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The Portuguese Competition Authority fines a TV sport channel for abuse of dominance (Sport TV)

Portugal, Unilateral practices, Abuse of dominance, Distribution agreement, Price discrimination, Sports, Entertainment

Portuguese Competition Authority (Autoridade da Concorrência), Sport TV Portugal, 6 June 2013

EUCLH Ref. PT44

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On 6 June 2013, the Portuguese Competition Authority (*Autoridade da Concorrência*, AdC) sanctioned *Sport TV Portugal*, S.A. (hereinafter, "*Sport TV*"), for an alleged abuse of its dominant position in the Portuguese market for TV access to premium sports content, in violation of article 6 (abuse of dominant position) of the 2003 Competition Act (Law 18/2003, of June 11) [1] and article 102 of the Treaty on the Functioning of the European Union (TFEU) [2].

Although under the former Competition Act there was a very vivid dispute on whether the *AdC* could enforce article 102 TFEU and the Lisbon Commercial Court considered in its decisions that, in any case, the *AdC* could not apply sanctions under Regulation (EC) 1/2003 nor under the 2003 Competition Act for the breach of articles 101 or 102 TFEU, it is worth noting that in this case the *AdC* considered that the practices in question, by affecting the competitive structure of the *pay-tv* market in Portugal, leading to the isolation of the national market and, consequently, to the partition of the single market, would be in breach of article 102 TFEU.

The decision in this PRC-2010/02 is the result of an investigation formally initiated in July 2010, following a July 2009 complaint by pay-TV operator *Cabovisão - Televisão por Cabo, S.A.* ("*Cabovisão* ") concerning the mandatory compensation fee demanded by *Sport TV* on its distribution agreements for the supply of its channels, which allegedly conferred upon one of the competitors on the pay-tv retail market – *Zon Multimédia* – a commercial advantage over its rivals. In fact, according to the *AdC*, by imposing discriminatory prices and unequal and unfair commercial conditions with vertical effects on the downstream media market to the various pay-TV operators (which were considered to provide identical or equivalent services), *Sport TV* systematically and continually restricted the access to TV sports content to other operators. In other words, from January 1, 2005 until April 1, 2011 (the period of time when the compensation model was in force), *Sport TV* selectively cut its price to the one customer with whom it had corporate links, whilst charging excessively high (and

arguably exploitative) prices to the other pay-TV operators, thus limiting the "production, distribution, technical development and investments" (*vide* Article 102 (2) (b) TFEU) in relation to the services concerned, penalizing certain operators to the detriment of competition and consumers.

It is relevant to note that in Portugal, as in most EU Member States, there is a tendency to consider premium sports channels (which broadcast the games of top European football leagues and other major sport events) as a "must have" product for pay-tv operators [3]. In addition to that, at the time of the proceedings, *Sport TV* was the only pay-tv premium sports channel in Portugal and it was – and still is, despite the current complex merger proceeding currently pending before the *AdC* [4] - jointly-owned (50%/50%) by *Sportinveste, SGPS, S.A.* (which has been acquiring the Portuguese football league broadcasting rights over the last seasons as well as other relevant European Leagues, amongst them the Spanish, Italian, German, French or English [5] football leagues), and – not surprisingly - by *ZON Multimédia*, the incumbent pay-tv operator and the dominant player in the Portuguese triple-play market.

In Portugal, under Article 43(1) (a) of 2003 Competition Act (as under article 69 (2) of the 2012 Competition Act), abuses of a dominant position may be punished with a fine of up to 10% of the turnover of the infringing company in the last year before the decision. Taking into account the seriousness of the infringement, the *AdC* imposed a fine in the amount of €3.73 million [6], which corresponded to 2.5% of *Sport TV*'s turnover in 2012 for that period, as well as the accessory sanction of requiring the company to publish an excerpt of the decision in the Official Journal of the Portuguese Republic (*Diário da República*) and in a major national newspaper.

