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Contents

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News

Mergers

The European Commission approves Banco Santander's acquisition of Banco Popular Español S.A.

On 14 July 2017, Banco Santander notified its proposed acquisition of Banco Popular to the Commission. This transaction followed the European Central Bank's decision concluding that Banco Popular was failing or likely to fail according to Article 18(1) of the Single Resolution Mechanism set out in Regulation (EU) No 806/2014.

Banco Santander and Banco Popular are active in the provision of commercial, retail investment and wholesale banking services as well as insurance services in Spain and Portugal. Therefore, the investigation of the Commission focused on the impact of the acquisition on the national and regional Spanish and Portuguese markets of retail and corporate banking, leasing, factoring and the provision of ATM services.

The Commission's analysis has shown that the transaction would not give rise to competition concerns given that (i) the combined market shares of the parties are generally below 25%, and (ii) important competitors are present in the markets concerned. As a result, the transaction has been cleared by the Commission.

Case-law & Analysis

The Court of Justice of the EU annuls judgment of the General Court which upheld fine for abuse of a dominant position on Intel *(Judgment of 6 September 2017 in Case C-413/14 P Intel Corporation Inc. v Commission)*

In 2009, the European Commission imposed a €1.06 billion fine on Intel for abuse of dominant position on the market for x86 central processing units (CPUs) from October 2002 to December 2007. According to the Commission the practice was aimed at implementing a strategy with the alleged purpose of foreclosing a competitor, Advanced Micro Devices Inc. (AMD) from the market and consisted in applying a series of rebates to four major computer manufacturers (Dell, Lenovo, HP and NEC) and payments to the retailer Media-Saturn-Holding which induced loyalty and greatly diminish the ability of other companies to compete on the merits of their own x86 CPUs.

Intel brought an action against the Commission's decision before the General Court of the EU, which dismissed Intel's action in 2014. This judgment was subsequently appealed before the Court of Justice of the EU.

The Commission sustained that the fact that a company in a dominant position granted loyalty rebates could amount by the very nature of the practice to an abuse capable of restricting competition, to the extent that an analysis of all the circumstances of the case –and, in particular, an as efficient competitor test (or AEC test)– was not required. The General Court upheld this line of reasoning.

The Commission indicated that the rebates were by their very nature capable of restricting competition, as anticompetitive harm is presumed in exclusive dealing and loyalty rebate cases. The General Court confirmed this view and stated that it is not necessary to show that exclusivity rebates are capable of restricting competition on a case by case basis in the light of the facts of the individual case. According to the General Court, "*even a positive AEC test result would not be capable of ruling out the potential foreclosure effect which is inherent*" in exclusivity rebates. In short, under the General Court's view, exclusivity-linked rebate schemes do not admit economic defence.

The Court of Justice has set aside the judgment in first instance, finding that the General Court failed to take into consideration Intel's arguments regarding the Commission's application of the AEC test. According to the Court of Justice, if the defendant raises a detailed no-exclusion defence (as Intel did), then a merits analysis must be undertaken. The Court of Justice states that "*balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.*" (Par. 140).

According to the Court of Justice, the AEC test was a key aspect of Commission's assessment and the General Court would have had to take into account all the arguments put forward by Intel concerning this test.

The judgment removed the (almost) *per se* illegality of loyalty/exclusivity rebates that could be inferred from Hoffman La-Roche, and concludes that not every exclusionary effect is necessarily detrimental to competition. The case is now referred back to the General Court so that it may examine, in the light of the arguments brought by Intel, whether the rebates schemes at stake were indeed capable of restricting competition.

The General Court of the EU reduces Austrian bathroom-fittings cartelist fine by €10 million *(Judgment of the General Court of the EU of 12 September 2017 in Case T-411/10 RENV Laufen Austria AG v European Commission)*

On 23 June 2010, Laufen Austria and another sixteen bathroom equipment manufacturers were fined €622 million by the European Commission for their participation in a price-fixing cartel.

Laufen Austria brought an appeal against the fining decision before the General Court of the EU. By judgment of 16 September 2013, the General Court upheld the Commission's decision and dismissed Laufen Austria's claim. The claimant appealed this judgment before the Court of Justice of the EU, which ultimately found that the Commission's fining methodology had not been sound regarding Laufen Austria's fine. Consequently, it set aside the General Court's judgment and referred the case back to the latter for review of the claim concerning the reduction of the €32 million fine imposed on Laufen Austria AG by the Commission.

On 12 September 2017, the General Court adjudicated the matter and concluded that the individual fine that had been imposed on Laufen Austria should be cut down by €10 million. The reason behind the adjustment is the fact that, in light of the proportionality principle, the Commission fining guidelines prevent that cartelists are imposed a fine that exceeds 10% of its turnover.

