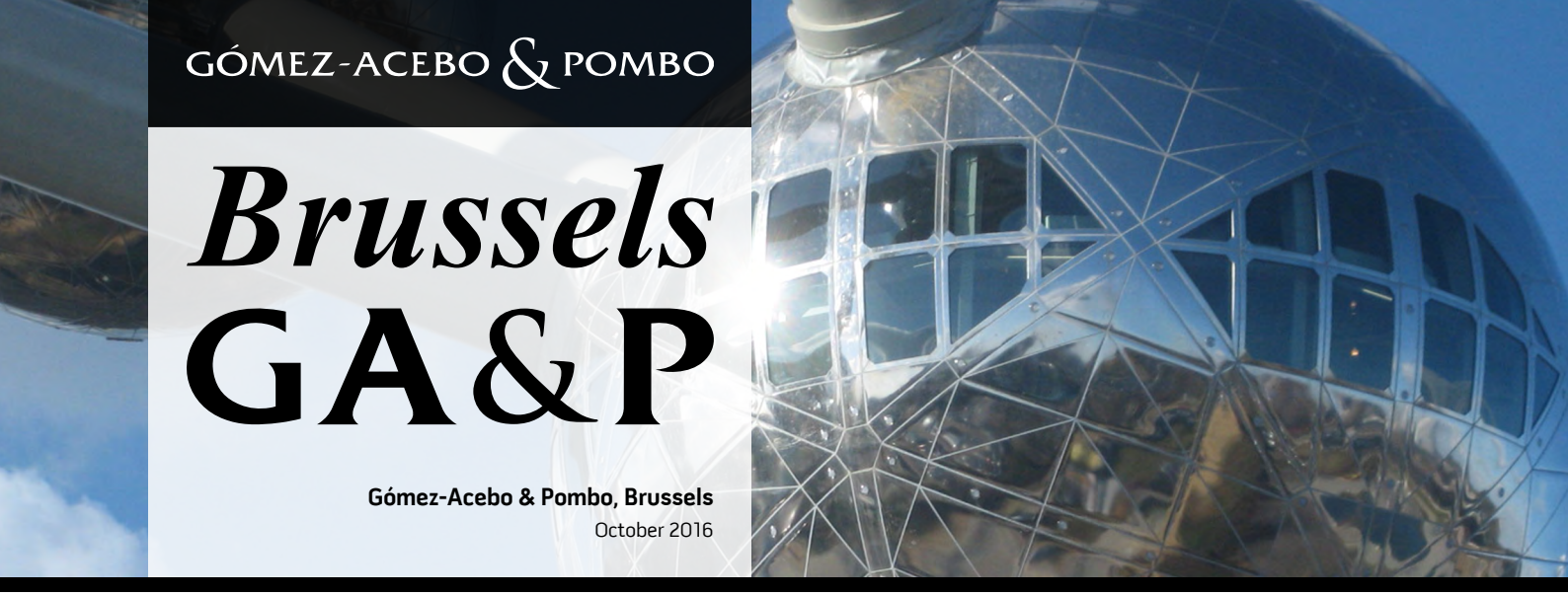

GÓMEZ-ACEBO & POMBO

Brussels GA&P

Gómez-Acebo & Pombo, Brussels
October 2016

Content

News

Antitrust

Commission launches public consultation on the functioning of certain procedural and jurisdictional aspects of EU merger control

On 7th October 2016, the European Commission launched a public consultation in order to seek feedback from citizens, businesses, associations, public authorities and other stakeholders on certain aspects of EU merger legislation. The consultation will remain open until 13th January 2017.

The consultation is focused on: (i) the effectiveness of purely turnover-based thresholds in the EU Merger Regulation, (ii) the treatment of cases that typically do not raise competition concerns and (iii) the referral mechanisms between national competition authorities and the European Commission.

Regarding notification thresholds, the review of a merger falls under the European Commission´s competences where they have EU dimension. This takes place when the turnover of at least two of the merging parties meets the relevant notification thresholds.

The consultation aims at tackling the issue of whether this system is still the most effective way of control. In this sense, the assessment will address suggestions calling for complementing the existing thresholds by other alternative criteria in order to capture some types of transactions in certain sectors, such as digital services and pharmaceuticals. Thus, the Commission seeks to ascertain whether there is a possible enforcement gap under EU merger control.

Concerning the treatment of typically unproblematic cases, currently, there is a simplified procedure in place for cases that generally do not raise competition concerns. The present consultation is targeted at obtaining feedback on the functioning of the simplified procedure. In particular, the objective is to assess whether there is scope for further simplification of the treatment of certain categories of non-problematic cases.

As for referral mechanisms, the European Commission is willing to collect stakeholders´ views on the functioning of the system and on certain procedural and technical aspects of the EU Merger Regulation.

After analyzing the results of the public consultation, the Commission will prepare an evaluation of the relevant procedural and jurisdictional aspects of EU merger control. This will help to decide on possible future reforms in the field of EU merger control.

Commission is likely to open more cartel cases against car-parts manufacturers

It has been reported that high officials within the European Commission have stated that more cartel cases against car-parts manufacturers are likely to come and that cartel investigations in the sector had not yet come to an end.

The Commission has already adopted five decisions imposing fines amounting to EUR 1.4 billion that affected companies active in markets of wire harnesses foam, parking heaters and engine starters. In addition, investigations are currently on- going against airbags, thermal systems and car lights manufacturers.

