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# Brussels G A _ P Newsletter

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# News

## The European Commission fines two maritime car carriers and four car parts suppliers EUR 546 million in three separate cartel settlements

Four maritime car carriers, two suppliers of spark plugs and two suppliers of braking systems have been fined EUR 395 million, EUR 76 million and EUR 75 million respectively, in the framework of three separate cartel settlement decisions adopted by the European Commission.

With regard to the first ones, the Commission established that Chilean maritime carrier CSAV, the Japanese carriers "K" Line, MOL and NYK, and the Norwegian/Swedish carrier WWL-EUKOR participated in a cartel concerning intercontinental maritime transport of vehicles from 2006 to 2012. According to the Commission, the carriers' sales managers held regular meetings at different locations and spoke over the phone. The aim of these contacts was to coordinate prices, allocate customers and exchange commercially sensitive information. The participants to the cartel proposed artificially high prices or abstained from participating in specific tenders so as to stay off each other's traditional routes and customers.

This investigation was launched as a result of an application for immunity filed by MOL, which in exchange received full immunity and avoided a fine totalling EUR 203 million. For its part, CSAV, "K" Line, NYK and WWL-EUKOR obtained important reductions in their respective fines for their cooperation with the Commission. Since all the participants acknowledged their participation in the cartel, all of them benefit from an extra discount of 10% in their fines, in accordance to the Commission's 2008 Settlement Notice.

As for the spark plugs suppliers Bosch, Denso and NGK, the Commission found that they had participated in an EEA-wide cartel from 2010 to 2011. The cartel consisted in exchanging commercially sensitive information, agreeing on prices for specific customers and respecting each other's historical supply rights. The investigation was prompted by an application for immunity submitted by Denso, which avoided a EUR 1 million fine. Bosch and NGK received significant reductions in their fines as reward for their cooperation with the Commission and benefitted from an additional 10% discount for acknowledging their participation in the infringement, as per the Commission's 2008 Settlement Notice.

Finally, in the braking systems sector the Commission unveiled two separate cartels related to: (i) hydraulic braking systems (which participants were TRW, Bosch and Continental) and (ii) electronic braking systems (which participants were Bosch and Continental). In both cartels, commercially sensitive information was exchanged via bilateral meetings or phone conversations. The first cartel lasted between 2007 and 2001 and the second one started in 2010 and ended in 2011. As in the previous cases, the investigation concerning the first cartel started after TRW filed for immunity. This allowed TRW to avoid a fine totalling EUR 54 million. Continental and Bosch benefited from reductions on their fines for cooperating with the Commission and got an extra discount of 10% under the Commission's 2008 Settlement Notice for the acknowledgement of their participation in the infringement.

Continental filed for immunity in the second cartel and avoided a EUR 22 million fine, while Bosch's fine was reduced for its cooperation and acknowledgement of the conduct in accordance to the Commission's 2008 Settlement Notice.

## The Court of Justice of the EU receives the first preliminary ruling on the EU Damages Directive

A Portuguese court (Tribunal Judicial da Comarca de Lisboa) has referred the first preliminary ruling request on Directive 2014/104 ("the EU Damages Directive") to the Court of Justice of the EU. The reference of the case is C-637/17.

The main question referred by the Portuguese court aims at clarifying the applicability of the EU Damages Directive to proceedings instituted before the expiry of the Directive's transposition period concerning facts that occurred prior to its publication.

The preliminary ruling has been referred in the context of an action for damages filed by Cogeco Group against Sport TV on the basis of articles 9 and 10 of the EU Damages Directive. The plaintiff founded its claims on the basis of a decision of the Portuguese Competition Authority declaring that Sport TV had abused its dominant position in the paid TV market between 2006 and 2011. The Decision was confirmed by Lisbon's Court of Appeal in March 2015.

According to Article 498(1) of the Portuguese Civil Code, the right to bring an action for damages expires within 3 years as from the day in which the person concerned knew of its right to bring such an action. However, under Article 10 of the EU Damages Directive the right to bring an action for damages resulting from competition infringements expires 5 years after the person concerned learned of the conduct, the harm caused and the identity of the author of the infringement.

