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Gómez-Acebo & Pombo

January | 2018

# Brussels G A _ P Newsletter

Brussels

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# News

## The European Commission fines Qualcomm EUR 997 million for abuse of dominance

The Commission investigation has shown that Qualcomm held a dominant position in the worldwide market for Long-Term Evolution (LTE) baseband chipsets during the period subject to investigation, i.e., 2011 to 2016.

EU Competition Law prevents dominant companies from imposing exclusivity conditions to their customers in exchange for payments or rebates. Such practices may deter customers from switching suppliers, thereby distorting competition.

In this sense, the Commission has found that Qualcomm abused its dominant position by entering into exclusivity arrangements with Apple in order to exclude other chip manufacturers from the mobile phone market. On this basis, Qualcomm has been fined EUR 997 million.

The anti-competitive arrangements were concluded through an agreement signed in 2011 with Apple, whereby Qualcomm committed to pay significant amounts to the American IT company on the condition that the latter would use Qualcomm's chipset in iPhones and iPads. In 2013, the parties extended the duration of the agreement until 2016.

According to the Commission, Apple considered sourcing part of its chipsets from Intel but was led to drop the idea due to Qualcomm's payments.

There is another Commission investigation on-going into Qualcomm. More precisely, the Commission is assessing whether Qualcomm engaged in predatory pricing by selling its products at prices lower than the manufacturing costs between 2009 and 2011.

This last investigation was prompted by a complaint filed by Icera, one of Qualcomm's competitors, concerning the dongles market. Dongles are devices that contain chipset and allow laptops to be connected to broadband services.

## The European Commission undertakes the review of SMEs' definition

The European Commission is reviewing the definition of micro, small and medium-sized enterprises (SMEs) established by Recommendation 2003/361/EC of 6 May 2003. For this purpose, the Commission has launched a public survey which will be useful to determine how appropriate the current definition is and to identify options for potential amendments.

The current Recommendation is aimed at creating a level playing field and avoiding distortion of competition between enterprises; ensuring equal treatment of all SMEs; and improving the consistency and effectiveness of SME policies.

Currently there are EU policies providing SMEs with the opportunity to obtain financial support, lower fees and reduced administrative burdens, among others. The SME definition is core to determine whether a company can benefit from these policies and, as it stands to date, is built on three criteria: (i) number of staff; (ii) financial parameters; and, (iii) independence/ownership.

As for criterion (i), in order to qualify as SME, it is compulsory that the company has less than 250 workers in annual full-time equivalent. Regarding criterion (ii), the company must have a turnover equal or lower than EUR 50 million or its balance sheet total shall not exceed EUR 43 million. If one of these limits is exceeded, as long as the other is met, the company can still qualify as SME. Finally, with regard to criterion (iii), the EU SME definition differentiates between autonomous enterprises, those with partner relationships (ownership between 25% and 50%) and enterprises with linked relationships (ownership above 50%). Autonomous enterprises are those which are totally independent and are not linked to any partner or entity. In case a company is not autonomous, the staff number and financial criteria of the linked entities must be added to those of the enterprise.

## The US government applies to intervene in Apple's EU State Aid case for a second time

Apple and the Irish government have appealed the 2016 Commission's Decision whereby Ireland was ordered to recover up to EUR 13 billion from the American IT manufacturer.

The US applied to intervene in the case before the General Court of the EU. However, by order of 15 December 2017 in Case T-892/16, Apple Sales International and Apple Operations Europe v Commission, this application was rejected by the Court due to the US failure to show that it was directly concerned by the decision in question or that it has a particular interest in the case. The US has challenged the Court's order to reject its application to intervene. The reference of the appeal is C—12/18 P(I).

The procedural rules of the General Court of the EU allow Member States and other interested parties to intervene in a case. Whereas this right is automatically recognised for EU Member States, companies and third countries are required to demonstrate that they have a specific interest in the outcome of the case for the right to intervene to be granted.

In this sense, the US argued that: (i) its tax revenues would decrease if the decision is upheld; (ii) the bilateral tax agreement between Ireland and the US would be negatively affected and (iii) the development of the OECD's transfer pricing rules may be harmed.

The application to intervene filed by the Irish Business and Employers Association has also been rejected by the General Court of the EU.

