G A _ P
Gómez-Acebo & Pombo

June | 2017

# Brussels G A _ P Newsletter

Brussels

# Contents

**News** . . . . . **3**

▸ Antitrust . . . . . 3

— The European Commission imposes a EUR 2.42 billion fine on Google for abusing its dominant position as search engine by giving more visibility to its own comparison shopping tool while demoting competitors' comparison shopping services in Google's search results. . . . . 3

— The European Commission opens formal investigations into Guess, Nike, Sanrio and Universal Studios regarding its licensing and distribution practices. . . . . 4

— Spain transposes Directive 2014/104 governing actions for damages for infringements of Competition Law by means of Royal Decree 9/2017 . . . . . 5

**Currently at GA_P.** . . . . . **8**

— Thomson Reuters publishes Professional Sports Law compendium, with chapter on Competition Law authored by GA_P's lawyer Sara Moya. . . . . 8



Design and layout: José Á. Rodríguez and Ángela Brea

# News

## Antitrust

### The European Commission imposes a EUR 2.42 billion fine on Google for abusing its dominant position as search engine by giving more visibility to its own comparison shopping tool while demoting competitors' comparison shopping services in Google's search results

The European Commission has imposed a EUR 2.42 billion fine on Google for violating EU Competition Law by abusing its dominant position by giving preference to its own comparison shopping tool over those of its competitors in Google's search results. Google's violation must now end within 90 days; otherwise Google could bear penalty payments of up to 5% of the average daily worldwide turnover of Google's parent company Alphabet Inc.

Google's comparison shopping tool "Google Shopping" is a tool that enables consumers to compare products and prices online. When Google entered the comparison shopping tools' market back in 2004, there were already certain operators established in the market. To boost the use of its own service, in 2008, Google decided to put in practice a new strategy. First, Google gave its own comparator the best placement, concretely, when a customer made a search on Google for which Google Shopping could show results, these were shown at or near the top of the list of results. Second, competing comparators were displayed in Google's results lists on the basis of certain search algorithms, which resulted in rivals' websites being displayed on page four (or even further) of the list of results. As a consequence, Google Shopping gained much more visibility than its competitors, especially in smartphones where screens are smaller.

The investigation has revealed that Google is the dominant search engine in all the countries that are part of the European Economic Area (EEA). Indeed, Google holds market shares greater than 90% in most of the EEA countries. Dominance is not prohibited under EU Competition Law; however, dominant companies are prevented from abusing their market power by restricting competition either in the market where they are dominant or in separate markets.

The Commission has found that, by demoting rival comparison tools in Google's result lists, Google abused its dominant position in the search engine market and, consequently, breached Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Google's conduct has resulted in a significant increase of traffic for Google Shopping, whereas its competitors have suffered important losses.

This is not the only on-going case concerning Google. The Commission is also investigating Android operating system and the so-called "AdSense". As for the first, the Commission is concerned that Google has harmed choice and innovation in a series of apps and services for smartphones by

implementing a programme on mobile phones that allegedly permitted to guarantee and increase Google's dominance as a search engine. With regard to AdSense, the Commission is assessing whether Google has prevented that third-party websites sourced search ads from Google's rivals leading to a significant decrease of choice for consumers.

On another note, as reported in the GA_P Alert of September 2016, in August 2016 the Commission adopted a decision requiring Ireland to recover up to EUR 13 billion from North American company Apple. The Commission grounded its decision on the fact that Apple had benefited from a selective tax advantage in Ireland consisting in very significant tax reliefs, resulting from two tax rulings that were issued by the Irish tax authorities back in the 90s. Both Ireland and Apple have appealed the decision before the General Court of the EU. The case is currently pending and, interestingly, the US government has applied to intervene in the case in support of the company.

The rules of procedure and statute of the EU Courts allow EU Member States or other interested parties to intervene in a case. While Member States have an automatic right to intervene in the procedure, companies and non-EU countries do need to apply and motivate its request to intervene. Therefore, it is still to be seen whether the application filed by the US will be deemed admissible.

