

G A \_ P

Gómez-Acebo & Pombo

October | 2020

# Brussels G A \_ P Newsletter

---

Brussels Office



# Contents

<b>News.....</b>	<b>3</b>
— Commission prolongs and expands the State aid Temporary Framework.....	3
— Commission requests feedback on Inception Impact Assessment for VBER update.....	3
— Commission launches a public consultation on the MVBBER .....	4
— Commission calls for contributions on the topic “Competition Policy supporting the Green Deal”.....	4
— The CNMC investigates the possible execution of unauthorised mergers, as well as potential antitrust practices involving the funeral insurance and funeral services markets .....	5
— The CNMC and the Catalan Competition Authority publish their joint contribution to the consultation on the White Paper on Artificial Intelligence .....	5
— The CNMC fines 33 school transport companies and one association for creating a school transport cartel in Navarre .....	6
— Cani Fernández’s views on Competition policy and sustainability .....	6
<b>Case law.....</b>	<b>7</b>
— Advocate General Giovanni Pitruzzella proposes that the CJEU should annul the judgement of the General Court that found that the tax arrangements of FC Barcelona did not constitute an illegal State aid.....	7

## News

### Commission prolongs and expands the State aid Temporary Framework

The Commission has prolonged and extended the scope of the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak.

Following what is already the fourth amendment of the Temporary Framework, its measures are prolonged for six months until 30 June 2021 (they were going to expire on 31 December this year), while measures enabling recapitalisation support are prolonged for three months until 30 September 2021 (they could be granted until 30 June 2021). Taking into account the continued general lack of sufficient private capacity to cover all economically justifiable risks for exports to countries from the list of marketable risk countries, the Commission has also extended until 30 June 2021 the temporary removal of all countries from the list of “marketable risk” countries under the Short-term export-credit insurance Communication.

This amendment also introduces a new measure to cover fixed costs of companies. Beneficiaries of this measure are companies facing a decline in turnover during the eligible period of at least 30% compared to the same period of 2019. The support will contribute to a part of the beneficiaries' fixed costs that are not covered by their revenues, up to a maximum amount of EUR 3 million per undertaking. The Commission has also adapted the conditions for recapitalisation measures. In particular, where the State was an existing shareholder prior to the recapitalisation, it will be able to exit from the equity of such enterprises through an independent valuation, whilst restoring its previous shareholding.

### Commission requests feedback on Inception Impact Assessment for VBER update

The Commission has published its inception impact assessment for the review of the Vertical Block Exemption Regulation (“VBER”) and accompanying Guidelines on Vertical Restraints (“Vertical Guidelines”), and has asked for feedback, which can be provided until 20 November.

In September, the Commission published the findings of its evaluation of the VBER and Vertical Guidelines, which revealed that the rules are still relevant, but that there is still room for improvement. In that sense, the Commission explained the areas it will focus on in its review. For instance, it aims to solve some of the problems identified by clarifying and simplifying the rules, incorporating

recent case law and filling in gaps in the rules that would otherwise create scope for divergent interpretations. It also intends to clarify the treatment of possible efficiencies resulting from resale price maintenance. Therefore, it will engage with businesses in discussions on concrete instances regarding the conditions under which these efficiencies can be claimed and the evidence that is required to satisfy the conditions of Article 101(3) TFEU. The Commission will also explore a possible revision of the rules on dual distribution, active sales restrictions, indirect measures restricting online sales, and parity obligations, which require a further in-depth assessment. For each of these issues, the Commission has outlined several policy options. The Commission will also take into account the outcome of the ongoing evaluation of the Motor Vehicles Block Exemption Regulation (see below).

## **Commission launches a public consultation on the MVBER**

The Commission has launched a public consultation that will be open until next 25 January in order to assess if the objectives of the Motor Vehicle Block Exemption Regulation (“MVBER”) and its Guidelines (Supplementary guidelines on vertical restraints in agreements for sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles) have been fulfilled. The MVBER mandates the Commission to draw up an evaluation report on its operation by 31 May 2021, in view of its expiry on 31 May 2023.

