

# Brussels GA&P

Gómez-Acebo & Pombo, Brussels  
November 2016

## Content

---

<b>News</b> .....	<b>2</b>
— Antitrust .....	2
▶ The European Ombudsman finds that the handling of the complaint against Google by the Commission was fair .....	2
▶ The Spanish Competition Authority imposes a EUR 46.44 million fine on two companies for market sharing agreements in the markets of transport and money handling .....	2
▶ Commission publishes study on “pass-on” of overcharges .....	3
<b>Case-Law &amp; Analysis</b> .....	<b>3</b>
▶ Advocate General Wathelet indicates in his Opinion that judges can block Amazon sales on foreign websites .....	3
<b>Currently at GA&amp;P</b> .....	<b>4</b>
▶ Sara Moya Izquierdo (GA&P Brussels) mentioned as one of the 500 most influential women in Spain .....	4



# News

## Antitrust

### **The European Ombudsman finds that the handling of the complaint against Google by the Commission was fair**

In a decision of 26<sup>th</sup> October, published on 7<sup>th</sup> November, the European Union (EU) Ombudsman found that the handling of a complaint filed by a French IT company, which has developed an online search service, against Google was correct (Case 1041/2015/OV).

The French IT company resorted to the EU Ombudsman concerning the way the European Commission was dealing with its complaint regarding the alleged abuse of a dominant position by Google.

Firstly, the complainant argued that there had been maladministration in several aspects of the handling of the complaint by the European Commission. The EU Ombudsman rejected this argument by stating that the EU officials in charge of the case had acted properly.

Secondly, the complainant expressed concerns in respect of the fact that the former EU Commissioner for Competition (Mr. Joaquín Almunia) was biased in his involvement in Google's main antitrust investigation. In this regard, the EU Ombudsman determined that there was not enough tangible evidence to support this argument.

Finally, the complainant criticized the excessive time taken by the Commission to send the pre-rejection letter. The EU Ombudsman held that the Commission had taken enough steps to rectify this even if, at that time, the institution had limited resources for this task due to most of them being deployed for the main investigation against Google.

### **The Spanish Competition Authority imposes a EUR 46.44 million fine on two companies for market sharing agreements in the markets of transport and money handling**

The *Comisión Nacional de los Mercados y la Competencia* (CNMC) has fined companies Prosegur and Loomis with EUR 46.44 million. The managers of the companies have also been imposed a fine totaling EUR 52,600. The sanctions are the result of a continuous and single infringement of Article 1 of Spanish Fair Competition Act (Law 15/2007, of 3 July) and article 101 of the Treaty on the Functioning of the European Union (TFEU). The infringement lasted for 7 years, since 2008 until, at least, 2015.

The CNMC has found that the companies –which are active *inter alia* in the market of transport and money handling– engaged in market sharing, price fixing and exchanges of sensitive commercial information during a 7 year period.

The investigation stems from an anonymous complaint, that led to authority to dawn raid the premises of Prosegur and Loomis. The investigation has proved that the companies engaged in agreements and concerted practices in the Spanish market for transport and money handling. In particular, there is evidence that the companies agreed on (i) sharing strategic clients; and (ii) sharing clients by assuring services in favor of one of the companies. For the purposes of the latter, the parties used subcontracting in an abusive and not justified manner.

Evidence of these practices has been found in e-mails of employees and has been further proven by the strategy that Loomis and Prosegur adopted in the market, which shows the existence of a previous agreement or concerted practices in order to mutually respect the positions that both companies had in the market.

The CNMC has therefore concluded that both companies committed a serious infringement, as provided for in Article 62.4. a) of the Spanish Fair Competition Act and, as a consequence, has imposed a EUR 39,4 million fine on Prosegur and a EUR 7 million fine on Loomis.



According to Article 63.2 of the Spanish Fair Competition Act, legal representatives and members of the board of the companies can be sanctioned if they have participated in the agreements and decisions. On this basis, the managers of both companies have been sanctioned with fines amounting to EUR 36.000 and EUR 16.000 respectively.

### **Commission publishes study on “pass-on” of overcharges**

On 25<sup>th</sup> October 2016, the European Commission published a study on the “pass-on” of overcharges. The study results from Directive 2014/104/EU (the “Antitrust Damages Directive”), which requires the Commission to issue Guidelines for national courts on how to assess pass-on. The study is the first step towards the issuance of the Guidelines, which are expected to be published in the course of 2017.

