GA_P
Gómez-Acebo & Pombo
50 Aniversario

Brussels GA_P

Brussels Office

2021 September

News

Commission adopts a statement of objections in view of adopting interim measures following Illumina's acquisition of GRAIL

The European Commission ("the **Commission**") has sent a statement of objections to Illumina and GRAIL informing them that it intends to adopt interim measures. According to the Commission, these measures aim at restoring effective competition after the alleged breach of the standstill obligation that parties to a concentration have to respect. On August, the Commission opened an investigation[1] against these companies for implementing the transaction before the Commission's clearance (practice known as "gun-jumping"), following Illumina's public announcement that it had decided to complete its acquisition of GRAIL.

It would be the first time that the Commission adopts interim measures following a breach of the standstill obligation. According to the institution, Illumina's proposal to hold GRAIL separate before the Commission's final decision on the concentration is not enough to address "a number of serious shortcomings identified in that proposal".

Commission consults son prolonging the State aid Temporary Framework

The Commission has sent[2] to Member States for consultation a draft proposal to prolong the State aid Temporary Framework, set to expire on 31 December 2021 following the last amendment, until 30 June 2022. The institution also seeks to adjust the scope of the Temporary Framework by enabling, for a limited duration, forward-looking investment and solvency support measures to leverage private funds and investment in undertakings that rely on loan financing and may be more indebted after the coronavirus crisis. In total, the Commission has approved 650 State aid measures by virtue of the Temporary Framework and granted aid amounting to 3 trillion euros.

Commission consults on short-term export-credit insurance availability

The Commission has launched[3] a public consultation on the availability of private short-term export-credit insurance for exports to all countries listed as 'marketable risk countries' in the 2012 Short-term export-credit insurance Communication. Based on the results of the public consultation, the Commission will assess whether the current temporary removal of all countries from the list of 'marketable risk' countries remains justified

[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322
[2] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4948
[3] https://ec.europa.eu/competition-policy/public-consultations/2021-availability-stec_en

and, therefore, needs to be further prolonged beyond December 2021.

According to the 2012 Short-term export-credit insurance Communication, which is in force since 2013, trade within 27 EU Member States and nine OECD countries listed in its Annex with a maximum risk period of up to two years entails marketable risks and should, in principle, not be insured by the State or State supported insurers. In the context of the coronavirus outbreak and aiming at making public short-term export credit insurance more widely available, in March 2020 the Commission decided to temporarily remove all countries from the list of 'marketable risk' countries until 31 December 2020. This measure has been prolonged several times.

Commission approves award of slots at Paris-Orly airport to Vueling in the context of Air France recapitalisation

In the context of Air France's recapitalisation that took place in April 2021, the company agreed to grant 18 daily take-off and landing slots at Paris Orly airport. That airport, where Air France has significant market power, is structurally highly congested, meaning that airlines cannot get access to take-off and landing slots that they request for their operation at the airport. Air France committed to grant the above-mentioned slots in order to enable the lasting entry or expansion of a competing carrier at the airport.

A number of carriers participated in the procedure to choose the awarded competitor. The Commission was assessed by a monitoring trustee throughout the process and gave priority to airlines already operating at Paris-Orly and based on the capacity and connectivity that they would achieve making use of the slots made available by Air France. The Commission has[4] ranked Vueling first, which will be able to offer new flights as from November 2021.

CNMC fines document service providers for bid rigging

The Spanish Markets and Competition Authority ("the CNMC") opened in October 2019 formal proceedings against Bibliodoc Servicios Documentales, Pandora Gestión Documental, Lobnova and Salomé Lendínez Ramírez because it suspected that they had engaged in anticompetitive conduct in public bids for file and document management services for some public administrations (such as the Spanish Ministry of Defence, the Reina Sofía National Art Centre and the Spanish National Institute for Agricultural and Food Research and Technology).

At the end of said proceedings, the CNMC sanctioned[5] the above-mentioned companies for bid rigging. More precisely, the CNMC has found that the companies shared sensitive information and decided in advance to the public procurement procedure what prices to include in their bids. The sanctioned conduct had a duration of 3 years (from 2016 to 2019). Bibliodoc has been fined

[4] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4805
[5] https://www.cnmc.es/expedientes/s002519

with 65,254 euros, Libnova with 75,250 euros, Pandora Gestión Documental with 20,351 euros and Salomé Lendínez Ramírez with 1,000 euros.

