisions. Nevertheless, rather than carrying out an in-depth analysis of the situation, the Court limited itself to noting that, given that the operating part of the Decision contained a reference to the existence of '*national measures taken to implement [it]*', i.e. those measures aimed at recovering the State aid and derogating the measure, this provision did not apply to State aid.

In short, this is a 'conservative' ruling on the question of admissibility which maintains a strict position regarding the requirements of legal interest to bring proceedings and, therefore, limits the access to the judicial review of the European courts for beneficiaries under State aid schemes. On the other hand, being one of the first judgments (if not the first) on the interpretation of new Article 263(4) *in fine*

of the TFEU with respect to State aid, more detailed reasoning regarding this provision, rather than the scant analysis contained in the GC judgment, would have been helpful. It remains to be seen whether, in any appeal on a point of law, the CJEU - or the GC itself in subsequent rulings – adds to or qualifies the criterion applied in this case.

Napoleón Ruiz (Brussels)

Spain

LEGISLATION

A. The CNC publishes its report concerning the Draft Bill creating the National Markets and Competition Commission

Last March 15, the Council of the National Competition Commission (‘the CNC’) approved the Report on the Draft Bill creating the National Markets and Competition Commission (‘the CNMC’), which will take over the functions that are currently exercised by the National Energy Commission, the Telecommunications Market Commission, the National Competition Commission, the Railway Regulatory Committee, the Airport Economic Regulation Commission and the Postal Sector National Commission.

The report fundamentally criticizes the way in which the draft Bill has been prepared, contrasting it with the much more reflective and consensus-based approach taken in the preparation of the current Spanish Antitrust Law (*Ley 15/2007, de 3 de julio de Defensa de la Competencia*, ‘LDC’). The CNC therefore suggests the need for a more in-depth and transparent procedure, particularly as regards unifying into a single body the specific functions of the competition authority with those of other supervisory and regulatory bodies. The report also points out that the Draft Bill is not accompanied by the corresponding report on the analysis of the impact of the proposed legislation with the resulting lack of any legal, economic and budgetary analysis of the institutional modification.

With regard to the content of the Draft Bill, the CNC notes in its report a series of issues that are not clearly defined and that need to be reconsidered. First, it points to the need for an adequate institutional structure for the application of the LDC which guarantees the functional separation of investigatory and decision-making bodies in the handling of sanctions proceedings. In addition, it suggests that the future legislation should include the basic institutional design of the CNMC, specifying the functioning and the form in which the governing bodies will exercise their functions. The CNC also expresses its concern about the transitional period until the new body is operational, since it considers that the provisions in this regard are insufficient. Similarly, it proposes that regulations should be laid down regarding the employees and civil servants who are to form part of this new body and how they will join the same. Finally, the report deals with the manner in which the CNMC will be financed, of fundamental importance to ensure the adequate funding of the regulatory body and the correct exercise of its functions, while safeguarding its independence from the Government.

Elisa Uría (Madrid)

B. Creation of a Surveillance Unit within the CNC’s Directorate of Investigation

On February 10, 2012, the Council of Ministers approved Royal Decree 345/2012 implementing the basic organic structure of the Ministry of Economic Affairs and Competitiveness. The Second Final Provision of this legislation made two changes to the CNC’s Bylaws, approved by

Royal Decree 331/2008, of February 29, namely the creation of two new units, Surveillance on the one hand and Information Systems and Communications on the other.

The new Surveillance Unit, which forms part of the Directorate of Investigation, will take over the investigatory tasks with respect to the monitoring of compliance with the obligations, decisions and resolutions referred to in article 41 of the Spanish Competition Law (the LDC), as a means of ensuring the fully effective nature of the CNC's declarations.

According to article 41 of the LDC, the CNC must monitor the implementation of and compliance with the obligations laid down in the LDC, together with the decisions and resolutions which are adopted in application thereof, both as regards restrictive conduct and interim measures and merger control. The LDC, in force since 2007, lays down a procedure for termination by way of settlement of behavioral cases, which has led to an increase in such cases and, in turn, of surveillance cases.

