

# Brussels G A \_ P Newsletter

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Brussels



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## News

### **Commission prohibits proposed merger between Tata Steel and Thyssenkrupp**

On 11 June 2019, the proposed joint venture (“JV”) between the two companies was prohibited by the Commission. The prohibition is grounded on the effects that the proposed JV would have produced in the market, namely, reduced competition and increased steel prices. The Commission’s decision is mainly based on the fact that both companies are two of the main producers of: (i) coated and laminated steel for packaging applications; (ii) galvanised flat carbon steel for the automotive industry; and (iii) flat carbon steel.

The steel sector is a key industry across the European Economic Area (“EEA”), mainly because of the number of jobs that it creates (360,000) and the high presence of production sites (500) in the EU. It is also a key sector because the automotive industry and the packaging industry depend heavily on it. The main concerns of the Commission with regard to the JV were that the merger would have resulted in a reduced choice in suppliers and higher prices for customers of goods by the industries in which both companies have significant presence.

In addition, the role of imports from third countries was carefully investigated, concluding that it would be impossible for customers to offset price increases through imports.

Finally, there were concerns that the competitive pressure from remaining players would not suffice to ensure effective competition.

The remedies that the undertakings proposed to the Commission were found inadequate to address the above-mentioned concerns.

### **Commission opens investigation into Broadcom and sends Statements of Objections (“SoO”) on interim measures in TV and modem chipsets markets**

The Commission has opened an investigation into Broadcom’s commercial practices over a number of competition concerns.

Broadcom is one of the world’s largest designers, developers and providers of key components of wired communication devices and is a global leader in the markets of systems-on-a-chip, front-end chips, Wi-Fi chipsets and central office/head end equipment.



The investigation has begun over the suspicion that Broadcom has been engaging in exclusionary practices including, among others, setting exclusive purchasing obligations and product bundling.

At the same time, the Commission has sent an SoO to the company seeking to impose interim measures. The SoO sets out some of the preliminary conclusions: Broadcom is likely to hold a dominant position in several markets; and, some of the agreements between Broadcom and its customers contain exclusive purchasing obligations, which may restrict competition and stifle innovation in the affected markets.

The SoO also states that interim measures may be indispensable in this case and, as a consequence, the Commission will carry out its investigation as a matter of priority.

### **The CNMC seeks a preliminary ruling on the Framework Agreement for the Dock Work Sector from the CJEU**

In Spain, the dock work sector has been traditionally regulated by Royal Decree 2/1986. This Decree provided special sectorial rules, including the obligation to hire workers from the port docker management limited companies (“Sociedades Anónimas de Gestión de Estibadores Portuarios” or “SAGEP”) for the provision of cargo-handling services.

Under this system, which was organised through a collective agreement, stevedoring companies were required to be shareholders of SAGEP.

By means of a judgment of 2014 (Case C-576/13), the Court of Justice of the European Union (“CJEU”) established that such special rules infringed the freedom of establishment contained in Article 49 of the Treaty on the Functioning of the European Union (“TFEU”).

To redress this infringement, in 2017, the Spanish Government approved “Royal Decree-Law 8/2017”, whereby the obligation to have a shareholding in SAGEP was abolished. This was followed by a new collective agreement in July 2017.

The new agreement imposed a set of commercial obligations that, in the view of the Spanish Competition and Markets Authority (“Comisión Nacional de los Mercados y la Competencia” or “CNMC”) view, go beyond the scope of collective bargaining and the provisions of the law. Following concerns of anticompetitive practices, the CNMC launched an investigation in November 2017.



While the investigation was ongoing, in March 2019, the Spanish government passed Royal Decree-Law 9/2019. This piece of legislation could be applied retroactively in as much as it grants operators the possibility of agreeing an obligatory stake of stevedoring companies in SAGEP.

In this context, the CNMC has referred for a preliminary ruling to the CJEU the question of whether Article 101 TFEU prevents agreements between operators and workers' representatives when these set out how companies that are not under the structure of SAGEP must hire.

