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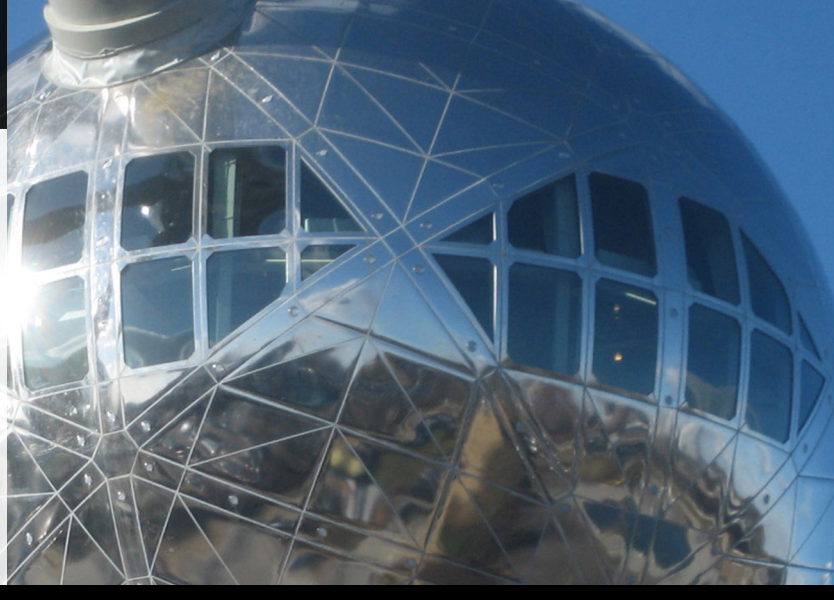

Content

News

Antitrust

Facebook fined EUR110 million for providing misleading information during the review of its acquisition of WhatsApp in 2014

The European Commission has imposed a EUR110 million fine on Facebook for providing misleading information during the Commission's review of its acquisition of WhatsApp in 2014.

During the assessment of the proposed transaction, Facebook said to the Commission that it would not be possible to merge the list of users of both WhatsApp and Facebook. However, in August 2014, a WhastApp update was announced and included the possibility of linking WhatsApp users' numbers to Facebook users' identities. The Commission has found that this possibility already existed in 2014 and that, consequently, Facebook provided incorrect information during the merger assessment.

For the calculation of the fine, the Commission took into account the fact that Facebook had supplied this information in two occasions, *i.e.* in the notification form and in the follow-up questionnaire response.

According to Facebook, these events were not intentional. Hence, Facebook would have, since the beginning of the investigation, acted in good faith to make sure that it provided correct information in any exchange with the Commission.

This investigation and resulting fine do not have any impact on the decision to clear the acquisition of 2014.

Spain transposes the EU Damages Directive

On 27 May 2017, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "EU damages Directive") was transposed in Spain by means of Royal Decree 9/2017. This Royal Decree amends the Spanish Competition Act and the Spanish Civil Procedure Law in order to align both norms to the EU Damages Directive.

The transposition comes five months after the deadline to transpose the Directive expired (27 December 2017) and follows a letter of formal notice sent to Spain by the European Commission in January 2017.

More details on the content of the Spanish transposition of the EU Damages Directive will follow in the next GA&P Alert.

State aid

The Commission approves new state aid rules exempting certain public support measures from prior notification

Following two public consultations, the European Commission has extended the scope of the 2014 General Block Exemption Regulation ("GBER") so as to cover investments in ports and airports. The 2014 GBER enabled Member States to implement a series of State aid measures without prior notification to the Commission due to its unlikely potential to distort competition.

The new Regulation widens the coverage of the 2014 GBER and allows Member States to make public investments in regional airports handling up to 3 million passengers per year without need of prior approval by the Commission. Aid for operating costs of small airports, handling up to 200,000 passengers per year, is also exempted form the obligation of pre-notification to the Commission under the new Regulation.

Regarding ports, the new Regulation authorizes to make public investments by Member states of up to EUR150 million in sea ports and up to EUR50 million in inland ports without prior notification to the Commission. Covering the costs of dredging in ports and access waterways is also under the scope of the new Regulation.

Finally, the new Regulation has also facilitated that public authorities compensate companies for the additional costs they face when operating in the EU's remotest regions.

The new Regulation aims at reducing administrative burdens for public authorities and is part of the Commission's plan to focus resources on the control of bigger cases that may significantly impact competition in the Single Market.

Case-law & Analysis

The Court of Justice of the EU finds that selling multimedia players which permit to visualize films that are illegally available on the internet could breach EU copyright rules *(Judgment of the Court of justice of the EU of 26 April 2017 in Case C-527/15Stichting Brein)*

The Court of Justice of the EU has found that the temporary reproduction on a multimedia player of works protected by copyright and obtained by streaming is covered by the right of reproduction enshrined in Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.

The dispute behind this case concerns Mr Wullems, who created and commercialised a multimedia player online, and Stichting Brein, a Dutch foundation that protects the interests of copyright holders. The device of Mr Wullems retrieves content from streaming websites and enables its reproduction through an interface on a television screen. While some of the streaming websites used for this purpose contain digital content which has been authorised by right holders, some others give access to it illegally.

In this context, Stichting Brein asked the District Court of Midden-Nederland (the Netherlands) to prevent Mr Wullems from selling multimedia players that illegally give users access to protected works. The association argued that marketing the multimedia player amounted to making a communication to the public, which breaches the Dutch Copyright Law, this is, the national law that transposes Directive 2001/29. In view of the circumstances, the Dutch Court decided to refer a preliminary ruling to the Court of Justice of the EU about the matter.