Sport TV lodged an appeal before the *Tribunal da Concorrência, Regulação e Supervisão* (Court of Competition, Regulation and Supervision [7]). Under the 2003 Competition Act appeals against AdC decisions applying fines have to be lodged within 20 working days from the notification of the infringement decision [8] and the appeal has a suspensive effect [9]. According to a *Sport TV communiqué*, the grounds where basically an infringement of the rights of defense, the infringement the right to a swift decision (proclaimed in article 6 of the so-called European Convention of Human Rights) and a violation of the principle of proportionality. Specifically, *Sport TV* argues that the compensation model was implemented since the incorporation of the company in 1998, and it was created to "address intensive principal needs, financing of high fixed investments, safeguarding of a commercial dynamics able to ensure the increasing of the channel sales, preventing and facing of the piracy phenomenon and adjusting the company's activity to the current practices of trading of TV channels with a premium content". *Sport TV* also states that the compensation model was reviewed in 2004 as to comply with the monitoring obligations imposed by the Competition Authority [10].

In the misdemeanor proceedings, there was also an intense debate on whether the fact that *Sport TV* has kept the *AdC* aware of any and all the relevant modifications in the contractual arrangements in this area would create legitimate expectations about the lawfulness of the conduct by the defendant, which the *AdC* dismissed invoking in the *FAQ* press release the *Ziegler* General Court decision [11]. This issue is of utmost interest to private parties and lawyers in the decentralised system adopted with Regulation 1/2003 that, as we all recall, has eliminated the centralised exemption power of the European Commission (under article 101) and made self assessment a central feature in the evaluation of restrictive practices under competition law both under EU and national law (in 101 or 102 TFEU or the equivalent national rules).

The charge of discriminatory and exploitative prices by a dominant undertaking may affect the competitive structure of the market, especially in a highly concentrated market like the pay-tv market in Portugal, and the result of excluding competitors or potential competitors. Consequently, if a dominant undertaking engages in the practice of price discrimination with the recourse of methods which are different from those of normal competition, the competition authorities tend to declare for an abuse to exist.

Nevertheless, questions have been raised regarding what directions should the *AdC* issue as to future behaviour, and if the issue of such directions will require a continuous surveillance of all distribution agreements *Sport TV* or other premium sports channel provider (e.g., in Portugal, *Benfica TV*) enter into with the pay-TV operators and a more effective monitoring of the compensation model in effect. Given the complexity of the analysis and the huge amount of information about the market needed (which frequently lack), and the nature of competition law enforcement, it is not a task for the competition regulator to – or of the Courts of law – determine the correct level of prices in any given market. It is therefore not surprising that the *AdC* – and the generality of the competition authorities across the EU - tend to deploy their resources only against clear-cut exclusionary conducts by dominant undertakings rather than establishing themselves as price regulators [12]. Only by focusing on those types of conduct, enforcement authorities may direct their powers to ensure that markets function properly and that consumers ultimately benefit from the efficiency and productivity which result from effective competition.

I would like to acknowledge the collaboration of the Sérvulo team and, particularly, that of Luís Bordalo e Sá.

[1] Although the 2012 Competition Act (Law 19/2012, of 8 May) is in force since July, 7 2012, the former Competition Act remains applicable to infringement procedures opened prior to the entry into force of Law 19/2012 (article 100 (1) (a) of Law 19/2012, of 8 May). As for the 2012 Competition Act, see *Lei da Concorrência – Comentário conimbricense*, M. Gorjão-Henriques (Dir.) (M. Lopes Porto/J. L. Cruz Vilaça/Carolina Cunha/M. Gorjão-Henriques et al. – Coord.), Almedina, Coimbra, 2013.

