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Gómez-Acebo & Pombo

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News

The European Commission sends Statement of Objections (SoO) to Telefónica Deutschland for alleged infringement of merger commitments

On 22 February 2018, the Commission addressed an SoO to Telefónica Deutschland (“Telefónica”) detailing its concerns that the company may have breached one of the commitments linked to the Commission’s clearance of its acquisition of E-Plus in 2014.

In particular, back then, Telefónica committed to offer wholesale 4G services to all interested operators at best prices under specific conditions, in exchange for the Commission’s approval.

According to the Commission, Telefónica would have not fully implemented this obligation. As a result, competition in the German market for mobile communication could have been distorted.

If the investigation confirms the infringement, Telefónica could be imposed a fine of up to 10% of its turnover and the Commission could decide to revoke its 2014 clearance decision.

This is the first time the Commission sends an SoO for an alleged breach of merger commitments.

The European Commission vetoes Siemens / Alstom’s merger

On 6 February 2019, the Commission adopted a prohibition decision against Siemens’ proposed acquisition of Alstom, which aimed at combining the parties transport equipment and service activities.

This decision was based on the Commission’s finding that the transaction at issue would significantly impede effective competition in two sectors: signalling systems (necessary to ensure safety in rail and metro transport) and very high speed trains (i.e., running at more than 300 km/h).

With regard to signalling systems, the Commission established that the acquisition would have led to the removal of a very significant player from a number of mainline and urban signalling markets. In particular, the combined entity would have become the leading operator in European Train Control System (“ETCS”) automatic protection systems in the European Economic Area (“EEA”) and in standalones interlocking systems in some Member States. In addition, concerning metro signalling, the transaction would have resulted in the merged entity being the undisputed leader in Communication-Based Train Control (“CBTC”) metro signalling systems.

As for high speed trains, the number of suppliers would have decreased, since one of the two main operators would disappear with the merger. The resulting entity would have held very high market shares in this market.

The competitive pressure that would exist in these markets post-transaction would not have been enough so as to ensure effective competition.

Although the parties proposed a series of commitments to obtain clearance, the Commission considered they were not sufficient to address the competition concerns or to prevent price increases and reduction of choice for railway operators and managers of rail infrastructure.

The European Commission launches public consultation on the Vertical Block Exemption Regulation (“VBER”)

The European Commission has opened a public consultation for stakeholders to provide input on the review of the VBER and its Guidelines.

The consultation asks stakeholders their views on whether current rules should be amended on the basis of *inter alia* the latest changes of the market.

The Commission is also enquiring whether the existing framework provides enough legal certainty for operators when assessing if their agreements fall under the VBER and whether the legal costs to ensure compliance have increased with the last amendment of the rules.

The deadline to submit comments on this review expires on 27 May 2019. Once all the input received has been processed, the Commission will publish a summary of the main issues and conclusions identified.

The Spanish Competition Authority (“CNMC”) opens formal investigation against 25 consultancy firms and some of its top executives

The CNMC has started a formal investigation against 25 companies active in the provision of consultancy services, on the basis of evidence of possible infringements of Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the EU (“TFEU”). These provisions prohibit anticompetitive agreements and practices.

The conducts in question would relate to market-sharing agreements or concerted practices with regard to (mainly public) tenders for consultancy services. The companies concerned would have submitted fake bids for certain tenders so as to share the market from 2009 until 2018.

The CNMC's investigation does not only concern the said undertakings but also some of its managers. This is the case for the executives of Bmasil Strategy, S.L., Deloitte Consulting, S.L.U., Idom Consulting, Engineering, Architecture, S.A.U, Innovisions 21, S.L, 97S&F, Pricewaterhousecoopers Asesores De Negocios, S.L, Regio Plus Consulting, S.L. and Red2Red Consultores, S.L.

This investigation follows the dawn raids conducted by the CNMC in October 2018, which were prompted by a referral from the Basque Competition Authority.

The opening of an investigation does not prejudice the outcome thereof.

Case-Law & Analysis

The General Court of the EU finds that Belgian tax exemptions for multinationals' excess profits was not an aid scheme and annuls Commission's recovery decision (*Judgment of 14 February 2019 in Joined Cases T-131/16, Belgium v Commission, and T-263/16, Magnetrol International v Commission*)

In 2016, the Commission adopted a decision declaring that a Belgian tax exemption for excess profit of multinational companies was incompatible State aid. Accordingly, the Commission ordered Belgium to recover the aid of all the beneficiaries.

