04
OCTOBER 2023

CRUZ VILAÇA ADVOGADOS

IN THIS EDITION

FOREWORD

The Court of Justice backs up the Commission in *CK Telecoms* after heavy criticism by the General Court

On 13 July 2023, the Grand Chamber of the Court of Justice of the EU ('Court of Justice' or 'Court', unless referring specifically to the General Court) ruled on *CK Telecoms*, an appeal of a General Court judgment which had annulled a decision by the European Commission ('Commission') prohibiting a concentration notified under the Merger Regulation. Observers of the activity of the Court of Justice will know how rare it is for a merger decision to reach this stage of judicial review, the only other being *Bertelsmann* in 2008 (also a Grand Chamber judgment). Most notably, the three annulments of merger decisions by the General Court in the early 2000s (T-310/01 and T-77/02; T-5/02; and T-342/99) which put into question the economic competence of the Commission's merger review, leading to the "modernisation" of the enforcement of EU competition law more broadly, were not appealed before the Court of Justice (although *Schneider* did come before the Court of Justice on the issue of the Commission's liability).

The changes brought about by modernisation provide an extra layer of interest to *CK Telecoms*. The General Court had laid bare a 'gap' in the Merger Regulation's standard of (creating or reinforcing) a 'dominant position' (notably by limiting a collective dominant position to a very specific kind of oligopolistic coordination where members monitor and punish deviations): oligopolist effects without such a position would not be caught by merger control. The substantive standard was therefore amended to a 'significant impediment of effective competition' ('SIEC'), of which a dominant position became an example (Article 2(3) and (4) of the Merger Regulation). However, besides a few recitals, the Merger Regulation did not explain exactly how an SIEC extended beyond dominance. To all appearances this was left to the Commission to elaborate in its guidance, which the Horizontal Mergers Guidelines did for the unilateral effects that result from a merger between close competitors. It is precisely the extent of a SIEC that was clarified, for the first time (since *Bertelsmann* also dealt with collective dominance), in *CK Telecoms*.

CK Telecoms reversed the judgment of the General Court and referred it back for reappraisal. This was welcome by the Commission's as a validation of its approach, and won't therefore have anything like the impact of the annulments that prompted modernisation. It nonetheless shows a very different approach by the Court of Justice and the General Court to the control of the Commission's action. This is apparent in several findings that the General Court distorted the Commission's decision and in extensive sections where, due to the lack of precedent, the Court speaks almost directly. It can be argued that such marked divergence effectively prevents the General Court from triggering sweeping changes of competition policy purely of its own authority. The lesson for the Commission is very clear: no matter how heavily criticised by the General Court, it is worth appealing to the Court of Justice.

Of the many interesting aspects of the judgment, the following should be highlighted: standard of proof, oligopolistic effects, closeness of competition, and efficiencies (reference to paras. in

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parentheses).

On the standard of proof of a SIEC, the General Court had rejected a 'more likely than not' standard – the so-called 'balance of probabilities' – in favour of an explicitly stricter 'strong probability' (88). In turn, the Court of Justice rejected a strong probability as inadequate to a prospective analysis of economic effects (86) where the Commission margin of discretion should be safeguarded (82). While the complexity of a theory of harm affected that analysis, notably in identifying probable consequences, it does not change the standard of proof (78). The Court therefore reaffirmed a standard of balance of probabilities (87). This is important beyond merger control. Although a formal distinction was made with the infringement of Articles 101 and 102 TFEU (81), these may also involve prospective analysis, notably because the counterfactual – the judicially-validated method for assessing anti-competitive effects – requires building a hypothetical scenario (in some cases, extending into the future) to compare with the situation resulting from the infringement.

On oligopolistic effects, the General Court had found that, absent a dominant position, an SIEC required demonstrating two cumulative conditions: eliminating the constraints between merger parties and reducing the pressure on remaining competitors (114). It seemed to be on solid ground since recital 25 to the Merger Regulation employed the conjunction 'as well as' between these requirements, the General Court reasoning that any merger fulfils the first condition by reducing competition between the parties. An alternative between the conditions would therefore give the Commission free rein in merger review. The Court of Justice nevertheless employed a purposive interpretation to hold that the conditions are indeed alternative, as otherwise the elimination of the competitive constraints that the merging parties posed on each other would never to be operative in itself (112). The Court's concern with the effectiveness of merger control is therefore diametrically opposed to the fear of false positives by the General Court.

