G A _ P
Gómez-Acebo & Pombo

June | 2019

Brussels G A _ P Newsletter

Brussels

G A _ P

Contents

Layout: Rosana Sancho Muñoz

News

AB Inveb fined EUR 200 million for restricting cross-border sales of beer

The Commission has imposed a fine on AB Inveb for abusing its dominant position on the Belgian market by restricting cheaper imports of Jupiler beer from the Netherlands into Belgium.

AB Inveb is the largest beer brewer in the world. In Belgium, AB Inveb's most popular beer is Jupiler, representing approximately 40% of the Belgian beer market in sales volume. Jupiler is also sold in other Member States. In the Netherlands, Jupiler is sold to retailers and wholesalers at cheaper prices than in Belgium.

The Commission's investigation has shown that AB Inveb has a dominant position in the Belgian beer market and that it abused the same by restricting competition. In particular, Ab Inveb limited the freedom of supermarkets and wholesalers to import Jupiler from the Netherlands into Belgium.

For this purpose, AB Inbev:

(i) modified the packaging of some of its Jupiler products so as to render its sale in Belgium more difficult;

(ii) restricted the volumes of Jupiler beer sold to Dutch wholesalers;

(iii) made the sale of Jupiler conditional on a commitment by a Belgian retailer to limit its imports of less expensive Belgian beer from the Netherlands; and,

(iv) conditioned customer promotions in favour of a Dutch retailer to its commitment not to offer the same promotions to Belgian customers.

Based on these practices, the Commission found that AB Inbev had abused its dominant position from February 2009 until October 2016, thereby breaching Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

As a result, AB Inveb was fined EUR 200 million. This amount includes a previous 15% fine reduction in return for the company's cooperation with the Commission during the investigation.

Five banks fined EUR 1.07 billion for their participation in the foreign exchange spot trading cartel

The European Commission has found that financial institutions Barclays, RBS, Citigroup, JPMorgan and MUFG participated in two cartels in the Spot Foreign Market for 11 currencies (namely the Euro, British Pound, Japanese Yen, Swiss Franc, US, Canadian, New Zealand and Australian Dollars, and Danish, Swedish and Norwegian crowns).

Foreing Exchange, also known as "Forex", refers to trading of currencies. Exchanging large amounts of a currency into another currency is normally done by Forex traders. Forex traders are mainly hired by asset managers, pension funds, hedge funds, large enterprises and banks.

The Commission's investigation has shown that traders engaging in Forex spot trading on behalf of the above-mentioned banks exchanged sensitive information and trading plans. In addition, they occasionally coordinated their strategies via online professional chats.

The exchanged data referred to pending customers' orders, prices of specific transactions, open risk positions and other details of trading actions.

These exchanges allowed traders to (i) make informed decisions on whether to sell or to buy and at which point in time; and (ii) to occasionally identify coordination opportunities.

The Commission has identified two separate infringements. The first one included communications in three chatrooms among traders from UBS, Barclays, RBS, Citigroup and JPMorgan from December 2007 to January 2013. And, the second one encompassed exchanges in two chats among traders from UBS, Barclays, RBS and MUFG from December 2009 to July 2012.

UBS benefited from full immunity for disclosing the existence of the infringements and avoided a EUR 285 million fine. The rest of the banks involved, except for MUFG, which did not apply for leniency, benefited from reductions of their fines in return for their cooperation with the Commission.

In addition, based on the Commission's 2008 Settlement Notice, a further reduction of 10% was applied to the fines imposed on the banks after admitting to their participation in the infringements and their liability.

Grocery retailers' premises dawn raided in France and Belgium

On 20 May 2018, the European Commission, supported by officials from the French Competition Authority, carried out unannounced inspections at the premises of two French grocery retailers. The

dawn raids follow concerns that the two grocery retail companies might have been engaging in anticompetitive practices in breach of Article 101 TFEU.

For its part, the Belgian Competition Authority also confirmed that it had conducted inspections at the establishments of certain retailers, which are suspected of having engaged in anticompetitive practices in connection with a purchasing alliance for consumer goods. Such practices could constitute infringements of both Article IV.1 of the Belgian Code of Economic Law and Article 101 TFEU.

Inspections are a preliminary step of the investigations and do not prejudge the outcome thereof.

The Spanish Competition Authority ("CNMC") raids pharmaceutical manufacturers of a pulmonary disorder drug and contraceptive pills

In May 2019, the CNMC reported it had conducted dawn raids at the premises of pharmaceutical companies manufacturing a medicine to treat certain pulmonary disorders and contraceptive pills.