The initial years in which the new LDC has been in force have shown that monitoring compliance with the decisions and resolutions adopted by the CNC Council is a priority in order to restore immediately competition in those markets where it may have been eliminated or reduced. This, linked to efficiency reasons, makes it advisable to consider surveillance independently of the investigation of sanctions or merger proceedings, which, in institutional terms, has meant the need to separate the surveillance functions of the four units currently existing in the Directorate of Investigation.

In addition, this Unit will extend its functions to cover allocation and coordination procedures referred to in articles 2, 3 and 5 of Law 1/2002, of February 22, in order to foster cooperation and coordination with the regional competition authorities, particularly as regards the coordination of cases, ensuring the uniform application of the Antitrust Law throughout national territory.

Finally, the Information Systems and Communications Unit will form part of the CNC General Secretariat, being responsible for the preparation and application of the CNC's Information Systems Plan, the management of computer and telematic resources and the provision of technical assistance to and training of CNC users, including assistance in inspections of premises.

Jose Luis Azofra (Madrid)

CNC DECISIONS

A. The CNC sanctions Gestamp and Essa for breach of a duty to notify a concentration

On August 12, 2011, the CNC was notified of the concentration consisting in the purchase by Gestamp Manufacturing Autochassis, S.L. ('Gestamp') and Grupo Estampaciones Sabadell, S.L. and Bonmor, S.L. ('Essa') of joint control of Essa Palau, S.A. ('Essa Palau').

The parties had decided to divide the operation into two parts. First, Gestamp took a 10% stake in the share capital of Essa Palau while an additional 30% was to be acquired subsequently. The parties considered that the initial purchase of the 10% stake did not involve any change of control in Essa Palau and, therefore, could

be done without the CNC's prior approval. However, authorization was required for the implementation of the second part of the operation, i.e. purchase of the 30% stake. Thus, although the parties notified the whole operation to the CNC on August 12, 2011, they did not consider it necessary to wait for clearance before implementing the first part of the operation.

On September 7, 2011, the CNC Council authorized the notified concentration in the first phase on the basis that it did not give rise to competition concerns in the markets concerned. The concentration was also authorized by the German and Czech competition authorities in the first phase.

However, immediately after clearance, on September 14, 2011, the CNC decided to initiate sanctions proceedings against Gestamp and Essa for a possible breach of the obligation to notify concentrations prior to implementation, in accordance with article 9 of the LDC. The reason for this was that CNC considered that the grant to Gestamp of veto rights over the approval of the annual accounts and financial debt operations of Essa Palau in the first part of the operation amounted to joint control of the latter by Gestamp and Essa. Accordingly, the first part of the operation should have been referred to the CNC for clearance.

On January 18, 2012, the CNC Council confirmed the Proposed Decision issued by the Directorate of Investigation ('DI'), considering that the prior implementation of the operation without first obtaining clearance was a violation of article 9.2 of the LDC. As a result, it found Gestamp and Essa liable and fined them €124,400 on a joint and several basis.

It is worth considering the extent to which this Decision amounts to a change of approach by the CNC as regards determining those matters subject to a veto that confer control on a minority shareholder. Thus, the Commission's Guidelines in this area[16] require an examination of the entire operation and the list which they contain is not exhaustive. However, based on the precedents, it is at least debatable whether a veto over the annual accounts and financial indebtedness, without being linked to vetoes over the budget, the business plan, investment or the appointment of directors, would confer control. It will be interesting to see the opinion of the courts in the event that an appeal is lodged against the Decision. In any event, at present it would seem advisable to take particular care with regard to vetoes granted to those with a minority stake because the CNC appears to be widening the definition of controlling shareholder.

Andrea Riba / Yolanda Martínez (Barcelona)

B. The CNC fines Abertis Telecom S.A.U. €13,755,000 for abuse of a dominant position

On February 8, 2012, the CNC Council adopted a Decision[17] in which it found that Abertis Telecom S.A.U ('Abertis') had violated article 2 of the LDC and Article 102 of the TFEU. This violation consisted in an abuse of a dominant position in the wholesale service markets regarding access to its network of premises and Digital Terrestrial Television ('DTT') broadcasting centers in Spain and services for the retail

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[16] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004, on the control of concentrations between undertakings, OJEU C 95 of 16.04.2008, p.1.

