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— News —

Antitrust

Spanish competition authority fines public postal entity CORREOS for abuse of dominant position

The Spanish public postal entity Correos y Telégrafos S.A. (CORREOS) has been fined 8,17 million EUR by the Comisión Nacional de los Mercados y la Competencia (CNMC) for abusing its dominant position.

Despite the liberalisation directives issued on 1997, 2004 and 2008, CORREOS is the administrator of the most extensive postal network covering the whole national territory and the main operator in the market, reaching a turnover 10 times higher than its closer competitor, UNIPOST, which lodged the complaint that instigated the investigation of the abuse. In addition, CORREOS is entrusted to supply the "Universal Postal Service" until 2025 with the legal obligation of supplying its competitors the wholesale service of access to its network.

The abuse consisted on applying considerably higher discounts to "great clients" –those companies purchasing postal services for over 100,000 EUR per year- in comparison with alternative operators using the postal network and purchasing similar services. This behavior led to a margin squeeze given that those alternative operators were not able to offer their services to consumers without incurring in losses. Therefore, CORREOS has been held responsible for an abuse against Article 2 of the Spanish Competition Act for preventing alternative operators to compete in the segment of the "great clients".

European Commission will accept the third version of Google's proposed commitments

The European Commission has accepted Google's latest proposals in order to remedy complaints regarding an abuse of its dominant position in the Internet search market and therefore paving the way to a settlement agreement which would eventually save Google a competition fine reaching 10% of the company's turnover.

This new set of commitments are supposed to solve one of the key complaints raised by competitors, among which included US rival Microsoft, that Google ensured its services were more prominently displayed than theirs', putting them at a serious disadvantage. Google's remedy is therefore supposed to provide users with real choice between competing services presented in a comparable way.

The original complainants will now be given the chance to comment on the proposal before the Commission takes a decision on whether to make the commitments legally binding.

Furthermore, the Commission has declared that Google had already made significant concessions to meet other competition concerns; among these, content providers can now get an extensive opt-out from the use of their content in Google's specialised search services without being penalised by the company.

Google will also commit to remove exclusivity requirements in its agreements with publishers for the provision of search advertisements and remove restrictions on the ability for search advertising campaigns to be run on competing search advertising platforms.

The Commission has also stressed that, after the appraisal of comments, if it decided to made the commitments legally binding, Google's compliance would be supervised by an independent monitoring trustee over a 5 year period in the European Economic Area.

Mergers

Commission authorises acquisition of joint control in Financiera El Corte Inglés by Santander Customer Finance and El Corte Inglés

The European Commission has cleared the acquisition of joint control over Financiera El Corte Inglés S.A., "FECI", by Santander Customer Finance, S.A. and El Corte Inglés S.A. FECI, currently controlled by El Corte Inglés, provides credit services – mainly loans and financing– through private purchasing cards, connected to purchases in El Corte Inglés Group, active in Spain and Portugal, or with retailers based on bilateral agreements. The Commission concluded that the proposed operation would not significantly change the market structure and there will still be strong competitors in the markets for card issuing and consumer credit as well as in their respective sub-segments.

State Aid

Commission consults on draft guidance on notion of aid

The European Commission has launched a consultation on a draft notice aimed at facilitating the identification of state aid measures that need prior notification to be implemented, pursuant to Article 108 (3) TFEU. Upon results, the Commission intends to adopt a final guidance notice in the second quarter of 2014.

Whether a measure constitutes state aid or not is essential for national administrations and judges as well as business potentially benefiting from aid, as it determines whether a measure is subject to the Commission's approval before it can be implemented.

The said draft guidance notice addresses, inter alia, the following elements:

- The presence of an economic activity (notion of "undertaking");
- The imputability of the measure to the State;
- Financing through State resources;
- The presence of an economic advantage for the beneficiary;
- Selectivity
- Effect on trade and competition.

The final document is supposed to help stakeholders to determine whether the sale of a public asset, a capital injection in a company or certain tax policies entail state aid that has to be assessed by the Commission before being implemented, in order to verify whether the measure affects competition.

Comments can be submitted until 14 March 2014 using the following link:

http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html

Advocate General Sharpston proposes 50 million EUR fine on Spain for failing to recover illegal State aid in the Basque Country

In 2001 the European Commission declared three tax regimes in the Basque Country –which were not notified- as illegal and required Spain to recover the aid.

Upon the alleged inactivity of Spain, the Commission filed an action for infringement before the Court of Justice of the EU and the latter ruled in 2006 that Spain did not indeed execute the necessary measure to recover the illegal aid and ordered it to proceed with the recovery.

However, the Commission filed a new action requesting the Court of Justice to declare that Spain had failed to comply with the judgment and to impose a more than 64 million EUR fine.

