



EUROPEAN COMPETITION LAW REVIEW

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Poland

ANTI-COMPETITIVE AGREEMENTS

Health & Safety Certification—market sharing—leniency application—infringement decision

☞ Anti-competitive practices; Cartels; Certification; Fines; Health and safety policy; Leniency programmes; National competition authorities; Poland

On 29 December 2017 the President of the Office of Competition and Consumer Protection adopted a decision on a cartel on a national market for services of certification. Anti-competitive practices implemented by Istituto Italiano del Marchio di Qualita SPA from Milan (Italy) and Dekra Certification, LLC, from Wrocław (Poland) concerned an agreement to allocate clients and an agreement upon conditions of offers for services of certification in ISO 9001 (quality management system); ISO 14001 (environmental management system); OHSAS 18001/PN-N 18001 (workplace safety system) and ISO 27001 (security management system). Both companies agreed that they would not submit offers to incumbent clients attributed to each of them. Potential new clients were allocated due to a system of agreed offers. Arrangements were put in place during “accidental” meetings of managers of both companies. Even though a well-known Italian entity was engaged in the practice, the cartel decision is based solely on a national Competition Act because anti-competitive practices covered only the Polish market.

The President of the Office of Competition and Consumer Protection initiated an explanatory proceeding (under the Polish Competition Act such a proceeding can precede an antitrust proceeding) and inspected Dekra on 7 May 2014. Dekra subsequently submitted a leniency application, and on 20 May Istituto Italiano del Marchio di Qualita SPA also applied for leniency. The antitrust proceeding was formally initiated on 30 January 2015.

Dekra was successful in its leniency application and received full immunity. The Polish competition authority fined Istituto Italiano del Marchio di Qualita SPA a sum of 461,000 PLN (c. €115,000).

Prof. Agata Jurkowska-Gomułka
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Portugal

MERGER

Distribution—Liquified Petroleum Gas—proceed to full phase II investigation

☞ Acquisitions; Investigations; Liquefied petroleum gas; National competition authorities; Portugal

On 23 January 2018, the Portuguese Competition Authority (PCA) announced its decision to open an in-depth investigation with respect to the acquisition by RUBIS II Distribuição Portugal, S.A. (“Rubis”) of the assets part of the distribution business of Repsol Gás Portugal, S.A. (“Repsol”) in the Portuguese autonomous regions of Azores and Madeira.

The distribution of liquified petroleum gas (“LPG”) in those regions is currently made through pipelines, in bulk and bottles by three operators: Rubis and Repsol, the merging operators, and Galp. Since, as a result of the merger, the number of operators in the markets of supply and distribution of LPG in Azores and Madeira would be reduced to two, the PCA decided to proceed to a phase II investigation, concerned that this acquisition will significantly restrain competition and have a negative impact on the supply conditions of LPG to final consumers.

The PCA will now carry out further investigations, including assessing whether new operators are likely to enter the mentioned markets and compete with the existing ones. Clearance will now depend on whether the

PCA considers that the operation, as notified or as a result of commitments possibly offered by Rubis, is or is not likely to create significant barriers to competition in the markets concerned.

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PROCEDURE

Damages Directive—request for preliminary ruling—follow-on damages claim—entry into force of directive

☞ Competition law; Directives; EU law; Implementation; Portugal; Private enforcement

On 30 January 2018, the Court of Justice of the European Union ("CJEU") published a request for a preliminary ruling lodged by the Lisbon Civil Court on 15 November 2017 regarding the application of the EU Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU, "Directive") to an action filed in Portugal by Cogeco Communications Inc ("Cogeco") against Sport TV Portugal, SA ("Sport TV"), Controlinveste-SGPS, SA ("Controlinveste") and NOS-SGPS, SA ("NOS") (altogether "Defendants"), in which Cogeco is seeking compensation for damages in the amount of €11.5 million, following a decision of PCA imposing Sport TV a fine for abuse of dominance which occurred prior to the Directive being voted by the European Commission.

The referral, comprising six questions, respects the clarification on whether the European Commission's deadline for transposition of the Directive, which elapsed on 27 December 2016, can be deemed as the date from which the Directive is applicable vis-à-vis a private party. In addition, advice is also sought on whether the Directive can be applied to facts occurred before its publication, entry into force and transposition into national law.

This referral—and the corresponding future Court ruling—is of a particular importance because Portugal has failed to transpose the Directive within the prescribed deadline.

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ABUSE OF A DOMINANT POSITION

Stock market—defence of contractual rights—competition authority action—unsuccessful

☞ Abuse of dominant position; Multilateral trading facilities; NASDAQ; National competition authorities; Sweden

On 15 January 2018 the Patent and Market Court found that Nasdaq had not abused its dominant position—dismissing the claims of the Swedish National Competition Authority (SCA). The decision was reached after a several-weeks-long trial taking place in September and October last year.

The SCA argued that Nasdaq had abused its dominant position in the stock exchange market when urging the data centre Verizon to refuse the multilateral trading facility Burgundy access to its hub in 2010. The SCA argued that Nasdaq's actions led to the exclusion of Burgundy from the European market for trade services in transparent order books in Danish, Finnish and Swedish stocks. The Patent and Market Court concluded that Nasdaq held a dominant position in 2010, inter alia, referring to the fact that Nasdaq held 60–90 per cent of the market and the significant barriers to entry in the relevant markets. However, the court rejected the SCA's claims