[17] CNC Council Decision of February 8, 2012 in Case S/0207/09 *Transporte Televisión.*

distribution transport of DTT signals in the same country, through engaging in the practice of margin squeeze from April 2009 until the present.

Following a complaint by a competitor company, Ses Astra Ibérica S.A, (‘Astra’), the DI commenced sanctions proceedings against Abertis for an alleged abuse of a dominant position in April 2010. It is worth noting that the latter was obliged, by regulation of the Telecommunications Market Commission (‘CMT’), to allow access to its network of premises and DTT broadcasting centers to other operators, on the basis that they constituted an essential asset for the provision of the service of the transmission and broadcast of the TDT signal. The DI found that, in view of the price and other conditions on which Abertis provided access to its centers, competitors as efficient as it had no margin to operate in the market for the distribution transport of the TDT signal. In other words, Abertis engaged in the anticompetitive conduct known as margin squeeze. Accordingly, the CNC Council found a breach of the above-mentioned provisions to exist and fined the company €13,775,000.

Finally, it should be noted that Abertis has already been sanctioned for abuse of a dominant position in May 2009[18] with respect to practices that led to market foreclosure, by imposing abusive conditions and an excessive duration in the contracts entered into with other companies in the sector and for having offered discounts for joint broadcasting contracts in all territories, leading to foreclosure in the market for the transmission of the broadcasting signal to these operators.

Elisa Uría (Madrid)

C. The CNC imposes fines totaling more than €11m on various cement companies for participating in a cartel

In its Decision of January 12, 2012,[19] the CNC Council imposed fines of between €500,000 and €5,700,000 on Canteras de Echauri y Tiebas, S.A. (‘Cetya’), Cementos Portland Valderrivas, S.A. (‘CPV’), Hormigones Beriain, S.A. (‘Berian’), Cemex España, S.A. (‘Cemex’) and Canteras y Hormigones Vre, S.A. (‘Vresa’) for fixing the prices of concrete, mortar and aggregate and participating in a market sharing agreement in the Navarre province and adjacent areas from June 2008 until September 22, 2009.

The case arose following a complaint filed against three cement companies (CPV, Cetya and Berain) which attached transcripts of recordings of telephone conversations and meetings held between different companies, plus other supplementary documents. The preliminary information-gathering phase was opened and inspections took place of the premises of the companies complained of as well as Holcim and Cemex, and on December 15, 2009 the DI commenced sanctions proceedings for breach of article 1 of the LDC.

In its Decision of January 12, 2012, the CNC Council found that the companies concerned had (with varying degrees of participation) entered into agreements for the fixing and gradual increase of the prices of concrete, aggregate and mortar, and to share the market for these products. These agreements were implemented through a system of allocation of the building works to which the participating companies could supply these products within each of the

[18] CNC Council Decision of May 19, 2009 in Case 646/08 *Axión/Abertis*.

[19] Case S/0179/09 *Hormigón y productos relacionados*.

defined areas in accordance with quotas established by them. These concerted practices materialized through meetings and telephone calls.

Although some of the companies alleged that the documents which, according to the DI, showed their compliance with the agreement were nothing more than their internal estimates and many of the building works were ultimately not carried out by the companies, the Council decided that the evidence gathered from the inspections showed that the agreements existed and had been complied with, apart from the fact that the cartel amounted to a *per se* violation, there being breaches which did not reduce the liability of the cartel members.

In relation to the geographic market, the companies alleged that it was smaller than that of the Navarre province, although the CNC Council responded by differentiating between 'relevant geographic market' and 'geographic market concerned'. Thus, the former established the territory where the competition conditions were relatively homogeneous in order to analyze the impact on the possible anti-competitive behavior, while the latter was the geographic area in which the infringement in question took place or was capable of producing effects on the actual competition conditions. In addition, the CNC Council stated that the companies concerned themselves defined the geographic market in question through their agreements, dividing the territory into at least six geographic areas and assigning quotas to each of them. The fact that some companies did not operate in all of these areas or did not produce all of the products did not prevent the conclusion being reached that they were all responsible for a single cartel infringement, which was defined in the LDC as '*any secret agreement between two or more competitors whose purpose is the fixing of prices, production or sales quotas, market sharing, including bid rigging, or the restriction of imports or exports.*'

