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Contents

News **3**

— The Commission opens investigation into distribution of air tickets 3

— The Commission clears the acquisition of parts of Fox by Disney with commitments 3

— The Spanish Competition Authority (“CNMC”) opens a formal investigation against Adidas España for potential anticompetitive practices 4

— The Spanish Competition Authority (“CNMC”) publishes preliminary guidelines on calculation of fines 4

Case-law & Analysis **6**

— The General Court of the EU confirms the Commission’s decision declaring the Spanish tax scheme for the amortisation of financial goodwill to be incompatible State aid 6

Currently at GA_P **6**

— Two GA_P’s Competition Law partners mentioned in the 2019 edition of “Best Lawyers” 7

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News

The Commission opens investigation into distribution of air tickets

The Commission's investigation aims to ascertain whether agreements between Amadeus and Sabre, on the one hand, and airlines and travel agents, on the other, may breach EU Competition Law.

Amadeus and Sabre are the largest Computerised Reservation Systems ("CRSs") worldwide. CRSs compile information on flights from many airlines. Travel agencies and travel management companies use CRSs to compare prices, book and issue air tickets for their clients.

In particular, the Commission will focus on determining whether certain clauses of the agreements between CRSs and airlines and travel agents may be preventing the latter from using alternative ticket distribution providers.

This type of clauses would be hindering the access to the market for providers of new air ticket distribution services. This could also be increasing the cost of distribution for airlines, which would be ultimately passed on in the price paid by consumers for their tickets.

These clauses would be in breach of Article 101 of the Treaty of the Functioning of the EU ("TFEU"), which prohibit anticompetitive agreements between companies.

The opening of an investigation does not prejudge the outcome thereof.

The Commission clears the acquisition of parts of Fox by Disney with commitments

On 14 September 2018, Disney notified its proposed acquisition of certain parts of Fox' business. Disney and Fox are two of the main Hollywood film studios and both have a number of TV channels, such as Disney Channel, Fox, National Geographic and History.

In the European Economic Area ("EEA"), the companies provide audio-visual contents and TV channels to broadcasters and distributors. The transaction's aim is to combine Disney with parts of Fox (e.g. Fox films and TV studios as well as its cable and international TV business).

The investigation of the Commission has shown that with regard to the production and distribution of films in movie theatres, on the one hand, and with regard to distribution of films and other TV content for home entertainment and licensing, on the other, the proposed transaction would not entail competition concerns. In the Commission's view, operators such as Sony, Universal and Warner Bross would still be competing with the merged entity in those markets.

Concerning supply of TV at the wholesale level, the investigation has revealed that the acquisition would eliminate two significant suppliers of so-called “factual channels” in the EEA. These channels focus on documentaries, drama and science-related programmes.

Thus, the commitments to which the clearance is subject include Disney’s divestment of the factual channels the company controls in the EEA. This divestment will completely remove the overlaps between the activities of the parties in the supply of factual channels at the wholesale level in the EEA.

The Spanish Competition Authority (“CNMC”) opens a formal investigation against Adidas España for potential anticompetitive practices

The CNMC’s concerns relate to anticompetitive clauses present in Adidas’ contracts with some of its franchisees. These clauses would limit certain type of sales, such as on-line sales and cross-sales, and would establish disproportionate non-compete obligations. In addition, Adidas could have indirectly fixed the resale prices of its franchisees.

The investigation was prompted by a complaint. The latter led the CNMC to start a preliminary review and, subsequently, a preliminary investigation (S/DC/0631/18) with the aim of ascertaining whether the circumstances of the case justified the opening of a formal investigation.

On the basis of the evidence available, the CNMC considers that there are rational indicia regarding the existence of practices that are prohibited by Article 1 of the Spanish Competition Act and Article 101 of the Treaty of the Functioning of the European Union.

The CNMC has reminded the parties of its confidentiality obligation, which is intended to protect the investigation and the decision thereof.

Opening a formal investigation does not prejudge its outcome. The CNMC has now 18 months to conduct its investigation and adopt a decision on the case.

The Spanish Competition Authority (“CNMC”) publishes preliminary guidelines on calculation of fines

In November 2018, the CNMC published a set of preliminary guidelines that will govern its fining powers. The aim is to improve transparency and objectivity in the calculation of competition fines, while ensuring proportionality, deterrence and legal certainty.

