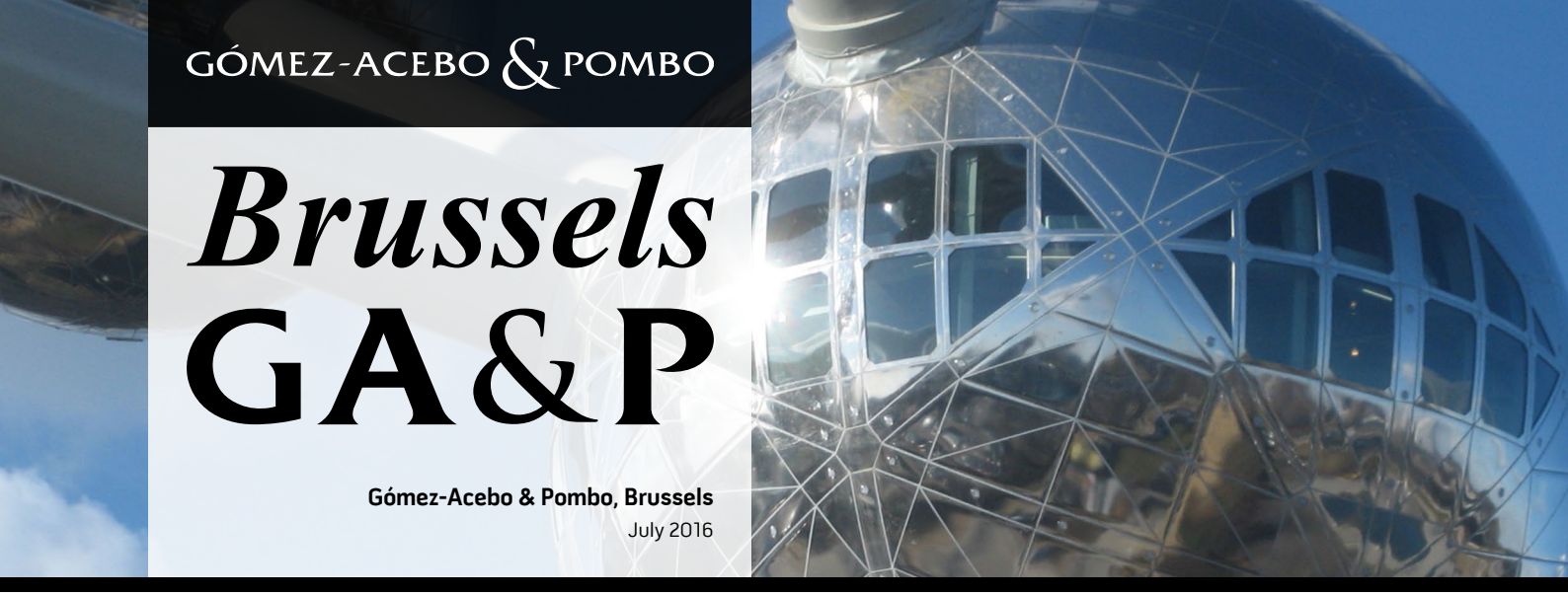

GÓMEZ-ACEBO & POMBO

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Content

News

Antitrust

Spanish Competition Authority publishes a report on the new fees applicable to automatic teller machines (ATMs)

Up to March 2015 ATM owners and banks issuing credit cards (issuing banks) had an agreement where they approved the right to use each others ATMs at a low and fixed fee. Nevertheless, large banks with a greater number of ATMs thought this was not a fair system, firstly, because the fee was not enough to cover the maintenance of the ATMs and secondly, because smaller banks where taking advantage of larger ones, since due to the small amount of ATMs they owned, they barely had costs and their clients could just use other ATMs at a low price.

With the new regime established by Royal Decree 11/2015, ATM owners charge a fee they unilaterally fix with certain limits. . For instance, the fee has to be paid by the issuing bank and not by the client. The report published now by the Spanish *Comisión Nacional de los Mercados y la Competencia* (CNMC) indicates that these fees have been tripled, from EUR 0.65 to EUR 1.80 or 2

The CNMC in this report has also stated that although, it is still soon to know the consequences of the new regime, it can be stated that there has not been an increase in the amount the clients are finally charged since in general the issuing banks, as a market strategy, do not pass these fees on to their clients.

Moreover, the CNMC has suggested that there has been a transfer of clients to larger banks undermining smaller banks, due to the fact that the ATM network a bank has is a factor clients now consider since it is not apparent how much extra, if any, they would be charged if they use an ATM from a different bank. In this sense, the CNMC has emphasized the need of transparency so that both the issuing banks and the clients clearly know the fees unilaterally established by the ATM owners. The report requests that ATM owners notify their new fees to the issuing banks, allowing them a reasonable period to inform their clients about the use of other banks' ATMs.

It can be concluded that larger banks have greatly benefited from the new regime since they have experienced an increase in the number of clients and in the amount they receive from other issuing banks when their ATMs are used by a non-client. By contrast, the costs they have to pay to other banks have been reduced. On the other hand, smaller banks are been forced to sign agreements between them to be able to compete with larger ones.