The General Court found that, for the calculation of the fine, the Commission had taken the turnover of the Laufen Austria's parent company Roca Group despite the fact that the latter had only acquired Laufen Austria AG in 1999, midway through the cartel. The General Court concluded that the Commission had erroneously used the turnover of Roca Group for the period during which Laufen Austria did not belong to the Roca Group. This led to the imposition of a higher fine than the 10% cap permitted under the guidelines.

On this basis, the General Court reduced the part of Laufen Austria's fine for the period before it was acquired by the Roca Group. The part of the fine relating to the period post-acquisition by the Roca Group, *i.e.*, €17.7 million, remains unchanged.

The Court of Justice of the EU annuls fines imposed by the European Commission on Italian steel manufacturers for participating in a cartel (*Judgments of the Court of Justice of the EU of 21 September 2017 in Joined Cases C-86/15 P and C-87/15 P Ferriera Valsabbia and Valsabbia Investimenti v Commission, Alfa Acciaci v Commission; C-85/15 Feralpi v Commission; C-88/15 Ferriere Nord v Commission; C-89/15 Riva Fire v Commission***)**

In 2002, the European Commission fined eight steel manufacturers and their sector association €85 million for fixing the prices of reinforcing bars, *i.e.*, steel bars used to

reinforce concrete in buildings, between 1989 and 2000. The decision was appealed before the General Court of the EU and the latter found that the fines should be slightly reduced on the basis of a procedural error.

Five of the eight addressees of the Commission's decision appealed the General Court's judgment before the Court of Justice of the EU. According to Regulation 774/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, cartelists are entitled to attend an oral hearing in the presence of their national competition authorities. Given that the claimants had not been provided with this opportunity, they claimed that their rights of defense had been violated.

The Commission counter argued that the companies had already attended an oral hearing in 2002, which preceded the initial prohibition decision, and consequently their rights of defense had not been breached.

The Court of Justice of the EU has dismissed the Commission's argument: it found that the Commission erred by depriving the companies from another hearing because the applicable rules had changed between the first and the second hearing. According to the amended rules, *i.e.*, Regulation 774/2004, the parties should have had the opportunity to present their arguments in the context of a hearing in which the authorities of the Member States were present. Given that the Italian competition authority was not in the second hearing, the procedural rules were breached by the Commission.

As a consequence, the Court of Justice of the EU has set aside the General Court's judgment and annulled the Commission's decision concerned.

Spanish Audiencia Nacional annuls €22.6 million fine imposed on Repsol *(Judgment of Audiencia Nacional of 28th July 2017)*

On 2 July 2015, the Spanish competition authority (*Comisión Nacional de la Competencia* or CNMC) fined the oil company Repsol €22.6 million for an infringement of Article 1 of the Spanish Competition Act and Article 101 of the TFEU consisting in the coordination of fuel prices within its flagged gas stations.

Together with Repsol, four other companies –Lence Torres, Complejo San Cristóbal, Estado de Servicio Lorquí and Cerro de la Cabaña– received fines ranging from €28,000 to €145,000. More concretely, Repsol would have, on the one hand, entered into two agreements fixating prices and discounts and, on the other hand, exchanged commercially sensitive information.

On appeal brought by Repsol, the Spanish competent court, *Audiencia Nacional*, has annulled the decision of the CNMC considering that Repsol SA does not carry out any activity in the market for

the distribution of fuel in gas stations. The sole responsible for such activity is Repsol Comercial de Productos Petrolíferos, a subsidiary owned at 99.78% by the parent company Repsol SA. Therefore, the CNMC erred in attributing the responsibility, since Repsol SA could only be jointly liable but not responsible. The judgment does not assess whether the practice was indeed anticompetitive.

Currently at GA_P

GA_P hosts "The Insurance Sector: Preparing for Brexit" roundtable

Last 18 September 2017, our Madrid's office hosted a roundtable on "The Insurance Sector: Preparing for Brexit". The panel of the conference included José Luis Kaiser Moreiras (Spanish Director General for International Trade and Investment), Francisco Carrasco Bahamonde (Spanish Deputy Director General for Insurance and Regulation of the Directorate General for Insurance and Pension Funds) and Bill Murray (Director for Economy and Policy of the British Embassy). GA_P's partner, Pablo Muelas García, and GA_P's international counsel, Ralph Smith, moderated the debate, which aimed at reflecting on the open questions that Brexit has triggered for the insurance sector in the EU. Among others, the panelists discussed about the impacts of the fact that the EU insurance passport will no longer cover British companies. Possible alternatives to the EU passport for British insurance companies were also part of the discussion. Finally, each of the panelists offered an overview on how their respective institutions will approach the upcoming months of Brexit negotiations.