

# Brussels GA&P

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## — News —

### **Merger control**

#### **A new case of Merger referral: the European Commission accepts the request from the Spanish Competition Authority to assess the acquisition by Cemex of Holcim's cement operations in Spain**

Pursuant to Article 22 of the EU Merger Regulation, an EU national competition authority may request the Commission to examine a concentration that does not have Community dimension when this transaction affects trade between Member States and threatens to significantly affect competition within the territory of the State making the request. The Commission views this provision as a 'useful corrective instrument' to ensure the proper allocation of cases between the Commission and the Member States (Communication from the Commission: Report from the Commission to the Council on the operation of Regulation No 139/2004, COM (2009) 281 final, 18 June 2009, para. 21).

Spain has recently made use of the referral mechanism. The Mexican company Cemex plans to acquire the operations of the Swiss company Holcim in both Spain and the Czech Republic. This acquisition does not have a Community dimension, i.e. it does not meet the turnover thresholds set by the EU Merger Regulation and, therefore, it does not have to be notified to the European Commission. However, the transaction meets the notification thresholds established by Spanish and Czech competition rules and, consistently, it was notified to the national

competition authorities of both Spain and the Czech Republic.

The Spanish Competition Authority has decided to submit a referral request to the European Commission in accordance with Article 22.1 of the EU Merger Regulation.. Following the Spanish request, the European Commission has confirmed that it is the best placed authority to deal with the potential cross-border effects of the transaction and, as a result, it has accepted the referral.

The Czech competition authority has not submitted a referral request to the European Commission and will continue to analyze the effects of the transaction in the Czech Republic.

The European Commission is examining simultaneously the notification of a concentration consisting of the acquisition by Holcim of Cemex's German subsidiary, Cemex West.

### **State aid:**

#### **Airlines operating at Spanish airports Girona and Reus under formal investigation procedure.**

A new episode in the saga of low-cost airlines, regional airports and state aid: the Commission is assessing whether marketing agreements concluded between public authorities and airlines operating at Girona-Costa Brava and Reus airports comply with EU State aid rules. The agreements in question concern the advertising of the regions and contain various conditions related to the presence



and scale of operations of the airlines at the two airports.

The investigation was initiated following a complaint lodged in May 2012 by an airline operating at Barcelona-El Prat airport. According to the complainant, the Irish airline Ryanair would have obtained illegal state aid by means of subscribing

marketing agreements with the public authorities at Girona and Reus airports.

The Commission will also examine whether Girona and Reus airports themselves may have benefitted indirectly from the marketing agreements by getting relieved of certain costs they would otherwise normally bear when developing their activities.

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## — Case-law & Analysis —

### **Spanish procedural legislation does not guarantee the effectiveness of the directive on the sale of consumer goods and associated guarantees**

The Court of Justice of the European Union has answered<sup>1</sup> to a question referred for a preliminary ruling by a Spanish court deciding over a dispute between the buyer of a convertible (Ms Duarte), the dealer who sold the vehicle (Autociba) and the manufacturer (Citroën España). The buyer requested the rescission of the contract of sale for lack of conformity as the vehicle's roof was defective and the attempts to repair it resulted unsuccessful.

The Directive on the sale of consumer goods and associated guarantees (the Directive)<sup>2</sup> provides that, in a case such as the one at stake, the consumer has the right to require the rescission of the contract, or, if the lack of conformity in the goods is only minor, an appropriate reduction in the sale price.

Ms Duarte requested the national court for the rescission of the contract. The court considered that since the defect on the vehicle was minor this rescission could not be granted. Although, pursuant to the provisions of the Directive, Ms Duarte would have been entitled in such a case to ask for a reduction of the price, such a remedy could not be ordered since, according to Spanish procedural rules, a court cannot accept a request that has not been sought by the parties. No

further action requesting a price reduction would have been admissible given that under Spanish law the principle of *res judicata* would apply to all claims concerning matters that have already been decided.

The Spanish court decided then to ask the Court of Justice whether these Spanish procedural rules were compatible with the Directive.

The Court of Justice states that a consumer who only requests rescission of the contract before the Spanish judge, sees himself deprived in a definitive manner of the possibility of his right to a price reduction, given that the consumer can neither modify his initial request nor ask the judge to recognize this right on his own motion.

