

G A _ P

Gómez-Acebo & Pombo

March | 2018

Brussels G A _ P Newsletter

Brussels



Contents

News	3
— New EU Regulation to ban unjustified geo-blocking in the internal market.	3
— The Spanish Competition Authority fines 9 bar associations for issuing a collective price recommendation on lawyers' professional fees.	4
— The Spanish Competition Authority fines ten courier and parcel companies EUR 68 million for participating in a customer-allocation cartel.	5
— Cosmetic distributors dawn raided by Belgian and French Competition Authorities	5
Case-law & Analysis.	6
— The General Court of the EU reverses the suspension of the recovery order addressed to Spain in relation to the EUR 665 million alleged State aid granted to energy company Iberdrola (<i>Order of the General Court of the EU of 20 February 2018 in Case Iberdrola v. Commission, T 260/15 R</i>)	6
Currently at GA_P.	6
— GA_P Madrid hosts seminar on "Competition 2017: Damages, on-line sales and abuses"	6

News

New EU Regulation to ban unjustified geo-blocking in the internal market

Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market has been adopted and published. This Regulation will be applicable as of 3 December 2018.

Geo-blocking is a practice that precludes customers from having access to products or services from websites of other Member States. The Regulation will put an end on e-commerce barriers based on the nationality or residence of the customers. In particular, Regulation 2018/302 will ensure that EU customers are not subject to prices or offered products or payment conditions that differ depending on the Member State of the customer.

The new rules do not cover services which main feature is the provision of access to or use of copyrighted materials via intangible means. Music streaming services, e-books, online games and software are thus excluded from the scope of the Regulation. This type of services will be part of a review to be carried out by the Commission two years after the entry into force of the Regulation.

Regulation 2018/302 shall not apply to the services regulated under Article 2(2) of the EU Services Directive, which include financial, audio-visual, transport, healthcare and social services.

The new rules prohibit traders to discriminate between customers with regard to general terms and condition –including prices– in the following cases: (i) sales of goods that are delivered in a Member State where the trader offers delivery or that are collected by the customer at an agreed location; (ii) services that are electronically provided (e.g., cloud services, data warehousing services, website hosting and firewalls); (iii) services received by the customer where the trader operates (e.g., hotels, sports events, car rental, tickets for festivals, etc.).

While price discrimination is prohibited, price differentiation remains possible, which means that traders will still be able to offer different commercial conditions and to target specific customers in concrete territories. Traders will not be required to offer delivery in all Member States.

In addition, it will no longer be possible to apply different payment conditions depending on nationality or location of the customers. Limits on access or redirection to different websites for nationality or residence reasons will also be forbidden, unless the customer explicitly consents to such redirection.

Regulation 2018/302 also establishes that provisions in agreements imposing obligations on traders to act in breach of the Regulation with regard to access to online interfaces, access to goods or services and payment shall be automatically void. These provisions may relate to contractual restrictions prohibiting the trader to respond to unsolicited requests from customers for the sale of goods, without delivery, outside the trader's contractually allocated territory for reasons related to customers' nationality, place of residence or place of establishment. It should be noted that the application of this rule with regard to agreements concluded before 2 March 2018, which are compliant with Article 101 Treaty of the Functioning of the European Union ("EU") and equivalent national provisions, is deferred to 23 March 2020.

The Spanish Competition Authority fines 9 bar associations for issuing a collective price recommendation on lawyers' professional fees

The Spanish Competition Authority ("CNMC") has fined 9 bar associations EUR 1.4 million for issuing a collective price recommendation regarding lawyers' professional fees.

The case was triggered by a complaint filed by Bankia as a consequence of the numerous claims filed by the bank's shareholders requesting the amounts they had invested in 2001, when Bankia got listed on the Spanish stock exchange. The investigation showed that out of the 83 bar associations that exist in Spain, only 9 (i.e., Barcelona, Valencia, Sevilla, La Rioja, A Coruña, Santa Cruz de Tenerife, Albacete and Avila) had prepared, published and circulated ranges of professional fees.

The authority considered that this behaviour amounted to a prohibited practice. Lawyers' professional fees are not regulated at national level and shall be freely set. No minimum fees are established by law either.

