

# Brussels GA&P

Gómez-Acebo & Pombo, Brussels  
September 2016

## Content

---

<b>News</b> .....	<b>2</b>
— Antitrust .....	2
▶ Commission´s initial findings on the e-commerce sector inquiry have identified certain business practices that may restrict competition .....	2
▶ Spanish Court has ruled that dawn-raids carried out by the Spanish Competition Authority against candy companies in 2013 did not breach privacy rights .....	2
— State Aid .....	2
▶ The Commission has ordered Ireland to recover up to EUR 13 billion granted to Apple as illegal state aid .....	2
<b>Case-Law &amp; Analysis</b> .....	<b>3</b>
▶ The EUR 357 million fine imposed by the Commission on Pilkington Group for its participation in the so-called “car glass cartel” has been confirmed by the European Court of Justice .....	3
<b>Currently at GA&amp;P</b> .....	<b>4</b>
▶ Mind the GA&P at Rock and Law Madrid .....	4



# News

## Antitrust

### **Commission's initial findings on the e-commerce sector inquiry have identified certain business practices that may restrict competition**

In May 2015, the European Commission launched the e-commerce sector inquiry in order to identify potential competition concerns in European e-commerce markets.

The preliminary report of the inquiry published on 15 September 2016 has, on the one hand, confirmed the growing importance of the sector and, on the other hand, identified a series of potentially restrictive practices. The Commission aims at encouraging companies to review their distribution contracts in order to align them to EU Competition law.

In particular, the Commission has found that, in order to have a better control of the distribution of their products, manufacturers tend to put in place selective distribution systems and to sell on-line directly to their customers. Distribution agreements normally include a list of contractual sales restrictions, which, under certain conditions, may render on-line shopping more complicated and, ultimately, result in consumers' harm.

The preliminary report also contains some reflections with regard to digital content. Copyright licensing agreements have been found to be complex and often exclusive. These agreements usually restrict the territory, technology and windows that can be used by digital content providers. Furthermore, the Commission has emphasized that where geo-blocking results from an agreement between suppliers and distributors, it has the potential to restrict competition in the EU internal market and, consequently, breach Article 101 of the TFEU.

During a two month period, the report will be open to public consultation providing stakeholders with

the possibility to submit comments or any additional information they may have. The final report is expected to be published in the first quarter of 2017.

### **Spanish Court has ruled that dawn-raids carried out by the Spanish Competition Authority against candy companies in 2013 did not breach privacy rights**

In November 2013, the Spanish Competition Authority ("*Comisión Nacional de los Mercados y la Competencia*" or "CNMC") carried out a series of dawn-raids in the premises of several candy manufacturers. The suspicion was that the companies had engaged in price fixing and market sharing agreements in the market of "turrón", a traditional Spanish Christmas sweet.

In 2016, the companies were fined EUR 6.12 million by the CNMC for price fixing and exchange of information.

One of the fined companies, Almendra y Miel, together with its parent company and an employee, brought an action before the Spanish competent court ("*Audiencia Nacional*") challenging the lawfulness of the dawn-raids. One of the arguments referred to the fact that the CNMC's investigators had accessed electronic data stored on a mobile phone, which were of no relevance for the investigation and which were not covered by the investigation's order. On these grounds, the claimants argued that there had been a breach of privacy rights.

The judgment rendered by the *Audiencia Nacional* on 18 July 2016, but only disclosed to the public recently, has found there was no breach of privacy rights during the performance of the dawn-raids. The court has also concluded that the investigation order entitled the investigators to access agendas of employees, which included their mobile phones.

## State Aid

### **The Commission has ordered Ireland to recover up to EUR 13 billion granted to Apple as illegal state aid**

The European Commission has found that Ireland granted undue tax benefits by allowing Apple to pay significantly less taxes than other companies from 1991 to 2014.