The regulation provides block exemptions for certain vertical agreements and practices in the automotive sector, covering motor vehicle distribution and after-sales agreements. The purpose of the evaluation is to gather evidence on the functioning of the MVBER from the perspective of stakeholders. These stakeholders are vehicle manufacturers and dealers, spare parts manufacturers and distributors (authorised and independent), and repairers (authorised and independent), associations, consumer organisations, as well as academics with a focus on EU competition law and notably on the motor vehicle sector. Following the principles of better regulation, the evaluation will be based on the following criteria: effectiveness, efficiency, relevance, coherence and EU added value.

## **Commission calls for contributions on the topic “Competition Policy supporting the Green Deal”**

Following a discussion in how competition policy can support the Green Deal, where EU competition commissioner Margrethe Vestager announced the launch of a public consultation on the current relationship between competition rules and sustainability policies and on possible improvements on the matter, the Commission has called for contributions on this topic.

The Commission has recognised that competition policy cannot be in the lead to make Europe green since there are dozens of more effective ways to protect the environment. However, the aim of this public consultation is to understand how competition law can better support the Green Deal.

In this context, the Commission aims to receive feedback on how can be treated vertical and horizontal agreements between undertakings pursuing the Green Deal objectives, how merger control could better contribute to protecting the Green Deal objectives and whether sustainable objectives should be taken into account in the coming consultation on the revision of State aid rules.

The deadline for sending contributions is 20 November 2020. The Commission has already announced that a conference will take place in early 2021 to bring together the different ideas.

### **The CNMC investigates the possible execution of unauthorised mergers, as well as potential antitrust practices involving the funeral insurance and funeral services markets**

The Spanish Competition and Markets Authority (“CNMC”) is investigating possible gun jumping in the funeral insurance and comprehensive funeral services sector, as well as possible previous coordination between the companies involved in it, and the reporting of incomplete, incorrect, misleading or false information to the CNMC.

In the view of the information gathered when the parties finally notified the merger, from 8 to 10 September, inspections were carried out at the headquarters of various companies in the funeral insurance and services markets. These inspections signal a return to the CNMC’s inspection activity, which has been suspended in recent months as a result of the restrictions associated with the Covid-19 outbreak.

### **The CNMC and the Catalan Competition Authority publish their joint contribution to the consultation on the White Paper on Artificial Intelligence**

The CNMC and the Catalan Competition Authority (ACCO) published its joint contribution to the Consultation on the White Paper on Artificial Intelligence launched by the Commission, in which they analysed the main competition challenges that arise with this new reality.

Both competition authorities mentioned that some of these challenges concern the proliferation of zero-price markets in the digital economy. These models transfer competition from price and quantity variables to qualitative variables relating to the service quality, which is more difficult to measure. Furthermore, both authorities draw attention to the fact that the digital sector is characterised by its high speed, which requires a rapid reaction from the competition authorities. They also highlighted the risk of collusion in algorithms, and the need of competition authorities to analyse the effect of using pricing algorithms on the behaviour of companies in the market. Other concern they have noted is the new entry barriers that may arise in connection with artificial intelligence, including access to data, given the importance they have in the functioning of algorithms.

The agencies also mentioned the risks to competition posed by companies positioned as gate-keepers, which might be tempted to favour themselves when offering a product or service in the same channel they control. In these situations, it is likely that competition authorities need to employ certain mechanisms to make the operator conduct itself in a neutral manner. In addition, they highlighted the challenges involved in the assessment of data mergers or concentrations between companies handling large volumes of data. Unlike traditional mergers where the market definition is in principle more obvious, when the operation is explained by the interest in obtaining data, it is more complicated to anticipate the multiple markets that can be affected, since data have different uses.

To face these challenges, both authorities believe that their tools need to be adapted to the digital reality. In this sense, they suggest that competition authorities could make use of artificial intelligence in order to detect anti-competitive practices. In addition, in the case of investigations, they propose to monitor the code of algorithms used by companies.

### **The CNMC fines 33 school transport companies and one association for creating a school transport cartel in Navarre**

The CNMC has fined 33 school transport companies and an association for creating a school transport cartel in the region of Navarre. According to the national authority, companies conspired to share and raise the costs of the regional School Board's tenders over a period of time from 2013 to 2018.