It is not common that foreign governments seek to appear in support of a party in EU judicial proceedings. The most recent precedent dates back from 1983, when the government of Dominica intervened in a case relating to banana imports (Order of the Court of Justice of the EU of 23 February 1983 in Joined Cases 91 and 200/82, Chris International Foods Ltd v Commission of the European Communities).

## Case-law & Analysis

### Advocate General Wahl concludes that Ernst & Young did not violate gun-jumping rules in its 2013 takeover of KPMG Danish unit *(Opinion of Advocate General Wahl of 18 January 2018 in Case C-633/16, Ernst & Young P/S v Konkurrencerådet)*

Gun-jumping rules prevent companies, subject to the obligation to notify, from completing a merger or acquisition, in whole or in part, prior to obtaining the approval from the relevant Competition Authorities.

In May 2014, Ernst & Young (EY) acquisition of KPMG's Danish unit was approved by the Danish Competition Authority. Subsequently, the Danish regulator investigated the decision of KPMG to terminate the affiliation with its parent company, which preceded the merger and concluded that this transaction had breached the stand still obligation established under Danish Competition Law. EY appealed this decision before the Danish Maritime and Commercial High Court.

In this context, the court decided to refer a preliminary ruling to the Court of Justice of the EU in order to ascertain the scope of article 7(1) of Regulation 139/2004 on suspension of concentrations, so as to interpret the homologue national provision.

In his Opinion, Advocate General (AG) Wahl has concluded that EY did not disregard merger rules when it required KPMG's Danish unit to put an end on the affiliation that existed with its parent company as part of an acquisition that took place in 2013. According to AG Wahl, such practice did not breach the rules because it took place before and was severable from the transaction.

AG Wahl has come to the conclusion that, even if the termination of the affiliation was linked to the acquisition, it did not result in EY gaining control over KPMG. Indeed, KPMG continued to be a

competitor of EY. In AG Wahl's view, the potential of the termination of the affiliation in the market was not relevant for the application of gun-jumping rules.

AG's opinions are not binding. Therefore, it will be for the Court of Justice of the EU to decide whether to follow AG's Wahl reasoning or not.

### The General Court of the EU upholds the Commission's decision whereby Belgium was ordered to recover illegal State aid granted to Charleroi airport *(Judgment of the General Court of the EU of 25 January 2018 in Case T-818/14, Brussels South Charleroi Airport (BSCA) v European Commission)*

The General Court of the EU has dismissed the appeal filed by Brussels South Charleroi Airport ("BSCA") against a 2014 Commission decision whereby Belgium was ordered to recover illegal State aid granted to BSCA.

In its decision, the Commission found that a series of measures adopted by the Belgian region, Wallonia, in favor of the BSCA constituted illegal State Aid within the meaning of EU Law. More precisely, Wallonia charged very low concession fees to BSCA as compared to what would have been charged by a private operator.

Based on the Commission's decision, the measures were in breach of EU Law since the entry into force of the new Aviation Guidelines on 4 April 2014. As a consequence, the Commission (i) required Belgium to increase the fees of the concession to the level of what a private operator would have required in exchange for the measures in question; and (ii) ordered the recovery of the payments made after 4 April 2014. At the date of the Decision, the amount to be recovered reached approximately EUR 6 million. In the Commission's view, the favorable treatment granted to BSCA has distorted competition *vis à vis* other airport operators, especially Brussels-National.

BSCA filed an action for annulment against this decision arguing that the Commission erred in law and in fact in several aspects of its assessment. By judgment of 25 January 2018, the General Court of the EU dismissed BSCA's claims and upheld the Commission's decision. The parties may now appeal the General Court's judgment before the Court of Justice of the EU for a final ruling of the case.

# Currently at GA_P

## GA_P's Competition Law team "recommended" by the 2018 Global Competition Review ("GCR")

The 2018 edition of the GCR includes GA_P as "recommended" law firm for Competition Law in Spain. It also highlights the work of the head of our Competition Law team, Iñigo Igartua.

GCR's list compiles the top law firms and economic consultancies doing important Competition Law work around the world. More information is available at: https://globalcompetitionreview.com/benchmarking/gcr-100-18th-edition/1152555/spain