GÓMEZ-ACEBO & POMBO

Brussels GA&P

Gómez-Acebo & Pombo, Brussels
January 2014

— Case-law & Analysis —

Spanish Supreme Court conditions the passing-on defence to strict requirements

The Spanish Competition Court imposed fines of EUR 87.45 million on a number of sugar-producing companies for participating in a cartel consisting on the fixing of the sale price of sugar for industrial use from February 1995 to September 1996.

Several companies that purchased sugar from the fined companies brought actions for damages, claiming losses as a result of the cartel. In this procedure, the defendant argued that as the claimants passed on the overcharge downstream to their customers, the claimants actually suffered no loss from paying the overcharge.

The Supreme Court judgment of 7 November 2013 ruled in favour of the claimants based on the following reasons:

First, the Court noted that "passing on" should not be seen as a simple output price in the sense of increased prices in the downstream market in proportion to the increase in prices experienced in the upstream market; in fact, what must have been passed on to customers is rather the economic damage and loss, i.e. the harm, which involves a loss of company competitiveness and a negative effect on the brand image.

The Supreme Court recognized that increasing the selling price of sugar-derived products due to the increased cost of sugar will cause a reduction in the volume of sales on account of falling demand.

Therefore, the Court concluded that proving that the direct purchaser of sugar has also increased the price does not suffice to apply the"passing on" doctrine. It must also be proven that the increase charged to customers has managed to pass on the harm suffered by the price increase resulting from the cartel, and if the price increase has failed to pass on all the harm because there was a decrease in sales (insofar as other competitors did not suffer the cartel and snatched market share from those who did, etc.) the "passing on" defence cannot be allowed or, at least, not in full.

The Supreme Court considered that the claimants are not the ones who have to prove that the harm was not passed on downstream, but it is the defendant who has the burden. In the case at stake, the expert reports submitted by the claimants were crucial. In this sense, although a the Court recognized these reports cannot "*make a perfect reproduction of what would have been the situation if there had been no unlawful conduct*" […] "*such methods should not prevent victims from receiving an amount of compensation adequate to the harm suffered, but rather justifies wider judicial power in assessing the harm*".

Finally, what the Supreme Court required from the claimant's expert report is that it made *"a reasonable assumption technically based on non-erroneous testable data"*.

— News —

Antitrust

European Commission accepts binding commitments from Deutsche Bahn concerning pricing of traction current in Germany

The Commission opened an investigation against Deutsche Bahn (DB) in 2011 in order to assess potential competition concerns relating to DB's pricing system for traction current, i.e. the provision of electricity used to power trains. DB, the sole German supplier of this traction current and therefore holder of a dominant position on this market, was accused of a breach of Article 102 TFEU consisting in setting up rebates in favour of its own subsidiaries.

After analysing the results of the market test conducted by the Commission, DB has offered a set of commitments consisting on: (i) the introduction of a new pricing system which will establish the price of electricity separately from the fee charged for accessing the network; (ii) DB undertakes not to apply discounts; (iii) DB will reduce of 4% on traction current for non-DB companies based on their invoice of the preceding year; (iv) DB will give a granted access to its network to electricity providers for the supply of traction current, enabling both DB and non-DB providers to supply railway companies directly.

The Commission has accepted these commitments and made them legally binding.

Johnson & Johnson and Novartis fined EUR 16 million for delaying market entry of a generic pain-killer

The European Commission has imposed fines of more than EUR 10 million on the US company Johnson & Johnson (J&J) and of more than EUR 5 million to the Swiss Novartis for the anti-competitive agreements concluded by their respective Dutch subsidiaries in relation to the medical product Fentanyl.

Fentanyl is a very strong pain-killer developed and commercialized by J&J since the 60s. Its patent protection expired in the Netherlands in 2005. By that time Novartis' Dutch subsidiary, Sandoz, had developed a cheaper generic version of this product but decided to enter in a so-called "co-promotion" agreement with J&J's Dutch subsidiary by means of which, monthly payments to Sandoz were agreed as long as the product did not enter the market.

As a consequence, the entry into the market of Sandoz's generic version of Fentanyl was delayed seventeen months. In the Commission's view, by way of the agreement J&J and Novartis kept prices artificially high to the detriment of consumers and taxpayers who finance the health system in the Netherlands.

Spain: airport operator AENA and 11 car rental companies fined EUR 3,1 million for exchanging commercially sensitive information

The fines have been imposed by the Spanish competition authority (Comisión Nacional de los Mercados y la Competencia, CNMC). According to the CNMC, the addressees of the decision exchanged information concerning the invoicing and commercial terms contained in individual contracts entered into by car rental companies and their clients. AENA would have provided this type of specific sensitive information to all the rental companies involved in the infringement.

