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News

The Commission imposes a EUR 40 million fine to Guess for restricting cross-border sales through its agreements with retailers

The clothing and accessories company Guess operates a selective distribution network in the European Economic Area ("EEA"). Guess chooses its retailers based on certain quality criteria.

In June 2017, the Commission opened a formal investigation into Guess' distribution agreements and practices with the aim of ascertaining whether the company was illegally restricting retailers' ability to engage in cross-border sales within the EEA.

The Commission has found that, by means of its distribution agreements, Guess was preventing retailers from: using the Guess' brand for online search advertising; engaging in online sales without Guess' previous consent; selling in other Member States of the EEA that were outside of the contractual territory; performing cross-border sales among authorised wholesalers and retailers; and, deciding on retail prices.

The investigation has also shown that the agreements at issue led to market partitioning and that prices of Guess' products were 5 to 10% higher in Eastern Europe than in the Western Member States.

On this basis, the Commission has established that Guess infringed Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits anticompetitive agreements.

Since Guess significantly cooperated with the Commission, the company was granted a 50% reduction in its fine, which was finally set at EUR 39,8 million.

Commission invites interested parties to provide comments on the commitments offered by NBCUniversal, Sony Pictures, Warner Bros, and Sky

In July 2015, the Commission addressed a Statement of Objections ("SoO") to the studios NBCUniversal, Sony Pictures, Disney, Fox, Paramount and Warner Bros as well as to the pay-TV broadcaster Sky UK. In the SoO, the Commission expressed concerns that the studios and Sky had entered into bilateral agreements that contained certain anticompetitive restrictions.

Some of the clauses in the agreements were, in the Commission's view, preventing Sky UK from permitting access to pay-TV services available in the UK and Ireland to other EU customers.

In the SoO, the Commission explained that these clauses would be limiting the broadcasters' right to accept unsolicited requests from consumers located outside the contractual territory, thereby eliminating cross-border competition between pay-TV broadcasters and partitioning the EU's Single Market.

In April 2016, Paramount offered commitments to put an end over the Commission's concerns. These were accepted and made binding by the Commission in July 2016. For its part, in November 2018, Disney also offered a series of commitments. The Commission is currently reviewing the comments from interested parties received on the measures proposed by Disney.

Now, NBCUniversal, Sony Pictures, and Warner Bros have proposed a number of commitments, similar those offered by Paramount and Disney, that are currently being subject to a call for feedback from interested parties.

These studios are proposing to abide by the proposed commitments for a 5-year period. The commitments will cover standard pay-TV services and, in so far as that they are subject to licences with pay-TV broadcasters, subscriptions to video-on-demand services. In addition, the commitments cover both satellite broadcast services and online services.

If the feedback received on the commitments indicates that they are satisfactory to address all competition concerns, the Commission may adopt a decision making the commitments legally binding without concluding whether there is an infringement of EU antitrust rules.

The Spanish Competition Authority ("CNMC") opens an investigation into possible anticompetitive practices in the scrap metal sector

The CNMC is investigating the existence of potential anticompetitive practices in the sector of scrap metal purchases for steel production. The practices would have consisted in fixing the prices at which scrap metal is purchased.

On 27 and 29 November 2018, dawn raids were conducted at the premises of several companies that are active in this market. These inspections are a preliminary step in the investigation and do not prejudge the outcome thereof or the responsibility of the undertakings concerned.

If the inspections show that there is evidence of anticompetitive practices, a formal investigation will be open by the CNMC.

This type of agreements between competitors constitute very serious violations of Competition Law, which may be sanctioned with fines of up to 10% of the turnover of the undertakings concerned.

Value Added Tax ("VAT") amendments on the lease of real estate in Belgium

In October 2018, the Belgian Chamber of Representatives voted on the proposal to amend the Belgian VAT Code with regard to optional taxation of real estate lease.

The proposal amends the VAT Code and the Royal Decree n. 20 of 20 July 1970 establishing VAT rates and the distribution of goods and services according to those rates.

The proposal brings significant amendments on the VAT applicable to immovable property rentals. The general rule continues to be the exemption of VAT for leases of immovable property in Belgium. However, now the parties to the lease will have the right to choose, under certain conditions, to subject the lease of immovable property used for professional purposes to the VAT.

In such a case, the lessor will pass on the VAT to the lessee in the price to be paid for the rent. The lessor will be entitled to deduct the VAT of the works performed on the property.

The optional taxation is only possible for buildings and parts of buildings and, for this regime to apply, the lessee needs to be subject to VAT.