In the same line, article 9 of the EU Damages Directive establishes a non-rebuttable presumption regarding the existence of a Competition Law infringement if there is a final decision of a Competition Authority or a final judgment declaring such infringement. By contrast, article 623 of the Portuguese Procedural Code does not foresee such a presumption.

The facts underlying Cogeco's claim occurred before the date of publication of the EU Damages Directive (*i.e.*, 5 December 2014), and Cogeco's claim was filed before 27 December 2016, date at which the transposition deadline of the Directive expired.

Hence, the Court of Justice of the EU will need to rule on whether it is possible to exclude the application of national provisions that clash with the EU Damages Directive regarding actions for damages exercised before the expiry of the Directive's transposition period related to facts that took place before its publication.

If the question was to be replied positively, the Court of Justice has been asked to clarify whether it is possible to interpret and apply the national provisions in question in a way that is in line with the EU Damages Directive. If that is the case, the Portuguese Court has inquired whether it is possible for the claimant to invoke article 22 of the EU Damages Directive in proceedings concerning an action for damages instituted before a national court. Such article (i) prohibits the retroactive application of substantive provisions adopted by Member States in order to transpose the Directive and (ii) establishes that procedural national provisions adopted by Member States in order to transpose the Directive shall not apply to actions for damages brought before 26 December 2014 (*i.e.*, the date of publication of the Directive).

## The Spanish Competition Authority ("CNMC") fines four banks for colluding to offer interest rate derivatives at conditions different to those agreed with the clients

The CNMC has imposed a EUR 91 million fine to Banco Santander, Banco Sabadell, BBVA and Caixabank for colluding to offer interest rate derivatives at different conditions from those agreed with the clients concerned.

The derivatives in question were used to cover the risks of the interest rate linked to corporate bonds employed for project finance. The CNMC's investigation has shown that the banks at issue coordinated before making their respective offers to their clients so as to set conditions that differed from the ones that they had initially committed to offer. By so doing, the banks gave the impression that they were acting according to the conditions of the market.

This conduct amounts to a very serious infringement of article 1 of Spanish Competition Act (Law 15/2007) and article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The infringement has been found to have lasted for 10 years (from 2006 to 2016).

The investigation was prompted by a complaint filed by a company active in the promotion, construction and operation of wind farms and infrastructures. During its enquiry, the CNMC also had access to documentation provided by 22 additional companies, concerning 43 transactions of derivatives linked to corporate bonds for project finance between 2006 and 2016.

As a consequence, the CNMC has imposed the following fines: EUR 31.8 million to Caixabank; EUR 23.9 million to Banco Santander; EUR 19.8 million to BBVA and EUR 15.5 million to Banco Sabadell.

The CNMC's decision can be challenged before the Spanish High Court ("Audiencia Nacional") within 2 months after notification.

## A new Belgian Code of Companies and Associations

An important modification in the field of Belgian corporate law is now on track and it also concerns non-profit associations and foundations (hereinafter "Associations").

Last 20 July 2017, the Federal Council of Ministers approved a draft bill introducing a complete new Code of Companies and Associations (hereinafter the "CCA"). The bill is expected to be adopted by the Federal Parliament in the course of the year and to be applicable as from 1 January 2019.

Although this new code has not yet been adopted and the text has, to date, not been made available; it is expected to introduce major changes. In particular, the bill aims at simplifying and modernising the Belgian Corporate Law landscape by making it more flexible, thereby turning Belgium into a more attractive State for the establishment of companies. The CCA will not only affect Corporate Law but will also bring important changes for Associations. Some of the major highlights of the future Belgian CCA are set out below.

— **The CCA vis-à-vis associations:** The future CCA will repeal the Act of 27 June 1921 on non-profit associations, international non-profit associations and foundations. By virtue of the new rules, Associations will be able to conduct economic activities without limitation and, in such cases, they will be considered as undertakings (*enterprises / ondernemingen*). As a consequence, Associations will be subject to insolvency laws. Distribution of benefits to its members will nevertheless remain prohibited.

— **Distinction between civil and commercial companies:** The current distinction between civil and commercial companies will be abolished. This will imply that all the undertakings to which the CCA applies will be subject to insolvency rules.