In its judgment, the Court of Justice of the EU has confirmed that selling a multimedia player, such as the one at stake, constitutes a "communication to the public" in the sense of Directive 2001/29. In this line, the Court has recalled that the concept of "communication to the public" must be interpreted broadly since it is intended to provide a high level of protection for authors.

The Court of Justice has also referred to the fact that the multimedia player has been purchased by a fairly large number of people and, consequently, the "communication" in question covers all potential acquirers of the media player. Therefore, the communication is targeted to an unknown number of potential recipients and involves a significant number of persons. The Court has also observed that the objective of selling the multimedia player at issue is to make profit.

According to the Court, temporary reproduction, on a multimedia player, of a work protected by copyright that is obtained by streaming on a third party's website, –which content is shown without authorisation from the copyright holder– cannot be exempted from the right

of reproduction. An act of reproduction is only exempted from the right of reproduction if it meets the following cumulative requirements: (i) it is temporary; (ii) it is incidental; (iii) it is an integral and technical part of a technological process; (iv) the sole purpose of that process is to transmit in a network or a lawful use of the work or subject matter in question, and (v) it does not have any independent economic relevance. In addition, the exemption is only applicable to special cases that do not hinder the normal exploitation of the work concerned and do not harm the legitimate interests of the right holder.

In the present case, the Court has concluded that the media player's purchasers gain access to a free and unauthorised offer of protected works intentionally and in full knowledge of the circumstances. The Court has also found that acts of temporary reproduction of copyright-protected works hinder the normal exploitation of those works and unreasonably harm the legitimate interests of the copyright holders because they usually bring about a decrease of the lawful transactions relating to those protected works.

Advocate General Szpunar concludes that Uber's electronic platform falls within the field of transport and, consequently, requiring Uber to obtain the necessary licences and authorisations under national law does not breach EU Law *(Advocate General's Opinion of 11 May 2017 in Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain, SL)*

The dispute behind this case concerns Uber and a Taxi Association of Barcelona. Uber is an electronic platform which enables users to order urban transport services in the cities where Uber is present through a smartphone application. The transport service is provided by non-professional private drivers using their own vehicles, the so-called UberPop services.

In 2014, the Taxi Association brought an action before a Commercial Court in Barcelona against the Spanish company Uber Systems Spain SL ('Uber Spain'), a company of the group managing the Uber platform, arguing that it had engaged in unfair competition towards the drivers of the Taxi Association. In particular, the latter claimed that Uber Spain was not entitled to provide the UberPop services in Barcelona because neither the company nor its owners or drivers have the licences and authorisations required for the provision of taxi services required under local regulations.

In light of the circumstances, the Commercial Court adjudicating the case decided to seek the interpretation of the Court of Justice of the EU through a preliminary ruling concerning the classification of Uber's activity under EU law (*i.e.* Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, replaced by Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services; and, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

In its Opinion, Advocate General Szpunar has explained that in order to adjudicate the matter it is necessary to first determine whether Uber services benefit from the principle of the freedom to provide services, as information society services, or whether they fall within the field of transport, which is regulated by national law. In the first scenario, requiring licenses or authorizations could be incompatible with the principle of the freedom to provide services. However, in the second one, Member States would, in principle, be entitled to regulate Uber's activity.

In the Advocate General's view, Uber is a composite service given that only part of it is provided by electronic means. Composite services may qualify as "information society service" if (i) the part of it that is not provided by electronic means is economically independent of the service provided electronically or if (ii) the provider supplies the whole service or exercises decisive influence over the conditions under which the non-electronically provided part is supplied, so that the two services form an indivisible whole, and with the proviso that the main component is provided by electronic means.

According to Advocate General Szpunar, Uber services do not meet any of the two conditions. First, the drivers who work for Uber are not engaged in an autonomous activity that is independent from the platform. Instead, their activity, *i.e.* transportation of passengers, exists thanks to the platform. Second, Uber exercises control over economically important aspects of the urban transport service offered through its platform. Therefore, Uber cannot be regarded as an intermediary between drivers and passengers. In addition, it is transport, *i.e.* the non-electronically provided service, which is the main supply and which gives the service meaning in economic terms.

In view of the above, the Advocate General has concluded that, in relation to the supply of transport, the supply whereby passengers and drivers are connected with one another by electronic means is neither self-standing nor the main supply. Hence, Uber's service does not qualify as an information society service but as organisation and management of a comprehensive system for on-demand urban transport.

Based on the fact that transport is the main component of the service, the Advocate General has proposed that the answer of the Court of justice of the EU should be that the Uber services are classified as services in the field of transport. Thus, Uber's activity could be subject to the conditions under which non-resident carriers may operate transport services within the Member States.

Currently at GA&P

GA&P's Brussels-based Competition Lawyer, Sara Moya Izquierdo, guest speaker in Sports Law Conference "A new legal framework for sport" to be held in June in Madrid

Our Brussels-based Competition lawyer, Sara Moya Izquierdo, will be a guest speaker in the Sports Law Conference "A new legal framework for sport" that will take place on 6-8 June in Madrid. The conference is organised by the Spanish Sports Council in collaboration with the Spanish Olympic Committee. Her contribution will be part of a round table on "The framework of the economic activity of professional sportspersons" and is scheduled at 10:30 am on the 8th of June at the Madrid's premises of the Spanish Sports Council.