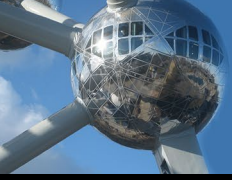


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News

Antitrust

European Commission is considering introducing a whistleblowing scheme to complement leniency programme.

An official of DG Competition announced during a recent conference that the Commission is considering the introduction of a new whistleblower program allowing informants, such as employees or unhappy consumers, to report about cartel behaviour through an independent agency to the

Commission. This model has been implemented with success in Germany and Denmark. The system would work as follows: the informant would blow the whistle to the agency directly and subsequently a dialogue between the Commission and the informant could begin by way of a system allowing the identity of the informant to be kept anonymous. The Commission will take a decision on the possible implementation of the system in the following months.

State Aid

European Commission declares tax advantages to Fiat in Luxembourg and to Starbucks in The Netherlands as illegal State aid.

In June 2014 the Commission initiated an investigation into the tax rulings issued by the Luxembourgish and Dutch national tax authorities related to the companies Fiat and Starbucks respectively. Tax rulings are comfort letters granted to a company specifying how its corporate tax will be calculated or how certain special tax provisions will be applied.

The Commission has considered that the particular tax rulings issued to these companies did not reflect the economic reality and used artificial and complex methods to calculate their taxable profit. In particular, this situation would result from taking into account transfer prices (i.e. those of goods and services sold intra group) that do not correspond to market conditions.

As for the Fiat case, the Commission has found that the tax ruling issued in 2012 artificially lowered the taxes paid by Fiat Finance and Trade (based in

Luxembourg) in the following manner: first, the capital base approximated was considerably lower than the actual capital due to a number of economically unjustifiable assumptions and downward adjustments. Second, the estimated remuneration applied to this lower capital for tax purposes was also lower than market rates.

With regard to Starbucks Manufacturing (located in The Netherlands), the Commission has considered that the tax ruling issued in 2008 artificially lowered the taxes paid by the company. First, Starbucks Manufacturing pays a considerably high royalty to another company within the Starbucks group based in the UK for roasting know-how, which allowed the company to unduly shift taxable profits. Second, Starbucks Manufacturing also pays an inflated price for green coffee beans to a Swiss subsidiary within the group.

Based on the above, the Commission has declared these tax advantages as State aids incompatible with the internal market and has ordered their recovery which is estimated in €20 to €30 million for each company.



Case-law & Analysis

The Court of Justice of the EU confirms the General Court's judgment on the infringement of AC Treuhand as facilitator of a cartel (*Judgment of 22 October 2015. AC-Treuhand AG v European Commission. Case C-194/14 P*).

In 2009, the European Commission fined the Swiss consultancy AC Treuhand for facilitating two heat stabilizer cartels.

Based on the Commission's decision, participants in the cartel engaged in price fixing, market sharing and exchanges of commercially sensitive information. In this context, AC Treuhand received fines of €174,000 for playing an essential role in the infringement, since it organized and attended the cartel meetings and collected and supplied sales data to the companies.

This decision was challenged before the General Court of the EU which dismissed AC Treuhand's action in February 2014. Subsequently, AC Treuhand brought

an appeal to the Court of Justice of the EU, which has confirmed the General Court's judgment.

First, the Court of Justice has declared that Article 101 of the Treaty on the Functioning of the European Union (TFEU) refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition, irrespective of the market on which the parties operate. In this sense, the Court has indicated that the effectiveness of this Article 101 TFEU would be jeopardized if facilitators, such as AC Treuhand, could escape liability.

Second, the Court has confirmed that the Commission was right to fix AC Treuhand's fine as a lump sum instead of using its value of sales. The company is a consultancy firm – therefore, not active on the markets for heat stabilizers– and the turnover it generated from the services offered to the cartelists was not sufficient to reflect the importance of the infringement.

Currently at GA&P Brussels

Next November 26, Gómez-Acebo & Pombo will host a seminar in its Lisbon office on the evolution and perspectives of Competition Law and Policy in Portugal. Mr. António Ferreira Gomes, President of the Portuguese Competition Authority, will be our

guest speaker. The seminar will deal in particular with leniency regimes, settlement proceedings and private enforcement from the EU, Portuguese and Spanish perspective. Please contact us for more information on this event.

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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