In this sense, the Court concludes that, although the Directive guarantees a high level of consumer protection without indicating the processes under which those rights are to be asserted in judicial proceedings, national procedural rules shall not be such as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law, as this would not comply with the principle of effectiveness.

The ruling of the European Court leaves doubts as to how Spain will comply with the Directive in order to solve this inconsistency and guarantee the high level of consumer protection established by its provisions. In order to respect the principle

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<sup>1</sup> Judgment of the Court of Justice of 3 October 2013 in case C-32/12, Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA. Not yet published in reports.

<sup>2</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. OJ L 171, 07/07/1999 p.12-16.



of effectiveness of EU directives, the Spanish legislator would have to include in the Procedural Civil Law explicit cases where, *ex officio*, the Judge shall be able to derogate to the legal principle of party disposition, firmly integrated in a long-standing legislative tradition in Spain.

### **The Court of Justice clarifies the application of Brussels I Regulation on consumer protection in cross-border sales**

Brussels I Regulation<sup>3</sup> contains special jurisdiction rules for protecting consumers, who may bring an action against a trader before the courts of their own domicile if: (i) the trader carried on or directed, by any means, his commercial activities to the Member State of domicile of the consumer, and if (ii) the disputed contract fell within the scope of the trader's activities.

The French resident Mr Sabranovic ran a second hand car business close to the German border. On his website French telephone numbers and a German mobile phone number were indicated. Mr Emrek, a resident in Germany, learnt about Mr Sabranovic's business through acquaintances and decided to purchase a car from Mr Sabranovic. Subsequently, he filed a claim against Mr Sabranovic in Germany asking for the application of a warranty agreement arguing that German courts were competent according to Article 15 (1) (c) of Brussels I Regulation, due to the fact that Mr Sabranovic targeted his activities through his website to Germany. The latter, however, claimed that even though he had targeted his activity towards Germany by means of a website, the contract had not been the result of this activity.

The German court dismissed the action as inadmissible and Mr Emrek appealed the decision before the Landgericht (Regional Court) of Saarbrücken, which decided to refer a question for a preliminary ruling to the Court of Justice. This question aimed at clarifying whether in a case such

as the one at stake there shall be a causal link between the means used to direct the commercial activity to the Member State of the consumer's domicile (a website in this case) and the conclusion of the contract with the consumer.

The Court has replied that Brussels I Regulation does not require the existence of a causal link. However, the existence of such a link constitutes strong evidence which may be taken into consideration by the national court when determining whether the commercial activity is in fact directed to the Member State where the consumer lives.

Furthermore, the Court agreed with the Advocate General's opinion in that although a casual link is not a condition to apply Brussels I Regulation, the fact that a trader is established close to the border of another Member State, in an urban area extending on both sides of the border, and uses a telephone number allocated by the other Member State, may also constitute evidence that the trader's activity is directed to that other Member State.

This judgment has given some light on an unclear issue that arises from the already obsolete Brussels I Regulation. Nevertheless, several other aspects of this Regulation remain uncertain, especially as far as e-commerce is concerned. For instance, doctrine is still not settled as regards the determination of the place of supply of services in order to establish the jurisdiction on these type of contracts when the contract is performed fully online, since there is not a clear place where the services are provided.

There has been a recast of Brussels I Regulation<sup>4</sup> that will apply from January 2015, which tackles some of these issues and introduces certain improvements such as the abolishment of the *exequatur* in terms of recognition of decisions. However, most of the issues arising from e-commerce, such as the one indicated above, will still have to be construed by the Courts.

<sup>3</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 012 , 16/01/2001 p. 1-23.

<sup>4</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, p. 1-32.



— *Currently at GA&P Brussels* —

*CROSS-BORDER CREDIT AND CLAIMS  
MANAGEMENT*

GÓMEZ-ACEBO & POMBO Brussels has strongly contributed with practical expertise, together with IFI – Instituto de Formación Integral, to the new materials of the European Commission on general international credit management issues. This EU initiative offers a throughout functional approach to students, entrepreneurs, professionals and

business people regarding cross-border credit and claims management and aims at improving the business environment in the EU.

For more information, we invite you to check the following link:

[http://ec.europa.eu/enterprise/policies/sme/business-environment/cross-border-enforcement/teaching\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/business-environment/cross-border-enforcement/teaching_en.htm)

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