Competition authorities from Canada, Japan and the US have also investigated car-parts manufacturers for price-fixing and bid-rigging conspiracy. Investigations in the US have resulted in fines against dozens of companies totaling billion of dollars and in at least twenty executives being condemned to imprisonment.

In relation to this topic, GA&P Brussels participated in a European Commission's study on the operation of the system of access to vehicle repair and maintenance information, where it, *inter alia*, assessed the competition concerns stemming from the refusal from to grant access to repair and maintenance information. The study was published in 2014 and is publicly accessible here.

EU charge sheet suggests that Google is illegally tying Android to Internet search in contracts with smartphone manufacturers and telecom operators

According to the new charge sheet sent to Google by the European Commission, the search engine would be tying its Android to Internet search in contracts with smartphone manufacturers and telecom operators.

The charge sheet includes a series of six presumable abuses of EU Competition Law. In particular, the alleged abuses relate to: (i) the pre-installation of Google applications, (ii) the provision of financial incentives and (iii) the hindrance to smartphone manufacturers to develop Android beyond Google´s instructions. While being abuses on their own, the Commission has grouped them up as part of a broad strategy aimed at maintaining its position in the search market.

This charge sheet follows the Statement of Objections sent to Google and its parent company, Alphabet, in April 2016. The Statement refers to the fact that Google may be licensing Google Play to smartphone manufacturers and telecom operators on condition that they install its search engine as default program in their products.

Google will be required to change its conduct and will most likely be imposed a fine, which will be calculated on the basis of Android sales in the EEA. The alleged infringement has reportedly lasted for five years and three months. The length of the infringement will have an impact on the amount of the fine.

Case-Law & Analysis

Advocate General Wahl concludes that the Court of Justice of the EU should uphold Intel's appeal against the EUR 1.06 billion fine for abuse of dominance and refer the case back to the General Court *(Advocate General's Opinion of 20 October 2016 in Case C-413/14 P Intel Corporation Inc. v Commission)*

Advocate General (AG) Wahl has rendered its conclusions on Intel´s appeal against the General Court´s judgment of 12th June 2014 in Case T-286/09, where Intel´s action against the EUR 1.06 billion fine for abuse of dominance was dismissed. In its conclusions, AG Wahl has upheld five out of the six arguments brought by Intel and has recommended that the case is referred back to the General Court.

Firstly, Intel argued that the General Court erred in law in the legal characterization of rebates as exclusivity rebates. In this regard, AG Wahl found that by concluding that exclusivity rebates constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish an abuse of dominance, the General Court erred in law.

Secondly, Intel alleged that the General Court erred in law both by finding an infringement in 2006 and 2007; and, by assessing the relevance of market coverage. In AG Wahl's opinion, by doing so, the General Court did not follow the criterion of "sufficient market coverage" and, as a consequence, failed to ascertain that the behavior in question was capable of restricting competition in 2006 and 2007.

Thirdly, Intel contested the fact that certain rebate arrangements that covered a minority of a customer's purchases were classified as exclusivity rebates by the General Court. In relation to this, according to AG Wahl, no separate category of exclusivity rebates exists. In case the Court thinks otherwise, AG Wahl recommends upholding this ground given that exclusivity rebates would be conditional upon the customer purchasing all or most of its products from the dominant undertaking, which is not satisfied in this case.

Fourthly, Intel claimed that the General Court's interpretation of EU law with regard to the absence of an obligation to record an interview between the Commission and an executive of Dell constituted an error of law. In this respect, AG Wahl found that the General Court erred in law by concluding that the Commission did not breach EU law by not organizing and recording a meeting as required under the applicable rules.

Fifthly, the claimant challenged the Commission's jurisdiction regarding Intel's arrangements in China with Lenovo. In line with Intel's argument, AG Wahl questioned the consideration that Intel's abuse could be deemed to have been implemented in the EEA. Consequently, in AG Wahl's view, the General Court failed to assess whether the anticompetitive effects of certain agreements between Intel and Lenovo had the capability to produce any immediate, substantial and foreseeable anticompetitive effect in the EEA.

Finally, the last argument brought by Intel concerned (i) the amount of the fine; and, (ii) the

retroactive application of the 2006 Guidelines on the setting of fines. Regarding the amount of the fine, AG Wahl found that the fact that the fine imposed was the highest one ever imposed at the time did not amount to disproportionality. As for the retroactivity of the 2006 Guidelines, AG Wahl explained that it is not the fining guidelines but the EU legislation which defines the limits of the European Commission's discretion in imposing a fine for a breach of EU Competition law. Therefore, as long as the fine imposed complies with the limits of that legislation, the principle of non-retroactivity cannot be invoked to contest the fine.

Currently at GA&P

Mário Marques Mendes (GA&P Lisbon) moderates the International Chamber of Commerce conference on the transposition of the Private Enforcement Directive

On 28th October 2016, Mário Marques Mendes (Partner within our Competition Law team) participated as moderator in the conference organized by the International Chamber of Commerce (ICC) in Lisbon. The subject of the conference was "The Transposition of the Private Enforcement Directive". The conference includes lectures from judges of the Court of Justice of the EU; officials of DG Competition; members of the Portuguese Competition Authority and competition lawyers, among others.