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News

BMW, Daimler and Volkswagen Group subject to formal investigation by the European Commission regarding potential coordination on the deployment of clean emission technology

Following the inspection of the companies' premises in October 2017, the Commission has decided to open an in-depth investigation into BMW, Daimler and the Volkswagen Group.

The Commission's investigation aims at establishing whether the car manufacturers concerned colluded to avoid competing against each other with regard to the development and implementation of clean emission technology.

The focus of the investigation is to ascertain whether BMW, Daimler, Volkswagen, Audi and Porsche met to discuss technologies to limit harmful car exhaust emissions and to determine whether there has been a breach of EU Competition Law.

More precisely, the Commission is assessing the potential violation of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits cartels and restrictive business practices.

Starting a formal investigation does not prejudge the outcome of the probe.

The European Commission addresses Statements of Objections ("SoOs") to bioethanol companies

A number of bioethanol producers are said to have received SoOs from the European Commission for their alleged participation in collusion to increase prices in the sector.

The SoOs follow an investigation opened by the Commission in 2015 into alleged exchanges of information among ethanol manufacturers prior to the submission of bids to the price reporting agency Platts. The investigation aimed at ascertaining whether such contacts increased benchmarks and prices.

Reportedly, the companies discussed with the Commission a potential settlement but the negotiations came to an end without an agreement. As a consequence, the Commission resumed its investigations, which have led to the abovementioned SoOs.

The Spanish Competition Authority fines six cargo handling companies and five trade unions for entering into anticompetitive agreements with regard to a Spanish port

Six cargo handling companies and five trade unions have been fined by the Spanish Competition Authority ("CNMC") for concluding agreements that restricted competition in the Port of Vigo (Spain), increased prices and decreased competitiveness. The fines amount to EUR 3 million for the cargo handling companies and EUR 430,000 for the trade unions.

The CNMS's investigation has shown that two agreements entered into in 2010 and 2013 between the Port Authority of Vigo, the entity in charge of managing dockers ("SAGEP") in Vigo, six cargo handling companies and five trade unions breached Article 101 of the Treaty on the Functioning of the EU ("TFEU") and Article 1 of the Spanish Competition Act. Both provisions prohibit collusive agreements and their breach is considered as a very serious infringement under the Spanish Competition Act.

The agreements in question prevented workers not employed by SAGEP from loading and unloading unregistered motor vehicles and from performing deliveries of goods.

The CNMC has emphasized the importance of the right to collective bargaining while clarifying that this case did not concern labour agreements but the attempt to extend a legal reservation (applicable to ports' cargo handling activities) to areas to which the reservation does not apply and that are liberalised.

The CNMC has stated that, in line with EU and national case-law, the agreements in question cannot be considered as collective agreements since they do not regulate the labour conditions of SAGEP's workers but the internal organization of cargo handling companies.

In addition, through the agreements, cargo handling companies were prevented from autonomously deciding about their internal organization or the staff they could hire to provide services in the port, namely loading and unloading motor vehicles, which is not a service legally reserved to dockers.

Indeed, the CNMC has established that the agreements were concluded by independent companies that competed against each other (i.e., the cargo handling companies that are SAGEP's shareholders), trade unions and the Port Authority of Vigo.

The Spanish Competition Authority fines eleven companies for the participation in a cartel on IT and data treatment services for the Spanish Public Administration

Eleven companies have been fined for participating in a cartel for the provision of IT and data treatment services to the Spanish Public Administration. According to the Spanish Competition Authority ("CNMC"), the companies engaged in customer allocation, price fixing and exchange of commercially sensitive information to increase the prices of public tenders. The total amount of the fines equals EUR 29.9 million.

The investigation was prompted by a complaint filed with the CNMC. Following the investigation, and after having heard the undertakings concerned, the CNMC has established the existence of a very serious infringement of Article 101 of the Treaty on the Functioning of the EU ("TFEU") and of Article 1 of the Spanish Competition Act, which prohibit collusive agreements.

The companies concerned provided IT and data treatment services in the whole territory of Spain. In most of the cases, this type of contracts require that staff of the provider works from the premises of the client as support personnel. Administrative bodies such as the Spanish Tax Authority, the IT services of the Spanish Social Security and the Public Service of Employment ("SEPE") were affected by the anti-competitive practices.

Among others, the CNMC has concluded that the cartelists entered into a consortium with the sole purpose of participating in a tender; engaged in preferential subcontracting and offered economic incentives in exchange for the commitment to abstain from participating in particular tenders.

The CNMC's decision can be challenged before the Spanish Audiencia Nacional within two months after notification.

Belgian Competition Authority issues draft Guidelines on information exchange on markets and prices

On 12 September 2018, the Belgian Competition Authority (the "BCA") released its draft guidelines on information exchange pertaining to markets and prices (the "Guidelines") and is now subject to public consultation until 15 November 2018.

The Guidelines target trade associations (i.e. federations of undertakings or of liberal professions; the "Associations") as they regularly consult the BCA on market information they can exchange with their members, or on tools that may be provided by them and certain service providers to their members or clients, mainly to assist them in setting their prices.

The purpose of the Guidelines is to provide information on what is, and is not, possible as regard exchange of information through Associations and undertakings active on the market of supply of market information. However, the Guidelines do not apply to information directly shared among competitors, and certainly not if it is shared within the framework of a cartel; neither do they apply on information exchange within the strict framework of a horizontal cooperation agreement benefiting from a block exemption or an individual exemption.