On closeness of competition, the General Court had found that, in an oligopolistic market where all undertakings were by definition close competitors, the Commission was required to demonstrate that the merging parties were 'particularly close' in order to apply this theory of unilateral effects (183). Again, there was a concern by the General Court that any merger from four to three competitors, as was the case, would be automatically prohibited (185). The Court of Justice nevertheless upheld the Commission guidance standard of (simple) close competition between the merging parties (187). The Court even held that a merger between undertakings that are not the closest competitors could lead to a SIEC (190). By rejecting General Court's standard of particularly close competition, the Court of Justice cemented the Commission's leeway in reviewing mergers in oligopolistic markets. It should however be remembered in this regard that, without advancing such unilateral effects so precisely, infringements of Articles 101 and 102 TFEU often rely on exclusion affecting particularly close competitors.

Finally, regarding efficiencies, the General Court had found that any concentration leads to efficiencies from the coordination of the activity of the merging parties (236), which would necessarily be integrated in the quantitative models of price-setting by the merged entity (237). The Commission was therefore required to take such 'standard' efficiencies into account of its own motion, as opposed to the efficiencies countervailing any negative effects from the merger that, per the Commission's guidance, should be put forward by undertakings. The Court of Justice explicitly rejected such a reasoning (241), being more concerned with the reversal of the burden of

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proof (243) and, as throughout the judgment, the effectiveness of merger control (244). This last issue should further recall that an efficiency defence is also available for Articles 101 and 102 TFEU but that, like for merger control, it is very rarely employed in practice precisely because (as the General Court was aware) effects analysis usually incorporates efficiencies. To some extent, this was why Intel required the Commission to consider efficiencies in order to find that a rebate was abusive under Article 102 TFEU (C-413/14 P).

Although Intel was clear that it was up to undertakings to advance such efficiencies, it also forced the Commission to take such arguments fully into consideration. CK Telecoms, by contrast, employs a more traditional burden of undertakings fully demonstrating efficiencies.

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EUROPEAN COMMISSION DESIGNATES SIX GATEKEEPERS UNDER THE DIGITAL MARKETS ACT

On 6 September 2023, the European Commission designated, for the first time, six gatekeepers - Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft - under the Digital Markets Act. In total, 22 core platform services provided by gatekeepers have been designated. The six gatekeepers will now have six months to ensure full compliance with the DMA obligations for each of their designated core platform services. The designation decisions follow a 45-day review process conducted by the Commission after the notification by Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung of their potential status as gatekeepers.

STATE OF THE UNION ADDRESS BY THE PRESIDENT OF THE EUROPEAN COMMISSION

On the 13 of September, President of the Commission Ursula von der Leyen outlined the main priorities and flagship initiatives for the year to come, building on the European Union's successes and achievements of the past years in her State of the Union address. See the State of the Union address here.

Source: website of the European Commission

10 POINT PLAN FOR LAMPEDUSA

On 17 September 2023, in view of the unfolding situation in Lampedusa, European Commission President von der Leyen laid out a set of immediate actions to be exercised in full respect of fundamental rights and international obligations, such as reinforcing the support to Italy by the European Union Asylum Agency and the European Border and Coast Guard (Frontex); supporting the transfer of people out of Lampedusa, including to other Member States; supporting the prevention of departures by establishing operational partnerships on anti-smuggling with countries of origin and transit; and stepping up border surveillance at sea and aerial surveillance including through Frontex, and explore options to expand naval missions in the Mediterranean.

COMMISSION RE-IMPOSES €376.36 MILLION FINE ON INTEL FOR ANTICOMPETITIVE PRACTICES IN CPU MARKET

On 22 September 2023, the European Commission re-imposed a fine of around €376.36 million on Intel for a previously established abuse of dominant position in the market for computer chips called x86 central processing units. This case originated in 2009, when Intel was fined by the Commission in €1.06 billion for engaging in a series of anticompetitive practices aimed at excluding competitors from the relevant market in breach of EU antitrust rules. In 2014, the General Court dismissed Intel's appeal against the 2009 Commission's decision (T-286/09). In 2017, following an appeal by Intel, the Court of Justice annulled the 2014 General Court's judgment and referred the matter back to the General Court (C-413/14 P). The Court of Justice further clarified the conditions to establish when conditional rebates may amount to an infringement of EU competition rules, asking the General Court to review whether the conditional rebates were capable of restricting competition. Finally, in 2022, the General Court ruled again on the matter and partially annulled the 2009 Commission's decision but confirmed the unlawfulness of Intel's naked restrictions (which consisted in payments made by Intel to three computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs and to limit the sales channels available to these products.