[2] The full text of the decision was not disclosed to the public and an appeal is still pending before the Court of Competition, Regulation and Supervision. The *AdC* only published on its website a press release (dated 20 June 2013), still not available in English, that may be consulted at http://www.concorrencia.pt/vPT/Noti... . Also, it is worth noting that at least in one of the former five cases of abuse of dominant position (since 2007 until 2013, one per year, except in 2011) the *AdC* seems not to have concluded for a breach of article 102 of the TFEU (or of former article 82 EC). On 12 April 2012 (Case No. 10/8), the *AdC* found that *Roche* has abused its dominant position in the context of public procurement procedures for the supply of pharmaceutical products to hospitals and applied a fine of EUR 900.000.

[3] See, in that regard, for example, Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/ 37398 — Joint selling of the commercial rights of the UEFA Champions League), para. 71, and Competition Decision of of 11 June 1993, *EBU/Eurovision* (Case IV/32.150 - Joint acquisition and exchange of sport media rights), para. 11. Also, Competition Commission UK, *Movies on pay TV market investigation - A report on the supply and acquisition of subscription pay-TV movie rights and*

services, 2010, that concluded, among other things, "[c]ontent is a 'must-have' element of a TV service for most people" and that "results suggest that, although sports are regarded as important by more consumers, access to movies could prove to be a significant factor in many consumers' choice of pay-TV provider."

[4] Concentration no. 4/2013. On 28 January 2013, the transfer of 50 percent of *Sport TV* from *Controlinveste Media to Portugal Telecom* and *Zon Multimedia* was notified to the Portuguese Competition Authority. However, on 22 August 2013, the Competition Authority has decided to launch an in-depth investigation into the operation which is still pending. In fact, the *AdC* has doubts about the effects of the so-called "triangle operation" on the market for broadcasting rights for premium sports content, the market for conditional access channels with premium sports content and the markets for premium sports content for internet and mobile markets. Nevertheless, an appeal is already pending before the Court of Competition, Regulation and Supervision concerning the alleged violation by the *AdC* of the time limits to adopt a decision. Under article 50 (4) of the 2012 Competition Act, "[w]here a decision has not been taken within the time limit as stipulated in paragraph 1 of the previous article [i.e. 30 working days], a non-opposition decision is deemed to have been adopted concerning the proposed concentration between undertakings". Finally, on 22 January 2014, the Portuguese Regulatory Authority for the Media (*Entidade Reguladora para a Comunicação Social – ERC*) declared its opposition to the operation in its actual terms and urged the Parties to modify certain non-compete clauses amongst the two major four-play operators – *PT* and *Zon*. It is worth noting that, when negative, the *ERC* prior opinion is binding [article 57 of 2003 Competition Act (now, article 95 of the 2012 Competition Act), modifying Law 2/99 on the freedom of press].

[5] Except from the 2013/2014 season.

[6] There are few cases of abuse of dominance decisions in Portugal adopted by the *AdC* and few particularities are known in such cases. The highest fine ever imposed by the *AdC* in abuse cases was of EUR 53 million *(Portugal Telecom (broadband internet*) case, but the Lisbon Commercial Court dismissed the decision for exceeding the limitation period. In the *PT Comunicações (Ducts)* case, also concerning an abuse of a dominant position, the fine was of EUR 38 million (this latter fine was annulled by the Lisbon Commercial Court, whose decision was further confirmed by the Lisbon Court of Appeal). Finally, in the OTOC case, the *AdC* found that the Portuguese Order of Chartered Accountants had abused its dominant position (together with an unlawful decision of association of undertakings) and imposed fine of EUR 300,000. However, on appeal, the Lisbon Commercial Court reduced it to EUR 90,000 and considered that the OTOC had not abused its dominant position. In turn, the Lisbon Court of Appeals decided to submit a preliminary ruling to the ECJ regarding the application of EU competition rules to a professional bar such as OTOC and its regulations. The ECJ ruled that such a regulation must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU. Other cases lead to smaller fines.

[7] Created by Law no. 46/2011, of June 24, and established by Decree-Law no. 67/2012, of March 20.