— **Types of companies:** One the most important aspects of the future CCA is the reduction of the types of companies. Only the following companies with legal personality will remain: (i) the public limited liability company (*société anonyme / naamloze vennootschap*), (ii) the private limited liability company (*société à responsibilité / besloten vennootschap*), (iii) the cooperative company (*société cooperative / coöperatieve vennootschap*) and (iv) the partnership (*société en nom collectif / vennootschap onder firma*).

  The European Company (*société européenne / Europese vennootschap*) and the European Cooperative Company (*société coopérative européenne / Europese coöperatieve vennootschap*) will also remain as they are mainly governed by European Law.

Furthermore, the private limited liability company will become the most common type of company and, contrary to the current situation, will be the new "by-default company" for small and large businesses (including subsidiaries of multinational companies). For its part, the public limited liability company will be intended to cover very large businesses with several shareholders and listed companies.

For this purpose, the current prohibitions on preferential dividends, authorised capital, interim dividends, issuing of profit-sharing certificates, warrants and convertible bonds within the private limited liability company (which often drove the entrepreneurs to choose the public limited liability type) will no longer apply.

As regards cooperatives, this type of company will be reserved only for companies with a 'real' cooperative purpose, by making reference to the original cooperative idea, *i.e.*, companies which purpose is the promotion of the activities of its shareholders. A minimum of three shareholders will still be required.

— **Share capital:** Over the years, share capital has become an outdated concept, which has not always allowed the protection of creditors. This concept will be abolished for those private limited liability companies which current minimum share capital is set at EUR 18,550.

In such cases, the concept of share capital will be replaced by the one of "net assets", which should enable the company to finance its activities.

In other words, the founding shareholders will have to justify in a detailed financial plan that the company has a sufficient equity upon incorporation. The rules regarding this financial plan will be more stringent than the current ones and the liability of the founders in case of bankruptcy should remain the same as it is today.

Furthermore, as a consequence of the abolishment of the concept of "share capital", the provisions for distribution of profits will be amended and will only take place after a double test has been carried out:

a) First, at the shareholders' meeting, it will be required to establish that the company's net assets will remain positive after the distribution of profits;

b) Second, the management body will have to determine that the company will have enough liquidity to be able to pay for its debts, as they become due, for a period of at least 12 months, after the distribution of profits. This decision must be motivated by the management body in a report which must be reviewed by the company's statutory auditor.

Finally, as stated above, private limited liability companies will be allowed to distribute interim dividends (that is, profits of the ongoing financial year).

It is also noteworthy that, under the CCA, and contrary to the current situation, the shares of a private limited liability company may be freely transferred, as in public limited liability companies, if so provided in its bylaws. Hence, the current system of "closed company" will become subsidiary.

— **Number of shareholders and directors:** The principle that a company must have multiple shareholders will be abolished and even a public limited liability company may be incorporated by a single founder.

— **Multiple-vote shares:** It will be possible to issue multiple-vote shares, contrary to the current "one share one vote" principle (that will remain as a subsidiary principle). However, listed companies will still face a limitation of a maximum of 2 votes per share, provided that the concerned shares have been (i) paid up in full and (ii) held by the same shareholder for an uninterrupted period of 2 years.

— **Applicable law and registered office:** So far, Belgium applies the theory of the effective place of management, with the consequence that a foreign company with its registered office abroad will be subject to Belgian Corporate Law when its effective place of management is located in Belgium.

According to the CCA, the registered office will prevail, which means that Belgian Corporate Law will apply to companies having their registered office in Belgium, irrespective of where its effective place of management is located.

— **Timing:** The new corporate legislation should be applicable for all existing companies as from the start of their financial year beginning the year after the publication of the CCA in the Belgian Official Journal. Therefore, it will be necessary to reassess the appropriateness of all corporate entities.

## Currently at GA_P

### Our Brussel's based partner Miguel Troncoso highlighted by Chambers and Partners as foreign expert in Competition and European Law in Belgium and ranked as expert based abroad in the "Corporate/M&A: Competition – Spain" category

The head of GA_P's Brussel's office, Miguel Troncoso, has been included by Chambers and Partners in their 2018 list of foreign experts in Competition and European Law in Belgium as well as in the "Corporate/M&A: Competition – Spain" ranking.

For further details, please consult the following links:

https://www.chambersandpartners.com/194/2455/editorial/2/6/global-spain-corporate-m-a-competition

https://www.chambersandpartners.com/32/362/editorial/2/5