María Antonia Labrador (Madrid)

D. The CNC fines Iberdrola more than €10 million

On February 24, 2012 the CNC Council adopted a Decision in *Iberdrola Sur*, in which it declared that Iberdrola, S.A. ('Iberdrola), Iberdrola Comercialización de Último Recurso, S.A.U. ('Iberdrola CUR') and Iberdrola Distribución Eléctrica, S.A. ('Iberdrola Distribución') had breached article 3 of the LDC, concerning the distortion of free competition through unfair acts. As a result, the companies in question were fined €10,685,000 on a joint and several basis.

The context in which the anti-competitive conduct took place was the liberalization of the retail market for the supply of electricity, with the entry into operation of the last resort supply ('SUR') system and the last resort tariff ('TUR') on July 1, 2009. In this liberalization process, two types of consumers may be distinguished: (i) consumers who qualified for the TUR, namely those who consume electricity via a low voltage connection with a contracted power of up to 10 KW; and (ii) consumers who do not qualify for the TUR, namely those with a high voltage connection and low voltage users who consume more than 10KW.

With the entry into force of the SUR on July 1, 2009, the second type of consumers, who, until then, had been supplied under the tariff system, had to switch to being supplied under free market conditions. Nevertheless, to avoid these clients being automatically cut off, the legislation provided that customers without any right

to SUR who had not entered into a supply contract with a supplier when the SUR came into force had to be supplied by the supplier of last resource ('CUR') of the business group which owned the distribution network for the area in which they were located. In such cases, the price paid by these consumers for electricity consumed was not the TUR but rather it included a penalty aimed at encouraging the signature of the contract in question, culminating with the service being cut off on December 31, 2012.

In this context, the specific conduct for which the Iberdola Group companies were fined was that after Iberdrola CUR had, in accordance with the sectoral regulations, taken on responsibility for supplying 470,791 consumers who found themselves in the situation described above, 268,001 of these consumers were automatically transferred from Iberdrola CUR to Iberdrola, the group company responsible for supplying electricity in the free market.

Accordingly, the conduct which the CNC found to be a breach of the LDC consisted in the transfer of contracts from the CUR to the free-market supplier without first obtaining the consumer's express consent, as required by the applicable legislation. According to the CNC, this led to a significant increase in the number of consumers who were loyal to IBERDROLA, and therefore the conduct effectively reduced the size of the market that other suppliers could reasonably capture and strengthened barriers to entry.

This is not the first time that the CNC has fined electricity companies for violations of the competition rules in relation to the liberalization of the electricity market. Thus, with respect to Iberdrola Group companies, the CNC has previously imposed two fines, one of €15 million on Iberdrola Distribución in *Centrica/Iberdrola*[20] and the other of €17,865,000 on Iberdrola in *UNESA y Asociados*.[21]

Desiré Martín (Madrid)

E. The CNC fines maritime transport companies which operate in the Balearic Islands for participating in a cartel

In its Decision of February 23, 2012, the CNC Council found a violation of article 1 of the LDC to have been committed by the following shipowners: Compañía Transmediterránea S.A. ('Transmediterránea'), Balearia Eurolíneas Marítimas S.A. ('Balearia'), Isleña Marítima de Contenedores S.A. ('Iscomar'), Servicios y Concesiones Marítimas de Contenedores S.A. ('Sercomisa') and Mediterránea Pitiusa S.A. ('Mediterránea Pitiusa').[22]

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[20] CNC Council Decision of April 2, 2009 in Case 644/08 *Centrica/Iberdrola*, in which Iberdrola Distribución was sanctioned for refusing to give Centrica unconditional and mass access to its Supply Point Information System, and for discriminatory treatment of competitors of the group's supplier, Iberdrola, in relation to access to information on clients.

[21] CNC Council Decision of May 13, 2011 in Case S/0159/09 *UNESA y Asociados*, in which Iberdrola was fined a total of €21,612,000 for different types of conduct. For the specific market liberalization infringement, i.e. obstructing the change of supplier in the market for the supply of electricity to small clients, it was fined €17,865,000.

