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— News —

SME initiative: €800 million of EU regional funds to help finance Spanish SMEs

In Spain, small and medium-sized enterprises (SMEs) represent 74% of the private sector employment and create 85% of new jobs.

The European Commission (EC) has adopted the first SME initiative programme consisting on the reallocation of €800 million from the European Structural and Investment Funds (ESIF) to Spanish SMEs. The initiative will not be operated through traditional grants but through guarantees and/or financial securities, which will ease SMEs' access to credit.

The value of this investment is expected to reach € 3.2 billion thanks to the leverage effect of private investment as SME loans.

In particular, this initiative will grant guarantees to Spanish banks and other financial institutions to cover portfolios of loans extended to eligible SMEs. As the credit-risk of these institutions will be partly covered (and therefore reduced); these institutions will be able to provide more and less expensive loans to SMEs.

Spain is the first EU Member State to implement a programme of this kind, designed by the EC and the European Investment Bank (EIB) Group to boost access to finance for EU's small businesses.

State Aid

European Commission opens a formal investigation procedure in relation with the Belgian excess profit ruling system

The EC has initiated a formal investigation procedure related to Article 185(2) b) of the Belgian Income Tax Code, which allows groups of companies to substantially reduce their corporation tax liability in Belgium on the basis of so-called "excess profit" tax rulings.

These are profits registered in the accounts of entities in Belgium that allegedly result from being part of a multinational group. In order to apply the deductions, the company needs prior confirmation by the Belgian tax administration through a tax ruling.

According to the EC, the deductions granted through the excess profit ruling system usually amount to more than 50% of the profits covered by the tax ruling and can sometimes reach 90%.

This scheme appears to exclusively benefit multinational groups, while Belgian companies only active in Belgium cannot obtain similar benefits. Moreover, after examination of past administrative practices, the EC considers that these tax rulings are often granted to companies that have relocated a substantial part of their activities to Belgium or that have made significant investments in Belgium.

Therefore, the EC has identified serious concerns as to whether the Belgian tax provision complies with EU State aid rules.

This investigation falls within the current background of the EC investigations of tax ruling practices of several Member States. In 2014, the EC opened formal investigations procedures with regard to tax schemes applied to Apple in Ireland; to Starbucks in the Netherlands and to Fiat Finance & Trade and Amazon in Luxembourg.

— Case-Law & Analysis —

Entry into force of EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation 1215/2012" or "Brussels I*bis* Regulation") was adopted on 12 December 2012 to recast and replace the old Regulation No 44/2001 (Brussels I Regulation). Regulation 1215/2012 aimed at easing the free circulation of judgments in civil and commercial

matters within the EU and at facilitating access to justice.

As from 10 January 2015, Regulation 1215/2012 enters into force and applies to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after this date.

The new regulation has left the core features of the previous regime on jurisdiction largely unchanged. The main changes can be summarised as follows:

1. *Abolition of exequatur*

   Regulation 1215/2012 abolishes the need for an *exequatur*, i.e. the procedure for the declaration of enforceability of a judgment in another Member State. Regulation 1215/2012 provides that a judgment delivered in a Member State, which is enforceable in that Member State, shall be enforceable in any other Member State, without any declaration of enforceability being required (Article 39).

2. *Enhancement of effectiveness of choice of court agreements*

   An important amendment concerns the rule on international *lis pendens* which aims at addressing the abuse known as "Italian torpedo", which consists on undermining contractual jurisdiction clauses with the rushing to the favoured court in order to gain advantage of first seizure.

   The new regulation preserves the general rule that any court other than the court first seized must stay its proceedings pending its decision. However, where a court of a Member State on which parties have conferred exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings until the court seized on the basis of the agreement declares that it has no jurisdiction under such agreement.

3. *Extension of the jurisdiction rules to disputes involving defendants who are not domiciled in an EU Member State*

   Previously, consumers were often not able to exercise their rights when, for instance, purchasing goods from an undertaking domiciled in a non-EU country but selling products in the EU.

   The new jurisdiction rules in relation to employees, consumers and insured shall also apply independently of the domicile of respectively the employer, the undertaking or the insurer, when an exclusive competence rule protecting these three categories of person designates as competent an EU jurisdiction.

4. *Arbitration*

   The arbitration exception is maintained in Regulation 1215/2012. However, some of the concerns arising from the case-law of the Court of Justice of the EU (in particular in case West Tankers) are addressed in the new regulation.

   A party may still open proceedings on the validity of an arbitration agreement and the court seized of the dispute has the right to refer the parties to arbitration. Nevertheless, a court of a Member State is not required to recognise a judgment of a court of another Member State on the validity of an arbitration agreement. Even in the case of inconsistent decisions, where a court of a Member State is presented with (i) a valid arbitral award under the New York Convention and (ii) a conflicting judgment given by another court of a Member State that is enforceable under the Brussels Ibis Regulation, the New York Convention takes precedence over Regulation 1215/2012, which means that the enforcement of the arbitral award takes precedence over the enforcement of a judgment.

