GÓMEZ-ACEBO & POMBO

# Brussels GA&P

Gómez-Acebo & Pombo, Brussels
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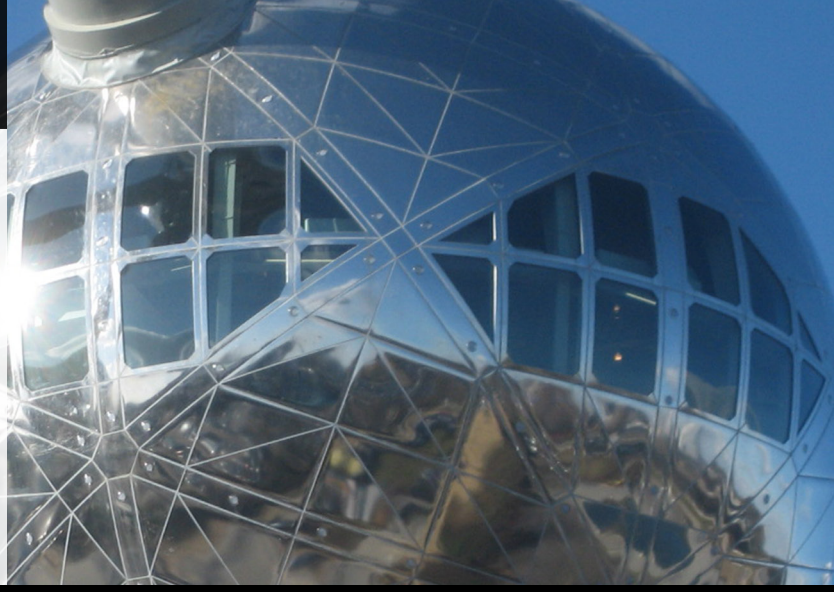

## — News —

**New rules for companies registered in Belgium**

By Royal Decree dated 26 March 2013, Book III of the new Belgian Code of Economic Law ("CEL") has entered into force on 9 May 2014. Book III deals with the freedom of establishment of undertakings and their general obligations, including those related to their registration within the Belgian Crossroads Bank of Enterprises ("CBE").

By virtue of Article III.26 of the CEL, which replaces Article 14 of the Act of 16 January 2003 establishing the CBE, any undertaking operating in Belgium has the obligation to properly register all its activities within the CBE.

Article III.26 of the CEL clearly stipulates that any legal action filed by an undertaking will be dismissed when such action is based on an activity for which that undertaking was not properly registered within the CBE under the appropriate NACE-BEL number (i.e. the statistical classification of economic activities in the European Union) at the time of the filing of the action. Therefore, the consequences for an undertaking for not registering properly all its activities may be serious in the event of litigation.

This provision is not new but has been modified in order to integrate two rulings of the Belgian constitutional court, following the confusing wording of the Act establishing the CBE.

Article III.26 of the CEL integrates all legal actions (claims, counterclaims and cross-claims) regardless of how they are brought by the undertaking (whether it is by way of summons, exchange of conclusions, etc.). It also provides that the relevant motion to dismiss must be made *in limine litis*, i.e. before any other motions.

Article III.26 of the CEL makes it easier to dismiss a legal action brought by an undertaking based on that undertaking's failure to properly register all its activities. Therefore, it is important that undertakings list all their activities with the relevant NACE-BEL number at the CBE, and keep that registration up to date.

If the undertaking realizes its failure after it has already filed the legal action, it has the possibility to properly register the activity based on which the action is lodged. In this case, the undertaking has to withdraw at will from the first action (the one based on the activity not yet/not properly registered) and may file a new action on the same issue. However, if the defendant's defence has already been filed, withdrawal will be impossible without the consent of the other party. This procedural issue makes it necessary for undertakings operating in Belgium to pay special attention to register properly all their activities with the CBE under the appropriate NACE-BEL number.

**Antitrust**

**New Commission Notice on *de minimis* agreements**

The European Commission has published a revised version of rules applicable to agreements of minor importance, i.e. those which potential distortion of to competition is not appreciable.

The new set of rules still determines that the anticompetitive effects of agreements between enterprises will be considered not appreciable in the following circumstances:

- For agreements between competitors, when the aggregate shares of the parties does not represent more than 10% of the value of the relevant market.

- For agreements between non-competitors, if the sum of each company's shares does not exceed the value of the 15% of the relevant markets.

The most important novelty is the introduction of the *Expedia* case-law, which establishes that agreements of minor importance would only benefit from the exemption as long as they did not pursue the objective of restricting competition. In other words, restrictions by object will fall under the scope of Article 101 TFEU independently of the small dimension of the concrete negative effects they may cause in the market.

