

G A \_ P

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## News

### **Commission expands Temporary Framework to small companies in difficulty before 31 December 2019 and incentivise private investments**

The Commission has extended, for the third time, the scope of the Temporary Framework adopted on 19 March 2020 in order to enable Member States to support micro and small companies that were a difficulty before 31 December 2019 and to provide incentives for private investors to participate in coronavirus-related recapitalisation measures.

Regarding the further support to small companies, it has to be noted that one of the conditions in order to grant State aid under the Temporary Framework is that the companies were not in difficulty before 31 December 2019. Even if they cannot benefit from these temporary rules, they are eligible for aid under existing State aid rules, in particular for the Rescue and Restructuring Guidelines. However, the COVID-19 crisis has exacerbated their existing difficulties and led them to serious liquidity shortage or even to insolvency proceedings. Following the new amendment, aid under the Temporary Framework includes all micro and small companies, unless such companies are in insolvency proceedings, have received rescue aid that has not been repaid, or are subject to a restructuring plan under State aid rules.

As concerns the incentive of private investments, the Commission has adapted the conditions for recapitalisation measures under the Temporary Framework in order to (i) allow companies with an existing State shareholding to raise capital similar to private companies and (ii) encourage capital injections with significant private participation also in private companies. In particular, if private investors contribute to the capital increase in a significant manner, the acquisition ban and the cap on the remuneration of the management are limited to three years.

### **Commission opens investigations into Apple's App Store rules and into the company's practices regarding Apple Pay**

As regards the investigations into Apple's App Store, in particular, the Commission will investigate the mandatory use of Apple's own proprietary in-app purchase system and restrictions on the ability of developers to inform iPhone and iPad users of alternative cheaper purchasing possibilities outside of apps. The Commission will investigate in particular two restrictions imposed by Apple in its agreements with companies that wish to distribute apps to users of Apple devices: (i) the mandatory use of Apple's own proprietary in-app purchase system 'IAP' for the distribution of paid digital content; and (ii) restrictions on the ability of developers to inform users of alternative purchasing possibilities outside of apps.

The Apple Pay investigation concerns Apple's terms, conditions and other measures for integrating Apple Pay in merchant apps and websites on iPhones and iPads, Apple's limitation of access to the Near Field Communication (NFC) functionality ("tap and go") on iPhones for payments in stores, and alleged refusals of access to Apple Pay. It appears for example that Apple Pay is the only mobile payment solution that may access the NFC 'tap and go' technology embedded on iOS mobile devices for payments in stores. Therefore, the Commission will investigate a possible infringement of Arts. 101 and 102 TFEU by Apple.

### **Commission consults on a new tool to address structural competition risks**

The consultation is situated in a context of debate on the role of competition law in an increasingly globalised and digital world and on the need to change EU competition rules in order to maintain the fair functioning of markets in the EU. The Commission believes that in order to maintain the fair functioning of markets, emphasis must be placed on the following three pillars: (i) the "continued vigorous enforcement" of the existing competition rules making full use of Articles 101 and 102 TFEU, including the use of interim measures and restorative remedies, where appropriate; (ii) a possible ex-ante regulation of digital platforms, including additional requirements for those that play a gatekeeper role; and (iii) a new competition tool to deal with structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules, for example preventing markets from tipping.

A stakeholder consultation on the impact assessment on platform-specific ex ante regulation, which covers the second pillar, and a parallel stakeholder consultation that deals with the third pillar have been launched. For the former, stakeholders could submit their views until 30 June 2020, and for the latter until 8 September 2020.

### **Commission adopts White Paper on foreign subsidies**

According to the Commission, the current instruments of EU law are insufficient to address and remedy distortions in the EU internal market arising from subsidies granted by third country governments. This is why this White Paper has been adopted, aiming to provide the Commission with new tools to address the potential distortive effects caused by foreign subsidies in the single market and to tackle foreign access to European public procurement and funding.