   Despite the approval and entry into force of Regulation 1215/2012, the following issues remain outstanding:

   - Regulation 1215/2012 does not address a situation where a party needs to enforce an arbitral award in a Member State, whose court held the arbitration agreement invalid.

   - Taking into account the precedence of the New York Convention over the Brussels Ibis Regulation, there might be a scope for parallel court and arbitral proceedings until the arbitral tribunal renders an enforceable award.

   - There might also be a risk of repeated court proceedings where a party dissatisfied with a judgment on the validity of an arbitration

agreement rendered by the court first seized (which falls outside the scope of the Brussels Ibis Regulation – pursuant to its Recital 12 – and which is therefore not binding on other Member States) initiates similar court proceedings in another Member State.

Spanish Supreme Court clarifies the interpretation of the 10% cap for calculating fines for competition infringements *(Judgment of the Spanish Supreme Court of 29 January 2015 in case n. 2872/2013 BCN Aduanas)*

The Spanish Supreme Court has issued an awaited judgment in a road haulage cartel case that solves the recent years' discrepancy between the *Comisión Nacional de los Mercados y la Competencia* or CNMC (Spanish Competition Authority) and the *Audiencia Nacional* (court of appeal for CNMC's decisions) with regard to the interpretation of the 10% cap for calculation of fines imposed for competition infringements.

Pursuant to Article 63 of the Spanish Competition Act, the CNMC may impose fines within the following limits: (i) for minor infringements, a fine of up to 1% of the total turnover of the infringing company in the year preceding the decision; (ii) for serious infringements with a fine of up to 5% of the total turnover of the infringing company and (iii) for very serious infringements with a fine of up to 10% of the total turnover of the infringing company.

When interpreting and applying this provision, the CNMC as well as the court of appeal for the CNMC's decisions have assessed the two following questions: (i) whether the percentage turnover limit (i.e. 1%, 5% or 10%) operates as a maximum cap or as the top of a scale within which the amount of the fine has to be determined; and (ii) whether the concept of "total turnover" refers to the whole turnover of the undertaking concerned or only to the turnover which is connected to the infringement (this is especially relevant for companies that manufacture or offer different products or services). The CNMC and the court of appeal reached different outcomes when assessing these questions.

The *Audiencia Nacional* interpreted so far that the 10% turnover limit for very serious infringements shall be understood as a sliding scale used for the calculation of fines instead of a limit or cap on the final fine after the calculation has been done. That is, that the 10% limit serves as a leveler with regard to the seriousness and duration of the infringement and not as legal maximum which is exclusively applied if the amount of the fine exceeds from 10% of the infringing undertaking's turnover.

In addition, the *Audiencia Nacional* established that the 10% limit applies to the turnover in the market affected by the infringement and not to the global turnover related to all the economic activities of the infringing company. As a consequence of this interpretation some fines of multiproduct companies were considerably reduced.

As for the first consideration, the Supreme Court has now partially followed the *Audiencia Nacional's* interpretation and has considered that pursuant to Regulation 1/2003 the national courts and the CNMC are not obliged to follow the calculation methods of the European Commission. In this sense, the limits established in Article 63 of the Spanish Competition Act shall be interpreted as a scale and not as a maximum cap to be applied after the calculation of the fine.

As for the turnover to be taken into account, the Supreme Court has considered that, contrary to what the *Audiencia Nacional* interpreted, it should be based on the global turnover and not on the turnover in the affected market.

It is to be expected that based on this judgment, the CNMC will modify its Guidelines on the calculation of fines.

Furthermore, it is to be noted that this judgment reaches very similar conclusions as to a judgment delivered by the *Bundesgerichtshof* (German Supreme Court) on 26th February 2013 in the grey cement cartel case. The *Bundesgerichtshof* ruled that the 10% limit shall be understood as an upper range of a sanctioning frame and not as a 'cap' to cut the fine imposed at a maximum level. As the case in Spain, the German Competition authority's guidelines followed the doctrine of the European Commission.

Following this judgment, the German Federal Cartel Office issued new revised Guidelines on the Setting of Fines for Competition infringements on 25th June 2013.

The new doctrine will affect, on the one hand, similar pending cases at the Supreme Court – i.e. Bodegas Barbadillo, Endesa, Bidetrans, Caydsa or Blue Water – and, on the other hand, recent years'

cases in which undertakings appealed fines on the abovementioned grounds without success. In the latter case, it could be assessed whether, once the precedent is settled, these companies may have grounds for filing an action for review before the Supreme Court.

— *Currently at GA&P* —

Mário Marques Mendes has joined our firm as the new head of the Competition and EU Law department of GA&P in Lisbon.

Mário Marques Mendes, founder of *Sociedade de Advogados Marques Mendes & Associados*, has over 30 years of experience in advising clients on EU Law matters, Competition and International Commerce and has developed his expertise both in Portugal and abroad, including Brussels.

He is accompanied by two other lawyers, Pedro Vilarinho Pires and Alexandra Dias Henriques.

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

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