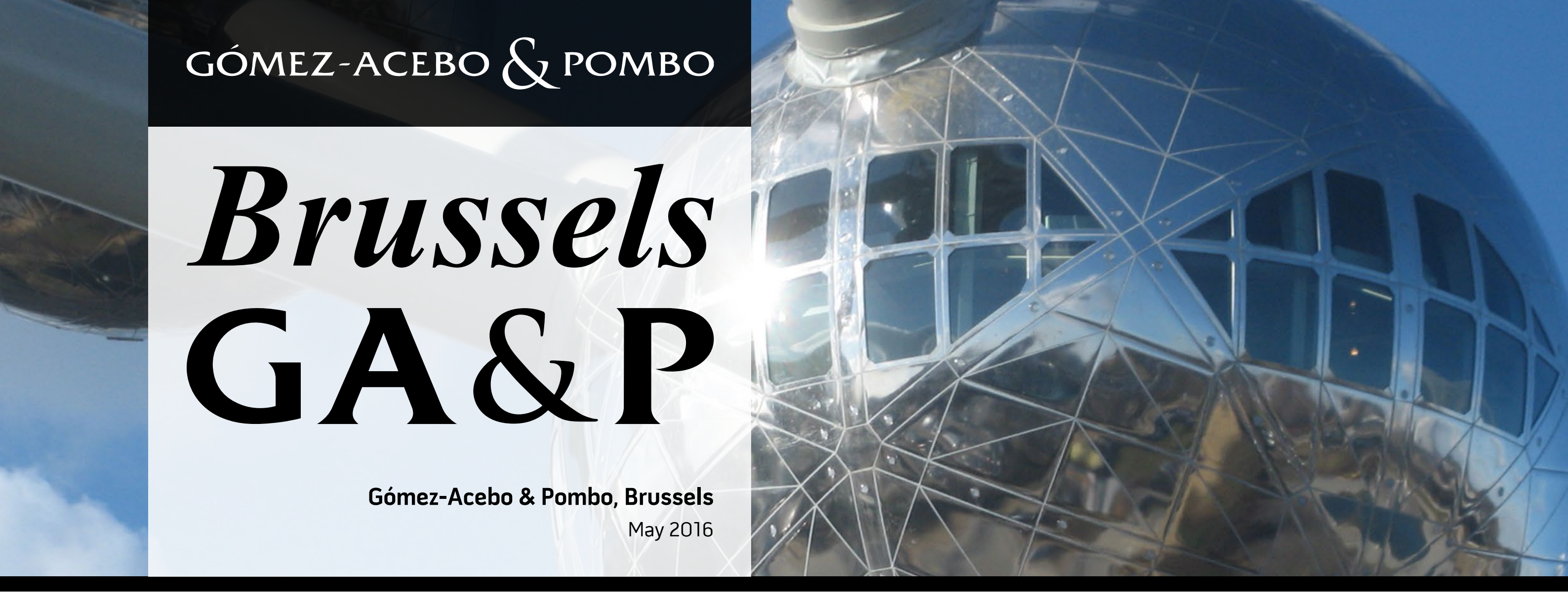

GÓMEZ-ACEBO & POMBO

# Brussels GA&P

**Gómez-Acebo & Pombo, Brussels**

May 2016

## Content

# News

## Mergers

**European Commission bans acquisition of Hutchinson by rival O2 in the UK**

The in-depth investigation carried out by the Commission on the merger between Telefónica UK's "O2" and Hutchison 3G UK's "Three", showed important competition concerns in the UK mobile market.

The transaction would have left only two mobile network operators, Vodafone and BT's Everything Everywhere (EE) as competitors of the new merged entity, which would likely resulted in higher prices and less choice for consumers. In addition, the Commission considered that the transaction would have a probable negative impact on the quality of service due to hindering new development of the mobile network infrastructure.

Together with the above-mentioned mobile network operators, there are some mobile virtual operators in the UK retail mobile market (Virgin Media, Talk Talk and Dixons Carphone's iD). These operators do not own the networks they use to provide mobile services, reason why they need access to the other operators' network at wholesale rates. In this sense, the Commission also considered that the acquisition would reduce the number of mobile network operators willing to host other operators on their networks.