The Paper proposes three complementary modules: (i) a general instrument to identify and deal with foreign subsidies; (ii) a specific merger control mechanism; and (iii) a specific public procurement mechanism. Under the first module, the supervisory authority, which would be a national authority or the Commission, could act upon any information that a company in the EU benefits from a foreign subsidy by imposing measures to remedy the likely distortive impact. Module 1 can be complemented by Module 2, which intends to control acquisitions of EU companies by

state-owned companies of third countries or that are financed by third countries. Finally, under the Module 3, bidders of large contracts would have to notify the contracting authority of financial contributions exceeding a certain amount received from third countries. If the authority establishes that the bidder has received a foreign subsidy, it has to analyse whether it has distorted the public procurement procedure. If that is the case, the bidder would be excluded from the procurement procedure.

The White Paper is open for public consultation until 23 September 2020 for all stakeholders to express their views and will help the Commission to prepare appropriate legislative proposals in this area.

## **Commission launches a process to address the issue of collective bargaining for the self-employed**

It is settled case law of the Court of Justice of the European Union that collective bargaining with workers falls outside the scope of the application of EU Competition rules. However, according to EU competition law, self-employed are considered “undertakings” and agreements they enter into such as collective bargaining may therefore be captured by the EU competition rules. Therefore, and taking into account that the Commission has committed to improving the working conditions of platform workers during this mandate (who usually have no other option than to accept a contract as self-employed), the Commission is analysing if it is necessary to adopt measures at EU level in order to address the issues raised by this situation and improve the conditions of these workers.

Consequently, stakeholders from the public and private sector, including competition authorities and government bodies, academia, as well as legal and economic practitioners trade unions and employers’ organisations are invited to submit their opinions in the on-going public consultation on the Digital Services Act Package.

## **Commission Decision fining Meliá has been published**

Meliá has been fined with 6,7 million by the Commission for including anticompetitive clauses in agreements with tour operators that discriminated between consumers based on their country of residence. According to the recently published Commission Decision, the hotel groups’ standard terms for contracts with tour operators included a clause stating that hotel reservations are valid only for consumers who were resident in specified countries and “the hotel would be entitled to reject the reservation” if the country of residence was different from the ones mentioned in the contracts.

These agreements were specially problematic under EU competition law because the establishment of a differentiation between consumers on the basis of their country of residence may result

in the partitioning of the internal market according to national borders. Such clauses have the object of restricting competition, and therefore there is no need to take into account of the concrete effects of the agreements. In addition, Meliá concluded a series of contracts with restrictive clauses for the distribution of accommodation at its resort hotels in 2014 and 2015. Hence, these agreements constitute a single and continuous infringement.

Based on the gravity of the infringement and considering the value of sales that should be taken into account in this case, the Commission set the fine at 7% of the value of sales which was EUR 9.5m. However, since Meliá cooperated with the Commission beyond its legal obligation, it received a 30% fine reduction.

## **CNMC refuses to open an investigation into Cabify and Uber**

In a recently published decision, the Spanish Competition and Markets Authority (CNMC) has refused to open an investigation into the platforms after having received complaints against them for alleged anticompetitive conduct. The complaints concern a campaign of both platforms called “We all fit in the future”, advertised by the association Unauto VTC, in which they offered their services for free for 12 hours on 26 September 2018. Following that campaign, the association Fedetaxi provided to its members a form to complain about this initiative to the CNMC for an alleged infringement of Art. 1 of the Spanish Competition Act.

First of all, the CNMC establishes that taxis and passenger service vehicle companies are only competitors in the market for pre-booked car transportation via online apps, since the former can be booked through mobile apps and the latter are not allowed to be directly hailed in the streets. Then it finds that the effects of the “We all fit in the future” campaign are almost insignificant because taxis do not have a significant share in the segment of pre-booked car transportation services via app and, in addition, the number of services booked during the campaign does not show a significant difference with other dates. Regarding the analysis of a potential abuse of dominant position, the CNMC states that, even assuming the existence of a dominant position, the campaign was not abusive because given the specific context, its content and, in particular, its duration, it had no capacity to restrict competition. Finally, the CNMC rejects the existence of price fixing since passenger service vehicles do not use a specific app in a coordinated way. Indeed, prices are determined by the platforms independently.

## **CNMC publishes its guidelines on confidentiality claims for competition procedures**

The CNMC’s guidelines on the processing of confidential information and personal data involved in processes of the Competition Act 15/2007 intend to guide those companies who ask the Spanish agency to have certain data or documents provided by them as part of antitrust proceedings declared confidential. Even though it is a possibility that already existed under the Competition Act,



and numerous judgements from the highest courts in the country have dealt with this issue, the guidelines seek to promote legal certainty by taking into account the legal doctrine and precedence established over the years, it also reviews substantive and procedural aspects of confidentiality.