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COMMISSION BLOCKS ACQUISITION OF ETRAVELI BY BOOKING

On 25 September, the European Commission prohibited, under the EU Merger Regulation, the proposed acquisition of Flugo Group Holdings AB ('eTraveli') by Booking Holdings ('Booking'). The acquisition would have allowed Booking to strengthen its dominant position on the market for hotel online travel agencies in the European Economic Area, leading to higher costs for hotels and, possibly, for consumers. Booking did not offer remedies that were sufficient to address these concerns.

COMMISSION ADOPTS RESTORATIVE MEASURES TO UNWIND THE ACQUISITION OF GRAIL BY ILLUMINA

On 12 October, the European Commission adopted, under the EU Merger Regulation, restorative measures requiring Illumina to unwind its completed acquisition of GRAIL, following the Commission's decision to prohibit the transaction. After the Commission prohibited the acquisition of GRAIL by Illumina over concerns that the merger would have stifled innovation and reduced choice in the emerging market for blood-based early cancer detection tests, Illumina and GRAIL unlawfully completed the merger during the Commission's in-depth investigation, in breach of EU merger control rules. The Commission thus orders the following measures: (i) divestment measures requiring Illumina to unwind the transaction with GRAIL; and (ii) transitional measures that Illumina and GRAIL need to comply with until Illumina has dissolved the transaction.

REQUEST FOR PRELIMINARY RULINGS BY THE PORTUGUESE COMPETITION COURT

Tribunal da Concorrência, Regulação e Supervisão (Portugal) has made three separate requests for preliminary rulings: Imagens Médicas Integradas (Case C-258/23); Synlabhealth II (Case C-259/23); and SIBS — Sociedade Gestora de Participações Sociais and Others (Case C-260/23). The requests for preliminary rulings arise after the Portuguese Competition Authority sought judicial authorization from the Public Prosecutor's Office to carry out measures involving the search, examination, collection, and seizure of evidence, including emails and internal documents. The Public Prosecutor's Office granted such authorization based on the existence of indications of anticompetitive practices and the need to gather relevant evidence. What is at stake is the legality of seizing business records, including emails, and the application of Article 7 of the Charter of Fundamental Rights. The Portuguese Competition Court asks if the classification of business records transmitted via email constitutes 'correspondence' under the Charter, and whether Article 7 precludes the seizure of such records in the context of investigations into prohibited agreements and practices under EU competition law (Article 101 TFEU and Article 102 TFEU).

LISBON COURT OF APPEAL UPHOLDS HIGHEST EVER FINE FOR ABUSE OF DOMINANT POSITION

On 27 September, the Lisbon Court of Appeal confirmed EDP Produção's abuse of a dominant position, sanctioned by the Portuguese Competition Authority in September 2019. The ruling confirms that the capacity restriction practiced by EDP Produção led to a "loss of productive efficiency in the market, with a significant increase in the prices of the regulation band market above the competitive price, determining that electricity consumers were doubly harmed, by bearing higher network access tariffs and retail energy prices". The Lisbon Court of Appeal applied a fine of 40 million euros, which is the highest fine for abuse of a dominant position confirmed by two courts in Portugal.

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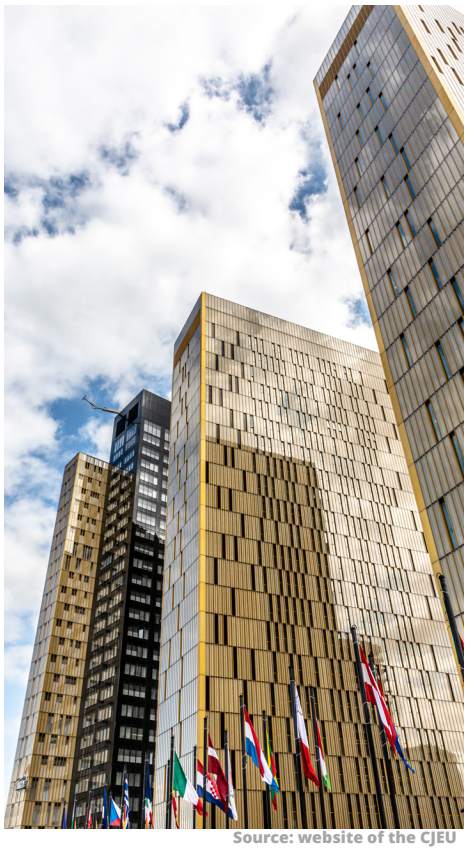
EUROPEAN COURT OF AUDITORS WARNS OF CHALLENGES IN OFFSHORE RENEWABLE ENERGY EXPANSION

On 19 September, the European Court of Auditors published a report concerning "Offshore renewable energy in the EU", in which it examines whether the Commission and the Member States promoted the sustainable development of offshore renewable energy and concludes that, while their actions have supported this type of energy, ensuring its social and environmental sustainability remains a challenge.