[8] Under the 2012 Competition Act, the appeal should be lodged within 30 working days, may not be prorogated and continues to count in judicial holidays (article 87). It is an area in which the intended harmonisation with the EU law established in the Portuguese financial assistance program

(Decision 2011/344/EU) was not achieved, for under EU law, an undertaking has two months (and 10 days) to appeal from a Commission's decision to the General Court (article 263 TFEU and General Court Procedural Regulation).

[9] Under the 2012 Competition Act, the appeal does not suspend the execution of the *AdC* decision except if the Court allows it to be replaced by a guarantee. Unlike under the EU Competition law, the Court is not authorised to decide that even the guarantee should not be offered. Also, under the 2003 Competition Act, the Court may not aggravate the fine, whereas under the 2012 Competition Act the Court has the same powers than that of the General Court in its unlimited jurisdiction (article 88 of the 2012 Competition Act ; article 31 of Regulation (EC) no. 1/2003).

[10] See, in this regard, *Zon Multimédia*'s Announcement dated 19 June 2013, available at : http://www.zon.pt/institucional/Doc....

[11] Judgment of the General Court (Eighth Chamber) of 16 June 2011, *Ziegler SA v European Commission*, Case T-199/08, ECR, 2011, II, pp. 3507, nr. 157 : « In addition, even if facts known to a person working for the Commission could be imputed to the latter as an institution, mere knowledge of anti-competitive conduct does not imply that that conduct was implicitly 'authorised or encouraged' by the Commission within the meaning of point 29, last indent, of the 2006 Guidelines. Alleged inaction cannot be treated in the same way as a positive act such as an authorisation or encouragement ». The General Court admitted, however, that the Commission's inaction may be relevant if it "led in fact to conclude that the practice was lawful or that the Commission created confusion in that regard". It is worth noting that *Ziegler* appealed to the ECJ (case C-439/11 P) that decided by Judgment of 11 July 2013, dismissing the appeal.

[12] See, Richard Whish/David Bailey, Competition Law, Seventh Edition, Oxford, 2012, p. 720.

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The Portuguese Supreme Court clarifies the conditions regarding the existence of an abuse of economic dependence (Toyota Portugal)

Portugal, Unilateral practices, Abuse of dominance, Private enforcement, Abuse of economic dependence, Automobile

Supreme Court of Justice (Supremo Tribunal de Justiça), Toyota Portugal, Case no. 178/07.2TVPRT.P1.S1, 20 June 2013

EUCLH Ref. PT45

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The recent *Toyota Portugal* judgment of the Supreme Court of Justice (*Supremo Tribunal de Justiça*) [1] provides a clear-cut opportunity to, even briefly, examine the current stances on the abuse of economic dependency (also known as *relative dominance*), i.e., the practice where one undertaking abusively exploits the economic dependence of another undertaking due to the absence for the latter of an equivalent alternative for the supply of goods or the provision of services. [2]

Under Decree-Law (*Decreto-Lei*) no. 371/93, of 30 October (1993 Competition Act) [3], Portuguese competition law prohibits the abuse of a relative dominant position. The prohibition was further modified in its constituent elements in the 2003 Competition Act [4] and incorporated without relevant changes in article 12 of the 2012 Competition Act as follows : "[i]*t is prohibited, as far as it may affect the functioning of the market or the structure of competition, the abusive exploration, by one or more undertakings, of a state of economic dependence in which any supplier or customer finds himself in, for lacking an equivalent alternative*". [5]

Although there is major criticism at national level about the appropriateness of such a prohibition under competition law and about its natural place in contractual law [6], the fact is that the 2003 and 2012 there was no political consensus over the future of this prohibition and the legislative power decided to keep the prohibition [7].

The *Toyota* judgment seems to be a major Court decision in Portugal in a *stand-alone* case of infringement of a competition law prohibition, thus setting a standard for the future private enforcement of competition law prohibitions in our jurisdiction, where a deficit of public enforcement is generally recognised, even if the causes are necessarily complex.