At the end of 2013, the Commission informed the Court that the total amount together with the interest had been recovered, the last payment of which being 15 October 2013. Nevertheless, the parties still disagree on the calculations and the amount to be recovered and Spain has declared that it only proceeded to the full payment in order to limit any penalty eventually imposed by the Court but without admitting the legality of the recovery.

Under the opinion of Advocate General Sharpston, the 1998 Regional Aid Guidelines had to be examined in order to assess the need to recover the controversial aid. In her view, the 'incentive requirement' established in the guidelines allows the non-recovery only of aid for which it is established that the application was submitted before work started on the investment project.

Following the calculations of the Advocate General, Spain had to recover 322 million EUR at the time the 2006 judgment was issued and not 358 million as the Commission claims. In this sense, she proposed the Court to lower 10% the figures submitted by the Commission regarding due interest.

Advocate General Sharpston has also assessed the applicability of the *de minimis* rule, that exempts from notification if the total aid granted to one enterprise did not exceed 100 000 EUR gross over a three year period. In recovering the aid in the form of a tax base reduction for new businesses, the Spanish authorities originally deducted 100 000 EUR per three-year period from the amount to be recovered from each beneficiary. The Advocate General has considered that Spain was not allowed to proceed this way.

In respect to the financial penalty, Advocate General Shrapston has concluded that it should be fixed at 50 million EUR. This amount, although it reduces the fine claimed by the Commission, would be the highest lump sum ever imposed by the Court.

Advocate General Sharpston is of the opinion that Spain deserves such penalty given that the amount of illegal aid concerned and the delay in recovery are both considerable. In addition, she has stated that this amount is likely to have an enough dissuasive effect.

Internal Market - Belgium

Transposition of Directive 2011/83/EU and the new Belgian Economic Law Code

On 30 December 2013, the Act of 21 December 2013 introducing Book VI of the Economic Law Code on Market Practices and Consumer Protection was published in the Belgian State Gazette (the "Act").

With the Act the Belgian legislator has implemented Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (the "Directive") and integrated the provisions of the Act of 6 April 2010 on Market Practices and Consumer Protection in the new Belgian Economic Law Code, which remains a work in progress.

The Directive aims to harmonize national legislation of the Member States with regard to consumer information and common aspects of distance and off-premises contracts with consumers. The harmonization is especially necessary to support online cross-border sales which due to a defragmented European landscape regarding consumer rights could not yet get off the ground.

The Directive hopes to clear the path by offering better and harmonized consumer protection in all Member States.

Book VI of the Belgian Economic Law Code shall enter into force on a date to be set by Royal Decree. However, the Directive foresees that Member States should apply the relevant national provisions as of 13 June 2014. We may therefore expect that the Act shall be set to enter into force before or by that date at the latest.

More information with regard to the Act and the new Belgian Economic Law Code and its entry into force will be provided in our next edition.

— Case-law & Analysis —

Advocate General Bot's opinion indicates that the Spanish legislation for air passengers' baggage is not compatible with EU Law

The Spanish law on Air Navigation prohibits airlines to charge passengers for checking in luggage in the form of an optional price supplement.

In August 2010, the airline Vueling added a surcharge of 40 EUR to the base price of the tickets bought by Mrs. Arias Villegas for checking in two suitcases online. Based on this, the purchaser decided to file a complaint against the airline as she considered that the contract of carriage was vitiated by an abusive clause. The complaint led to a 3000 EUR fine to Vueling imposed by the consumer protection body of the region of Galicia.

The administrative court hearing the case decided to ask the Court of Justice of the EU whether the Spanish law is compatible with the principle of pricing freedom established in the EU legislation.

Advocate General Bot has issued his opinion where he proposes the Court of Justice to declare the Spanish legislation in question incompatible with EU law given that the above mentioned principle covers all commercial services associated with the performance of the contract of air carriage. Furthermore, he has declared that the Spanish legislation would undermine the objective pursued by the EU legislature of achieving a more efficient, consistent and homogenous application of EU law for the internal aviation market.

In this sense, Advocate General Bot has reminded that, except with respect to airlines entrusted with a public service and the charges imposed by public authorities or airport managers, Member States are no longer entitled to intervene in airlines' pricing practices, conditions and types of services included in the basic price of the ticket.

In spite of this, he has stressed the duty of the air carriers to communicate at the start of the booking process undertaken by the customer, in a clear, transparent and unambiguous way, the detailed rules for pricing with respect to the check in of luggage and allow the customer to expressly accept or refuse the service in question on an opt-in basis. Moreover, he has indicated that Member States shall control that these requirements are met.

Finally, Advocate General Bot has also stated that this interpretation is not applicable to hand luggage as this shall be carried by the airline for free, given that the passenger is the sole responsible for this type of luggage and it is not part of the commercial services provided by the airline, because there are no costs for the checking in, tracing and storing.