JUDGMENT IN STAATSSECRETARIS VAN VEILIGHEID EN JUSTITIE

Staatssecretaris van Veiligheid en Justitie (Opinions politiques dans l'État membre d'accueil) (C-151/22) concerns two individuals who seek asylum in the Netherlands, claiming that they would face persecution in Sudan due to their political opinions and activities. The Court of Justice, ruling on the interpretation of Article 10, paragraph 1, sub-paragraph e) of Directive 2011/95/UE (Qualification Directive), decided that in order for the opinions, ideas or beliefs of an applicant who has not yet attracted the negative interest of the potential actors of persecution in his or her country of origin to fall within the concept of 'political opinion' or 'political characteristic', it is sufficient for that applicant to claim that he or she has or expresses those opinions, thoughts or beliefs. The Court also decided that for the purposes of assessing whether an applicant's fear of persecution on account of his or her political opinions is well founded, the competent authorities of the Member States must take account of the fact that those political opinions, owing to the degree of conviction with which they are expressed or the possible engagement by that applicant in activities to promote those opinions, could have attracted or may attract the negative interest of the actors of potential persecution in that applicant's country of origin.



Source: website of the CJEU

OPINION OF ADVOCATE GENERAL KOKOTT IN *HEUREKA GROUP*

Advocate General Kokott delivered her Opinion in Heureka Group (Comparateurs de prix en ligne) (C-605/21), a case concerning a preliminary ruling request whereby the Court was asked to provide interpretation regarding Directive 2014/104/EU (Damages Directive), Article 102 TFEU, and the principle of effectiveness. Advocate General Kokott suggests that, to determine the temporal applicability of Article 10 of Directive 2014/104/EU, it is necessary to ascertain whether the situation at issue arose before the expiry of the time limit for transposition of that directive or whether it continues to produce effects after the expiry of that time limit. To that end, it is necessary to ascertain whether, on the date of expiry of the time limit for transposition of Directive 2014/104, the limitation period applicable to the situation at issue in the main proceedings had elapsed, which means determining the time when that limitation period began to run. Over the period prior to the expiry of the time limit for transposition of Directive 2014/104, the starting point of the limitation period is determined in accordance with national law.

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ADVOCATE GENERAL RANTOS OPINION IN *BANCO BPN V BIC PORTUGUÊS AND OTHERS*

Advocate General Rantos delivered his Opinion in *Banco BPN v BIC Português and Others* (C-298/22), a case which concerns a preliminary ruling request, made in proceedings between several banking institutions and the Competition Authority, Portugal, the defendant in the main proceedings, concerning the Authority's decision to impose a fine on those institutions for an infringement of national provisions of competition law and of Article 101 TFEU, which consists of participation in a concerted practice, in the form of informal coordination between competitors via the exchange of sensitive and strategic information. The AG concluded that Article 101 TFEU does not preclude the classification as a restriction of competition by object of an exchange between competitors of information concerning the commercial conditions applicable to transactions, where such a practice has artificially increased transparency and reduced uncertainty as to the functioning of the market. Moreover, AG Rantos concluded that Article 101 TFEU does not preclude such classification where it has been impossible to identify or establish any gain in efficiency or any uncertain or positive effect on competition resulting from that exchange of information.

Source: website of the CJEU

CASE *WS AND OTHERS V FRONTEX*

Case *WS and Others v Frontex* (T-600/21) is an action for damages against the European Border and Coast Guard Agency (Frontex). It concerns a number of Syrian nationals arrived in Greek islands. After expressing their intention to apply for international protection on the island of Milos, a joint operation conducted by Frontex and Greece led to their transfer to Turkey, from where they moved to Iraq. According to the applicants, Frontex infringed on its obligations relating to the protection of their fundamental rights which resulted in their unlawful return to Turkey and refusal of international protection. The General Court found that Frontex cannot be held liable for the damages incurred by the refugees during the return operation, since it does not assess the merits of return decisions but merely provides technical and operational support to the Member State in question. It found no causal link between the alleged unlawful conduct of Frontex and the various forms of damage suffered by the applicants.