The measure: (i) aims at simplifying the rules on VAT; (ii) will be an incentive for investments on newly built apartments and renovations; and, (iii) closes the competition gap between Belgium and its neighbouring countries.

Case-law & Analysis

The Court of Justice of the EU reverses General Court's judgment and dismisses damages imposed on the EU in favour of certain undertaking for bearing bank guarantee charges in the context of excessively lengthy proceedings before the General Court

(Judgements of 13 December 2018 in Joined Cases C-138/17 P EU v Gascogne Sack Deutschland and Gascogne and C-146/17 P Gascogne Sack Deutschland and Gascogne v EU; Case C-150/17 P EU v Kendrion; and, in Joined Cases C-174/17 P EU v ASPLA and Armando Álvarez and C-222/17 P ASPLA and Armando Álvarez v EU)

In February 2006, five companies (Gascogne Sack Deutchsland, Gascogne, Kendrion, ASPLA and Armando Álvarez) filed actions for annulment against a decision whereby the Commission fined them for their participation in a cartel in the industrial bags' sector.

The General Court did not rule on the dispute until 2011, when it dismissed the actions of all the above mentioned undertakings. These judgments were appealed before the Court of Justice of the EU which, in 2013, upheld the challenged judgments and confirmed the fines imposed on the companies. In these judgments, the Court of Justice also established that the proceedings before the General Court had been excessively lengthy and stated that the companies had the right to file actions claiming for compensation for the damages suffered as a consequence of the length of the proceedings.

On this basis, in 2014 and 2015, the companies concerned brought actions against the EU. The cases were adjudicated by the General Court in 2017, when it ruled that the EU had to pay compensation to the claimants for:

- The material damage caused to the companies for having to maintain the bank guarantees for an excessively long period of time (EUR 47 064.33 to Gascogne; EUR 588 769.18 to Kendrion; EUR 44 951.24 to ASPLA; and EUR 111 042.48 to Armando Álvarez);

- The non-material damage resulting from the uncertainty lived by the companies during the delay of the General Court (EUR 5000 to Gascogne Sack Deutschland; EUR 5000 to Gascogne; and, EUR 6000 to Kendrion)

The EU and the companies concerned, except for Kendrion, appealed the General Court's judgments in 2017.

By judgments of 13 December 2018, the Court of Justice has first dismissed Kendrion's claim that the appeal brought by the EU (represented by agents of the Court of Justice) should be declared inadmissible on the basis of the existence of a conflict of interest. Kendrion argued that, since the EU was represented by the Court of Justice, the latter, when adjudicating the dispute, incurs a conflict of interests that harms the company's right to an impartial and independent tribunal, as required by the Charter of Fundamental Rights of the EU. The Court has held that such a situation is not the result of a choice by the Court itself but the mere consequence of the application of EU procedural rules on compensation for damages caused by the EU. This type of claims must be directed against the EU, which must be represented by the EU institution whose conduct has allegedly caused the damage in question: in this case, the Court of Justice as an institution.

The Court of Justice has stated that the failure of the General Court to adjudicate within a reasonable time is a serious breach of EU that can entail liability for the EU to compensate the damages suffered by the economic operators concerned, provided that a causal link between the damage and the infringement of EU law is established.

With regard to the causal link in the cases at issue, the Court has found that the damage related to the charges of the bank guarantees are the result of the parties' own choice to avoid paying the fines immediately. In the Court's view, such a choice broke the link between the breach and the damages suffered by the companies.

Therefore, the Court of Justice has held that the General Court erred by finding that the causal link had not been severed by the choice of the companies to constitute a bank guarantee to secure the payment of the fines.

According to the Court, this conclusion is not affected by the fact that, at the time the companies guaranteed the payment of the fines, it was not foreseeable that the proceedings would be excessively lengthy. The companies could have terminated the bank guarantees when they noticed the slow progression of the cases.

In these circumstances, the General Court's judgments have been set aside in as much as they granted compensation for material damage corresponding to the charges of the bank guarantees.

By following this reasoning, the Court seems to ignore an essential point raised by some of the parties: the *effet utile* of EU rules that provide for the possibility of guaranteeing the payment of a fine instead of proceeding to its upfront payment.

The Court of Justice has nevertheless upheld the compensation granted by the General Court for non-material damages.

Currently at GA_P

Carlos Rueda re-elected as GA_P's managing partner

GA_P's Board of Directors has re-elected Carlos Rueda as managing partner of the firm. Mr. Rueda took over the lead of the firm in 2016. After his re-election, his mandate will run until 2021.