The decision was challenged by both Belgium and one of the beneficiaries ("Magnetrol International") before the General Court of the EU. The plaintiffs grounded their appeal on the fact that the decision was interfering in Belgium's tax jurisdiction in direct taxation and that the Commission erred by establishing the existence of an aid scheme in the case at hand.

As for the tax jurisdiction argument, the General Court of the EU has held that, although direct taxation is a competence of Member States, it needs to be exercised in compliance with EU law, which included EU State aid rules. On this basis, the Court has dismissed the parties' claim in this respect.

However, with regard to the existence of an aid scheme, the General Court has found that the Commission erred by considering that the tax exemption concerned constituted an aid scheme.

The Court grounded this conclusion on several points. First, the Commission had identified a series of provisions as the basis of the scheme; however, such provisions did not foresee all the essential points of the said scheme. To grant the alleged aid, it was necessary to adopt further implementing measures. This is a feature that leads to exclude the existence of an aid scheme.

Second, the Belgian authorities had important discretion to determine the amount and conditions of the exemption. Again, this prevents establishing the existence of an aid scheme.

Finally, according to the Court, the theoretical aid beneficiaries were not defined in a general and abstract manner.

On this basis, the Court has concluded that the Commission erred and, accordingly, has annulled its decision.

The General Court of the EU annuls Commission's state aid decision concerning tax regime of Spanish professional football clubs (*Judgements of 26 February 2019 in Cases T-679/16, Athletic Club v Commission, and T-865/16, Fútbol Club Barcelona v Commission*)

In 2016, the Commission adopted a decision declaring that four Spanish professional football clubs (i.e., Fútbol Club Barcelona, Club Atlético Osasuna, Athletic Club and Real Madrid Club de Fútbol) had received incompatible state aid in the form of corporate tax privileges. As a consequence, Spain was ordered to put an end over the tax regime in question and to recover the aid granted from the recipients.

The privileges were granted on the basis of the clubs' non-profit organizations status, as the clubs concerned had opted to operate as sports clubs instead of becoming sports public limited companies ("SPLC").

The Commission's decision was appealed before the General Court by Fútbol Club Barcelona and Athletic Club.

While in its judgment concerning Fútbol Club Barcelona, the General Court has declared the nullity of the decision; the General Court has dismissed the Athletic Club's appeal.

The General Court has examined whether the Commission proved that the tax regime at issue, as a whole, conferred an advantage to its recipients. In this regard, the Court has found that a nominal preferential rate was applied to the four beneficiaries between 1990 and 2015.

Despite this, according to the Court, the analysis of such an advantage shall be made in conjunction with the other components of the non-profit organizations' tax regime. In this sense, tax deductions for reinvestments of extraordinary profits was lower for non-profit organisation than for SPLCs. The Commission excluded that this could offset the advantage conferred by the preferential tax rates by arguing that it had not been shown that the deductions were more advantageous.

Nonetheless, in the Court's view, the Commission bore the burden to prove the existence of the advantage and, finding that such an advantage existed could only be possible if it was demonstrated that the tax deductions for SPLCs did not offset the advantage resulting from a lower nominal tax rate applied to non-profit organizations.

Thus, the General Court has found the Commission erred in the assessment of the facts in the case at issue.

The Court has also examined the question of whether, despite that error, the Commission could rely on certain figures included in a study submitted by Spain during the administrative procedure in order to establish the existence of an advantage. The Court has stated that such data should have been reviewed in the light of all the factual evidence provided to the Commission.

Overall, the Court has concluded that the Commission has not proven to the requisite legal standard that the measure conferred an advantage on its beneficiaries.

Currently at GA_P

Our Brussels' Competition partner Miguel Troncoso ranked in Chambers Global 2019

GA_P's Brussels Competition partner Miguel Troncoso has been ranked in Chambers Global 2019 as foreign expert in Spain (Competition/EU Law) and as expert based abroad (Corporate/M&A: Competition Spain).

For more info: <https://chambers.com/profile/individual/568123?publicationTypeId=2>