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CASE OF *C. V ITALY*

On 31 August 2023, the European Court of Human Rights handed out its decision in case *C. v Italy* (application no. 47196/21), a case involving the refusal by the Italian authorities to recognise parent-child relationships in surrogacy arrangements. The Court has held that there has been a violation of Article 8 of the Convention (right to respect for private and family life) in its procedural aspect in connection with the establishment of parentage, but it did not find a violation of Article 8 on account of the refusal to transcribe the applicant's birth certificate in respect of her intended mother.

CASE OF *KOILOVA AND BABULKOVA V. BULGARIA*

In the case of *Koilova and Babulkova v. Bulgaria* (application no. 40209/20), the European Court of Human Rights found a violation of Article 8 of the Convention (right to respect for private and family life) on account of the failure by the Bulgarian authorities to set up a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship. The applicants, two women who married in the United Kingdom and live in Sofia, were denied the right to have their marriage entered in the Bulgarian civil status register, on the ground that under the Bulgarian legal system a marriage could only be between a man and a woman.

DUARTE AGOSTINHO AND OTHERS V. PORTUGAL AND 32 OTHERS

On 27 September, the European Court of Human Rights, sitting in its Grand Chamber formation, held a hearing in *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20), a case concerning greenhouse gas emissions from 33 Member States, which, in the applicants' view, contribute to the phenomenon of global warming. The applicants, Portuguese nationals aged 11 to 24, claim that the forest fires that have occurred in Portugal each year since 2017 and the powerful winter storms are a direct result of global warming. Accordingly, they claim that, as a result of these natural disasters, they have experienced disrupted sleep patterns, allergies, respiratory problems, as well as anxiety caused by the prospect of spending their whole lives in an increasingly warm environment, affecting them and any future families they might have. The applicants rely on Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention, read in the light of the concerned Member States' undertakings under the 2015 Paris Agreement on climate change (COP 21).

Source: website of the ECtHR

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LATEST NEWS ON OUR WEBSITE

CYBER RESILIENCE ACT, A FAR-OFF PROPOSAL?

On 14 september 2023, CVA published a newsletter in which it analyses the proposal, presented by the European Commission, to complement the already comprehensive European regulation on the cybersecurity of products consisting of or containing digital elements. The proposal, which is in the phase of negotiations within the "trilogue" between the European Parliament, the Council of Ministers of the EU and the European Commission, in the framework of the ordinary legislative procedure, is a very important piece of legislation - especially considering the growing concerns about security within the internal market arising from the fact that, in its present form, it may harm the functioning of the internal market, whose preservation and integrity is, however, its intended goal. Read the full newsletter here.

JOSÉ LUÍS DA CRUZ VILAÇA INTERVENES IN INTERNATIONAL CONFERENCE ON THE RULE OF LAW

José Luís da Cruz Vilaça, managing partner of CVA, was one of the speakers at the International Congress "Independencia Judicial Y Estado de Derecho" ("Judicial Indepedence and the Rule of Law"), which took place on October 4, 5 and 6 at the Complutense University (Madrid). His intervention focused mainly on the case law of the Court of Justice on the rule of law, as well as on its complementarity and convergence with the case law of the European Court of Human Rights.

JOSÉ LUÍS DA CRUZ VILAÇA INTERVENES IN UNITED NATIONS (UNCTAD) CONFERENCE

José Luís da Cruz Vilaça, managing partner of CVA, was one of the speakers at the Webinar on Competition Law and Policy for Portuguese-speaking developing countries (PALOP), organized by the United Nations Conference on Trade and Development (UNCTAD). José Luís da Cruz Vilaça's presentation considered the subject matter "Judicial review of competition authorities' decisions in sanctioning proceedings". Find out more here.

RITA LEANDRO VASCONCELOS MODERATES WEBINAR ORGANISED BY APDE

On 24 October 2023, the Portuguese Association of European Law ("APDE"), in partnership with the Law School of the University of Minho, organised a Webinar on the Conclusions of the XXX FIDE Congress (1st session). Topic III of the Congress was on the theme of "European Social Union". Professor Maria do Rosário Palma Ramalho, the national rapporteur, and Professor Alessandra Silveira, were the two speakers. Rita Leandro Vasconcelos, partner at CVA and Vice-President of APDE, moderated the webinar.

APDEN ORGANISES FIRST ENERGY LUNCH

On October 25, 2023, the Portuguese Energy Law Association ("APDEN") organized its first energy lunch at the Grémio Literário. The lunch featured a speech by the Secretary of State for the Sea, engineer José Maria Costa, who addressed various topics such as renewable energy, the green transition and European funds. The subsequent debate was moderated by José Luís da Cruz Vilaça, managing partner at CVA and President of APDEN.

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