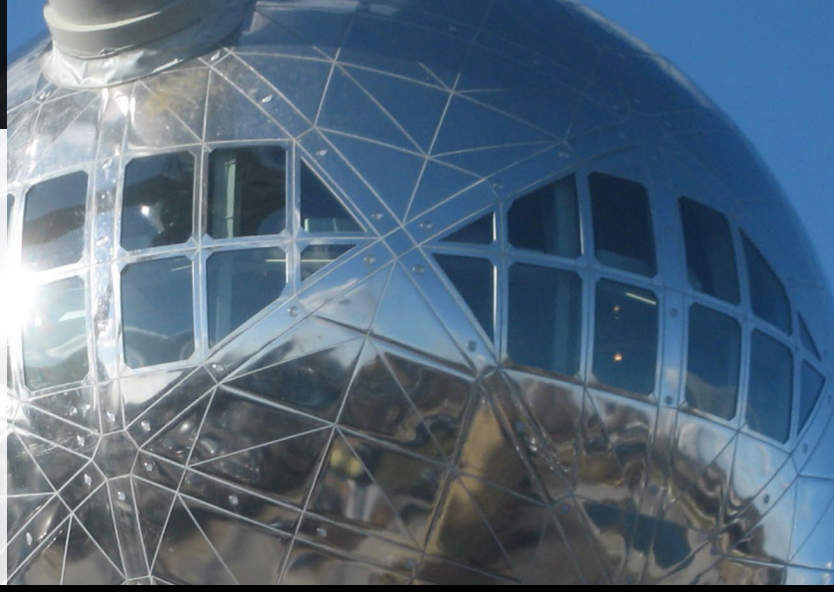
GÓMEZ-ACEBO & POMBO

Brussels GA&P

Gómez-Acebo & Pombo, Brussels
October 2014



— News —

Mergers

The acquisition of WhatsApp by Facebook cleared by the European Commission

Facebook Messenger (a service offered by Facebook) and WhatsApp offer communication applications for smartphones that allow consumers to send text, photo, voice and video messages. As a consequence, the Commission's investigation of the proposed concentration focused on three areas:

i. Consumer communications services: the investigation showed that the parties are not close competitors, due mainly to the fact that Facebook Messenger is integrated within the social network of Facebook. Each application is used in a different manner and a number of users often use both simultaneously. In addition, the market is very dynamic and there are several competing applications available, such as Line, Viber, iMessage, Telegram, WeChat and Google Hangouts.

ii. Social networking services: the user base of WhatsApp already overlaps to a significant extent with that of Facebook, so the gain in terms of new members of the latter in the event of integration would be limited.

iii. Online advertising services: the Commission concluded that in spite of Facebook's eventual introduction of advertising on WhatsApp, and/or the use of WhatsApp as a potential source of user data for its advertisement activity, there will still be enough providers of these services in the market. In addition, the Commission considered that data protection concerns do not fall within the scope of competition Law.

Based on the above considerations, the Commission concluded that the transaction would raise no competition concerns and has authorised it.

State Aid

Commission orders Spain to recover illegal aid granted through tax benefits aimed at promoting foreign acquisitions

The European Commission declared in 2009 and also in 2011 that the Spanish legal scheme that allowed companies to deduct from their tax base the financial goodwill arising from foreign acquisitions of shareholdings was incompatible with EU State aid provisions. The Commission concluded that this scheme gave the beneficiaries a selective economic advantage over their competitors that carry out domestic acquisitions and ordered the recovery of aid granted with certain exceptions based on the existence of legitimate expectations.

Spain did not repeal the provision but committed not to grant the exemption to any new beneficiary, arguing that the financial goodwill could still be deducted in certain cases, i.e. the cases where the Commission acknowledged legitimate expectations or authorised a transitory period.

In March 2012, the Spanish authorities adopted a new administrative practice and allowed companies to deduct the financial goodwill from indirect shareholding acquisitions (i.e. the acquisition of a

stake in a company by way of the purchase of shares in its parent company).