Although the guidelines are of general application, it will be possible to apply alternative methods when the application of the guidelines to a case is not reasonable. The guidelines are without prejudice to the rules on leniency.

The fines for competition infringements in Spain are determined following a two-step methodology.

First, a general rate is calculated on the basis of the characteristics of the infringement. This will be a percentage of the undertaking' global turnover corresponding to the year that preceded the infringement. The more serious the infringement is, the higher the rate will be. For this exercise, as required under the Spanish Competition Act, the following factors shall be taken into account: the characteristics of the market affected by the infringement; the market share(s) of the undertaking(s) concerned; the scope of the infringement; the effect of the infringement on consumers' legitimate rights and interests; and, the measures adopted to guarantee the achievement of the illicit practices.

Second, an individualized rate is established by taking into account the specific conduct of the undertaking concerned. Three criteria are considered in this respect: (i) the duration of the infringement; (ii) the dimension of the market that is affected by the infringement; and, (iii) the aggravating and mitigating circumstances.

The final rate is the result of combining both the general and the individualized rates. The fine will be calculated by applying the final rate to the undertaking's global turnover corresponding to the year before the fine was imposed.

At the end of the process, the CNMC will verify that the fine that results from the application of the final rate is proportionate to the effective size of the infringement. To this effect, the CNMC will use a benchmark value of what should be considered as deterrent and proportional. If the fine (in euros) significantly exceeds this benchmark, it is likely that the fine is not in line with the proportionality principle. In such a case, the fine will be reduced accordingly.

To establish the benchmark value, the CNMC will estimate the illicit benefit that the undertaking could have obtained during the infringement. Then, this amount will be multiplied by a factor between 1 and 4, depending on the duration of the infringement and the size of the infringing company.

Case-law & Analysis

The General Court of the EU confirms the Commission's decision declaring the Spanish tax scheme for the amortisation of financial goodwill to be incompatible State aid *(Judgements of 15 November 2018 in Cases T-207/10 Deutsche Telekom v Commission; T-227/10 Banco Santander v Commission; T-239/11 Sigma Alimentos Exterior v Commission; T-405/11 Axa Mediterranean v Commission; T-406/11 Prosegur Compañia de Seguridad v Commission; T-219/10 RENV World Duty Free Group v Commission; and, T-399/11 RENV Banco Santander and Santusa v Commission)*

According to Spanish tax law, the amortisation of goodwill is only permitted in business combinations. However, in 2001 a new tax measure was inserted in the Spanish corporate tax law.

The measure enabled the liable undertaking that acquired at least a 5% shareholding in a company which was not tax resident in Spain and which was held without interruption for at least one year, to deduct the resulting financial goodwill in the form of an amortisation. The financial goodwill amount to the goodwill which would have been recorded in the acquirer's accounts if the two undertakings were combined.

The investigation of the Commission on the matter showed that the measure was incompatible with the internal market. Consequently, the Commission ordered Spain to recover the aid granted from the beneficiaries.

Several beneficiaries of the aid filed actions of annulment against the recovery decisions. By judgments of 7 November 2014 of the General Court, the decisions were annulled on the basis of the fact that the Commission had not established the selectivity of the measure. These judgements were appealed before the Court of Justice, which decided to set aside the General Court judgments.

The cases were returned to the General Court, which had to decide again whether or not the measure was selective, being selectivity one of the necessary and cumulative criteria required to classify a measure as State aid.

The General Court has now found that the measure was selective even if the advantage provided thereof is accessible to all undertakings liable for corporation tax in Spain. The Court has reminded that a measure may be selective even where the difference in treatment is based on the distinction between undertakings which choose to perform certain transactions and others that choose not to perform them, and not on the distinction between the undertakings in light of their specific characteristics. On this basis, the General Court has upheld the Commission's decision.

Currently at GA_P

Two GA_P's Competition Law partners mentioned in the 2019 edition of "Best Lawyers"

Our Barcelona-based Competition partner, Iñigo Igartua, and our Lisbon-based Competition partner, Mário Marques Mendes, have been included in the 2019 edition of "Best Lawyers" for Spain and Portugal.

More information is available at: **https://www.bestlawyers.com/**