The dispute arose when, in September 2002, *Toyota SC Comércio* (the exclusive importer of Toyota's

vehicles for Portugal) terminated an exclusive dealership agreement with "*Auto-AA*", a distributor and authorised repairer of the brand's vehicles in some municipalities of the north region of Portugal [8], subject to two years' notice ending in 2004. In October 2003, under the justification that the commercial relations between the parties started to be governed by Regulation (EC) no. 1400/2002 [9] which came into force, *Toyota SC Comércio* decided to introduce a selective distribution system for the selling of its vehicles in Europe where *Auto-AA* had no place. Indeed, the former's truly intention with the implementation of such distribution system was to eliminate the latter as a competitor of a newly-established distributor (owned at 50% by *Toyota SC Comércio*) in the promotion and selling of Toyota's vehicles. As a result, in 2004, before the termination of the dealership agreement, *Toyota SC Comércio* refused to consider *Auto-AA* as an authorised dealer on the grounds that it had the need to reorganise its distribution network. By doing that, *Toyota SC Comércio* completely dismissed the fact that latter was highly dependent on the maintenance of that commercial relationship as it could not operate profitably without retailing and providing after-sales services on the vehicles of that brand.

In its judgment, rendered on 20 June 2013, the Supreme Court of Justice began by clarifying that, notwithstanding the rule of primacy of EU law and its prevalence over national law, Regulation (EC) no. 1400/2002 in only applicable where EC law is applicable. [10]. However, in this regard, the Supreme Court seemed to have overlooked article 5 (3) of the 2003 Competition Act (v.g. 10 (3) of the 2012 Competition Act) [11] Most importantly, the Court acknowledged that, despite not being explicitly foreseen in EU Competition law, an abuse of economic dependence is to be considered as a restriction of competition if certain essential requirements are met. The Court listed the following conditions :
1. The undertakings involved (the firm or firms committing the abuse and its victim) are placed in a vertical relation (supplier-dealer or dealer-supplier) ;
2. The victim of the abusive behaviour is dependent on the abusing undertaking due to the absence of equivalent alternatives for either the supply or distribution of its goods and services. According to the said article 7 of the 2003 Competition Act, an undertaking has no equivalent alternative when the supply or distribution of the goods or services in question is provided by a restricted number of undertakings and the victim of the abuse cannot obtain identical conditions from other commercial partners within a reasonable period of time ;
3. The dominant undertaking's conduct is considered to be abusive. A list of examples of such conduct is provided by the Competition Act, comprising the refusal to deal or the unjustified termination of an existing commercial relationship between the undertakings involved, taking into account, inter alia, their previous commercial relations, recognised practices in a particular economic activity and the contractual conditions that have been specifically set down ;
4. The abusive exploitation of the economic dependence affects the functioning of the market or the structure of competition.

As a result, and contrary to *Toyota SC Comércio*'s view, the Supreme Court of Justice not only upheld both the first instance Court decision and the Oporto Court of Appeal's [12] decisions but it has also decided, in relation to the claim of abuse of economic dependence, to increase the amount of compensation to be paid to Auto-AA from EUR 21 900 to EUR 50 000 (additional compensations were also applied but related to other claims, such as a goodwill compensation or compensation for clientele or compensation for investments to distributors, considering that legislation on commercial agency agreements is applicable by analogy to these distribution agreements).

The *Toyota Portugal* judgment paves the way to a more effective application of the prohibition of abuse of relative dominant position and seems to be a sign of a growing awareness by Courts (and by the legislator, as the new law on restrictive practices in commerce is bound to enter into force in 25 February 2014 – Decree-Law n.º 166/2013, of 27 December) of the need to protect the companies with less bargaining power in cases where the consequence of the use of contractual law affects the structure and functioning of the market in a significant way.