In June 2014, the Commission opened an in-depth state aid investigation against the US company. The enquiry led the Commission to uncover that Ireland had issued two tax rulings to Apple that substantially and artificially lowered the taxes paid by Apple in Ireland since 1991. These rulings accepted a specific method to establish the taxable profits for two Irish incorporated companies of the Apple group.



The rulings allowed almost all sales profits recorded by the two companies to be internally attributed to a head office. According to the Irish tax legislation in force at that time, these profits were tax-free in any country. The investigation has now shown that these head offices were an artificial setting that could not have produced such profits.

Given that the Commission is only entitled to order recovery for the 10-year-period preceding the first request of information (in this case, in 2013), Apple must now reimburse the Irish state the unpaid taxes for the period 2003 to 2014. This amount can total up to EUR13 billion, plus interest.

The investigation has also proved that the Irish tax rules enabled Apple to avoid taxation on almost all profits generated by the sales of its products in the entire EU market due to the company's choice to record all sales in Ireland. This scheme is not under the scope of state aid investigations. However, if other Member States conclude that Apple should have recorded its sales in those countries instead of Ireland on the basis of their national tax laws, Apple could be required to pay more tax locally in those countries. As a consequence, the amount to be recovered by Ireland would be reduced.

## Case-Law & Analysis

**The EUR 357 million fine imposed by the Commission on Pilkington Group for its participation in the so-called "car glass cartel" has been confirmed by the European Court of Justice** (*Judgment of 7 September 2016 in Case C-101/15P Pilkington Group and Others v Commission*)

The Court of Justice of the EU ("CJEU") has upheld the fine imposed by the European Commission on Pilkington group for its participation in the car glass cartel. The Commission decision whereby the fine was imposed had been already confirmed by the General Court of the EU in 2014.

The case concerned a cartel in the car glass sector, where the claimant, the Pilkington group, was one of the main operators in the worldwide market. In 2008, the Commission adopted a decision whereby it found that several companies active in the sector had allocated the supply of car glass so that they maintained their respective positions in the market. It was concluded that the Pilkington group had participated in the cartel from 1998 to 2002, which resulted in a fine of EUR 357 million.

Pilkington brought an action for annulment against the Commission's decision before the General Court of the EU, which dismissed the action of Pilkington. This judgment was appealed by Pilkington before the CJEU.

The CJEU has now upheld the General Court's judgment and confirmed the fine imposed by the Commission in 2008.

First, contrary to the argument brought by the claimant, the CJEU has stated that the Commission was entitled to calculate the fine by taking into account the sales registered during the infringement period on the basis of contracts concluded prior to that period. The cartel was aimed to allocate supplies of car glass with regard to any type of contracts, regardless of whether they had been concluded before or after the infringement period.

Second, the CJEU has concluded that the choice made by the Commission, to use the turnover figures for the last full business year preceding the adoption of the decision as the reference value, justifies the use of the exchange rate applicable during that period to convert the reference value, where this is not expressed in euros.

Finally, with regard to the argument that the fine imposed on Pilkington is proportionally higher than the one imposed to other participants due to its activity being less diversified, the CJEU has reached the conclusion that this does not breach the principles of proportionality and equal treatment. In this sense, the CJEU has explained that the Commission may not confer an advantageous treatment on the least diversified undertakings by using criteria that are irrelevant with regard to the infringement's gravity and duration.



## Currently at GA&P

### **Mind the GA&P at Rock and Law Madrid**

Our band (Mind the GA&P) will participate next Thursday 29<sup>th</sup> September in the annual event Rock and Law hosted in Madrid. This initiative was created in Lisbon in 2009 and has been held in Spain since 2010. The

concert will include 8 bands formed from lawyers of different top law firms and institutions in Spain and all profit will be donated to a charity cause, in this case, to the Lydia Project, an initiative to foster leukemia research within the foundation "Cancer Research Innovation Spain". More info at: [www.rockandlaw.org](http://www.rockandlaw.org)

---

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