

Brussels GA&P

Gómez-Acebo & Pombo, Brussels

March 2017

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News

Antitrust

Commission introduces new anonymous tool to alert about secret cartels and other competition infringements

The European Commission has presented a new tool to facilitate that individuals inform about secret cartels and other antitrust violations on an anonymous basis.

To date, the Commission's leniency programme, which allows businesses to report their own participation in a cartel, in exchange for a reduction of the fine, has been the most useful tool to detect cartels.

The Commission's new tool allows individuals, who are aware of the existence or functioning of a cartel or other types of antitrust violations, to cooperate in order to put an end on such practices. In addition, whistleblowers' anonymity is protected, through an encrypted messaging system. The service is managed by an external service provider which acts as an intermediary and only relays the content of messages without providing any data that could be used to identify the source of the information. The new tool also allows both the individual to ask the Commission to reply to their messages and the Commission to enquire further details or clarifications.

Whistleblowers who do not want to preserve their anonymity can directly contact the Commission through a specialized phone number and e-mail address.

The Spanish competition authority imposes fines totalling EUR6.12 million on 13 companies operating in the concrete sector for its participation in a cartel

The Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia* or "CNMC") has fined 13 companies active in the concrete sector EUR 6.12 million for a single and continuous infringement of Article 1 of the Spanish Competition Act (equivalent to Article 101 of TFEU under Spanish Law). A fine has also been imposed on the manager of one of the companies.

The CNMC's investigation has proved that the companies participated in a cartel to share the market and to fix prices for the supply of concrete in the Spanish region of Asturias. In particular, they agreed on the allocation of public and private works among concrete companies, exchanged commercial information and monitored their agreements, which were kept in secret.



The companies also created the so-called Temporary Union of Companies (“UTE”) and used it to participate in public tenders, without it being necessary. As a result of these practices, the cost of public works artificially increased for both tenderers and the Public Administration of the region. The cartel affected the cost of important public construction works such as the construction of the two biggest hospitals of the region.

Moreover, client-sharing and price-fixing was reflected in certain sheets that were used to keep track of the allocated works. Information exchanges took place through meetings, e-mails, WhatsApp and fax. Agreements were of a secret nature and hid the identity of participants through nicknames. The anticompetitive conducts lasted for at least 15 years.

In addition, on the basis of Article 63(2) of the Spanish Competition Act, which enshrines the possibility to fine the legal representatives or Members of the Board who have participated in the agreements, the CNMC also imposed a EUR12.000 fine on the manager of one of the companies.

Mergers

The Commission clears the acquisition of Spanish wind turbine manufacturer, Gamesa, by Siemens

The European Commission has approved Siemens’ proposed acquisition of Spanish wind turbine manufacturer Gamesa by finding that the transaction will not raise competition concerns in view of the number of important competitors that will remain active in the market.

Following Siemens’ notification on 6 February 2017, the Commission opened the ordinary merger review procedure and investigated the impact that the proposed transaction would have on the onshore and offshore wind turbine markets, where overlaps were identified between the parties’ businesses.

This investigation has led the Commission to confirm that the onshore wind turbine market is rather fragmented with several large competitors. Regarding the offshore wind turbine market, the Commission determined that it is a more concentrated market, being Siemens and MHI Vestas the main competitors. Gamesa is only active in this market through its subsidiary Adwen, which does not constitute a competitive constraint for Siemens.

Since it is unlikely that the transaction will affect the competitive situation, the Commission reached the conclusion that the proposed transaction would raise no competition concerns and has therefore approved it.



Case-Law & Analysis

The General Court annuls the Commission decision whereby the merger UPS/TNT was prohibited on grounds of a procedural irregularity (Judgment of the General Court of the EU of 7 March 2017 in Case T-194/13 United Parcel Service, Inc. v Commission)

The General Court has annulled the prohibition decision concerning United Parcel Service's ("UPS") proposed acquisition of TNT Express ("TNT") by concluding that the Commission breached UPS' rights of defence by using an econometric analysis which had not been discussed in its final form during the administrative procedure.

UPS and TNT Express ("TNT") operate in the specialist transport and logistics services sector worldwide. In the European Economic Area ("EEA"), UPS and TNT – as well as FedEx and DHL – are also active in the market of international express small package delivery.

In June 2012, UPS notified its intended acquisition of TNT to the Commission. By decision of 30 January 2013, the latter prohibited the said acquisition based on the fact that the transaction would have resulted in competition restrictions in 15 Member States in the express delivery of small packages to other European countries. In those Member States, the acquisition would have brought about a reduction in the number of significant players in the market (to three, or even two) and, consequently, prices would have increased. In this context, UPS challenged the decision of the Commission before the General Court of the EU.

By its judgment, the General Court has upheld UPS' action and annulled the Commission's decision. More precisely, the Court has noted that the rights of defence and, concretely, the right to a fair hearing requires that the undertaking concerned has the opportunity, during the administrative procedure, to be heard regarding the truth and relevance of the facts and circumstances alleged, and on the documents used by the Commission to support its claims.

The General Court has found that the econometric analysis carried out by the Commission was based on a different econometric model from the one that had been discussed with UPS during the administrative procedure. In particular, important changes to this model had been made by the Commission which should have been communicated to UPS. By failing to do so, the Commission violated UPS' rights of defence.

On the basis of this finding, the General Court has annulled the Commission's decision in its entirety without analysing the other pleas in law argued by UPS.



Currently at GA&P

GA&P hosts seminar on “Brexit: What’s next? The effect of Brexit on Spanish companies and organizations”

On 3 March 2017, our Madrid office hosted a high level Panel to discuss how Brexit will affect the relationships between the UK and national and international institutions, and what the impacts of Brexit will be for Spanish citizens and companies. The Panel was composed of Mr. Ignacio Molina, researcher at Real Instituto Elcano and professor at Universidad Autónoma de Madrid; Ms. Inmaculada Rodríguez Piñero, Member of the European Parliament; and Mr. José Ramón García Hernández, Member of the Spanish Parliament. The event was organized by GA&P, in collaboration with Grayling, and was chaired by Brussels-based partner Miguel Troncoso Ferrer. Overall, the Panel contributed to the general debate regarding the possible post-Brexit scenarios.

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