Also, it is clearly an indication that *stand-alone* actions in competition litigation may well be the solution in cases where the Competition Authority, probably because of the different priorities it establishes in the use of its powers (article 7 of the 2012 Competition Act) overlooks the impact of commercial abusive conduct in the market.

I would like to acknowledge the collaboration of the Sérvulo team and, particularly, that of Luís Bordalo e Sá.

[1] Judgment of the Supreme Court of Justice, dated 20 June 2013, Case no. 178/07.2TVPRT.P1.S1, *Toyota Portugal*.

[2] In the Portuguese doctrine, for all, see J. P. Mariano Pego, *A posição dominante relativa no direito da concorrência*, Almedina, Coimbra, 2009 ; and, of the same author, the annotation to article 12 of the 2012 Competition Act, in *Lei da Concorrência – Comentário conimbricense*, M. Gorjão-Henriques (Dir.) (M. Lopes Porto/J. L. Cruz Vilaça and others – Coord.), Almedina, Coimbra, 2013, pp. 164-168, with bibliographic references ; Miguel Mendes Pereira, *Lei da Concorrência anotada*, Coimbra Editora, Coimbra, 2009, pp. 177-179 ; Victor Calvete, "Abuso de Posição Dominante II : O Abuso de Dependência Económica", available at http://works.bepress.com/cgi/viewco...

[3] Under the Decree-Law no. 371/93, of 30 October, only two cases led to infringement decisions by the Portuguese Competition Authority related to abuses of economic dependency : Case 2/99 and Case 2/99, both concerning the dependency of distributors on suppliers in the market of beers. However, both the Lisbon Commercial Court and the Lisbon Court of Appeals declared that the proceedings reached the statute of limitations.

[4] There was no infringement decisions by the Portuguese Competition Authority related to abuses of economic dependency under Law no. 18/2003, of 11 June.

[5] Free translation close to the Portuguese official wording and rather different than that provided by the Portuguese Competition Authority (AdC) in its website. English version in not authentic, even if provided by the *AdC*.

[6] Victor Calvete, "Abuso de Posição Dominante II : O Abuso de Dependência Económica", available at http://works.bepress.com/cgi/viewco...

[7] In fact, there is no similar prohibition in the EU Law.

[8] Amarante, Marco de Canaveses, Castelo de Paiva, Baião, Cinfães, Resende and Lixa.

[9] Regulation (EC) no. 1400/2002, of 31 July 2012, on the application of Article 81(3) of the Treaty

to categories of vertical agreements and concerted practices in the motor vehicle sector. Regulation (EC) nr. 1400/2002 was replaced as from 31 May 2013, by Regulation (EU) 461/2010.

[10] As it is known (Miguel Gorjão-Henriques, *Da restrição da Concorrência na Comunidade Europeia : A franquia da distribuição*, Almedina, 1998, pp. 155-156 and notes 342 to 344) it may not be excluded that an agreement that is to produce effects within a member State and is celebrated between two or more undertakings of the same member State may affect trade between member States (cf., however, the Commission submission in the *Ladbroke Racing* case before the CFI – judgment of 18 September 1995) and the *Commission Notice Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty* (JO, C 101, 27.4.2004, pp. 81).

[11] « 3 – Agreements, concerted practices or decisions by associations of undertakings prohibited under the provisions of the previous article may be considered justified where, although they do not affect trade between member States, they do fulfill all the other requirements for application of a regulation adopted in accordance with the provisions of article 101(3) of the Treaty on the Functioning of the European Union » - Although some doctrine finds it a illegitimate reception of international law – see Manuel Lopes Porto/Victor Calvete, « Article 10 », in *Lei da Concorrência – Comentário conimbricense*, M. Gorjão-Henriques (Dir.) (M. Lopes Porto/J. L. Cruz Vilaça/Carolina Cunha/M. Gorjão-Henriques et al. – Coord.), Almedina, Coimbra, 2013, p. 121.

[12] In process 178/07.2TVPRT.P1, Judgment of 11.9.2012.

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