The passing-on defense consists in alleging that the damages suffered by a purchaser of a cartelized product are reduced or mitigated if he has passed on some of the overcharge to its customers. Pass-on is present in almost all antitrust damages claims and can be crucial for the quantification of damages, or even for a party’s standing to claim.

The study constitutes a tool for judges in so far as it facilitates the identification of the relevance and impact of pass-on in damages litigation, while ensuring that any economic or factual analysis is properly focused from the very beginning.

The study will also prove to be a valuable instrument in order to help judges considering the approaches of different experts and will assist them in assessing the adequate method for each case. It also explains the new EU rules on discovery that will be implemented in 2017. Finally, the study also provides judges with assistance to instruct economic experts and to examine the evidence provided by the latter.

The study is publicly accessible [here](#).

---

## Case-Law & Analysis

### **Advocate General Wathelet indicates in his Opinion that judges can block Amazon sales on foreign websites** *(Advocate General’s Opinion of 9 November 2016 in Case C-618/15 Concurrence SARL v Samsung Electronics France SAS, Amazon Services Europe Sàrl)*

According to the Opinion of Advocate General (“AG”) Wathelet, delivered on 9<sup>th</sup> November 2016, French judges should be entitled to compel Amazon to stop selling Samsung Electronics products through websites in other Member States.

The origin of the case is the selective distribution agreement that was concluded between the French retailer Concurrence and Samsung, which included a provision prohibiting the sale of those products via internet.

A dispute arose between the parties when Samsung accused Concurrence of breaching the selective distribution agreement by selling a number of its products through its website. Concurrence contested the legality of the terms of the contract, alleging that they were not applied uniformly to all distributors given that some of the latter were marketing the products in question on Amazon websites without any response from Samsung. As a consequence, Samsung terminated the agreement with Concurrence.

In this scenario, Concurrence brought the case before the French courts but its claims were dismissed. Concurrence brought an appeal against the judgment arguing, *inter alia*, that other suppliers had engaged in sales on Amazon websites in other EU Member States.

Not being successful in its claims, Concurrence brought an appeal in cassation before the French *Cour de Cassation* arguing that Amazon should not be entitled to allow other suppliers to sell Samsung’s products via Amazon in France or in any other Member State. According to Concurrence, these activities resulted in harm for the company. The French Supreme Court decided then to refer a preliminary ruling to the Court of Justice of the EU.



The question regarded Article 5(3) of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). It intended to clarify whether this article can be interpreted as meaning that, in case of an alleged breach of a prohibition on resale outside a selective distribution network and by means of online offers for sale on a number of websites in various Member States, an authorized distributor which considers that it has been adversely affected, may bring an action seeking an injunction in the courts of the territory in which the online content is (or was) accessible; or if, by contrast, some other clear connecting factor shall be present.

In his opinion, AG Wathelet held that, even if the website is operated in other EU Member State, the French court has the right to rule on illegal sales performed through those Amazon websites. In particular, AG Wathelet suggested that the French on-line retailer Concurrency could obtain an injunction in a French court against Amazon websites in other Member States. He argued that the place where the loss took place should be considered as the place where the exclusive right's holder has experienced a reduction of sales and concluded that the origin of the websites on which the products are displayed for sale is not relevant for the purposes of determining the forum of jurisdiction.

---

## Currently at GA&P

### **Sara Moya Izquierdo (GA&P Brussels) mentioned as one of the 500 most influential women in Spain**

Our Brussels-based EU and Competition lawyer Sara Moya Izquierdo has been included in the 2016 list of the 500 most influential women of Spain. The Spanish magazine YO DONA, which is released as a supplement of the largest Spanish newspaper, El Mundo, publishes a list of the top influential women of the country on a yearly basis. The list includes women active in various fields, such as politics, economics, judiciary, culture and fashion. The full 2016 list can be consulted [here](#).

---

For further information please visit our website at [www.gomezacebo-pombo.com](http://www.gomezacebo-pombo.com) or send us an e-mail to: [info@gomezacebo-pombo.com](mailto:info@gomezacebo-pombo.com).

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York