The Commission was informed (not notified) of this new practice in April 2012.

As a consequence, the Commission opened an in-depth investigation in July 2012 which has now shown that the amended application constitutes a new state aid and that the new administrative practice is incompatible with EU State aid rules.

The Commission has concluded that beneficiaries of this new practice have no legitimate expectations as regards their situation; since the receipt of tax benefits derived from the indirect acquisition of shareholdings was not covered by the scope of the original measure at the time of adoption of the 2009 and 2011 decisions. Therefore, the Commission has ordered the Spanish authorities to recover such illegal state aid.

Commission orders recovery of incompatible aid from certain terrestrial digital platform operators in Castilla-La Mancha

Spain adopted a series of regulatory measures between 2005 and 2008 in order to switch from analogue to digital television.

After two complaints brought by a satellite platform operator and a terrestrial Digital Terrestrial TV ("DTT") operator, the European Commission opened an in-depth investigation in 2010 into the public financing of DTT infrastructure in the autonomous community of Castilla-La Mancha. This Spanish region is categorised as a less urbanised area II in which broadcasters had no commercial interest to provide the service.

The investigation has shown that the public measure exclusively funded the digitisation of terrestrial transmission technology and that, alternative platforms such as satellite, cable or the internet, could not effectively benefit from the aid. In addition, the measure also discriminated between different terrestrial operators, as the subsidies, which reached 46 million EUR, were granted to only two companies.

This two pre-selected companies received an undue advantage over their competitors and therefore need to return the subsidies to the authority.

Belgian law

Class actions

The Act of 28 March 2014, inserting Title II "Class actions" in Book XVII "Special legal procedures" of the new Belgian Code of Economic Law ("CEL") and introducing the possibility to file a class action (*rechtsvordering tot collectief herstel / action en reparation collective*), has entered into force on 1 September 2014 (the "Act").

The Act aims to offer consumers a simplified and cheaper manner to obtain compensation for collective damage. A consumer is any natural person who is acting for purposes unrelated to his/ her trade, business, craft or profession. However, the Act does not introduce a general class action open to every single consumer in the market: only consumers-to-business (C2B) class actions are possible. Business-to-business (B2B) actions or consumers/businesses actions against public authorities (C2G or B2G) are excluded.

The scope of the new legislation is limited to damages that are the result of a breach of contract or an infringement of consumer related legislation as listed in the Act and covering fields such as consumer safety, competition, pharmaceuticals, insurance, transport, financial services and products, market practices and consumer protection, energy, intellectual property, data protection, etc.

As a consequence a group of consumers harmed by a common cause after the entry into force of the Act and suffering each individually a damage (the "Group") will now be able to obtain damages from undertakings through the intervention of a group representative (*groepsvertegenwoordiger / représentant du groupe*); however, only the consumer organisations identified by the Act can act as group representatives. Depending on the specific case, the consumer will have to decide to opt-in[1] or to opt-out[2] , as the Belgian legislator has decided to keep both systems.

[1] The consumer has to express his will to join the Group.

[2] The consumer has to express his will to leave the Group.

The Courts from Brussels have exclusive jurisdiction to hear and rule on the class actions. Proceedings will consist of three stages: (i) admissibility of the action, (ii) negotiations and settlement approval or proceedings on the merit, and (iii) execution:

i. Within 2 months after the filing, the Court will, in a first stage, examine whether the following admissibility conditions are met:

   - The alleged cause of the damage is a breach by the *undertaking* of its contractual and/or legal obligations,
   - The action is filed by a group representative that meets the requirements of the Act,
   - The class action is more suitable than an individual action.

   The Court's decision on admissibility to be published in the Official Journal and on the website of the Federal Ministry of Economic Affairs ("the Ministry"), shall mention at least:

   - The description of the collective damage,
   - The alleged cause of the collective damage,
   - The description of the Group and the most accurate estimation possible regarding the number of consumers being harmed,
   - The option system that will apply (opt-in or opt-out) and the deadline for the concerned consumers to exercise the option,
   - The duration of the cooling-off period.

ii. Following the decision on admissibility, the group representative and the undertaking will be granted a cooling-off period of 3 to 6 months allowing them to negotiate a settlement.