The full text of this report is available at the following link:

https://www.cnmc.es/Portals/0/Notas%20de%20prensa/INFORME_CNMC_CAJEROS.pdf

Commission takes further steps in the investigation against Google's comparison shopping and advertising-related practices

The European Commission has sent two Statements of Objections to Google. The first one constitutes a supplementary one stemming from the previous Statement of Objections sent in April 2015 and by which the Commission reinforces its preliminary conclusion that Google would have abused its dominant position by favouring its comparison shopping service in its search result pages. The Commission believes that this has led to consumers not being able to see the most relevant results in their search queries.

The Commission has also examined, and ultimately rejected, Google's argument that comparison shopping should not be considered in isolation, but together with the services provided by merchants such as Amazon and eBay.

The second Statement of Objections accuses Google of abusing its dominant position by artificially restricting the possibility of third party websites to display search advertisements from Google's competitors. The company places search ads directly on the Google search website but also as an intermediary for third party websites through its "AdSense for Search" platform. The websites offer a search box that allows users to search information. Whenever a user enters a search query, in addition to regular search results, search ads are also displayed.

The new Statement of Objections also indicates that in the European Economic Area Google has had in

the last ten years a market share of around 80%. A large proportion of Google's revenue from search advertising intermediation comes from its agreements with a limited number of large third parties (known as Direct Partners). The Commission is concerned that in these agreements Google could have imposed the following conditions to these third parties: (i) not to source search ads from Google's competitors, (ii) to take a minimum number of search ads from Google and reserve the most prominent space on their search results pages to Google search ads and, (iii) to obtain Google's approval before making any change to the display of competing search ads. However, the Commission is aware that Google has recently decided to change the conditions in its AdSense contracts with Direct Partners to give them more freedom to display competing search ads.

Google has now 8 weeks to respond to the first supplementary Statement of Objections and 10 weeks to respond to the second one.

Commission fines truck producers 2.93 billion euros for participating in a cartel

The European Commission has fined MAN, Volvo/Renault, Daimler, Iveco and DAF EUR 2.93 million for coordinating prices at "gross lists" level for medium and heavy trucks in the European Economic Area during a period of fourteen years.

The "gross list" price level relates to the factory price of trucks. The final price paid by consumer is then based on further adjustments applied to these gross list prices. The cartel also coordinated the timing for the introduction of emission technologies to comply with the Euro III to Euro VI environmental standards. Moreover, the cartelists also passed on to customers the costs of the emissions technologies.

The Commission stated that road haulage is an essential part of the European transport sector and that these truck manufactures together account for around 9 out of 10 medium and heavy trucks produced in Europe.

The fines were set on the basis of the Commission's 2006 Guidelines on fines, taking into account the respective companies' turnover, the seriousness of the infringement, the combined market share, the geographic scope and the duration of the cartel.

Under the Commission's 2006 Leniency Notice, MAN received full immunity for revealing the existence of the cartel and Volvo/Renault, Daimler and Iveco benefited from reductions on their fines for cooperating with the investigation. Lastly, these five companies were also granted a reduction of 10% in view of the parties' acknowledgment of their participation in the cartel and of their liability in this respect.

Scania was also investigated in the framework of this infringement but decided not to settle, therefore the investigation will continue under standard (non-settlement) cartel procedure for this company.

Case-Law & Analysis

The beneficiary of a patent licence must pay the agreed royalty even if it does not infringe the patented technology

The German company Behringwerke granted the company Genetech a worldwide non-exclusive licence to use a patented human cytomegalovirus enhancer. Nevertheless, the licensed patent was not infringed as a result of the way Genetech used the enhancer. For this reason Genetech refused to pay the royalty, arguing that the terms of the licence agreement indicated that the payment of the royalty was based on the supposition, first, that the enhancer was present in the finished product and, second, that the manufacture or use of that enhancer had, in the absence of that agreement, breached the rights attached to the patent. Genetech also pointed out that paying the royalty in this scenario would mean an imposition of unjustified expenses, in breach of Competition Law.

In this context, the Court of Appeal in Paris, before which the dispute is pending, requested the Court of Justice of the EU for a preliminary ruling in order to clarify whether the royalty agreed in a patent licence must be paid even if the patented technology is not infringed or if, by contrast, Article 101 (1) TFEU prohibits such payment

The Court has considered that Competition Law does not prohibit the obligation to pay a royalty for the use of technology, even where this use does

not constitute an infringement or the technology is deemed to have been never protected due to a later retroactive revocation of the patent. This situation would not infringe Article 101 (1) TFEU as far as the licensee can freely terminate the agreement by giving reasonable notice. A royalty shall reflect the price to be paid for commercial exploitation of the licensed technology with the guarantee that the licensor will not exercise its industrial-property rights. In this sense, if the licence may be freely terminated by the licensee, the payment of the royalty would not undermine competition by restricting the freedom of action of the lincesee of by causing market foreclosure effects.

In conclusion, if the payment is valid even after the expiration of the patent rights, the Court has considered that the payment would also be valid when those rights are still legally binding, as far as the licensee can freely terminate the agreement.

Currently at GA&P

GA&P ranked among the best 25 companies to work in Spain

The magazine *Actualidad Económica* has published a ranking of the best 100 companies to work in Spain and GA&P has been listed 21st, being one of the three law firms included in the ranking. The criteria used includes talent, working environment or training.