GÓMEZ-ACEBO & POMBO

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— News —

Antitrust

Abuse of dominance of energy suppliers declared in Belgium and Spain

Both the Belgian and the Spanish national competition authorities have recently imposed fines on electricity suppliers for abuse of dominant position.

On 10 July 2014, the Spanish competition authority imposed a 1.18 million EUR fine on Endesa Distribución for abusing its dominant position in the market for distribution network infrastructure between 2008 and 2012.

Endesa would have illegally charged for executing works in order to expand its distribution network instead of assuming these costs itself and only charge for the current rights of extension.

When calculating the fine, the Spanish authority has applied an extra 10% as aggravating circumstance in view of Endesa's recidivism.

A few days later, on 18 July 2014, the Belgian competition authority fined Electrabel -Belgium's largest energy provider- 2 million EUR for abusing its dominant position in the market for electricity generation, wholesale and trading from 2007 to 2010.

The infringement consisted in applying for sales of parts of the reserved capacity on the Belpex Day-Ahead-Market exchange, a price scale including an excessive margin of 60 euros/MWh.

Smart card chips producers fined 138 million EUR

The European Commission has imposed fines for over 138 million EUR to Infineon, Philips, Samsung and Renesas (former joint venture of Hitachi and Mitsubishi) for colluding in the market for smart card chips in the European Economic Area (EEA).

Smart card chips are used in a wide range of applications such as mobile telephone SIM cards, bank cards, identity cards, pay TV cards, etc.

The infringement consisted in a network of bilateral contacts operated from September 2003 to September 2005 to determine responses to customers' requests for lower prices. The companies discussed and exchanged sensitive commercial information on pricing, customers, contract negotiations, production capacity or capacity utilisation and their future market conduct.

Renesas benefitted from full immunity under the European Commission's 2006 Leniency Notice for revealing the existence of the cartel and Samsung received a reduction of 30% for cooperating during the investigation, which has resulted in a 35.11 million EUR fine. The German company Infineon has been fined 82.78 million EUR and the Dutch company Phillips 20.14 million EUR.

The Commission explored the possibility of a settlement with some of the companies investigated

but decided to revert to the normal procedure in 2012 due to the lack of progress in the discussions.

Mergers

Commission approves the acquisition of Holcim assets by Cemex

The planned acquisition by the Mexican Cemex of the Spanish operations of the Swiss building materials group Holcim was notified to the European Commission on 28 February 2014.

The Commission has finally cleared the transaction after having conducted a phase II investigation initiated in April 2014.

The Holcim assets acquired by Cemex include plants and quarries in Spain for the production and supply of cement, aggregates, ready-mix concrete and mortar.

In eastern Spain, the new entity is expected to face strong competition from competitors operating in the various geographic markets around the parties' grey cement production facilities, given the level of spare cement production capacity of these competitors.

In central Spain, the Commission initially considered eventual risks of coordination in the markets for grey cements. Nevertheless, after the in-depth investigation, the Commission concluded that the transaction was unlikely to result in coordination between producers in this segment.

In sum, the Commission considered that the operation would not raise competition concerns given the sufficient competition from rivals in all markets concerned and, therefore, approved the operation without conditions.

It is to be mentioned that in June 2014, the Commission approved the acquisition by Holcim of the Cemex West assets, mainly located in Germany. In addition, the Czech competition authority also approved the proposed acquisition of Holcim Cesko by Cemex in March 2014.

Freedom of movement of capital

The Court of Justice of the EU has declared the Spanish Inheritance and Gift Tax contrary to the freedom of movement of capital

On 3 September 2014, the Court of Justice of the EU (the "CJEU") has delivered its judgment in case C-127/12 concerning an infringement procedure against the Kingdom of Spain related to the Spanish Inheritance and Gift Tax (the "IGT").

The CJEU has declared that the Law 29/1987 of 18 December 1987 on Inheritance and Gift Tax (*Ley 29/1987, de 18 diciembre, del Impuesto sobre Sucesiones y Donaciones*; the "Law") is partially contrary to the freedom of movement of capital, as established in Articles 21 and 63 of the Treaty on the Functioning of the European Union (the "TFEU") and Article 40 of the Agreement on the European Economic Area ("EEA").

Although the IGT is a central tax (applied throughout Spain except in the Basque Country and Navarra), the Spanish Autonomous Communities may adopt their own rules which complete or replace the central ones by operation of the Law 21/2001 repealed and replaced by the Law 22/2009 of 18 December 2009.

As a general rule, the central legislation applies to non-residents, while the Autonomous Communities' rules apply only to residents in Spain when there is a personal or real connection with the corresponding Autonomous Community. Under the Spanish IGT regulation, where one of the parties involved in an inheritance or gift (the deceased, the donor or the recipient) is a non-resident, they cannot benefit from tax reductions adopted and applied in each Autonomous Community. The same takes place when the properties are located abroad.

