GA_P

Gómez-Acebo & Pombo

Brussels GA_P

Brussels Office

2022 September

News

Commission prohibits the acquisition of Grail by Ilumina

On September 6, the European Commission ("the Commission") prohibited the acquisition of Grail (an undertaking using new growing systems to develop cancer detection tests) by Illumina (a supplier of new growing systems for genetic and genomic analysis), because it considered that (i) the merger would have stifled innovation and reduced choice in the emerging market for blood-based cancer screening tests and (ii) the remedies proposed by the parties did not address the Commission's concerns. The Commission believes that the merger would have enabled and incentivised Illumina to foreclose Grail's rivals, who are dependent on Illumina's technology, from access to an essential input they need to develop and market their own tests. Indeed, (i) Grail and its rivals rely on Illumina's systems to develop and run their cancer detection tests and cannot create alternatives to Illumina in the short term and (ii) Illumina's systems sales to Grail's rivals represent a small proportion of its sales and profits, whereas cancer detection tests are expected to rapidly expand and become very lucrative. Illumina has **announced** that it intends to appeal the Commission's decision before the General Court of the European Union ("the General Court").

Commission approves up to €5.2 billion of public support by thirteen Member States for the second Important Project of Common European Interest in the hydrogen value chain

The Commission has approved an Important Project of Common European Interest to support research and innovation, first industrial deployment and construction of relevant infrastructure in the hydrogen value chain ("IPCEI Hy2Use"). The project was prepared and notified by a total of 13 Member States: Austria, Belgium, Denmark, Finland, France, Greece, Italy, Netherlands, Poland, Portugal, Slovakia, Spain and Sweden. The project complements the first IPCEI on the hydrogen value chain ("Hy2Tech"), which was approved by the Commission last July.

The IPCEI Hy2Use aims at supporting: (i) the construction of hydrogen-related infrastructure and (ii) the development of innovative and more sustainable technologies for the integration of hydrogen into the industrial processes of multiple sectors. The notifying Member States will provide up to EUR 5.2 billion in public funding, which is expected to unlock additional EUR 7 billion in private investments.

Commission publishes market study on hotels' distribution practices

On 26 August 2022, the Commission **published** the results of a market study on hotel distribution practices in the EU for the period between 2017 and 2021 ("the Study"). The Study focused on a representative sample of six Member

States (Austria, Belgium, Cyprus, Spain, Poland and Sweden) and aimed at providing the Commission with up-to-date facts on the sale and marketing of hotel accommodation in the EU and the impact of national laws prohibiting the use of parity clauses by hotel booking platforms.

The results of the Study do not indicate any major change in the competitive situation in the hotel distribution sector in the EU compared to 2016 (when the European Competition Network published its results of a monitoring exercise). According to the Study, (i) direct bookings (both online and offline) account for the highest share of independent hotels' sales (48%) and online travel agents ("OTAs") account for 44% of sales, (ii) micro and small hotels sell more through OTAs than medium-sized hotels, (iii) the majority of independent hotels use more than one OTA and (iv) the majority of independent hotels consider that the use of OTAs increases their total volume of bookings. The Study notes that it appears that some OTAs use commercial measures (for instance, improved or reduced visibility on the OTA website) to incentivise hotels to give them the best room prices and conditions. Finally, it observes that the national laws banning the use of wide and narrow OTA parity clauses in Austria and Belgium in the hotel sector do not appear to be associated with a greater or lesser use of OTAs by hotels.

Commission adopts Guidelines in collective agreements by solo self-employed people

By virtue of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), agreements between undertakings that restrict competition within the internal market are prohibited. Furthermore, under EU competition law, self-employed persons are considered to be "undertakings" since that concept convers any entity engaged in an economic activity, regardless of its legal status, and the way in which it is financed. Therefore, Article 101 TFEU may be applied to self-employed persons. However, the Court of Justice of the European Union ("the Court") has established that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers and necessary for the improvement of working conditions (judgement of the Court in case C-67/96, Albany, paragraph 59). Therefore, collective agreements intended, by their very nature and purpose, to improve working conditions fall outside the scope of Article 101 TFEU.

