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Gómez-Acebo & Pombo

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News

The Spanish competition authority fines five companies and three of their executives for an information exchange to collude in tenders for the award of institutional advertising contracts

Five companies (Carat España SAU, Inteligencia y Media SA, Media by Design Spain SA, Media Sapiens Spain SL and Persuade Comunicación) have been sanctioned for a collusive behaviour consisting in the exchange of commercially sensitive information in order to share tenders in the Framework Contract 50/2014, awarded to four of these companies. This framework contract concerned institutional advertising campaigns for the Spanish State.

The companies exchanged the information with the cooperation of a fifth company, Ymedia (a company of the same group as Carat). Fines have been set at EUR 4 million (Carat), EUR 2 million (Inteligencia y Media), EUR 627,890 (Media Sapiens) and EUR 495,000 (Persuade) by the Spanish competition authority. Media by Design did not receive a fine due to its lack of revenue in 2017; the authority may still investigate under a different procedure whether its conduct can be attributed to another company of the same group.

In addition, three executives or legal representatives of the companies Persuade, Ymedia and Media Sapiens have been fined EUR 40,000, EUR 32,000 and EUR 37,000 respectively due to their intervention in the conduct.

The decision may be appealed before the *Audiencial Nacional* within two months.

The Commissions dawn raids the metal packaging sector

On 24 April 2018, the European Commission carried out unannounced inspections at the premises of a number of companies active in metal packaging in several Member States. The Commission was accompanied by officials of the relevant national authorities.

The investigation follows concerns about a potential breach of Article 101 of the Treaty of the Functioning of the European Union ("TFEU") whereby cartels and restrictive business practices are prohibited.

This case was prompted by an investigation initiated by the German Competition Authorities. However, as this investigation evolved, the German authorities suspected that the anticompetitive practices may have had affected markets of other Member States. In this context, the Commission has taken over the investigation.

Dawn raids do not prejudge the result of the investigation.

Class Actions also available for SMEs and self-employed individuals in Belgium

Class actions were introduced into the Belgian judicial system by the law of 28 March 2014, inserted as Title 2 in Book XVII of the Belgian Code of Economic Law.

However, the scope of this law remained limited. Firstly, class actions are only available in relation to a limited list of matters regulated at national and EU level, mainly related to consumer protection: consumer rights, competition, financial services, privacy and protection of electronic data, as well as EU law concerning the rights of train passengers and airplane passengers. Secondly, only a limited number of recognized consumer associations may file a class action. This has been criticised for limiting the right to file the action.

As from 1 June 2018, class actions will be also available for small and medium-sized enterprises (SMEs) and self-employed individuals, who will now be able to file class actions through a group representative. In terms of procedure, SMEs and self-employed individuals will need to follow the same procedure available for consumers.

While SMEs are not defined under Belgian law, the European Commission defines them as undertakings with less than 250 employees and with an annual turnover of less than EUR 50 million or a total annual balance sheet of less than EUR 43 million.

In addition, as from 1 June 2018, the Brussels Commercial Court will be the only competent court with regard to class actions, and the Brussels Court of Appeal will remain competent for appeals filed against judgements delivered by this Commercial Court.

Case-law & Analysis

The General Court of the EU finds that the Commission must re-assess Lufthansa's and Swiss' request to waive their pricing commitments regarding the Zurich-Stockholm route *(Judgment of the General Court of the EU of 16 May 2018 in Case T-712/16, Deutsche Lufthansa AG v Commission)*

In 2005, the European Commission cleared the planned acquisition of Swiss by Lufthansa subject to a number of commitments, which included conditions on fares with regard to the Zurich-Stockholm and Zurich-Warsaw routes.

On 4 November 2013, Lufthansa and Swiss submitted a request for a waiver of such fare commitments before the Commission. The request was rejected by means of a Commission decision

of 25 July 2016 on the grounds that the conditions for a waiver were not met. Lufthansa challenged this decision before the General Court of the EU.

In its judgment, the General Court of the EU has concluded that the Commission failed to comply with its obligation to correctly assess Lufthansa's request to waive commitments regarding fares.

According to the Court, the Commission did not review the impact of the termination of a joint venture agreement between Lufthansa and SAS and did not address Lufthansa's argument that the Commission was no longer considering alliance partners to determine affected markets. In addition, the Court has found that the Commission failed to examine the codeshare agreement signed between Swiss and SAS in 2006.

Finally, the Court has established that the Commission disregarded its duty to carefully examine all the relevant information, make enquiries or conduct the necessary investigations in order to ascertain whether there was competition between Swiss and SAS, among others.

Due to this manifest error of assessment made by the Commission, the latter is now required to re-assess the request for a waiver regarding the route Zurich-Stockholm.

With regard to Zurich-Warsaw route, the Court has held that since the contractual relationships between Swiss and LOT have not changed from the time the fare commitments were made binding, the failures established by the Court are not sufficient to result in the annulment of the contested decision in so far as that route is concerned.

The Court of Justice of the EU confirms that regional taxes on large retail establishments in Spain are compatible with EU Law (*Judgment of the Court of Justice of the EU of 26 April 2018 in cases C-233 to C-237/16, ANGED and others*)

In Spain, three regions (Catalonia, Asturias and Aragón) introduced taxes on large retail establishments in order to offset potential impacts on the territory and the environment.

An association representing large wholesale companies challenged the lawfulness of such taxes in court and filed a complaint before the European Commission. The Spanish Supreme Court, before which the case is currently pending, requested a preliminary ruling to the Court of Justice of the EU so as to clarify whether such measures are compatible with EU law and whether the exemptions available from the taxes in question could constitute State aid.

The Court of Justice of the EU has considered that the criterion for determining which establishments are subject to the tax (i.e. the sales area) is neither discriminatory nor disadvantageous for natural or legal persons from other Member States.

As for the exemptions provided for such taxes, the Court firstly pointed out that the taxes aimed at correcting or counteracting the environment and territorial impact of the activities carried out by these establishments.

In this sense, the Court considered that exemptions based on the size or nature of the activities of an establishment do not constitute State aid, provided that the establishments exempted from the tax do not have an adverse effect on the environment and on town and country planning as significant as the others.

However, in the particular case of Catalonia, where a 60% reduction of the tax base is granted for certain activities, the Court considered that that criterion differentiates between two categories of large retail establishments that are objectively in a comparable situation in the light of the objectives of environmental protection and town and country planning. Therefore, the exemption is selective and constitutes State aid (provided that the other conditions set out in the Treaty are met).

Currently at GA_P

XXVIII FIDE Congress in Portugal

The Portuguese Association of European Law organised the XXVIII FIDE Congress last 23rd to 26th May in Estoril (Portugal).

The congress, sponsored by GA_P, dealt with the following issues:

— The internal market and the digital economy

— Taxation, State aid and distortions of competition

— The external dimension of the EU policies

Our colleagues Mário Marques Mendes, Pedro Vilarinho Pires and Alexandra Dias Henriques attended the event as representatives of our firm.

More info at: https://www.fide2018.eu/en/