The BCA reminds in its Guidelines that information exchanges may bring about various types of efficiency gains, by comparing their respective best practices. Also, consumers may benefit from these exchanges thanks to a decrease in research costs and an increase in their available choices. Nevertheless, these exchanges may also become problematic by having restrictive effects on competition, if they allow undertakings to have insight on their competitors' marketing strategies. Effects on competition will depend on the characteristics of the relevant market on which the information exchanges occur and on the type of information being exchanged. The risk assessment will therefore depend on whether the exchanged information would, or would not, allow undertakings to coordinate their behaviours so as to limit commercial risks implied by normal competition.

The Guidelines cover periodical market surveys (historical data), price benchmarking, prospective information on market trends and tools to help undertakings set their prices. They also include pragmatic tips and examples, a summary of the BCA's previous decisions on trade associations and extracts from the European Commission's guidelines on horizontal agreements.

Guidelines are available, in French, at www.abc-bma.be/sites/default/files/content/download/files/20180912_projet_guide_echanges_informations.pdf and, in Dutch, at www.bma-abc.be/sites/default/files/content/download/files/20180912_ontwerp-gids_uitwisseling_informatie.pdf.

UBO register to become a reality in Belgium

The Fourth European money laundering Directive 2015/849 has been implemented into Belgian law through the Act of 18 September 2017 on the prevention of money laundering and terrorism (the "Act").

The Act provides for the creation of a centralized register containing information about the ultimate beneficial owners of certain Belgian legal bodies ("the UBO Register"). The provisions of the Act have been completed by the Royal Decree of 30 July 2018, that will enter into force on 31 October 2018.

Belgian companies, Belgian (international) non-profit associations and foundations and Belgian trusts are required to register and update information on their ultimate beneficial owners (the “UBOs”) in this register.

As regards Belgian companies, UBOs are:

1. The natural person who ultimately, directly or indirectly, owns more than 25% of the voting rights or more than 25% of the shares or share capital of the company;

2. The natural person who ultimately holds control over the company by any other means (e.g. the right to appoint the majority of the board of directors of the company and right of veto);

3. If no person can be identified under the two first categories, the natural persons holding the position of senior managing officer(s) within the company (usually the CEO or the chair of the executive committee).

No later than 31 March 2019, the company’s administrative body must transfer all the information about its UBO to the UBO Register. Furthermore, the administrative body is required to update this information within one month after having been informed of any change thereto. This information must be transferred electronically, via the platform of the Federal Ministry of Finance. The platform is not yet operational.

The following information about the UBOs of a company must be provided:

1. Name and first name, date of birth, nationality, address, identification number with the National Register;

2. Date on which the person has become a UBO;

3. The category (or categories) of UBOs to which the person belongs to, individually or together with others;

4. Whether that person is a direct or indirect UBO and, in the latter case, the number of intermediaries, and for each of them, their identification data (name, date of incorporation, trade name, legal form, address of the corporate seat and the corporate number); and,

5. The extent of the ultimate interest, i.e. the percentage of the shares or voting rights and, in case of an indirect beneficial owner, the weighted percentage of shares or voting rights.

The UBO Register can be accessed by:

1. The competent authorities (including the tax authorities);

2. Entities such as the Belgian National Bank, financial institutions, insurance companies, notaries, accountants and lawyers (when it concerns their obligations regarding vigilance towards clients); and,

3. Any citizen.

Should the company's governing body fail to face its obligations, the Minister of Finance may impose administrative fines on directors, which may vary from EUR 250 to EUR 50.000. Courts may also impose criminal fines ranging from EUR 50 up to EUR 5.000.

Case-law & Analysis

According to Advocate General Kokott, the prohibition decision on the acquisition of TNT Express by UPS should be annulled on the basis of an error of procedure *(Advocate General's Opinion of 25 July 2018 in Case C-265/17 P, European Commission v United Parcel Services, Inc.)*

The contested decision was adopted by the Commission on 30 January 2013 to prohibit the planned acquisition of TNT Express by UPS as it was established that its implementation would significantly impede effective competition on the market for international express deliveries of small packages in 15 EEA Member States.

This decision was challenged by UPS before the General Court of the EU. On 7 March 2017, the General Court delivered its judgment and ordered the annulment of the decision on the basis of a breach of UPS' rights of defence. In particular, the General Court found that the last price concentration model used by the Commission was significantly different to the one that had been discussed with UPS and UPS had no opportunity to submit comments with the regard to those amendments.

This judgment was appealed by the Commission before the Court of Justice of the EU. In the context of these proceedings, the Advocate General has adopted her opinion and concluded that the Court of Justice should confirm the judgment of the General Court and dismiss the Commission's claims.

In her view, the model in question was at the basis of the objections against TNT's acquisition. As a consequence, the Commission should have given UPS the opportunity to comment on the price model effectively so as to ensure the company's rights of defence were observed.

In addition, according to the Advocate General, the Commission failed to prove that the time constraints of merger proceedings rendered it extremely difficult to hear UPS on the last price model.

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Our brand new web is online. Following our recent image changes and the adoption of the logo and acronym GA_P, the latest step has been the complete refurbishment or our website. Check it at: www.ga-p.com