

Brussels **GA&P**

Gómez-Acebo & Pombo, Brussels
December 2016



Content

News	2
— Antitrust	2
▶ The Commission sends formal antitrust charges to Facebook for allegedly providing misleading data concerning its merger with WhatsApp	2
Case-Law & Analysis	2
▶ The General Court of the EU annuls Commission decision on cartel fine against Spanish envelope manufacturer	2
▶ The Court of Justice of the EU rules that Spanish tax breaks for shareholdings in foreign companies constituted illegal state aid	3
▶ The Court of Justice of the EU finds that limiting the effects of the invalidity of 'floor clauses' in mortgage loan contracts in time is incompatible with EU law	3



News

Antitrust

The Commission sends formal antitrust charges to Facebook for allegedly providing misleading data concerning its merger with WhatsApp

The European Commission has sent formal antitrust charges to Facebook for allegedly submitting misleading information during the review carried out by the EU authority over Facebook's acquisition of WhatsApp in 2014.

The origin of the investigation concerns the fact that, in August 2016, WhatsApp's service was being updated in order to link users' phone numbers to their identities on Facebook. According to the Commission, it seems that this was already possible during the 2014 antitrust review. The Commission is therefore concerned that Facebook provided incorrect information to the EU and, consequently, breached its obligations under EU Competition Law.

The Commission has expressed that the investigation is not related to consumer protection, neighboring privacy or data protection issues.

The investigation could result in a fine of up to 1% of Facebook's turnover but it will not affect the validity of the Commission's decision that cleared the transaction.

The deadline for Facebook to reply to the charge sheet expires on 31 January 2017.

Case-Law & Analysis

The General Court of the EU annuls Commission decision on cartel fine against Spanish envelope manufacturer *(Judgment of the General Court of the EU of 13 December 2016 in Case T-95/15 Printeos and others Commission)*

The General Court of the EU has annulled a Commission decision that imposed a EUR 4.73 million fine against Spanish envelope manufacturer Printeos for its participation in a cartel.

The case, which decision was adopted in December 2014, implied fines totaling EUR 19.4 million to the companies Bong Ljungdahl, GPV, Hamelin, Mayer-Kuvert and Tompla for running a cartel in the envelopes' market. The members of the cartel entered into a settlement that brought about a reduction of 10% of the fine.

Printeos received fine reductions for accepting the settlement and for its cooperation with the Commission during the investigation. In spite of agreeing to the settlement, Printeos bought an appeal against the decision based on a breach of the principle of non-discrimination in the calculation of the settlement fine.

More precisely, Printeos argued that the Commission had failed to explain the reasons why the reductions were granted under a special provision in its fining rules that allows to take the differences between the infringing companies into account.

With regard to this point, the General Court of the EU has found that the obligation to state reasons that is imposed to the Commission becomes even more relevant when the latter deviates from its general method and that, in this case, the Commission had failed at motivating the differences in the reduction of penalties for certain members of the cartel. According to the General Court, the decision did not state adequate reasons for such reduction.



The Court of Justice of the EU rules that Spanish tax breaks for shareholdings in foreign companies constituted illegal state aid (*Judgment of the Court of Justice of the EU of 21 December 2016 in Joined Cases C-20/15 P Commission v World Duty Free Group and C-21/15 P Commission v Banco Santander and Santusa*)

The Court of Justice of the EU has upheld Commission's decision finding that Spanish tax breaks for shareholdings in foreign companies constituted illegal state aid.

According to Spanish law, an undertaking which is taxable in Spain that acquires a shareholding in a foreign company of at least 5%, and that holds it without interruption for at least one year, is entitled to deduct through amortization the goodwill resulting from that shareholding.

A formal investigation on this scheme was opened in October 2007 by the Commission as a result of a complaint filed by a private operator, who claimed that such scheme constituted State aid.

By means of two decisions of 28 October 2009 and 12 January 2011, the Spanish regime was declared to be incompatible with the internal market by the Commission, who ordered Spain to recover the aid granted.

The decisions were challenged by Spanish World Duty Free Group, Banco Santander and Santusa Holding before the General Court.

On 7 November 2014, the General Court rendered its judgments whereby it annulled the two Commission decisions, considering that selectivity of the scheme -which is one of the conditions that must be met for a measure to constitute state aid under Article 107(1) Treaty of the Functioning of the EU- had not been established in the decisions by the Commission. The judgments were appealed by the Commission before the Court of Justice of the EU on the basis of error of law by the General Court with regard to the interpretation of selectivity.

In its judgments of 21 December 2016, the Court of Justice of the EU set aside the two judgments and referred the cases back to the General Court.

In particular, the Court of Justice of the EU determined that, in applying the condition relating to selectivity, the General Court erred in law by annulling the decisions of the Commission, arguing that the latter had failed in the identification of the category of undertakings that were exclusively favored by the tax measure.

Contrary to the General Court, the Court of Justice found that, in order to prove selectivity, the Commission is not required to identify a particular category of undertakings that exclusively benefit from the measure at issue. In addition, the Court of Justice stated that a measure may be selective if it entails discrimination against undertakings that are excluded from it.

The Court of Justice of the EU finds that limiting the effects of the invalidity of 'floor clauses' in mortgage loan contracts in time is incompatible with EU law (*Judgment of the Court of Justice of the EU of 21 December 2016 in Joined Cases C-154/15 Francisco Gutiérrez Naranjo v Cajasur Banco SAU, C-307/15 Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA and C-308/15 Banco Popular Español SA v Emilio Irlés López and Teresa Torres Andreu*)

On 9 May 2013, the Spanish Supreme Court rendered a judgment holding that the so-called "floor clauses" included in mortgage agreements with consumers were unfair. These clauses establish that in case the interest rate falls below a certain threshold, the consumer shall continue to pay minimum interest equivalent to that threshold, without being able to benefit from a lower rate. The Supreme Court found these clauses to be unfair on grounds of the lack of information given to consumers in respect of the burden that the contract entailed. However, the Supreme Court limited the consequences of the judgment so that it would not be retroactive and only produce effects as of the date of the judgment.

In this context, a number of consumers affected by the clauses asked for repayment of the sums unduly paid to the financial institutions from the date on which their loan agreements were concluded. The Spanish courts before which the case was brought referred a preliminary ruling to the Court of Justice asking whether the limitation of the effects of the declaration of invalidity in time is compatible with Directive 93/13/EEC on unfair terms in consumer contracts.



The Court of Justice has determined that, according to the Directive, unfair terms must not be binding on consumers, being Member States obliged to provide adequate and effective means to prevent their use. Concretely, national courts shall exclude the application of an unfair contract term as if it had never existed and in a way that it does not bind the consumer. As a consequence, finding that mortgage floor clauses are unfair shall allow the restitution of the advantages wrongly obtained by the seller or supplier to the consumer's detriment.

For further information please visit our website at www.gomezacebo-pombo.com or send us an e-mail to: info@gomezacebo-pombo.com.

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York