

G A \_ P

Gómez-Acebo & Pombo

Januray | 2019

# Brussels G A \_ P Newsletter

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Brussels



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## News

### **The European Commission imposes EUR 570 million fine on MasterCard for breaching EU competition law**

Following a formal investigation opened in April 2013, the Commission has found that MasterCard prevented retailers and consumers from benefiting from lower interchange bank fees applicable in other Member States. By so doing, MasterCard segmented the EU internal market and breached Article 101 of the Treaty on the Functioning of European Union (“TFEU”), which prohibits anti-competitive agreements and practices.

In the Statement of Objections (“SoO”) addressed to the company in July 2015, the Commission had put forward competition concerns with regard to the rules imposed by MasterCard on its licensees. Until 9 December 2015, when the EU Interchange Fee Regulation introduced certain limits, the said fees varied significantly across EU Member States. MasterCard’s rules of the time forced retailers’ banks to apply the interchange fees of the retailers’ locations. As a consequence, the banks’ costs were kept artificially higher, thereby harming both retailers and consumers in breach of EU competition rules.

In such a context, the Commission has decided to impose a EUR 570 million fine on MasterCard. The Commission has considered that MasterCard and its licensees constituted an association of undertakings in the sense of Article 101 TFEU.

MasterCard has benefited of a 10% fine reduction for recognising the infringement and for its cooperation during the investigation.

### **The Spanish Competition Authority (“CNMC”) dawn raids the premises of certain companies active in the road maintenance, preservation and restoration sector**

In the context of an investigation into possible market allocation agreements and information exchanges in the road maintenance, preservation and restoration sector, between 17 and 20 December 2018, the CNMC conducted several inspections at the headquarters of various companies active thereof.

Dawn raids constitute a preliminary step aimed at ascertaining whether the companies are in breach of the Spanish Competition Act (“LDC”) and might lead to the opening of formal disciplinary proceedings.

According to the CNMC, the practices under investigation may constitute a violation of Article 1 LDC, which prohibits agreements distorting or impeding competition. A breach of that nature may lead to fines of up to 10% of the company’s turnover.

## Case-Law & Analysis

**The Court of Justice of the EU upholds the nullity of the Commission's prohibition decision of UPS' proposed acquisition of TNT (*Judgement of 16 January 2019 in Case C-265/17 P, Commission v. United Parcel Service*)**

The judgement of the Court of Justice concerns the Commission Decision of 30 January 2013 prohibiting UPS to acquire TNT Express on the basis of the impact that the transaction would have had on competition in the EU parcel delivery sector.

This decision was appealed by UPS before the General Court of the EU, which, by judgement of 7 March 2017, found the company's rights of defence had been violated.

In particular, the General Court found that the final price concentration econometric model used by the Commission to adopt the decision and the one disclosed to UPS during the proceedings differed considerably. The lack of disclosure of the final econometric model infringed the defence rights of UPS as the company had no opportunity to raise concerns on the matter. As a consequence, the General Court annulled the Commission's decision.

This judgment was challenged before the Court of Justice of the EU on appeal by the Commission. In its judgment, the Court of Justice has confirmed the General Court's judgment as well as the nullity of the Commission's Decision.

The Court of Justice has agreed with the General Court's findings that the Commission had the obligation to disclose any amendment in the econometric model used to adopt the Decision so as to provide the party concerned with the opportunity to object and make observations.

According to the Court of Justice, the disclosure of any methodological instruments to the party concerned aims at guaranteeing fairness of the administrative procedure, as required by the principle of good administration under Article 41 of the Charter of Fundamental Rights of the European Union.

Finally, the Court has concluded that there was sufficient evidence to declare the nullity of decision. In the Court's view, failing to confirm the conclusion of the General Court would imply raising the standard of proof and would encourage the Commission to be less transparent which, in turn, would render any subsequent judicial reviews of its decisions more difficult.

On these grounds, the Court dismissed the Commission's appeal.

**Advocate General Juliane Kokott rules out the application of the EU Damages Directive to proceedings concerning the action for damages brought by Cogeco against Sport TV Portugal** (*Opinion of Advocate General Juliane Kokott of 17 January 2019 in Case C-637/17, Cogeco Communications Inc. v. Sport TV Portugal, S.A., Controlinveste-SGPS, S.A., and NOS-SGPS, S.A.*)

Following the decision of the Portuguese Competition Authority finding that Sport TV had engaged in an abuse of dominance between 2006 and 2011, in February 2015, Cogeco, a Canadian cable company, brought an action for damages against Sport TV Portugal. Cogeco claimed that the EU Damages Directive should apply.

The action for damages, whereby EUR 11.5 million were claimed, was lodged before the Lisbon District Court just three months after the adoption of the EU Damages Directive and after the decision of the Portuguese Competition Authority had been confirmed on appeal.

Cogeco argued that the EU Damages Directive was applicable to the case, in particular, with regards to procedural rules as the case concerned trade between Member States. The application of the EU Damages Directive would benefit Cogeco as the Directive established a five-year statute of limitations for the filing of actions for damages. Such a timeline starts to run as from the moment in which the party concerned becomes aware of the anticompetitive conduct, the harm caused and the identity of the infringer.

Under Portuguese legislation, however, the statute of limitations is three years and starts to run as from the time the party concerned becomes aware of its right to lodge a damages action, even if it has no knowledge of the identity of the author of the damage.

In this context, the Portuguese Court referred a preliminary ruling to the Court of Justice, the first to be referred to the EU Court on the interpretation of the EU Damages Directive.

The Advocate General competent for delivering its opinion to the Court of Justice on the matter has concluded that Cogeco should not base its claim on the EU Damages Directive. She has grounded this conclusion on the fact that the Directive's transposition into the national legal orders of Member States had not been completed by the time the action was filed.

What is more, 22 more months were remaining for the transposition deadline to expire by the time of the filing of the action, which prevents any claim for direct effect.

On these grounds, the Advocate General has established that the Portuguese Law is to be applied to the case.

In any event, the case is still pending before the Court of Justice of the EU. If the latter reaches a decision in line with the Advocate General's opinion, depending on the calculations of the competent national judge, Cogeco's action might be deemed time-barred under Portuguese Law.



## Currently at GA\_P

### **GA\_P's Partner Almudena Arpón appointed as General Secretary of the IBA**

GA\_P's Partner Almudena Arpón has been appointed as the new Secretary General of the International Bar Association ("IBA"). Ms. Arpón will act as Secretary General for two years. The IBA is the worldwide association of the legal sector and brings together more than 80,000 members as well as 190 bars of more than 170 jurisdictions all over the world. Ms. Arpón leads GA\_P's telecommunications, technology and media group of the firm's corporate law department.