GÓMEZ-ACEBO & POMBO

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— News —

State aids

Commission adopts new guidelines for State aid to airports and airlines

Since the liberalization of the air transport in 1997, low-cost carriers have emerged as a new type of business and nowadays they even reach higher market shares than regular airlines. The activity of this type of carriers is intrinsically linked to small and uncongested regional airports, which are frequently publicly owned and subsidised.

This situation has urged the European Commission to review the current Aviation Guidelines, issued in 1994 and 2005.

The new guidelines are aimed at ensuring good connections between regions and the mobility of European citizens, while minimising possible competition concerns.

The main features of the new guidelines are the following:

- State aid for airport infrastructure is allowed if there is a genuine transport need and the public support is necessary to ensure the accessibility of a region. The new guidelines establish maximum aid intensities depending on the size of the airport, allowing more significant aids to smaller airports.

- Operating aid to regional airports –those with annual passenger traffic of up to 3 million- will be allowed for a transitional period of 10 years under certain conditions. In order to be able to receive operating aid, airports need to establish a business plan which allows full coverage of operating costs at the end of the transitional period. However, given the current market conditions, the text includes a special regime for airports with less than 700.000 passengers per year, allowing higher aid intensities and a reassessment of the situation after 5 years.

- Start-up aids to airlines for launching a new air route is only permitted if limited in time.

— Case-law & Analysis —

The EU Court of Justice clarifies certain aspects of the Commission SMEs Recommendation (Case C-110/13, Judgment of 27 February 2014)

A question for a preliminary ruling referred by a German Court has been answered by the EU Court of Justice in relation to the interpretation of the concept of linked enterprises as laid down in Article 3 (3) of the Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (the "Commission SMEs Recommendation").

Article 3 (3) of the Commission SMEs Recommendation

3. 'Linked enterprises' are enterprises which have any of the following relationships with each other:

a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

[…]

Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.

In the case at stake, the company HaTeFo was denied in 2006 an aid increase granted by the German Finanzamt Haldensleben. This decision was based on the fact that the company was linked to another undertaking and that, therefore, it did not qualify as an SME.

In these circumstances, the German Finance Court asked the EU Court of Justice whether, in order to qualify a company as an SME for the purpose of granting a subsidy, attention shall be exclusively paid to the legal/formal criteria established in the Commission SMEs Recommendation or also to other factual circumstances that may determine that a group of companies act as a single economic entity (cooperative conduct).

The Court states that the SME Recommendation must be interpreted by taking into account the reasons for its adoption, and reminds that the objective of the Recommendation is to include only undertakings that are genuinely independent SMEs. Therefore, it is necessary to examine the real corporate structure of SMEs (e.g. whether they are part of an economic group) and to ensure that the definition of SMEs is not circumvented by purely formal means.

The Court notices that it is apparent from the wording of the first and fourth subparagraphs of Article 3(3) of the Annex to the SME Recommendation that as a general rule those provisions cover only a case where enterprises have one or other of the relationships set out in points (a) to (d) of the first subparagraph of Article 3(3) of that annex. Nevertheless, it cannot be concluded from this that formal non-compliance with that condition precludes, in all cases, a finding that the enterprises concerned are linked.

In this sense, undertakings which are not formally linked through the relationships referred to in Article 3(3) of the Recommendation, but which, based on the role played by a natural person or group of natural persons acting jointly, constitute a single economic unit, must also be regarded as linked undertakings, since they engage in their activities or in part of their activities in the same

relevant market or in adjacent markets. Moreover, the condition that natural persons are acting jointly is satisfied where those persons work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of one another.

EU General Court trims fines imposed on two companies that participated in the LCD panels cartel (Case T-91/11, Judgment of 27 February 2014)

In 2010 the European Commission fined six Korean and Taiwanese manufacturers of liquid crystal display (LCD) panels more than 648 million EUR for operating a cartel between October 2001 and February 2006.

Two of these companies, Innolux and LG Display –which were fined 300 million EUR and 215 million EUR respectively-, brought actions before the EU General Court seeking the annulment of the Commission's decision or, in the alternative, a reduction of the fine.

The Court has rejected the main arguments put forward by the claimants but slightly reduced the fines imposed on each of the companies.

As for Innolux, the Court observed that the company made errors at providing the Commission with the necessary data to calculate the value of relevant sales, as it submitted sales relating to products other than the LCD panels. The Commission confirmed this point. Innolux had not explained the specifications of certain LCD panels to the external experts that compiled the data to be provided to the Commission. As a result, the value of sales used by the Commission in setting the fine was too high. The Court has admitted that Innolux lacked diligence when submitting inaccurate data but nevertheless decided to reduce the fine by recalculating the amounts, which led to a reduction of 2 million EUR, thus the sanction has been fixed at 288 million EUR.