It is not common that foreign governments seek to appear in support of a party in EU judicial proceedings. The most recent precedent dates back from 1983, when the government of Dominica intervened in a case relating to banana imports (Order of the Court of Justice of the EU of 23 February 1983 in Joined Cases 91 and 200/82, Chris International Foods Ltd v Commission of the European Communities).

The US application is in line with the government's position on EU investigations over tax treatment of multinationals in several Member States. More precisely, the US is of the opinion that the Commission's practice in this area is not in line with international tax treaties and that it results in an unfair and retroactive application of EU State Aid Law.

## The European Commission opens formal investigations into Guess, Nike, Sanrio and Universal Studios regarding its licensing and distribution practices

The European Commission has opened formal investigations against the companies Guess, Nike, Sanrio and Universal Studios.

Guess' activity focuses on designing, distributing and licensing of clothes and accessories. The Commission's investigation will assess whether Guess' distribution agreements prevent authorised retailers from engaging in online sales to consumers or retailers located in other Member States. Restrictions on wholesale to retailers in other Member States will also be part of the investigation.

For its part, Nike, Sanrio and Universal Studios are active in the licensing and distribution of merchandising products such as customized clothes, shoes, phone accessories, bags and toys. These three companies license the rights for some of the most popular brands. More precisely, Nike, Sanrio and Universal Studios license Fútbol Club Barcelona's, Hello Kitty's and Minions' merchandise, respectively. The Commission will assess whether these companies have violated EU Competition Law by limiting licensees' freedom to sell licensed products across borders and via internet.

Although companies can freely set up their distribution systems to a certain extent, they have to align to EU Competition Law, which guarantees the right of consumers to buy from any authorised retailer, even if located in another Member State. In the view of the European Commission, the agreements under scrutiny may be in breach of Article 101 TFEU, which contains a prohibition on agreements that prevent, restrict or distort competition within the Single Market.

The opening of these investigations follows the recent report on the e-commerce sector enquiry published by the Commission in May 2017, which found that more than one in ten retailers were subject to cross-border sales restrictions established in their distribution agreements. Despite being separate investigations, the four cases follow up one of the problematic issues identified in the said report, i.e. the existence of barriers to online and offline cross-border trade resulting from licensing practices.

## Spain transposes Directive 2014/104 governing actions for damages for infringements of Competition Law by means of Royal Decree 9/2017

On 26th May 2017, the Spanish government transposed Directive 2014/104 governing actions for damages for infringements of the National and European Competition Law ("the EU Damages Directive") into national law by means of Royal Decree 9/2017 ("the Royal Decree").

In order to align Spanish Law to the EU Damages Directive, which enables victims of competition infringements across the EU to claim full compensation for the harm suffered, the Royal Decree has amended two Spanish norms: (i) the Spanish Competition Act (Law 15/2007) and (ii) the Civil Procedure Act (Law 1/2000).

a) The Spanish Competition Act

With regard to the Spanish Competition Act, a sixth Title has been added concerning compensation for competition infringements. The main points of this Title are summarized below:

— For the purposes of bringing actions for damages, competition infringements are defined as practices contrary to Articles 101 and 102 of the TFEU and Articles 1 and 2 of the Spanish Competition Act. Unfair competition practices are excluded from the definition of competition infringement and claims for damages for unfair competition practices are regulated under specific legislation (Law 3/1991 on Unfair Competition).

— The right to full compensation of the victims is recognized. Therefore, compensation for competition damages shall result in restoring the victim's situation as it stood prior to the infringement. This means that compensation shall cover actual losses and lost profits, plus interests. Full compensation shall not, in any event, result in overcompensation of the prejudice by means of punitive, multiple or any other type of compensation.

— As for the legal standing to claim for damages, the new rules allow any person, whether direct or indirect purchaser, that has been a victim of a competition infringement to bring a claim for competition damages before the national courts. Where the claimant is a direct purchaser, the author of the competition infringement may counter argue that such claimant has passed on to the consumer the whole or part of the overcharge that resulted from the anti-competitive practice. In such cases, the burden of proof is on the infringer.