The CNMC has stated that during this period of time, the companies allocated the routes based on their preferences, setting up shifts and compensations to ensure workloads and prices. The companies coordinated their behaviour, so that when one company submitted a bid, no other party to the agreement did so, even though they had the means to do so. The CNMC affirms that had there not been an agreement between the parties to the cartel, the companies would have submitted bids for these tenders in order to have a better chance of obtaining a contract and would have offered competitive prices and terms.

In addition to the fines that amount to a total of 3.36 million euros (and a 15.000 fine for the association that arranged the agreement), the CNMC has reactivated the process to prevent the fined companies from bidding for public contracts, having forwarded the sanctioning decision to the Public Procurement Advisory Board of the State.

### **Cani Fernández's views on Competition policy and sustainability**

Last month, the President of the CNMC attended the virtual conference organised by the Greek competition authority "Competition Law & Sustainability", where she shared her thoughts on the subject.

First of all, she stated that it is a fact that there are no specific provisions on sustainability objectives in Spanish and EU competition law. Therefore, when competition authorities assess agreements that pursue sustainability objectives, they must do so by taking into account the general framework applicable to any competition assessment. As regards the Sustainable Development Goal 7: “Affordable and clean energy”, she has explained that even though competition policy has an essential role to play in making Europe green, it cannot replace the substantial role of regulation and green investment, which will be the real triggers of the green transition. She also believes that competition policy plays a key role in EU industry by encouraging EU companies to innovate by developing new technologies that will allow to use resources more efficiently. The CNMC President has also recalled that it is important that the EU competition framework remains appropriate in a rapidly changing world, continuously adapting to a modern green and digital economy.

Finally, she has stated that the recent announced public consultation on the improvement between sustainability policies and competition rules shows that there is still room for improvement in this relationship.

---

## Case law

**Advocate General Giovanni Pitruzzella proposes that the CJEU should annul the judgement of the General Court that found that the tax arrangements of FC Barcelona did not constitute an illegal State aid**

Spanish Law 10/1990 on sport, obliged all Spanish professional sports clubs to convert into public limited sports companies (“SLCs”), in order to promote a “more responsible management of their activity”. However, a distinction was made between the professional sports clubs: those that had obtained positive financial results in the years before the adoption of the above mentioned law could opt to continue operating in the form of sports clubs. The only professional clubs that fell within the exception were Real Madrid, Barcelona, Athletic Club de Bilbao and Osasuna, and they all made use of this possibility, which allowed them to be subject of a special rate of income tax. This rate was lower than the one applicable to SLCs.

The Commission initiated infringement proceedings against Spain because it considered that these football clubs had unduly enjoyed an advantageous tax rate of 25% for 20 years compared to the rate of 30% applicable to the other teams. It rendered a Decision in 2016, where it declared that Spain had unlawfully implemented State aid in the form of a corporation tax privilege in favour of those four football clubs. According to the institution, that regime was incompatible with the internal market and ordered Spain to discontinue the scheme and to immediately recover the aid granted from the recipients.

In first instance, the General Court annulled the Commission's Decision. It specially censured that the Commission had failed to examine properly the extent of the tax deductions for the reinvestment of extraordinary profits under the regime applicable to football clubs which it considered to be beneficiaries of State aid. The General Court also criticized that the Commission had not request sufficient information in that respect during the investigation procedure.

In its conclusions presented in case C-362/19 P, Advocate General Pitruzzella has stated that the scheme in question was an aid scheme and that the Commission could therefore merely examine the general characteristics of the scheme without having to examine each individual case in order to determine whether there was illegal State aid. Furthermore, as regards the tax deductions for the reinvestment of extraordinary profits, the Advocate General is of the opinion that those can be taken into account ex ante to determine if the scheme in question confers an advantage only if it can be known in advance that those deductions will always and systematically compensate the advantage resulting from the application of the preferential rate of taxation. If it is not possible to determine ex ante the impact of the reinvestments on the advantage granted, these will be taken into account only to determine the aid to be recovered. Pitruzzella considered that that was the case and, therefore, the Commission should not have taken the reinvestments into account when determining whether there was favourable treatment for the football club teams. The Advocate General therefore concludes that the Commission was not obliged to request additional information on the tax deductions or to demonstrate the existence of a tax advantage. He concludes by proposing to the Court to refer back the case to the General Court.