With regard to the pulmonary disorder drug, the CNMC is concerned about a potential abuse of dominant position by its manufacturer, which could have pursued a strategy to foreclose the market of supplies to the health services and hospitals in all the Spanish territory.

As for the contraceptive pills, the CNMC's concerns relate to the potential existence of an abuse of dominant position consisting in the exclusion of competitors through legal and judicial actions hindering the entry of third party pills in the national territory.

These practices could be in breach of Article 2 of the Spanish Competition Act and/or Article 102 TFEU, which prohibit abuses of a dominant position.

These inspections do not prejudge the outcome of the CNMC's investigations.

Case law & Analysis

The General Court of the EU annuls the Commission Decision ordering Spain to recover EUR 18 million of incompatible State aid granted to Real Madrid (Judgment of the General Court of the EU of 22 May 2019 in Case T-791/16, Real Madrid Club de Fútbol v. Commission)

On 22 May 2019, the General Court rendered its judgment on the action for annulment filed by Real Madrid against the Commission Decision of 4 July 2018 that (i) declared that the football club had been granted incompatible State aid worth EUR 18 million; and (ii) ordered Spain to recover this amount.

Between 1991 and 1998, Madrid City Council and Real Madrid entered into a number of agreements. One of these agreements provided for an exchange of land: the club would transfer several plots to the City Council, which in exchange would transfer to the former some land. Such land included plot B-32, which was worth EUR 595,194 in 1998, and which transfer never materialised.

In 2011, in order to put an end to a number of disputes related to the agreements and to compensate Real Madrid for the failed transfer of plot B-32, the parties concluded a settlement agreement. According to this agreement, Madrid City Council would compensate the club with the value plot B-32 had in 2011, which was estimated by the City Council at EUR 22.7 million. The compensation would be effected through the transfer of land owned by the City Council.

The Commission found that the transfer of this land constituted State aid. For the Commission, a market economy operator in a situation comparable to that of the City Council would not have concluded the 2011 settlement agreement. According to the Commission, such an operator would not have accepted to pay EUR 22.7 million compensation to Real Madrid since this amount exceeded the maximum degree of liability for the failure of the City Council to transfer plot B-32.

Moreover, on the basis of the report prepared by an independent real estate consultancy, the Commission considered that the estimation of the value of plot B-32 done by the City Council was incorrect; the value of plot B-32 should have been fixed at EUR 4.2 million. Thus, the difference between the two estimations entailed an advantage of EUR 18.4 million in favour of Real Madrid, which constituted State aid.

In its judgment, the General Court has started by acknowledging the need for a public entity to seek external legal advice prior to the conclusion of a transaction, as a prudent market operator would do.

The General Court then observed that the estimations of the value of plot B-32 done by Madrid City Council, on the one hand, and by the Commission, on the other, differed considerably and it has

declared that a manifest error of assessment in the determination of this value by the Commission could invalidate the Decision.

Although the General Court has endorsed the assessment made by the Commission regarding plot B-32, it has found that the analysis of the measure undertaken by the Commission was incomplete. The transfer of the plots took place in the framework of a global agreement whereby several properties were exchanged. Therefore, the Commission should have also assessed the value of the plots transferred to replace plot B-32. Instead of doing so, the Commission simply used the estimations on which the 2011 settlement agreement was based.

On this basis, the General Court has concluded that the Commission did not take into account all the aspects and context of the transaction to estimate not only the amount of aid but also the existence of an advantage in favour of Real Madrid.

Consequently, the Court has determined that the Commission did not sufficiently prove that the measure in question conferred an advantage for the club. Since one of the requirements for the existence of State aid within the meaning of Article 107(1) TFEU was not met, the General Court has annulled the Decision.

Currently at GA_P

GA_P's Brussels-based partner Miguel Troncoso co-ordinates conference on Competition Law and Policy in a digital world, organized by the Brussels Bar Association (young lawyers section)

The Brussels Bar Association is organising the conference "*Droit et Politique de la Concurrence dans un monde numérique*" ("Competition Law and Policy in a digital world"), which will be held in Brussels on 14 June 2019. The panel of speakers, which include Jacques Steenbergen (Head of the Belgian Competition Authority), will discuss whether the current competition legal framework is fit for the changes arising from the digital revolution, among other questions. GA_P's Brussels partner Miguel Troncoso is co-ordinating the conference.

More information on registration and programme is available here.