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# News

## Mergers

### **The Spanish Competition authority fines media group Mediaset €3 million for not respecting remedies after a merger clearance**

In 2010, the Spanish Competition authority (*Comisión Nacional de los Mercados y la Competencia* or CNMC) authorised the acquisition of the TV channel Cuatro by Gestevisión Telecinco S.A. (currently Mediaset) –subject to the remedies offered by the latter.

Remedies aimed at guaranteeing that advertising for both Cuatro and Telecinco TV channels would be kept separated and that advertisers would negotiate independently for each channel.

In March 2015, the Spanish authority initiated proceedings against Mediaset for failing to respect the clearance decision.

In particular, the CNMC considered that Mediaset did not comply with the remedy imposing the non development of commercial practices that, formally or *de facto*, lead to direct or indirect tying in the sale of advertising space for Telecinco or Cuatro. In this sense, the CNMC identified evidences that, from February 2013 to March 2014, Mediaset required or accepted the formal inclusion of a minimum global share of investment in its channels as a negotiating factor with advertisers. The CNMC has imposed a €3 million fine to Mediaset which may now appeal the infringement decision before the high administrative court (*Audiencia Nacional*).

This is the second sanction imposed on Mediaset in the framework of compliance with legally binding remedies offered in the framework of the Telecinco-Cuatro merger case. Mediaset was already fined €15 million in February 2013 for failing to comply with some of the remedies.

## Case-Law

### **General Court reduces fines imposed to Panasonic and Toshiba for their participation in a cartel concerning tubes for television sets**

In December 2012, the European Commission imposed fines for more than €1.47 billion to seven companies for their participation in two cartels concerning the market for cathode ray tubes (CRTs) and operated between 1996/1997 and 2006.

CRTs are used for manufacturing computer and TV screens. The two cartels concerned these two types of consumer products and consisted on price fixing, market and customer sharing and output limitations. In addition, the cartelists regularly exchanged commercially sensitive information.

Five of the fined companies and their subsidiaries involved in the infringement brought actions for the annulment of the Commission decision before the General Court or, in the alternative, for reducing their respective fines.

The General Court has rejected in their entirety the actions brought by Samsung SDI, LG Electronics and Philips. However, it has granted in part the claims brought by Panasonic, Toshiba and their common subsidiary at that time, MTPD.

As for Toshiba, the General Court has indicated that the Commission failed to meet the required legal standard for proving that this company was aware or had actually been kept informed of the existence of the TV-tubes cartel and that it intended to contribute by its own conduct to the objectives pursued by the cartel or that it could reasonably have foreseen those objectives and was prepared to take the risk. As a consequence, the General Court has considered that Toshiba cannot be regarded as having participated in the single and continuous infringement from 2000 until the creation of MTPD on 2003 and has annulled the €28 million fine imposed to Toshiba

In addition, the General Court has cut the fines for Panasonic from €157.5 million to €128.9 million, for Panasonic and MTPD jointly from €7.9 million to 7.5 million and for Panasonic, MTPD and Toshiba jointly from €86.7 million to €82.8 million.

The reductions applied to Panasonic are based on the fact that the Commission used wrong figures to calculate the company's fine. In this sense, Panasonic argued that the Commission had used an inappropriate methodology for calculating the value of its direct EEA sales of TV-tubes through transformed products. The General Court has uphold this claim indicating that the Commission's methodology was based in its 2006 Guidelines on the



setting of fines and it failed to use the data that most accurately reflected the value of Panasonic's EEA sales through transformed products.

Both Panasonic and Toshiba share responsibility for the fine imposed to the joint venture, which has been reduced by €4 million due to methodological issues in the calculation of the basic amount of the fine.

**Fine imposed to Total and Total France reduced from €128 million to €125 million by the Court of Justice of the EU**

In 2008, the European Commission imposed fines for over 676 million to nine groups of companies for participating in two cartels. The first one concerned paraffin wax at European level and was active between 1992 and 2005. Five out of these nine groups also operated a second cartel for slack wax in the German market from 1997 to 2004.

Total France was fined over €128 million jointly and severally with its parent company Total, S.A. The companies brought an action against the decision before the General Court, which rejected Total's claim but reduced the fine imposed on its subsidiary to €125 million, considering that the Commission had established a too long period of participation for Total France

Both Total and Total France (currently Total Marketing Services) appealed the judgment before the Court of Justice of the EU.

The Court of Justice of the EU has partially admitted the appeal brought by Total and has established that the General Court should have granted Total the same reduction than the one given to its subsidiary.

In this sense, the Court has held that in a case such as the one at stake where the liability of the parent company is purely derivative of that of its subsidiary and where no

other factor individually reflects the conduct for which the parent company is held liable, such liability cannot exceed that of its subsidiary. As a consequence, the Court has considered that the General Court erred in law in not taking into account the outcome of the judgment of Total France vis-à-vis its parent company Total. Therefore the fine imposed on Total jointly and severally with Total France has been set at €125 million.

As for the appeal brought by the subsidiary, Total France requested a reduction in the fine arguing that, on the one hand, it interrupted its participation in the cartel from May 2000 to June 2001, and, on the other hand, it ceased its participation from May 2004 onwards.

The Court of Justice has considering that the General Court erred in law in considering that an undertaking publically distancing itself from a cartel constitutes the only means available to prove that that it has ceased its participation in a cartel.

However, such error of law does not constitute grounds to annul the judgment for those periods of Total France's participation The Court of Justice has considered that there are objective and consistent indicia supporting that the participation was not interrupted. In this sense, the fact that Total France's representative left a meeting in May 2000 abruptly is explained by personal reasons, and cannot be regarded as an expression of the company's intention to distance itself from the cartel, in particular because after that, such representative was replaced by another employee and Total France started participating in the meetings again.

As for May 2004 onwards, the Court of Justice has considered that even if the company did not participate in the last three collusive meetings, Total France did not cease participating in the cartel, on the basis of objective and consistent indicia assessed in conjunction with the fact that that it did not distance itself publically from the cartel.

## Currently at GA&P Brussels

Sara Moya Izquierdo has recently published an article analyzing the Spanish law establishing a new system for centralized sale of football broadcasting rights from a Competition Law

perspective. The article has been published in the number 48 of the legal magazine "Revista Aranzadi de Derecho de Deporte y Entretenimiento" released in September 2015.

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