The information exchange affected car rental activities in airports located in Coruña, Asturias, Alicante, Almeria, Barcelona, Bilbao, El Hierro, Fuerteventura, Gran Canaria, Granada, Ibiza, Jerez de la Frontera, La Palma, Lanzarote, Madrid, Malaga, Menorca, Murcia, Palma de Mallorca, Pamplona, Santiago de Compostela, Reus, San Sebastian, Santander, Tenerife Norte, Tenerife Sur, Valencia, Valladolid, Vigo, Vitoria and Zaragoza. In accordance with the CNMC's decision, the anti-competitive practices at stake took place since 1996 until 2012.

Mergers

Phase II of merger control procedure initiated for the acquisition by Telefónica Deutschland of E-Plus mobile telecommunications business in Germany

On 31 October 2013, Telefónica Deutschland, a subsidiary of Telefónica Spain notified its intention to acquire the mobile telecommunications business in Germany of E-plus, a subsidiary of the Dutch mobile network operator KPN.

The initial market investigation carried out by the Commission showed that the planned acquisition may reduce competition in the retail mobile telephony market as well as in the market for wholesale access and call origination on mobile networks in Germany, where only two other competitors are active, i.e. Deutsche Telekom and Vodafone.

In particular, the Commission has identified the following eventual post-transaction concerns: (i) removal of a significant competitor; (ii) possible change in the new entity's incentive to exert competitive pressure on the remaining competitors; (iii) possible reduction of the incentives of Deutsche Telekom and Vodafone to grant access to their network to mobile virtual network operators, and (iv) less choice of existing and potential mobile virtual network operators of host networks and weakening of their negotiating power.

After the opening of Phase II, the Commission has 90 additional working days to take a decision, i.e. until 14 May 2014.

Action for annulment against the European Commission's Decision in case Microsoft/ Skype dismissed by the General Court

The US company Cisco Systems and the Italian Internet communications provider Messagenet brought an action for annulment of the 2011 European Commission Decision approving the acquisition by Microsoft of Skype (case COMP/M.6281). In its judgement of 11 December 2013, the General Court dismissed the abovementioned action.

Regarding the consumer internet-based communications market, the Court declared that, although the acquisition of Skype enables Microsoft to hold an 80%-90% market share, high market shares and high degree of concentration on such a segment of the market would not necessarily involve a degree of market power allowing Microsoft to significantly harm effective competition. As stated by the Court, the consumer communications sector is not a mature market but a fast growing one which is characterised by short innovation cycles. Therefore, in this type of markets, large market shares may be ephemeral. Moreover, considering that services provided in the consumer communications market are usually provided free of any charge, making clients pay for services would entail the risk of these clients changing supplier. Finally, the Court pointed out that Cisco and Messagenet have failed to evidence that the acquisition of Skype by Microsoft might harm competition.

As regards the market for Internet-based communications for enterprises, the Court rejected the argument of the applicants that, as a result of the acquisition, Microsoft would behave anti-competitively if it decided to make it easier for its enterprise videoconferencing and chat service Lync to interoperate with Skype than for competing products. In this sense, the Court indicated that a concentration may be declared incompatible with the internal market only if it harms competition in a direct and immediate manner. The effective interoperability between Lync and Skype still relies on different factors which are not certain. Furthermore, Lync faces competition from other significant players on the market, such as Cisco, which holds a market share larger than Microsoft.

The unsuccessful applicants may appeal this decision before the Court of Justice of the EU.

State Aid

Formal investigation procedure initiated against public funding to certain Spanish professional football clubs

The European Commission is formally investigating whether several public support measures adopted

in favour of seven Spanish football clubs infringe EU state aid rules. None of these measures was notified to the Commission.

In particular, the Commission is assessing: (i) possible tax privileges in favour of Real Madrid CF, FC Barcelona, Athletic Club Bilbao and Club Atlético Osasuna; (ii) a real estate swap between the City of Madrid and Real Madrid; and (iii) a series of guarantees given by the State-owned Valencia Institute of Finance for loans granted to clubs located in the region of Valencia, which were financially instable. i.e. Hercules CF; Elche CF and Valencia CF.

In March 2013 the Commission opened another formal investigation procedure into public funding of five Dutch professional football clubs.

— *Currently at GA&P Brussels* —

Miguel Troncoso Ferrer has participated, together with Eduardo Gómez de la Cruz and Ricardo Alonso Soto (GA&P Madrid) as lecturer in the working breakfast on the proposal for a Directive on Antitrust Damages Actions, held at our Madrid office on 16 January 2014.

For more information, click below:

http://www.gomezacebo-pombo.com/media/k2/attachments/Invitaciyn_16_01_2014.pdf

Materials of the Working Breakfast are available upon request (brussels@gomezacebo-pombo.com).