If this question is answered in the affirmative, then the CNMC asks the CJEU to clarify whether Article 101 TFEU is incompatible with Royal Decree-Law 9/2019 insofar as the latter provides the legal basis for imposing, by means of collective agreements, a specific way of hiring and establishes harmonised commercial terms and conditions.

Additionally, in the event of an answer in the affirmative to the latter question, the CNMC further asks if it should avoid applying the national legal provisions that are in breach of Article 101 and if it can fine the operators.

The referral has resulted in a stay of the disciplinary proceedings. The case reference number is C-462/19 SAGEP.

## **The CNMC investigates a possible infringement of merger commitments by Telefónica**

In 2015, the CNMC approved the acquisition of DTS by Telefónica, subject to a series of commitments relating to the pay television market.

Telefónica undertook, inter alia, to make available 100% of its premium channels to third-party operators under conditions which would allow them to replicate Telefonica's retail offers.

On 19 June 2019, the CNMC announced the opening of administrative proceedings against Telefónica for a possible breach of such commitments.

Concerns refer to Telefónica's miscalculation of the fixed costs of its premium TV channel 'Movistar Partidazo' in its wholesale offer to third parties in the 2016/2017 season. Although, in September 2018, Telefónica acknowledged its error and reimbursed the difference, the football season was already over so reimbursement did not repair the harm to competition.

These irregularities have been identified thanks to the monitoring work carried out by the CNMC to ensure that merger commitments are complied with.

## The CNMC has fined Spanish collecting society SGAE for abuse of dominant position in the management and exploitation of IP rights

The CNMC has fined SGAE (“Sociedad General de Autores y Editores”) with EUR 2.95 million for abusing its dominant position in the market of management and exploitation of musical and audio-visual intellectual property rights.

The CNMC investigation started in 2017, following several complaints. The probe has shown that SGAE abused its dominant position in relation to: (i) contractual terms and conditions imposed on authors and (ii) public reproduction of works.

With regard to the first abuse, the CNMC has concluded that SGAE imposed, without any justification, clauses that restricted the ability of authors to decide whether to grant only part of the management of their rights to SGAE. This practice hindered the development of alternative collecting societies that could compete with SGAE.

As for the second abuse, the CNMC found two infringements. First, it established that SGAE had sold bundles including authorisation for the public reproduction and communication of both musical and audiovisual work. This practice was implemented in the hospitality and restaurant sectors and required customers to acquire musical and audiovisual rights in a bundle.

Moreover, SGAE did not provide a price breakdown of all the products included in these bundles, thereby preventing buyers from knowing the exact price of each product and from comparing with offers from other companies.

These practices resulted in a breach of Article 2 of the Spanish Competition Act and Article 102 TFEU, which prohibit the abuse of a dominant position.

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## Case law & Analysis

### The Spanish Supreme Court rules against Repsol and affirms the CNMC’s fine

The Spanish Supreme Court has confirmed the penalty against Repsol for anticompetitive practices consisting in agreements and exchange of strategic information on the prices of fuel in Spain.

In the judgement, the Supreme Court has upheld the claims of the State Attorney (central government litigation lawyer) and has overruled the judgment of the Spanish High Court (“*Audiencia Nacional*”), which had determined that Repsol could not be held liable for the actions of its subsidiary, “Repsol Comercial de Productos Pretrolíferos S.A.”, in application of the principle of the individual nature of penalties.

By contrast, the Supreme Court has set aside this finding and has explained that fining the parent company for the action of its subsidiary is compatible with the principle of the individual nature of penalties and the principle of fault, when the former has complete (or almost complete) control over the latter.

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## Currently at GA\_P

### GA\_P’s Competition Law partner Miguel Troncoso organises seminar on Online Travel Agents (“OTAs”), hotels and rate parity clauses

On 2 July 2019, GA\_P’s office in Madrid hosted the seminar “OTAs, hotels and rate parity clauses: The way forward”. The event was organised by Brussels-based Miguel Troncoso, who moderated the discussion. Ms. Canedo Arrillaga, from the Spanish Competition Authority, participated as a speaker. The treatment of rate parity clauses under Competition Law was one of the focuses of the seminar.