As regards LG Display, the Commission had granted the claimant partial immunity under the Leniency Notice in respect of January 2006 for providing information relating to the cartel. Therefore, this period should not have been taken into account for the calculation of the basic amount. The Court has confirmed this error of the Commission and has established a reduction on the fine imposed on LG Display from 215 million to 210 million EUR.

The EU Court of Justice declares illegal the Spanish tax on retail sales of diesel and petrol (Case C-82/12, Judgment of 27 February 2014)

Directive 92/12/EEC established rules relating to excise duties in the EU so as to prevent additional indirect taxes from obstructing trade. This directive covers inter alia petrol, diesel, heavy fuel oil and kerosene.

Nevertheless, the directive provides that mineral oils may be subject to indirect taxation -other than the harmonised excise duty established by the directive- when the tax in question meets the following conditions:

- It pursues one or more specific purposes.
- It complies with the tax rules applicable to excise duties or VAT concerning the determination of the tax base and the calculation, chargeability, and monitoring of the tax.

Based on this, Spanish authorities established a tax on the retail sale of certain hydrocarbons, more concretely petrol, diesel, fuel oil and paraffin, known as the "IVMDH" (from its Spanish initials). This tax, in force from 2002 to 2013, was intended to finance the new competences transferred to the Spanish Autonomous Communities on health and, where relevant, environmental expenditure.

The haulage Catalan company Transportes Jordi Besora S.L., considered that the IVMDH was incompatible with the directive and requested the authorities a refund of 45.632,38 EUR, the amount of IVMDH paid as final consumer between 2005 and 2008.

In this context, the High Court of Justice of Catalonia decided to ask the EU Court of Justice whether the Spanish tax was compatible with EU law.

First, the Court has indicated that the revenue obtained from the IVMDH was allocated to the Autonomous Communities in order to finance certain of their competences. In this sense, the Court has considered that the reinforcement

of the autonomy of a regional authority through the grant of a power to generate tax income constitutes a purely budgetary objective that cannot, on its own, constitute a specific purpose. Even if the revenue from the IVMDH was used to cover health expenditure, this is just a matter of internal organisation of the Spanish budget, and therefore, it is not sufficient to sustain that it had a specific purpose. If any purpose could be regarded as specific, the harmonised excise duty established by the directive would be deprived of all practical effect.

The Court has also stated that, in order to be regarded as pursuing a specific purpose, the IVMDH should have been by itself addressed to protect health and environment (for instance, by reducing the social and environmental costs specifically linked to the consumption of the mineral oils on which that tax is imposed). In this particular case, the Autonomous Communities' health expenditure in general is not specifically linked to the consumption of the taxed hydrocarbons and such expenditure may be financed by all kinds of taxes.

In addition, the Court has underlined that the Spanish legislation does not provide with any mechanism for the allocation of revenue from the IVMDH to environmental purposes and therefore the tax could only be regarded as directed to protecting the environment if its structure was designed in such a way as to dissuade taxpayers from using hydrocarbons or to encourage the use of less contaminating products, which was not the case.

Finally, the Court has analyzed the request from the Generalitat de Catalunya and the Spanish Government to limit in time the effects of the judgment in the event that the IVMDH was declared to be contrary to EU law. In their opinion, the tax has led to abundant litigation and the revenues reached approximately 13 billion EUR between 2002 and 2011. The repayment of such an amount would jeopardise the financing of public health in the Autonomous Communities.

The Court has reminded that limiting the effects of a judgment is very exceptional and can only be awarded if two criteria are met: (i) parties concerned have acted in good faith; and (ii) there is a risk of serious difficulties.

As for the first condition, the Court considers that in this case it cannot be accepted that the authorities acted in good faith in maintaining the IVMDH in force for more than 10 years. In addition, the Court has indicated that it had already ruled, in 2000, on a tax with analogous features to those of the IVMDH and that a year later, the European Commission had warned Spain that such a tax would be incompatible EU law, warning that actually led to an action for infringement.

In relation to the financial consequences, the Court has concluded that limiting the temporal effects of a judgment solely on this basis would be contrary to the judicial protection of the rights which taxpayers have under the EU tax legislation.

— *Currently at GA&P Brussels* —

Seminar on the European patent with unitary effect

On March 31, 2014 a seminar on the European patent with unitary effect will be hold in the Madrid office of Gómez-Acebo & Pombo. Speakers in this seminar will be:

— **Gonzalo de Ulloa**
President of Gómez-Acebo & Pombo and head of the Intellectual Property and Information Technology Area of the Firm

— **Alberto Casado**
Vice president of the European Patent Office

— **Ángel Galgo Peco**
Magistrate at Audiencia Provincial de Madrid.

— **Luis Alfonso Durán**
President of the IP Committee at the CEOE

— **Ángel García Vidal**
Commercial Law professor chaired at Santiago de Compostela University and author of *"El sistema de la patente europea con efecto unitario"*

More information is available on:

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