[22] CNC Council Decision of February 23, 2012 in Case S/0244/10 *Navieras Baleares*.

The case arose following a complaint lodged in April 2010 by Consell Insular de Ibiza for possible anticompetitive conduct in the Balearic maritime transport market. Dawn raids of the headquarters of various companies were then carried out, which resulted in the DI deciding to commence sanctions proceedings against Balearia, Transmediterránea and Iscomar. Subsequently, two more companies, Sercomisa and Mediterránea Pitiusa, were also joined as defendants.

According to the CNC Council, the illegal conduct consisted in entering into agreements to fix prices and other conditions (commercial, service, production limitation and market sharing) in relation to the maritime transport of goods and passengers between the Spanish mainland and the Balearic Islands and between the islands themselves. First, the CNC found a cartel to exist on the Mainland-Balearic Islands routes which had lasted for nine years, between 2001 and 2010, which Balearia, Transmediterránea e Iscomar had formed part of. In addition, the Council also found that Balearia, Sercomisa and Mediterránea Pitiusa had agreed to share out the maritime transport market between Ibiza and Formentera between 1995 and 2011. For all of the above reasons, the Council fined shipowners a total of €54 million, Transmediterránea being hit with the single biggest fine (€36.1 million).[23]

[23] In the case of Transmediterránea and its subsidiary Europa Ferrys S.A. (‘Europa Ferrys’), this fine is in addition to that of €2 million imposed five months previously for obstructing the inspection work of the DI in the searches of the premises carried out at its headquarters, the highest sanction imposed to date by the CNC for a violation of this type. See the CNC Council Decision of September 21, 2011 in Case SNC/0014/11 *Transmediterránea* and Antitrust Newsletter no. 24 (November 2011).

Two aspects of the Decision deserve special attention. As regards the first type of conduct, the Council considered that a single continuous infringement over time existence, reflected in the evidence of the holding of meetings, agreements, draft agreements, and minutes of meetings or conversations over a decade that were progressively specified through different forms of anticompetitive cooperation with a common purpose: to obtain maritime transport services between the Spanish mainland and the Balearic Islands that were more profitable than would have been the case had competition existed. To this end, the companies coordinated their behavior through various basic parameters or behavioral elements (eg prices, exchanges, surcharges, discounts, withdrawal of vessels, etc.).

The Council has also pointed out the anticompetitive intentions of the cartel participants and their knowledge of the illegality of the behavior, having presumably agreed the application of small price differences at different moments in time and not always to all clients, the point of which was to cover up certain agreements which, if they had been applied with identical parameters, would have looked suspicious. According to the Council, where isolated breaches of these agreements took place, whether real or apparent, the immediate reaction was to censure the conduct and to pressurize the firm in question to ‘toe the line’ and comply with the agreements. Although the facts related more to one period than another, the Council found that the information available, despite being fragmented and dispersed, was sufficient to show the consistency, coordination and complementary nature of the parts of an overall plan to achieve a common anticompetitive goal.

With respect to the second type of behavior, the Council considered that it had not been shown that Mediterránea Pitiusa and Sercomisa knew and contributed to the overall plan to restrict competition on routes between the Spanish mainland and the Balearic Islands, routes on which they did not even provide a service. Accordingly, the Council defined the practice concerning the transport of passengers between Ibiza and Formentera as an independent infringement, isolated from the former and put into practice through specific instruments.

It is equally striking that the DI proposed to the CNC Council that the fine imposed on Balearia be significantly reduced – this company had filed a leniency request after the inspections were carried out – yet the Council rejected the request, taking the view that the attitude of Balearia could not be defined as '*full, continuous and diligent*', given that the company (i) made up to ten oral declarations; (ii) waited more than five months before providing fresh evidence concerning the first type of conduct and almost one year with respect the second conduct; and (iii) did not bring an end to the infringement concerning the second type of conduct at the time of adducing the evidence which accompanied its leniency request.

According to the Council, Balearia failed to comply with the cumulative requirements laid down in the LDC. Therefore, despite the fact that it provided evidence which made it possible to (i) increase the infringement period with respect to maritime transport between the Balearic Islands and the Spanish mainland; and (ii) to include Mediterránea Pitiusa as regards the illegal conduct on the Formentera-Ibiza line, its cooperation was only defined as a mere mitigating circumstance.