For example, the guidelines specify the method and the timeline for accessing files during the various possible procedures and recall that it is the CNMC which decides what aspects of the company's documents are confidential, after weighing the interest on a case-by-case basis. It also describes how personal data is processed when involving client-lawyer communications that might be subject to confidentiality.

### **CNMC publishes its guidelines on compliance programmes in relation to competition law**

With the publication of its guidelines, the CNMC intends to assist companies in their efforts to implement and develop compliance programmes, establishing the criteria that the company will take into consideration when ascertaining the effectiveness of a compliance programme. If a compliance programme is considered effective by the CNMC, the fines imposed by the agency may be reduced and companies may not be banned from contracting with public administrations.

The goal of the programme must be to ensure a true commitment to compliance of all the employees of the company (including its top management) and it has to be incorporated into the daily decision-making process within the company.

The criteria set out by the CNMC that must be included in compliance programmes are the following: (i) involvement of company management bodies and/or top executives; (ii) effective training; (iii) existence of a reporting channel; (iv) independence and autonomy of the person responsible for design and oversight of compliance policies; (v) identification of risks and design of protocols or oversight mechanisms; (vi) design of the internal procedure for managing reports and managing detection of violations; and (vii) design of a transparent and effective disciplinary system.

### **CNMC scrutinises the insurance sector for potential competition infringements**

The CNMC has published a press release in which it reports the functioning of its mailbox set up during the COVID-19 crisis. In it, it states that it has received more than 500 inquiries and complaints in the two months since the mailbox was set up to provide a contact point to present queries related to the application of competition rules during the pandemic. It had already informed that it monitors closely the trend in the prices of food, and following the inquiries received, it is also preliminarily investigating the insurance market, particularly in terms of life and sick leave insurance. The other particularly affected sectors are the financial (where the CNMC has received nearly the

half of the inquiries, 45%), prices of health/food products (30%) and funeral (5%) and insurance (1%). The rest of the complaints involve energy and telecommunications sectors.

## **Cani Fernández is appointed as new CNMC President**

The Spanish Parliament has approved Spain's Cabinet's appointment of five posts at the top management of the CNMC. Former legal secretary at the Court of Justice of the European Union, Cuatrecasas partner and assistant at the Ministry of Presidency Cani Fernández will be the new CNMC president, replacing José María Marín Quemada and will also chair the Competition Board.

Ángel Torres is the new vice-president and head of the Regulatory Board, while Pilar Sánchez, Carlos Aguilar and Josep Maria Salas will join the CNMC as members of the board. These five posts are for a term of six years, without possibility of renewal.

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## **Currently at GA\_P**

### **GA\_P's Competition Law Practice area hosts a webinar on COVID-19 and its implications in competition law**

On Tuesday 9 June 2020, Iñigo Igartua, head of GA\_P's Competition Law Practice, Miguel Troncoso, Brussels' managing partner, Eduardo Gómez de la Cruz, Of counsel in this practice, and our lawyers Ricardo Alonso Soto, María Czestochowa Martínez, Jesús Urriza, Andrea Díez de Uré and Isaque Leite discussed the measures and decisions taken by the authorities during the lockdown period and explained what changes are expected for the near future.

The webinar covered the CNMC and the European Commission's reactions regarding the pandemic, the issue of excessive pricing, the CMA permission for cooperation agreements between supermarkets and logistic operators, the use of the failing firm defence in the COVID-19 context, online sales by producers, the connection between the abuse of economic dependence and aid to retailers, and the current pressure on pharmaceutical laboratories.

### **GA\_P hosts a webinar on the new CNMC's antitrust compliance programme guidelines**

On Tuesday 23 June 2020, Iñigo Igartua, Miguel Troncoso, Eduardo Gómez de la Cruz and Ricardo Alonso explained the recently published guidelines on compliance programmes and its immediate consequences in terms of adequacy needs.



The webinar covered the history of compliance, the CNMC's Decisions before the publication of the guidelines, the criteria it takes into account in order to determine if a programme is effective or not, and what consequences an effective programme can have.

The session included surveys carried out in order to ascertain the opinion of the participants regarding compliance programmes.