

G A \_ P

Gómez-Acebo & Pombo

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# Brussels G A \_ P Newsletter

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Brussels



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## News

### Commission imposes EUR1.49 billion fine on Google for abusing its dominance in the online advertising intermediation market

On 20 March 2019, Google was fined EUR 1.49 billion for infringing EU Competition Law. The Commission found that Google had abused its dominance in the online advertising intermediation market by including anticompetitive clauses in its contracts with third party websites.

Through its AdSense for Search, Google acts as an intermediary between advertisers and website owners willing to use the space around their search results pages to make profit. The Commission's investigation confirmed that Google was the dominant operator in online search advertising intermediation in the European Economic Area ("EEA"): in between 2006 and 2016, it held market shares above 70% in the EEA.

The Commission's investigation has shown that, as from 2006, in hundreds of the agreements concluded between Google and the most commercially important publishers, Google had imposed exclusivity clauses. This prevented publishers from displaying adverts from competitors on their search result pages.

The investigation has also revealed that, as of March 2009: (i) these exclusivity clauses were gradually replaced by "Premium Placement" clauses, which obliged publishers to reserve the most profitable spaces for Google's adverts; and (ii) new clauses were introduced in the contracts so as to require Google's written approval in order for publishers to be able to change the way Google's competitors' ads were displayed.

In other words, Google imposed exclusive supply obligations and, later, implemented a "relaxed exclusivity" strategy with the aim of keeping for its own search adverts the best positions as well as controlling the performance of competing adverts.

These practices constituted an abuse of dominance in the online search advertising intermediation market, contrary to Article 102 of the Treaty on the Functioning of the EU ("TFEU"). As a consequence, competition and consumers were harmed, innovation was hindered and websites' owners were obliged to use Google almost exclusively. No efficiencies were demonstrated by Google.

## Nike fined EUR 12.5 million by Commission for imposing cross-border sales restrictions on its contracts with licensees

The Commission has established that Nike's non-exclusive licensing and distribution agreements breached article 101 of the Treaty on the Functioning of the EU ("TFEU").

The investigation has revealed that a number of clauses included by Nike in its agreements with licensees of merchandising products were anticompetitive.

First, the Commission has identified clauses that restricted, penalized or prohibited out-of-territory ("OOT") sales; as well as mechanisms or measures put in place by Nike to ensure that such restrictions were respected by licensees.

Second, with regard to master licensees appointed for certain territories, the Commission has found that Nike required them to stay within their territories and to guarantee that their sub-licensees comply with the territorial limits.

Finally, the Commission has proven that Nike explicitly prohibited licensees from supplying merchandising products to customers who could engage in OOT sales.

The Commission's investigation has shown that these practices lasted for approximately 13 years and concerned merchandise products of several professional football clubs, namely, FC Barcelona, Manchester United, Juventus, Inter Milan, AS Roma and the French Football Federation.

Since Nike actively cooperated with the Commission, the company was granted a 40% reduction in the amount of the fine.

## Spotify files EU complaint against Apple for alleged anticompetitive practices

On 11 March 2019, Spotify formally filed a complaint with the European Commission against Apple. According to Spotify, Apple would be restricting competition on its iPhones so as to favour its own streaming app "Apple Music".

In particular, Apple would be abusing its control over the iOS operating system and the App Store to impose unjustified requirements on its competitors.

For example, Apple allegedly charges Spotify a 30% commission when customers download and pay for the Spotify's app through the Apple's App Store. This condition is rendering Spotify more expensive for users than Apple Music. To avoid this penalty, Spotify asks its users to subscribe through Spotify's website. Since this is more difficult for consumers, it grants an advantage to Apple Music.

Spotify also argues that Apple would be interfering Spotify's communications with its own customers, for example, by refusing to allow updates or essential changes to its app

The complaint follows a series of failed attempts to resolve the dispute amicably.

The Spanish Competition Authority ("CNMC") opens formal investigation against 7 companies active in the marketing of metallurgical coke, petroleum coke, coal, anthracite, foaming agents and recarburisers

Following the dawn raids conducted in October 2018, the CNMC has started a formal investigation against 7 companies active in the in the solid fuel sector.

The CNMC is concerned that these companies may have infringed Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the EU ("TFEU"), which prohibit anticompetitive agreements and practices.

The companies under investigation may have engaged in market-sharing, price-fixing and exchanges of commercially sensitive information. These practices could have lasted from 1999 until 2018.

The investigation concerns the market for sale of metallurgical coke, petroleum coke, coal, anthracite, foaming agents and recarburisers in Spain.

The opening of an investigation does not prejudge the outcome thereof.

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## Case-Law & Analysis

The Court of Justice of the EU finds parent companies to be liable for cartel damages of their liquidated subsidiaries (*Judgment of 14 March 2019 in Case C-724/17, Vantaan kaupunki v Skanska Industrial Solutions Oy and others*)

The dispute that triggered the preliminary ruling in the present case relates to a 2004 decision adopted by the Finnish Competition Authority against the participants of an asphalt cartel that took place in Finland between 1994 and 2002.

Some of the victims of the cartel, such as the Finnish State and several municipalities, filed actions for damages against the cartelists.

In particular, the City of Vantaa brought an action against the parent companies of the participants of the cartel (i.e., Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy), which were fined for the practices of their subsidiaries, liquidated before the imposition of the fines.

The claimant argued that the notion of undertaking used for liability of competition fines should be extended to civil liability for competition damages.

A Court of First Instance in Helsinki accepted the claim against the defendant and granted compensation. On appeal, this judgement was reversed.

As a result, appeal proceedings before the Supreme Court of Finland were started. This Court referred a preliminary ruling to the Court of Justice of the EU asking for guidance on how to assess parent companies' liability for damages resulting from a cartel entered to by their liquidated subsidiaries.

In its judgment, the Court of Justice of the EU has concluded that parent companies cannot use corporate restructuring to avoid liability for claims for damages related to a cartel.

In the national proceedings, the participants in a cartel, Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy had argued that they were not responsible for their liquidated subsidiaries practices.

The Court of Justice clarified that in cases where the cartelists get acquired by another company, which dissolved them but continued their commercial activities, the acquirers can be held responsible for the damages resulting from the cartel.

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## Currently at GA\_P

### GA\_P Barcelona hosts competition law workshop

Our Barcelona office has hosted a seminar on the main Spanish competition cases of 2018 and what to expect from 2019. The workshop was opened by the Director General of the Catalan Competition Authority, Mr. Marc Realp i Campalans. Our competition law partner Iñigo Igartua and competition lawyers Andrea Díez de Ure, Isaque Marcos Leite and María Czystochowa Martínez participated in the discussion and presented interesting insights to the audience.