G A _ P

Gómez-Acebo & Pombo

October | 2017

Brussels G A _ P Newsletter

Brussels

G A _ P

Contents

Design and layout: José Á. Rodríguez and Ángela Brea

News

Antitrust

Commission sends Google additional evidence regarding Android's investigation

The Commission has addressed a "letter of facts" to Google containing additional evidence supporting the alleged abuse of dominant position regarding smartphones' operating system Android.

Letters of facts are issued where new evidence supporting the objections included in a Statement of Objections ("SoE") arises. The addressee of a letter of facts normally has one month to reply. However, this period can be extended if the level of complexity of the cases so requires.

The Commission's investigation into Google's Android was launched in April 2013 as a result of a complaint filed by the business group Fairsearch. The complainant argued that by requiring handset makers and app developers to pre-install a set of Google apps in their devices Google was restricting their freedom.

In April 2016, Google received a SoE whereby the Commission alleged that Google was engaging in abuse of its dominant open-source software by (i) requiring that smartphone manufacturers offer certain Google apps and (ii) preventing manufactures from developing new versions of the operating system.

State aid

Commission orders Luxembourg to recover illegal tax benefits worth €250 million granted to Amazon

The European Commission has found that Luxembourg granted undue tax benefits to Amazon worth around €250 million. These benefits allowed Amazon to pay four times less taxes than other companies. Luxembourg is now required to recover the amount that Amazon should have paid.

This decision follows an in-depth investigation launched by the Commission in October 2014, which led to conclude that, by means of a 2003 tax ruling, Luxembourg reduced the tax to be paid by Amazon in the country without any valid justification. This ruling allowed Amazon to shift most of its profits from Amazon EU, subject to tax in Luxembourg, to Amazon Europe Holding Technologies, which profits are not taxable in Luxembourg. In addition, it permitted to put in place a scheme whereby Amazon EU could pay a royalty to Amazon Europe Holding Technologies. According to the Commission, these royalty payments were inflated and did not reflect the reality which, overall, resulted in a substantial reduction of the taxable profits of Amazon EU.

In light of the circumstances, the Commission found that, by allowing the group to pay less tax than other companies subject to the same national tax law, Luxembourg granted a selective economic advantage to Amazon and, consequently, breached EU State aid rules.

Commission refers Ireland to the Court of Justice of the EU for failing to recover illegal tax benefits from Apple worth up to €13 billion

The European Commission has referred Ireland to the Court of Justice of the EU for failing to comply with its Decision of 30 August 2017.

In the said decision, the Commission established that Ireland had granted certain tax benefits to Apple allowing the latter to pay substantially less tax than other businesses. Consequently, the Commission required Ireland to recover the illegal State aid (estimated to be worth up to €13 billion) from Apple.

According to EU State aid rules, illegal State aid must be recovered in order to put an end over the distortion of competition created by the aid. The deadline for recovery expired on 3 January 2017; this is four months after the official notification. However, to date, Ireland has not yet recovered the amount claimed by the Commission.

Although Ireland has appealed the Commission's recovery decision, appeals do not have suspensive effect over the obligation of Member States to recover illegal State aid.

On the basis of Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU"), the Commission has referred the case to the Court of Justice of the EU. If the Court rules in favor of the Commission and Ireland fails to comply with such judgment, penalty payments may be imposed on Ireland under Article 260 TFEU.

Case-law & Analysis

The General Court of the EU holds that watch manufacturers are allowed to restrict the supply of watch parts only to approved repairers *(Judgment of 23 October 2017 in Case T-712/14 CEAHR. v Commission)*

In July 2004, the European Confederation of Watch and Clock Repairers' Association ("CEAHR") filed a complaint with the Commission arguing that there was (i) an agreement or a concerted practice between a number of luxury watch manufacturers and (ii) an abuse of dominant position

resulting from their refusal to supply spare parts to independent watch repairers. In CEAHR's view, this behaviour was significantly harming small repairers.

In July 2008, the Commission decided to reject CEAHR's complaint on the basis of lack of EU interest in pursuing the investigation. CEAHR appealed the Commission's decision before the General Court of the EU, which upheld CEAHR's claims and, by judgment of December 2015, annulled the challenged decision on the grounds that the Commission had failed to take into account all the relevant matters of law and fact in the analysis of the complaint.

The annulment of the Decision led the Commission to reopen the investigation. However, after having reassessed all the circumstances, the Commission established that the selective repair systems set up by the watch manufacturers did not aim at reserving the market of repair and maintenance of luxury watches to themselves. Indeed, it was found that independent watch repairers could qualify to be included in the networks if they fulfilled certain requirements with regard to machines, training and premises. Consequently, the Commission decided not to pursue the investigation demanded by CEAHR.

CEAHR challenged the new decision before the General Court of the EU claiming, among others, that the Commission had erred in law in the assessment of (i) the existence of an abuse resulting from the refusal by the watch manufacturers to supply spare parts to independent repairers, and (ii) the objectively justified nature of the selective repair system and of the refusal to supply spare parts.

The watch manufacturers, which intervened in support of the Commission before the General Court of the EU, contested the applicant's arguments and explained that the selective repair systems were objectively justified to fight counterfeits.

By judgment of 23 October, 2017, the General Court of the EU dismissed CEAHR's claims and considered *inter alia* that CEAHR had not elaborated on the reasons why counterfeits were not an actual risk. The General Court of the EU clarified that watch manufacturers are allowed to restrict supply of spare parts provided that their network of repairers is built on the basis of objective, qualitative and non discriminatory criteria.

In this regard, the General Court reiterated that the reputation or image of a brand cannot be used to justify a restriction of competition through a selective repair system. However, the objective of assuring the quality of the products at issue may justify the establishment of close networks of approved repairers.

Currently at GA_P

GA_P Brussels and our Brussels-based partner Miguel Troncoso included in the 2018 International Financial Law Review (IFLR) ranking

GA_P Brussels has been included as one of the Tier 4 firms of the IFLR's EU & Competition Law ranking. Additionally, our Brussels-based partner Miguel Troncoso has been rated as a highly regarded Competition Law practitioner. The whole ranking is available at the following link: https://www.iflr1000.com/Firm/Gomez-Acebo-Pombo-EU-CompetitionFirmLawyersWithFilter/841?searchAction=FirmLawyerTab&pageSize=25&pageNumber=1#rankings