   If the parties reach a settlement, it will be submitted to the Court for approval. The Court will then examine whether the settlement contains all elements required by the Act and if it is acceptable on the merits (the Court may refuse the approval e.g. when the damages granted to the Group or some of its members appear to be unreasonable). The parties will be bound by the settlement approved by the Court.

   The approval decision will be published in the Official Journal and on the website of the Ministry. In order to facilitate settlements such a decision will not be considered as recognition of any liability or fault by the undertaking.

   In case no settlement could be reached or the settlement is not approved, the Court shall rule on the merits of the class action and the damages. The Court's decision on the merits will bind all members of the Group, and will be published in the Official Journal and on the website of the Ministry.

iii. A trustee will be appointed to ensure the proper execution of the approved settlement or the judicial decision. The trustee's main task will be to allocate the right amount of damages to each individual member of the Group. The trustee's final report on the execution of his duties will be submitted to the Court, the group representative and the undertaking and will also be published in the Official Journal and on the website of the Ministry.

All expenses relating to the procedure or the publications required by the Act as well as the trustee's fees shall be borne by the unsuccessful party.

— *Case-law & Analysis* —

The Court of Justice of the EU clarifies how to apply the 10% fine cap when a parent company has purchased a subsidiary that was involved in a cartel *(Judgment of the Court of the UE of 4 September 2014, YKK Corporation v Commission, C/408/12 P, not yet published).*

In 2007, the European Commission fined YKK Stocko more than 68 million EUR for participating in the fasteners cartel from May 1991 to March 2001. In 1997, while the cartel was still operating, YKK Corp and YKK Holding acquired YKK Stocko. As a consequence, the Commission made YKK Corp

and YKK Holding jointly and severally liable for part – 49 million EUR – of the fine imposed on YKK Stocko.

The YKK group challenged the decision before the General Court ("GC") arguing, *inter alia*, that the more than 19 million EUR for which YKK Stocko was individually responsible represented 55% of YKK Stocko's 2006 turnover, which was considerably more than the 10% turnover limit; and that the Commission did not take into consideration that YKK Stocko was a separate undertaking before 1997.

The GC upheld the Commission's view and dismissed the action; therefore YKK brought an appeal before the Court of Justice of the EU ("CJEU").

The CJEU has now concluded that the GC had erred in its interpretation of Article 23(2) of Regulation 1/2003, which establishes the 10% turnover limit when calculating a fine. In this sense, the Commission was wrong at using the 10% limit on the turnover of the whole YKK group to establish the fine imposed solely on YKK Stocko. In other words, the Commission was wrong to treat YKK Stocko and the rest of the group as a single undertaking for the purposes of applying the 10% cap.

Therefore, the CJEU has annulled the Commission's decision in so far as it concerned the calculation of the fine for which YKK Stocko was held solely liable and has reduced it to 2,8 million EUR.

Calculation of fines imposed to parent companies and subsidiaries has given rise to debate since a long time, albeit often because of the presumption that subsidiaries 100% owned by their parents companies are not autonomous and therefore, parent companies, which have a considerably higher turnover, may be held responsible for the subsidiaries' conduct. This case gives light over the issue on how to apply the 10% cap to fines imposed on companies that have changed ownership during the infringement, which in the case at stake has allowed a significant reduction in the fine imposed.

— *Currently at GA&P* —

Iñigo Igartua, Head of G-A&P's Competition Team, selected Best Lawyer of the Year by Best Lawyers International

The directory Best Lawyers International, the world's premier guide for the legal profession, has recently published the results of its 7th Edition (2015) for Spain and Portugal, where Iñigo Igartua, partner of G-A&P based in Barcelona and head of the Competition Team, has been selected as "Lawyer of the Year" within the Competition Law practice area.