In this context, it is now for the national court to verify whether or not Vueling complied with these requirements with respect to the purchaser of the tickets that filed the complaint.

New labour legislation in Belgium as from 1 January 2014: partial harmonization of the statute of blue and white-collar workers

One of the particularities of Belgian Labour Law is the distinction between white and blue-collar workers: blue-collar workers generally perform manual work, while white-collar workers perform more intellectual labour. Each category was submitted, to a large extent, to a different set of rules.

As a consequence of the judgment of the Constitutional Court of Belgium dated 7 July 2011, the law of 26 December 2013 ("the Law") harmonizes the statute of blue and white-collar workers with regard to the notice period and the abolition of the carenz day. It is immediately applicable as of its entry into force on 1 January 2014 on all new and existing employment agreements. The existing labour regulations of the company have to be adapted to the new legislation.

a) Disability and abolition of the carenz day

Until 31 December 2014, a carenz day existed for blue-collar workers, but not for white-collar workers. In consequence, the first day of absence of blue-collar workers (due to illness or an accident) was not remunerated, provided that the period of the incapacity to work did not exceed 14 calendar days. By virtue of the new law the carenz day does no longer exist. All

workers now have the right to receive a salary as from the first day of disability.

However, collective bargaining agreements or labour regulations of the company can foresee that in the event the worker omits to immediately prevent his employer or to provide him with a medical certificate within a specified time frame, he will not be entitled to a guaranteed pay during the days preceding the notice or the submission of the certificate, except in case of a legitimate reason. The same sanction applies in case the worker does not cooperate with the examining doctor.

b) New notice periods (or corresponding severance pay)

The newly introduced notice periods are applicable to all employment agreements terminated after 1 January 2014. Each notice period is expressed in weeks and will start running on the next Monday following the notice.

From now on, the notice periods for all workers will be calculated in accordance with the same calculation method, taking into account only the years of seniority (including each calendar year started). Previous criteria such as age and salary will no longer be considered.

The workers who were already employed before 1 January 2014 will maintain the rights acquired on 31 December 2013. For them, the total notice period will be calculated in 2 parts: (i) the first one is determined by the continuous seniority acquired at 31 December 2013 (and still differs for white and blue-collar workers), while (ii) the second part is calculated in function of the continuous seniority acquired as from 1 January 2014 (same calculation method for both white and blue-collar workers).

c) Abolition of the trial period

As from 1 January 2014 employment agreements can no longer impose a trial period. There will only be an exception for employment agreements with students, temporary agreements, and first interim agreement.

d) Fixed-duration agreements or agreements for well-defined jobs

None of the parties is allowed to unilaterally terminate a fixed-duration agreement or an agreement for well-defined jobs before its maturity date without the existence of an urgent cause (e.g. dismissal for serious misconduct).

However, the new law introduces an exception for agreements concluded as of 1 January 2014. Each party is allowed to terminate the agreement during the first half (which can never exceed 6 months) of the agreed duration provided that the new notice periods (see point b) are respected and the end of the notice period falls within the first half.

e) Mandatory motivation of dismissals

As from 1 January 2014 every dismissal will have to be motivated. This is an important change with regard to the previous legislation. Nevertheless, the Law foresees that the social partners had to conclude a Collective Bargaining Agreement which has to provide a regulation relating to the motivation of a dismissal. The social partners have finally reached an agreement which will enter into force as from 1 April 2014.

In case the employer has not taken the initiative to motive the dismissal and refuses to motivate it upon the request of a worker, the employer will have to pay a fixed civil fine which corresponds with 2 weeks of salary. The fine may even increase up with an indemnification of minimum 3 weeks to maximum 17 weeks of salary when the motivation is proved to be "patently unreasonable". Whether the dismissal should be considered reasonable or unreasonable will be assessed by the Labour Court.

f) Outplacement

Under the new legislation more workers will have the right to outplacement services.

Every dismissed worker entitled to a notice period of at least 30 weeks (thus a seniority of minimum 9 years) and who has not been

dismissed because of an urgent cause will be entitled to receive outplacement services of his employer.

This new general rule will coexists with the "45+ outplacement regulation", which has now become a special rule, to be applied in the event that the worker who is at least 45 years and has a minimum 1 year of seniority does not meet the requirements of the general rule (a seniority of minimum 9 years).

For more information, please contact: Brussels@gomezacebo-pombo.com

— *Currently at GA&P* —

GA&P, together with ISDE (Instituto Superior de Derecho y Economía) and Fundación Estudiantes launches the third edition of the Master's Degree in Sports Law and Management. The Master will be presented next 21st February in Madrid.

http://www.gomezacebo-pombo.com/media/k2/attachments/Invitaciyn_III_Master_en_Derecho_y_Gestiyn_del_Deporte.pdf