In order to address these fears, Hutchison offered remedies, which however did not adequately solve the Commission's competition concerns. More concretely, Hutchison proposed measures to strengthen the development of existing mobile virtual operators or to support the market entry of new ones. It also committed to assume certain behavioral remedies aimed at, *inter alia*, granting mobile virtual operators access to 4G and future technologies.

Not being satisfied with these remedies, the Commission has decided to block the acquisition. This is the first prohibition decision taken in the last three years. The last one was adopted during the mandate of the former Competition Commissioner, Joaquín Almunia, and concerned the merger between Ryanair and Aer Lingus

## State Aid

**European Commission publishes notice on the notion of State Aid**

As part of the State Aid Modernisation Initiative, the Commission has issued new guidance on the notion of State aid aimed at assisting tax authorities and companies to identify when a public measure may be implemented without the need for the Commission to carry out a prior assessment.

It is expected that this notice fosters public investment in the EU by helping to create public funding schemes that do not distort competition. This instrument stems, in particular, from the recent State aid decisions on tax rulings.

The most important novelties concerned: (i) construction or upgrade of infrastructure; (ii) public investment with no cross border effect; (iii) public procurement; (iv) cultural activities; and (v) tax rulings and settlements.

Following the notice, tax rulings confer a selective advantage in particular when: they apply incorrectly national Tax Law which leads to a lower amount of tax; or they are not available to all undertakings in comparable legal and factual situations; or the tax authorities apply a more favourable tax treatment compared to other companies in similar situations.

As for tax settlements, the Commission has warned that they may involve State aid, particularly if the amount of tax due has been reduced without a clear justification (such as optimizing the recovery of debt) or disproportionately to the benefit of the company.

**Commission authorises AB InBev's acquisition of SABMiller, subject to conditions**

SABMiller (owner of the brands Miller, Peroni, Pilsner Urquell and Grolsch) is the world's second largest brewer, just behind AB InBev, largest one at global level and owner of Corona, Stella Artois and Budweiser. The approval is subject to AB InBev divest in practically the entire SABMiller beer business in Europe.

In comparative terms, worldwide, the merged entity will sell twice as much beer and reach four times more profit than Heineken, currently the third largest brewer, and five times more beer and twelve times more profit than Carlsberg, the fourth largest brewer.

In Europe, where Heineken and Carlsberg are the market leaders, the merger brings together the third and fourth competitors. AB InBev has a very strong presence in Belgium and Luxembourg and it is also present in Eastern Europe through Molson Coors, the company's bottler and distributor. By its side, SABMiller is especially strong in Poland, Czech Republic, Slovakia, Hungary and Romania.

The Commission's investigation showed that the transaction could lead to an increase in prices in all EU countries where SABMiller is active. Therefore, AB InBev proposed to divest the whole SABMiller's business in France, Italy, the Netherlands and the UK, for which it has already accepted an offer made by the Japanese brewer Asahi.

In order to address the additional competition concerns, AB InBev also offered to divest SABMiller's business in the Czech Republic, Hungary, Poland, Romania and Slovakia.

Based on these remedies, the Commission considered that the proposed transaction, would no longer raise competition concerns and it has granted the approval.

**The European Commission's Platforms Communication**

As part of the Digital Single Market Strategy, the Commission carried out an assessment of the role of online platforms, which was based on a public consultation, workshops and studies.

This assessment concludes that online platforms play an essential role with regard to innovation and growth in the Digital Single Market, to the benefit of both businesses and consumers.

Market fragmentation caused by different national (or even local) regulations may hinder the sustainable development and expansion of online platforms for both established players and new comers. In this sense, it is expected that the Digital Single Market and other related initiatives like Digitising European Industry, the Single Market Strategy and the Capital Markets Union, as well as investment through Horizon 2020 and the European Fund for Strategic Investments allow online platforms in the EU to thrive.

Now the Commission will further analyse the need of undertaking more targeted policy measures based on the identified concerns depending on the specific type or activity of online platforms. The following four principles will guide the Commission's action: (i) achieving a level playing field for comparable digital services; (ii) ensuring that online platforms behave responsibly to protect core values; (iii) fostering trust, transparency and fairness; and (iv) keeping markets open and non-discriminatory to foster a data-driven economy.