— Although the victim must prove the damages suffered, it is presumed that cartels result in damages, unless proven otherwise. In case the quantification of the damage is impossible, the courts are entitled to estimate its value.

— In case of plurality of infringers, they will all be jointly and severally liable for the damages claimed. There are two exceptions to this rule: (i) if the infringers are SMEs and (ii) where the infringers have benefited from the leniency programme. In these cases, liability will only extend to their very own purchasers, whether direct or indirect.

— Any competition infringement found by a national court or competition authority is *iuris et de iure*, that is to say, irrefutable in the context of proceedings related to claims for damages. By contrast, where a competition infringement has been established by a court or competition authority from another Member State, the existence of such infringement will be *iuris tantum*, that is to say, unless proven otherwise, it is presumed that the infringement existed.

— Regarding the statue of limitations of the action for damages, the victim of the competition infringement is entitled to bring a claim within a period of up to five years that starts to run when the infringement ceases or when the victim learns or may have learned of the following circumstances: (i) the conduct and the fact that the latter constitutes an infringement; (ii) the harm caused; and, (iii) the identity of the author of the infringement.

b) The Civil Procedure Act

The Royal Decree has introduced the following matters in the Civil Procedure Act:

— With regard to disclosure of evidence, it is established that national courts, upon the request of the claimant, are entitled to require that the author of the infringement or any third party disclose any relevant evidence they have. Such evidence can refer to the identity and address of the author of the infringement, the anti-competitive practices at issue, the identification and volume of products and services affected by such practices, the identity of direct or indirect purchasers, the prices charged and the identity of the group affected by the infringement.

— Where necessary, the courts may order the disclosure of confidential information and adopt certain measures in order to protect confidentiality (e.g., holding close or limited-access hearings, limiting the number of persons in charge of handling evidence, drafting a non confidential version of the judgment, etc.).

— Evidence can be requested before the opening of the proceedings, in the application or during the course of the proceedings. The costs of evidence will be borne by the party requesting the evidence. Where there may be relevant evidence in other files of the national competition authority, the court can order its disclosure provided that: (i) the investigation on the case at issue has been concluded by the authority; (ii) the evidence has not been submitted in the context of a leniency application, and (iii) it is not part of a settlement application.

— Penalties are established in case of failure to comply with a disclosure order, violation of confidentiality or destruction of evidence.

Finally, the Royal Decree includes a provision that establishes that the rules included therein govern the actions for damages brought in Spanish territory, regardless of whether the competition infringement has been declared by the European Commission, the Court of Justice of the European Union or competition authorities or judicial bodies of Spain or any other Member State.

While the Royal Decree has facilitated claiming for damages resulting from competition infringements in Spain, there are still a few issues that remain unresolved. For example, there are still difficulties for the exercise of collective actions and the fees required for filing a claim are increased in case of dismissal of the action.

The deadline for the transposition of the EU Damages Directive expired on 27 December 2016. Spain has fulfilled its obligation to transpose the directive almost five months after the expiry of the deadline. Despite this, Spain has not been the last Member State to comply with its obligation

to transpose the said directive. To date, Bulgaria, Czech Republic, Greece, Croatia, Cyprus and Portugal have not yet notified to the European Commission the national measures adopted in order to align their national legal systems to the EU Damages Directive.

## Currently at GA_P

### Thomson Reuters publishes Professional Sports Law compendium, with chapter on Competition Law authored by GA_P's lawyer Sara Moya

Our Brussels-based Competition lawyer Sara Moya has authored the chapter on "Sport and Competition Law: General overview. Restrictive practices" of the new edition of the Professional Sports Law compendium published by Thomson Reuters. More info on the book, which has been published in Spanish, is available here: https://www.thomsonreuters.es/es/tienda/pdp/duo.html?pid=10009691