It is worth noting that the maritime transport sector has been in the competition authorities' sights for the last ten years. Thus, last year the CNC fined various maritime transport companies (including Balearia and Transmediterránea) for engaging in similar anticompetitive conduct,[24] and fines have also been imposed in other earlier cases.[25] In any event, the Decision of February 23, 2012 is unlikely to be the last one, since sanctions proceedings are currently on foot against various shipowners for an alleged breach of article 1 of the LDC.[26]

Álvaro González (Madrid)

F. The CNC fines Endesa Distribución Eléctrica for breach of a dominant position

Last February 21, 2012, the CNC Council imposed[27] on Endesa Distribución Eléctrica, S.L.U. ('EDE') two fines of €14,967,960 and €8,158,000 for two types of conduct; first, a breach of article 6 of the former Spanish Antitrust Law (Law 16/1989) and Article 102 TFEU, and second, conduct contrary to article 2 of the LDC, consisting

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[24] CNC Council Decision of November 10, 2011 in Case S/0241/10 *Navieras Ceuta 2.*

[25] See CNC Council Decisions of September 8, 2010 in Case S/0080/08 *Navieras Línea de Cabotaje Ceuta-Algeciras* and the now defunct Spanish Antitrust Tribunal ('the TDC') of July 21, 2004 in Case 555/03 *Líneas Marítimas Estrecho*; of May 26, 2004 in Case 561/03 *Líneas Marítimas Estrecho 2* and of June 13, 2003 in Case 543/02 *Transmediterránea/Euroferrys/Buquebús.*

[26] Case S/331/11 *Navieras Marruecos* (pending decision).

[27] CNC Council Decision of February 21, 2012 in Case S/0211/09, *Endesa Instalación.*

in, respectively, preventing the development of effective competition in the market for electrical installations that were not reserved to the distribution company and the payment for the carrying out of the work of connecting the extension installation to the distribution network.

In the same sanctions proceedings, the CNC ruled out the existence of any abuse as a result of favoring the supplier of the sanctioned group by using EDE's business names and trademarks in the offers made for various unregulated services.

According to its own precedents in the sector,[28] the CNC identified two relevant markets in its Decisions. In the first place, the electricity distribution market, operated exclusively by distributor companies, which covers all of those activities which aim to ensure that electricity reaches final consumers from the high voltage transmission network.

Secondly, the electricity installations market, which, in turn, is sub-divided into the market for electrical installations reserved to distributors (work necessary for the connection to the distribution network of the receptor installations of the final users) and the electricity installations which are not reserved to the distributors. In the latter case, each final user may contract the services of any authorized installer in order to carry them out.

According to the electricity sector legislation,[29] with respect to the carrying out of certain non-reserved installations, to connect a new supply point to the network, the manager of the distribution network (the distribution company) must notify the technical and economic information required to the client so that the latter may choose the installation company on market conditions. There is also a legal obligation not to charge for this service, i.e. EDE must itself bear the cost of the connection work.

First, the CNC found that EDE infringed the first of the obligations described above when, in its capacity as the distributor, it took advantage of the privileged information which it had as a result of holding that position, thus giving it an advantage over other installation companies, by providing certain clients or their representatives with specific estimates for the carrying out of the connection work. In other words, EDE used its privileged position to choose the largest installations in the market, making it difficult for other operators to compete with it on an equal footing.

As regards the second type of conduct, the CNC considered that EDE abused its dominant position by charging clients for

[28] CNC Council Decision of September 20, 2011 in Case S/0089/08, *Unión Fenosa Instalación* and CNC Council Decision of September 20, 2011 in Case 2795/07 *Hidrocantábrico Instalación.*

Decision of the now defunct TDC, of December 14, 2006 in Case 606/05, *Asinem-Endesa.* The definition of markets contained in this Decision was subsequently confirmed by the judgment of the National Appeals Court (*Audiencia Nacional*) of April 21, 2008 (6th Legal Ground) JUR 2008\170828 and the judgment of the Spanish Supreme Court of February 10, 2011 (8th Legal Ground) RJ 2011\384.