Article 1 of the Spanish Competition Act prohibits agreements, decisions or collective recommendations aimed at or having the effect of hindering competition in the national market, in particular, those fixing, directly or indirectly, prices or commercial conditions. In addition, the so-called Omnibus Law of 2009 (Law 25/2009) explicitly prohibits recommendations concerning legal fees by bar associations as well as any other guidance or norm on the matter.

The CNMC's decision can be appealed before *Audiencia Nacional* within 2 months. Some of the bar associations concerned have already made public their intention to appeal the decision.

The Spanish Competition Authority fines ten courier and parcel companies EUR 68 million for participating in a customer-allocation cartel

The Spanish Competition Authority (“CNMC”) has fined ten courier and parcel companies EUR 68 million for participating in a customer-allocation cartel, namely, Correos Express, UPS, TNT, DHL, Toline, RedySer, FEDEX, ICS and MBE.

The CNMC has found that some of the companies entered into oral non-aggression arrangements, whereby the parties agreed not to offer their services to competitors’ clients. Thus, customers were prevented from having access to services offered by other companies.

Overall, the CNMC has uncovered nine cartels: Correos Express, MBE and ICS were the companies participating in the highest number of cartels. The conducts in question amount to a very serious infringement of Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the European Union (“TFEU”). The agreements had different durations (while the longest lasted for 10 years, the shortest lasted for one year).

The investigation was prompted by an immunity application filed by General Logistics Spain, SL (“GLS”), which allowed the company (and its parent) to avoid a EUR 3.8 million fine.

The CNMC’s decision can be appealed before *Audiencia Nacional* within 2 months.

Cosmetic distributors dawn raided by Belgian and French Competition Authorities

Despite the identity of the specific companies has not been unveiled yet, the Belgian and French Competition Authorities have confirmed they inspected premises of cosmetic distributors in their respective countries.

The investigation would relate to a potential breach of Article 101 Treaty on the Functioning of the EU (“TFEU”) and its homologue provision under national law, which prohibit agreements between undertakings that distort or may distort competition. This is the case of price fixing, retail price maintenance or exchange of commercially sensitive information between competitors. This kind of conduct may result in fines of up to 10% of the total turnover of the group.

It is common that this type of investigations result from applications for leniency submitted by one of the participants in the conduct, which in exchange, may avoid being fined.

The next step of the investigations is to assess the content of the evidence seized by the authorities.

Case-law & Analysis

The General Court of the EU reverses the suspension of the recovery order addressed to Spain in relation to the EUR 665 million alleged State aid granted to energy company Iberdrola (*Order of the General Court of the EU of 20 February 2018 in Case Iberdrola v. Commission, T 260/15 R*)

On 15 October 2014, the Commission found that Spanish tax breaks for indirect shareholding in foreign companies breached EU State Aid rules.

The measures were in force since 2001 and, in practical terms, allowed companies subject to tax in Spain to purchase shareholding of at least 5% in foreign companies and deduct the resulting goodwill from their corporate tax base. The same acquisition in a domestic company was not deductible. On the basis of these findings, the Commission adopted a decision ordering Spain to recover the undue benefits from the beneficiary companies of this scheme.

Iberdrola filed an action asking for the annulment of the decision and a request to suspend the recovery order. While the main appeal is still pending, by order of 22 November 2017, the President of the General Court of the EU granted the suspension requested by Iberdrola.

The Commission filed an appeal against the President's decision regarding the interim measures and the General Court ruled on the matter by revoking the suspension.

The General Court found that Iberdrola had failed to prove urgency and to show that repayment would cause serious and irreparable harm to the company. In this respect, the General Court concluded that the reimbursement of the aid would only entail liquidity problems for Iberdrola but would not result in irreparable harm.

Currently at GA_P

GA_P Madrid hosts seminar on “Competition 2017: Damages, on-line sales and abuses”

On 14 March 2018, our Madrid-based colleagues Eduardo Gómez de la Cruz and Ricardo Alonso Soto led a seminar on the main competition developments that took place during 2017 in Spain and on what to expect in 2018.

The discussion attracted the attention of in-house counsels and executives in charge of defining the competitive strategies of their companies. The main topics tackled during the session related to the Spanish Law transposing the EU Damages Directive, on-line sales' platforms, dawn raids and the right to defense. The question of whether excessive prices constitute an abuse was also discussed.