The CJEU has therefore considered that the Spanish IGT discriminates against the non-residents.

As a first consequence, the IGT regulation will have to be modified in order to eliminate this inequality between residents and non residents. As a second and direct consequence, non-residents

who inherited or acquired by gift assets or property in Spain and paid the IGT may now claim a tax refund against the Spanish Tax Authorities and get back the overpaid tax.

— Case-law & Analysis —

Spain - Failure to notify a concentration: when does this infringement expire?

The Spanish competition authority confirmed in its resolution of 2 December 2009 (case SNC/0004/09 ADESLAS) that the failure to notify a concentration expires two years after the date when the implementation of the transaction has been carried out. It should be noted that pursuant to Article 62 of the Spanish Competition Act, the implementation of a concentration before a compulsory notification and approval constitutes a serious infringement. Moreover, in accordance with Article 68 of the Act, serious infringements shall lapse after two years.

The declaration of the Spanish competition authority in the resolution abovementioned appeared however to be questionable after the judgment of the General Court of the EU ("GC") in case T-332/09 *Electrabel v Commission*. In this judgment, the GC indicated that the implementation of a concentration before its notification and approval by the European Commission constituted an infringement that cannot be characterised as an instantaneous one. As a result, a limitation period running from the date on which the infringement was committed –i.e. the date of the acquisition of control- was not applicable to this infringement. In other words, this infringement is a continuous one and lasts for so long as the control acquired remains and the concentration has not been authorized. In the appeal proceedings against this judgment (case C-84/13), the Court of Justice of the EU issued a judgment on 3 July 2014 that left open whether such an infringement is a continuous or an instantaneous one. This question was not relevant since in any event the European Commission had carried out investigative acts before the expiration of the applicable limitation periods.

However, on 24 July 2014, the Spanish competition authority confirmed in its resolution in case R/AJ/0269/14 MEVION that the implementation of a concentration without the compulsory prior notification and approval is an instantaneous (not continuous) infringement that is committed at the moment of the acquisition of control. In this sense, two years after the acquisition of control without any request having been made by the competition authority, the infringement will be deemed as expired.

European Union - Groupemenet des Cartes Bancaires – About the boundaries of a restriction "by object"

Groupement des Cartes Bancaires or CB Group is a French banking association created in 1984 in order to allow holders of a card issued by a member of the CB Group to make payments to affiliated traders and/or withdraw money from CB Group member's ATMs.

In 2002, the CB Group established three pricing measures: (i). a fee payable by the members of the CB Group whose card issuing activity exceeded their activity in affiliating new traders to the system, (ii) a new membership fee, which consisted in a fixed sum and a supplementary amount for members whose number of CB cards in stock exceeded a certain threshold at a given moment and(iii) a "wake-up" fee for members that were not very active before the date of application of the new pricing measures.

After an investigation, the European Commission concluded that such payment system infringed EU Competition Law by both its object and anti-competitive effects. Although it did not impose a fine on the association, the Commission ordered the CB Group to put an end to the alleged infringement and to refrain from adopting any similar measures in the future.

The CB Group sought the annulment of the Commission's decision before the General Court ("GC"), which confirmed the Commission's view in 2012 and declared that the latter had no need to examine the effects of the measures on the market.

The GC's judgment was appealed before the Court of Justice of the EU ("CJEU"), which has finally annulled the previous judgment and confirmed that the GC erred in law when applying the concept of restriction of competition by object.

The CJEU has taken the view that, in spite of the fact that the GC set out the reasons why the pricing measures were capable of restricting competition, it did not explain how that restriction revealed a sufficient degree of harm so as to be characterized as a restriction by object.

The CJEU recognized that the GC correctly found that the fact that the measures pursued a legitimate objective (i.e. fighting against free-riding and ensuring that companies accepted cards from other operators as well as their own) does not preclude the measures from being regarded as having an object restrictive of competition. However, in the CJEU's view, the fact remains that that restrictive object must be established.

The CJEU has sent the case back to the GC, which will now have to assess whether the pricing measures constitute an effects-based infringement.

It can be expected that the narrower interpretation of the concept of restriction by object made by the CJEU in this judgment will have a considerable impact in respect to the often criticised use (and abuse) of the by object–based decisions issued by competition authorities.

— *Currently at GA&P* —

Spanish Restructuring & Investment Forum 2014

Gómez-Acebo & Pombo has organized together with Debtwire and with the sponsorship of JB Capital Markets, Savia Asset Management and KPMG a forum on credit and real estate opportunities in Spain on 16 September 2014 in London.

Private equity investors; bank portfolio management teams; finance investment bankers; debt advisory specialists and lawyers with cross-practice expertise participated in the forum discussions which addressed the current financial and economic situation; investment strategies; real estate opportunities and the latest regulatory changes.