[29] See articles 41 and 42 of Electricity Sector Law 54/1997, of November 27 ('LSE'), Official Gazette (BOE) no. 285, of November 28, 1997, together with article 44 *et seq* and article 103 of Royal Decree 1955/2000, of December 1, governing the activities of transport, distribution, marketing, supply and procedures for the authorization of electrical energy installations, Official Gazette (BOE) no. 310 of December 27, 2000.

the carrying out of connection work. The competition authority took the view that EDE breached the obligation contained in the legislation not to charge the price in question for the service. As a result, the CNC considered that the profit in question had been illegally earned from the clients because it was the result of abusive behavior in the market.

With this Decision, the CNC continues its ongoing task of controlling the Spanish electricity sector and of applying the legislation which liberalizes the market in question.

Ismael Gutiérrez (Barcelona)

RECENT LAW CASE

The Supreme Court confirms a fine of more than €38 million imposed by the TDC on Iberdrola for abuse of a dominant position

Last January 30, 2012, the Spanish Supreme Court passed judgment in the appeal brought by Iberdrola Generación, S.A.U. ('Iberdrola') against the ruling of the National Appeals Court (*Audiencia Nacional*) of July 2, 2009 rejecting the claim for judicial review brought by Iberdrola (the 'Contested Judgment'). The original action had been brought by Iberdrola against the Decision adopted by the TDC in plenary session in Case 601/05 in which the company was fined €38,710,349 for abuse of a dominant position. The illegal practice in question consisted of offering prices in the electricity spot market aimed at causing a technical restraint situation in which it would be the only offeror. According to the TDC, this conduct was continuously engaged in between December 18, 2002 and May 27, 2003 with regard to the Castellón power station and between October 25, and December 31, 2003 with regard to the Escombreras 4 and Escombreras 5 power stations.

Iberdrola based its case on three grounds. First, it argued that the TDC had substantially altered the accusation prepared by the Spanish Competition Service ('the SDC'), in breach of article 24 of the Constitution. Thus, the TDC's accusation diverged from the legal assessment contained in the Statement of Objections and the Report-Proposal prepared by the SDC and, although the TDC considered that the same infringement had been committed (abuse of a dominant position under article 6.1 of the LDC), it defined this in terms of an offer to supply electrical energy at excessively high prices in order that this would not be matched and that it would be required in the technical restraints phase, which was different from the SDC's description of the violation (limited to the supply of electricity at abusive prices on two specific days). In addition, new facts were added (the supply of electricity from the Escombreras 5 power station in 2003 is included and longer periods were contemplated for the supply from the Castellón 3 power stations throughout 2002 and 2003 and Escombreras 4 in 2003, instead of a single day for each of these two power stations).

In this regard, the Supreme Court rejected the contention that, with respect to administrative sanctions proceedings, the new definition contained in article 43 (currently article 51) of the LDC could only consist in a change in the definition of the offence committed, without there being the slightest alteration of the facts pleaded as coming within in the defined conduct in question. It therefore dismissed the first ground of the appeal, concluding that there was neither a breach of the accusatorial principle nor of the defendant's defense rights, since at all times the company was aware of the accusations made, which was

always related to the same conduct and it could make allegations and defend itself at all times.

As regards Iberdrola's second ground, that no abuse of a dominant position existed, both the TDC and, subsequently, the National Appeals Court relied on two presumptions in reaching the opposite conclusion: (i) with respect to the comparison with the previous prices offered by the power stations concerned, that it must be supposed that these prices were above cost, unless the economically irrational behavior of operating at a loss was accepted; and (ii) with respect to the comparison with prices at which demand for electricity was being matched in the periods concerned, that if they were offered at markedly higher prices than those at which supply and demand was normally matched in the spot market this clearly showed that Iberdrola's intention was that its offers should not be matched. Given the dominant position of its power stations in the areas in question, this inevitably meant that they would be called on to resolve the technical restraints.