CNMC closes agriculture machinery case with commitments

On November 2020, the CNMC decided[6] to initiate proceedings against Maquinaria Garrido SL because it suspected that it was restricting passive sales and maintaining retail-price in the company's agreements with official distributors in the Topavi trademark. The CNMC has closed now these proceedings by way of a traditional enforcement remedy[7].

The investigated company rejected the renewal of the distribution agreements that triggered the sanctioning proceedings and requested the traditional enforcement of penalties. It has committed to include in new contracts an express authorisation of passive sales outside the exclusive territory of distributors and to remove any mention of minimum resale prices. The CNMC has found that this removes its competition concerns in respect of the distribution agreements.

CNMC approves the acquisition of Funespaña's

The CNMC has approved[8] in a second phase, under certain conditions, the acquisition of all the assets of Funespaña, Mapfre Group's funeral plan provider, by Santa Lucía. The merger concerns the funeral services and funeral plans sectors.

The CNMC had identified during the phase I review a series of competition concerns. Indeed, the resulting entity would have a monopoly over the wholesale mortuary market in 157 towns, the wholesale crematorium market in 35 towns and the wholesale cemetery market in 14 towns, in addition to large shares of the wholesale mortuary market in 217 towns, the wholesale crematorium market in 51 towns and the wholesale cemetery market in 14 municipalities. In addition, the CNMC feared that there might be potential coordinated effects between Santa Lucía and Mapfre in the various lines of insurance, because of Mapfre's 25 stake in the resulting entity.

Therefore, Santa Lucía suggested a series of commitments in order to address the CNMC's concerns: (i) the CNMC must approve the wording of the response to the first call made by the next of kin, (ii) the competition authority will oversee a random sample of first calls made to the new entity during the year and (iii) the new entity must allow entry by a competitor in Valdepeñas. In addition to that, the CNMC imposed a series of terms and conditions to the parties to the transaction: (i) Mapfre must dispose of its 25% stake in the resulting entity and (ii) eliminate the clause in the shareholders' agreement whereby it undertakes to engage the resulting entity's services, (iii) and will not be able to make any appointments in the new entity. Furthermore, Santa Lucía has three months to provide entry by a competitor to Valdepeñas.

[6] https://www.cnmc.es/sites/default/files/3245902_28.pdf
[7] https://www.cnmc.es/sites/default/files/3695168_3.pdf
[8] https://www.cnmc.es/expedientes/c108619

As to the procedural particularities of this case, the CNMC conducted inspections of the companies' headquarters (which were it first inspections after the Covid-19 outbreak) and decided to add to this case C/1162/21 Albia/Jordial and C/1178/21 Elysius/Juanals.

The Portuguese Competition Authority publishes report and best practices guide on anticompetitive agreements in the labour market

The Portuguese Competition Authority has published a report and a best practices guide on anticompetitive agreements in the labour market that seek to raise awareness of the risks of entering into anticompetitive agreements.

In its report[9], the Authority has indicated that labour agreements can introduce inefficiencies by distorting the allocation of the labour input or may reduce the salary of employees. These agreements are liable to be punished with a fine of up to 10% of the infringing companies turnover and up to 10% of the annual remuneration of individuals. It has recalled that recently, it had issued, for the first time, a statement of objections for a no-poach agreement as a restrictive practice of competition, involving the Portuguese Professional Football League and 31 sports companies.

Furthermore, the Portuguese Authority has published a best practices guide[10], where it stresses that companies should not enter into agreements with other firms not to hire each other's employees and exchange commercially strategic information on recruitment and remuneration of workers. It has also recalled, that outside legitimate social dialogues and collective bargaining agreements, companies cannot enter agreements with other companies on the salaries of their employees or participate in meetings where the wage-fixing of employees is discussed. Finally, it recommends to raise workers' awareness to competition law through internal training.

Case law

The General Court dismisses Altice's action against the Commission decision imposing two fines for gun-jumping

In December 2014, Altice signed a share purchase agreement ("the SPA") to acquire PT Portugal. The transaction, which was subject to EU merger control, was notified to the Commission in February 2015 and cleared in April 2015 with commitments (subject to the divestment of Altice's business in

[9] http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Issues%20Paper_Labour%20Market%20Agreements%20and%20Competition%20Policy.pdf

Portugal at the time). However, the Commission became later aware of press reports concerning the parties to the concentration and opened an investigation to analyse whether Altice had infringed its obligation to notify the transaction prior to its implementation (Article 4(1) of the EU Merger Regulation).

