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— News —

Antitrust

The Spanish Competition authority fines Telefónica Móviles with €26 million for anti-competitive practices

Since 2006, the mobile telecom operator Telefónica Móviles has included permanence commitments in contracts signed with SME customers. These commitments obliged SME customers to remain with Telefónica for a period of 12, 18 or 24 months and were linked to special rebates. Essentially, they penalised this type of customers for leaving Telefónica and change operator, the penalties being higher the closer the SME was to the end of its contract. In addition, permanence was renewed automatically.

The Spanish competition authority (*Comisión Nacional de los Mercados y la Competencia* or CNMC) has considered that such commitments result in restrictive effects on competition because they disproportionately limit customers' ability to change operator. Furthermore, the CNMC has also indicated that such practices substantially increase the subscriber acquisition costs of competitors and effectively excluded some of them from the SME segment, including mobile virtual network operators (MVNOs).

Based on the abovementioned, the CNMC has imposed a €25.78 million fine to Telefónica Móviles. In order to calculate the fine, the authority has taken into account Telefonica's market share in the SME segment, the scope and duration of the infringement, and the effect on customers and competitors.

Thirteen companies of paper & carton recovery and their sectorial association fined €3.8 million for operating a cartel in Spain.

The CNMC has fined thirteen companies active in the markets of paper & carton recovery and commercialisation, together with their association (*Unión de Empresas de Recuperación S.L.* or UDER) for operating a cartel. The fines amount to a total of €3.83 million.

The authority has indicated that, since 2007, the companies entered into market sharing and price fixing agreements and also shared resources and sensitive commercial information. These practices were gathered up in documentation signed by the members of UDER.

As for the market of paper & carton waste recovery, the agreements focused on non-competition clauses among partners, market sharing and price fixing.

Concerning the market of commercialisation of covered paper & carton, the agreements allowed the companies to jointly fix prices, share commercial sensitive information and concert quantities of supplied product.

The companies have new two months to challenge their respective fines before the competent court, the *Audiencia Nacional*.

— Case-law & Analy —

Commission decisions on Spanish tax deductions for foreign company acquisitions annulled by the General Court *(Judgments of 7 November 2014 in Cases T-219/10 Autogrill España SA v Commission and T-399/11 Banco Santander SA and Santusa Holding SL v Commission)*

The Spanish law on corporate income tax established that a company subject to tax in Spain that acquires a stake in a foreign company of at least 5% of its capital share and holds it without interruption for at least one year, is allowed to deduct the goodwill value resulting from that shareholding through depreciation of the basis of assessment for the corporation tax.

Following a complaint, the European Commission opened a formal investigation in October 2007 which led to the conclusion, in 2009 and 2011, that the Spanish tax measure violated State aid rules because it gave beneficiaries a selective economic advantage over competitors that carry out domestic acquisitions.

The companies Autogrill España, Banco Santander and Santusa Holding, to which the tax regime was applied, brought an action for annulment of the Commission decisions before the General Court.

The General Court has concluded that the Commission failed at establishing that the Spanish regime was selective, and that, therefore, one of the criteria for classifying a measure as State aid was not met. The Court considers that the Spanish regime was not addressed to any special category of undertakings industry but to a broad category of economic transactions. In this sense, for the General Court, the Spanish regime does not exclude, *a priori*, any special category of undertaking from taking advantage of it, since its application is independent of the nature of an undertaking's activity.

Based on the abovementioned, the General Court has annulled the Commission decisions.

The General Court has also stated that, even if that such measure favours undertakings which are taxable in one Member State as compared to undertakings which are taxable in other Member States, this does not affect the analysis of the selectivity criterion and supports only the finding that, depending on the circumstances, competition and trade may have been affected.

This judgment might have a great impact in the Commission decision delivered last month to recover illegal aid granted through a 2012 tax scheme that aimed at promoting foreign acquisitions (for more information on this, please check our previous Brussels GA&P).

Guardian's fine for participating in the flat-glass cartel is reduced from €148 million to €103.6 million *(Judgment of 12 November 2014 in Case C-580/12 P Guardian Industries Corporation and Guardian Europe Sàrl v Commission)*

In 2007, the Commission fined four flat glass manufacturers for participating in a cartel. Among these four companies, Guardian Industries, the smallest producer among the four, was fined the highest amount, €148 million.

Guardian challenged the decision to the General Court based on lack of sufficient evidence of its participation in the infringement and, in the alternative, requested a reduction of the fine alleging discrimination with respect to the other producers. However, the General Court dismissed Guardian's action.

Guardian appealed to the Court of Justice arguing that the General Court did not respect the principle of equal treatment in refusing to accept that, when calculating the fine, sales between entities belonging to the same undertaking (internal sales) must be taken into account on the same basis as sales to independent third parties (external sales).

The Court of Justice has concluded that the exclusion of the internal sales led to the relative weight of Saint-Gobain (a vertically integrated company, i.e. a company which brings together the various production and distribution stages for the same type of goods) in the infringement being reduced and that of Guardian (a non-vertically integrated company) being increased commensurately. Therefore, the Court has applied a 30% reduction to Guardian, fixing the fine in €103.6 million.

In addition, Guardian claimed that the duration of the procedure before the General Court

(almost 5 years) amounted to a breach of the fundamental right to a fair trial within a reasonable time, referred to in Article 47 of the Charter of Fundamental Rights of the EU. The Court of Justice while acknowledging this, has stated that it is for the General Court, which has jurisdiction under Article 256(1) TFEU, to determine such claims for damages, sitting in a different composition from the one that heard the dispute giving rise to the procedure whose duration is criticised and applying the criteria set out in the judgment *Gascogne Sack Deutschland v Commission.*

— *Currently at GA&P Brussels* —

Our offices in Madrid will hold the annual conference of *Asociación Española de Defensa de la Competencia* (the National Spanish Competition Association) next Thursday 4 December 2014. The conference will include four round tables on (i) "Antitrust policy", moderated by Isabel López Gálvez, Sub-Director of Cartels and Leniency at the CNMC; (ii) "Merger control"; (iii) "Compliance programmes", moderated by Iñigo Igartua, head of the Competition department at GA&P; and (iv) "Private application, economic questions and State Aid", moderated by Juan Briones, economist at E-Konomica.