In this regard, the Supreme Court considered that Iberdrola could easily have rebutted both presumptions, which were perfectly legitimate and appropriate to show the existence of the conduct in question, simply by providing the real data relating to its operating costs. Thus, by not adducing this evidence in either the administrative or court proceedings, the Supreme Court concluded that these presumptions acquired sufficient credibility to enable the court to find the existence of an abuse of a dominant position by Iberdrola.

With respect to the third ground, Iberdrola claimed that the Contested Judgment reversed the burden of proof. This allegation was rejected by the Supreme Court, since the Contested Judgment: (i) declared certain undisputed facts to be proved, that is, the prices at which electricity was offered during certain periods and that this behavior usually gave rise to a technical restraints situation arising as a result of such offers not being matched; and (ii) presumed that such prices were not justified by the costs, given that in other periods electricity was offered at lower prices and that this behavior was aimed at causing a technical restraints situation in areas where Iberdrola had a dominant position in the production of electricity. The Court also added that Iberdrola had at its disposal the means of rebutting these presumptions by simply producing data on its own real costs, and it made no attempt whatsoever to do this.

It should be noted that one judge dissented from the majority's interpretation of article 43 of Law 16/1989 (now article 51 of the LDC) on the basis that the Supreme Court's approach was 'new'. Thus, until this judgment, the Supreme Court had considered that the provision in question makes possible a legal definition of the conduct which was the subject matter of the sanctions proceedings different from that proposed in the statement of objections, but in any event complying with the applicable limit of the same facts contained in said statement of objections.

This judgment diverges from the Supreme Court's approach in its rulings of January 27, 2010[30] and January 28, 2010,[31] which annulled the decisions of the TDC which had found certain sporadic conduct by electricity generating companies called on to resolve technical constraints situations to be an abuse of a dominant position.

Enrique Ferrer (Madrid)

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[30] Decisions 12078/2007 and 5569/2010.

[31] Appeal 1278/2007.

Portugal

Bill to amend the Portuguese Competition Law

On March 22, 2012, the Portuguese Parliament approved a Bill introduced by the Portuguese government to amend the Portuguese Competition Law 18/2003, of June 11, 2003 and the Portuguese Leniency Law 39/2005, of August 25, 2005.

The revision of the Portuguese competition legal framework was one of the commitments given by the Portuguese government to the European Commission, the European Central Bank and the International Monetary Fund, in the context of its request for financial support.

The most notable features of the proposed amendments are the following:

The Bill gives the Portuguese Competition Authority ('the PCA') more discretion to determine how to carry on its activity, as it will be less constrained by the principle of legality, which determines that all complaints received must be investigated, and more able to act according to the principle of appropriateness, notably by assessing the relevance of the complaints submitted and deciding which cases to pursue so as to promote competition and protect the public interest.

Regarding the transactions subject to mandatory notification, the Bill keeps the two main tests currently in force to determine which transactions must be notified (turnover and market share), while changing the thresholds for notification. The following transactions must be previously notified to the PCA: (i) transactions leading to the creation or strengthening of a market share equivalent to or exceeding 50% in the national market for a given product or service, or a substantial part thereof; (ii) transactions leading to the creation or strengthening of a market share equal to or exceeding 30% and below 50% in the national market for a given product or service, or a substantial part thereof, provided that the individual turnover in Portugal of at least two of the undertakings concerned exceeded €5 million in the previous year; or (iii) where the turnover of the undertakings concerned in Portugal exceeded €100 million in the previous year, provided that the individual turnover in Portugal of at least two of the undertakings concerned exceeded €5 million.

The procedural rules applicable to the investigation by the PCA of restrictive practices, as well as the rules applying to the assessment by this authority of concentrations subject to mandatory notification, have been greatly broadened, to widen the scope of matters being regulated. In particular, the powers of the PCA to investigate restrictive practices have been extended and in some cases clarified. A notable example is the power of the PCA to make household searches (regarding partners, directors or employees of the undertakings) and seal computers or other electronic storage equipment.

Lastly, by contrast to the procedure under the current rules, with respect to the judicial review of a decision adopted by the PCA determining the imposition of fines, under the Bill the appeal would not generally have the effect of staying the proceedings and, therefore, the infringing undertaking would not be able to wait for a final court ruling before paying the fine. Another important change proposed in this regard is that the court would have the power to increase the fines imposed by the PCA.

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