Together with this Notice, the Commission has issued a Staff Working Document in order to further explain what should be understood by restrictive agreements by object. In this sense, this guidance document reminds that this type of agreements are, by their very nature, capable of restricting competition and that their potential to have negative effect is so high, that the Commission does not have to demonstrate that these effects actually occur. In addition, the Commission lists as an example a series of conducts that are regarded as being especially restrictive and thus directly classified as restrictions by object.

**State aid**

**State aids for R&D&I will be promoted by the new rules adopted by the Commission.**

The European Commission considers that research and innovation are key for the development and strengthen of the European markets. Accordingly, it has issued new rules directed to facilitate and promote the granting of public aids to companies that invest in R&D&I.

The reviewed rules consist of two complementary instruments:

i) The new General Block Exemption Regulation (GBER) sets out the conditions to grant aids without prior notification to the Commission.

ii) The R&D&I Framework include guidance as regards aids that have the potential of giving rise to inequality and alteration of competition, and are therefore subject to prior authorization by the Commission.

The Commission intends to widen the scope of both the GBER and the R&D&I Framework, but more specifically, it seeks to exempt from the prior approval requirement certain categories of aids, in the aim of allowing greater flexibility and speeding up of the general market.

Furthermore, the Commission pursues to encourage effective funding of non-economic R&D&I in the public interest, which requires a rigorous distinction between economic and non-economic (not considered State aids) activities. The objective is also to avoid indirect aids granted to companies, for what a guidance on how to ensure that R&D&I contracts are carried out in market terms is introduced.

The adoption of the new Framework should reduce administrative burdens and increase transparency and non discriminatory selection procedures when conceding aids.

Finally, the Regulation takes a further step in achieving EU's 2020 strategy which has as one of its major initiatives the accomplishment of the destination of the 3% of the GDP to R&D&I investment (this figure being already reached by Japan and the US).

# — Case-law & Analysis —

**The Court of Justice gives further clarifications with regard to the umbrella effect in cartel cases.**

In 2007 Kone, Otis, Shindler and ThyssenKrupp were fined 992 million EUR by the European Commission for operating a cartel in the elevators and escalators sector in BENELUX and Germany.

A year later, the Austrian competition authority imposed a 299 million EUR fine million against several operators including Kone, Otis and Schindler for implementing a price-fixing cartel related to the abovementioned services.

Based on this infringement, a subsidiary of Austrian Federal Railways, ÖBB-Infrastruktur, brought an action for damages against the members of the Austrian cartel claiming 1,8 million EUR for losses incurred as a result of the cartel. ÖBB did not acquire products from any member of the cartel but from competitors outside the infringement that set higher prices in order to adapt to the market price resulting from the cartel. This is known as "the umbrella pricing".

In this scenario, the Austrian Supreme Court referred a preliminary reference to the Court of Justice of the EU in order to clarify whether a member of a cartel may be held liable for a loss such as the described above. It should be noted that according to the Austrian law, no compensation maybe granted for a loss that was caused by a supplier which was not a member of the cartel and acted lawfully.

The Court of Justice has indicated that the liability of the participants in a cartel may be extended towards those victims who have not operated directly with them but with their competitors. However, the Court has held that, when a non-member of a cartel benefit from the practices of the cartel (by also raising their prices) it was operating under the cartel's umbrella. In these cases, it is necessary to pierce the umbrella and to make the members of the cartel liable. Therefore, the Court has ruled that: "*any person is entitled to claim compensation for loss suffered where there is a causal* -not necessarily contractual- *relationship between the loss claimed and the cartel at issue".*

In other words, if due to circumstances of the case and, in particular, the specific aspects of the relevant market, it is established that the members of the cartel are responsible for the increase in prices practiced by competitors which did not participate in the infringement, the victims of this price increase are entitled to claim compensation for the loss sustained from the members of the cartel.

The Court concludes that the Austrian legislation is not compatible with EU law insofar as it requires -categorically and regardless of the particular circumstances of the case- that contractual links exist between the victim and the members of the cartel in order to ask for and to be compensated from the loss caused by a cartel.

The objective is not to leave victims of infringements of competition rules undercompensated (or without a compensation) just because of a lack of contractual relationship between them and any of the members of the cartel. This judgment might have as a consequence to force companies which were member of cartels to pay damages to an indeterminate number of entities apart from those with whom they entered into contracts. In sum, on the one hand, the judgment represents a further step towards guaranteeing the right of victims to be compensated from competition infringements. However, on the other hand, it may lure competitors outside a cartel to raise their prices in the umbrella of the infringement while the offender will bear all liability.

# — Currently at GA&P Brussels —

Sara Moya Izquierdo and Miguel Troncoso Ferrer have published the article "Football broadcasting business in the EU: towards fairer competition?" in the Volume 5, Issue 6 of the Oxford Journal of European Competition Law & Practice:

http://jeclap.oxfordjournals.org/content/5/6/353