The Commission found that Altice had had the possibility of exercising decisive influence or had exercised control over PT Portugal prior to the clearance decision. For example, Altice could veto the appointment of senior management of PT Portugal or its pricing policy. In fact, the Commission concluded that this decisive influence had been exercised in a number of occasions. Furthermore, the Commission noted that commercially sensitive information had been exchanged between the parties to the transaction. Therefore, the Commission fined Altice with 62 million euro for failing to notify the concentration and with 62 other million euro for failing to comply with the prohibition on implementing the transaction prior to its notification and clearance by the Commission. Altice appealed the Commission's decision before the General Court (case T-425/18[11]).

In first place, the applicant had alleged that the Commission had committed an infringement of the *non bis in idem* principle. According to the applicant, Article 4(1) (obligation to notify a concentration) and Article 14(2) (fine for infringing that obligation) of the Merger Regulation are redundant in the light of the obligation not to implement the concentration before it has been notified and cleared (Article 7(1)) and the fine applicable in the event of infringement of that obligation (Article 14(2)). The applicant argued that these articles protect the same legal interest.

The General Court affirms that Articles 4 and 7 follow autonomous objectives: to notify a concentration and prevent undertakings to implement the transaction before clearance, respectively. It also considers that these articles are different in that Article 4 contains an obligation to act and constitutes an instantaneous infringement whereas Article 7 imposes an obligation not to act and is a continuous infringement. Furthermore, an infringement of Article 4(1) entails a violation of Article 7, but the converse is not true. Since the General Court believes that both provisions protect different legal interests, the Commission has not infringed the principle of *non bis in idem*.

In the second place, the applicant argued that the pre-closing covenants contained in the SPA did not amount to an early implementation of the merger and that it did not actually exercise any decisive influence over PT Portugal prior to the transaction closing.

The General Court recalls that according to the EU Merger Regulation, a concentration takes place where a change of control on a lasting basis results from the merger of two or more previously independent undertakings. As to the question of whether the SPA led to a change of control on a lasting basis of PT Portugal, the General Court

[10] http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Best Practices_In Preventing Anticompetitive Agreements in Labour Markets.pdf

[11] https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=T-425/18&jur=T

states that the power to co-determine the structure of the senior management usually confers on the holder the power to exercise decisive influence on the commercial policy of an undertaking. Furthermore, the preparatory clause enabling Altice to intervene in PT Portugal's pricing policy required the latter to obtain written consent from the former to introduce any change in prices. According to the General Court, Altice had not proven that the covenants contained in the SPA were necessary to ensure the value of the transferred undertaking was preserved.

Finally, concerning the amount of the fine imposed on Altice, the General Court mentions that the applicant had informed the Commission, on its own initiative, of the concentration well before the SPA was signed and then sent a case-team allocation request. It considers that, taking into account these circumstances, the fine to be imposed for failing to notify (Article 4(1) of the Merger Regulation) should be reduced by 10%.

Madrid court's request for a preliminary ruling has been published

On 27 May 2021, a Companies Court of Madrid decided to stay its proceedings and to make a request for a preliminary ruling to the Court of Justice (case C-333/21). The Court's submitted questions have been published[12] in the Court of Justice's website.

First, the companies court asks whether FIFA's and UEFA's Statutes stipulating that a third-party setting up a new pan-European club competition must seek their prior approval and any similar provisions in the articles of association of member associations and national leagues constitute a breach of Article 102 TFEU, taking into account the possible conflict of interests affecting FIFA and UEFA. Second, the court asks whether such a prior approval requested by UEFA and FIFA breaches Article 101 TFEU. In third place, it queries whether Articles 101 and/or 102 TFEU must be interpreted as prohibiting FIFA, UEFA, their member associations and/or national leagues, from threatening to adopt sanctions against clubs participating in the Super League and/or their players. Fourthly, the court seeks to obtain guidance on whether Articles 67 and 68 of the FIFA Statutes are incompatible with Articles 101 and/or 102 TFEU by identifying UEFA and its national member associations as original owners of all of the rights emanating from competitions (and thus depriving national clubs from those rights). In fifth place, the court asks whether restrictions contained in the rules of FIFA and UEFA could qualify for an exemption from antitrust enforcement and in sixth place it asks whether the request of prior approval for the establishment of a pan-European club competition constitutes a restriction to Articles 45 TFEU (free movement of workers), 49 TFEU (freedom of establishment), 56 TFEU (free movement of services) and/or 63 TFEU (free movement of capital).

[12] https://curia.europa.eu/juris/document/document.jsf?text=&docid=246272&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=768431

For further information please visit our website at www.ga-p.com or send us an e-mail to: info@ga-p.com.