

The Madrid Court of Appeals endorses an antitrust private enforcement action relating to an exclusive distribution agreement

Madrid, November 2020

J. Almoguera Abogados has recently obtained the reversal on appeal of a Madrid commercial court judgment dismissing a claim regarding the termination without cause by the European engine manufacturer Perkins of the legal relationship with its long time Spain exclusive distributor Modipe.

The action was based on an alleged breach by Perkins of, inter alia, articles 101 of the Treaty on the Functioning of the European Union and 1 of the Spanish Competition Act consisting in prohibiting passive sales outside Spain, aiming at partitioning the EU internal market.

Modipe submitted that Perkins had decided to terminate the distribution agreement after a more than twenty years old successful relationship for its failure to abide by Perkins' non-written prohibition of cross border passive sales. Modipe further submitted that Perkins had put in place a series of practices aimed at indirectly enforcing the out-of-territory restrictions, including the close monitoring of the final destination of Modipe's sales and threats to cut the financial support and discounts given to national distributors and even to terminate the relationship if Modipe continued accepting orders from non-Spanish purchasers.

Modipe pointed out the inherent evidentiary difficulty of competition violations and the importance of the principle of effectiveness and of presumptions in antitrust damages actions, and adduced certain indicia and emails exchanged with Perkins and other EU national distributors showing the prohibition of cross border passive sales.

However, the Madrid commercial court dismissed the claim because in its opinion the evidence presented was not conclusive.

The Madrid Court of Appeals has reversed the commercial court judgment and found that the evidence presented by Modipe proved Perkins' anticompetitive conduct through indirect measures and referred to the principle of effectiveness and the value of indicia and presumptions¹.

The Madrid Court of Appeals has also found that the prohibition of cross border passive sales is illegal irrespective of whether they are made to a final purchaser, a distributor or a reseller.

This judgment is an important milestone in the private enforcement of competition law in Spain, which has become far more relevant following the transposition of the Damages Directive² into Spanish law in May 2017.

¹ Judgment nº 402/2020 of 24 July 2020, available at: <http://www.poderjudicial.es/search/AN/openDocument/60245f08f7c141d5/20201102>.

² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.