The Commission has adopted on 29 September 2022 **guidelines** on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons ("the Guidelines"), in which it explains when it considers that self-employed workers do not infringe EU competition rules when they come together to collectively bargain for better working conditions. Among others, the Commission clarifies in the Guidelines that (i) Article 101 TFEU does not apply to those self-employed workers who are in a situation similar to a salaried worker, that is, working exclusively or predominantly for a single company, with salaried co-workers and providing services for or through a digital work platform, and (ii) it will not intervene against collective agreements of self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparties.

Commission seeks feedback on State aid rules for assessing State guarantees on loans

The Commission has launched an evaluation of the **Commission Notice** on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ('Guarantee Notice'), which explains how to calculate the aid amount in a State guarantee. First, it will carry out a public consultation to gather views on the functioning of the Guarantee Notice from all interested parties (including individuals or academia). Then, (i) a third party expert will seek feedback from interested parties directly involved in or affected by the provision of State guarantees or with relevant expertise in the field of credit risk, (ii) the Commission will request information from Member States on the use of the Guarantee Notice and (iii) finally, it will launch a Call for Evidence seeking feedback on the main aims of the evaluation, its scope and context. According to the Commission, since the last review in 2008 of the Guarantee Notice, capital requirements have been increased, market conditions and risk management practices have evolved, and Member States have developed several methodologies for granting State guarantees. The Commission aims at publishing the results of the evaluation in the first half of 2024.

Commission publishes state aid scorecard for 2020

Last 6 September 2022, the Commission **published** the 2021 State Aid Scoreboard, which analyses how State aid was spent in 2020 by Member States and the United Kingdom. It shows that Member States and the United Kingdom spent EUR 384.33 million (about 2.43% of their combined Gross Domestic Product in 2020) on State aid in 2021, EUR 227.97 billion were spent on Covid-19 measures. The report also indicates that the spending in 2020 on state aid for non-crisis objectives remained within pre-pandemic levels, with the largest expenditures being environmental protection and energy saving, regional development, as well as research, development and innovation. Furthermore, the report informs that Member States are increasingly using the General Block Exemption Regulation ('GBER'), which allows Member States to grant undertakings certain types of State aid that fulfil some conditions without prior notification to the Commission, as well as other sectoral block exemptions (i.e., Agricultural Block Exemption Regulation and Fishery Block Exemption Regulation). More precisely, in 2020, 79% of new State aid measures were implemented under the Block Exemption Regulations. As regards Spain, around 37.1% State aid spending was directed towards "regional development", while 34.7% to "remedy for a serious disturbance in the economy", 6.1% towards "promotion of export and internationalisation" and 22.1% to "other policy objectives". Furthermore, the most widely GBER measure is "regional aid – investment aid" (65.4%), followed by "social aid for transport for resident of remote regions" (11.1%), "additional costs in outermost regions" (6.3%) and experimental development (3.3%). In addition, Spain used most "direct grant / interest rate subsidy" as State aid form, and then "guarantees" and "tax advantage". Finally, the country expended in 2020 EUR

5681 million in Covid-19-related State aid (i.e., 34.7% of the total State expenditure).

Commission publishes second foreign direct investment screening annual report

The Commission published on 1 September 2022 its second annual **report** regarding the application of the EU Foreign Direct Investment ("FDI") Regulation (Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union) and developments in national FDI screening mechanisms ("the Report"). Some of the main findings in this Report are that (i) Global FDI inflows reached EUR 1.5 trillion in 2021, outperforming by 52% the values observed in 2020, (ii) the FDI inflows reached EUR 117 billion in 2021, with a decrease of 31% compared to 2020, (iii) in 2021, there were over 4.000 transactions done by foreign investors in the EU, (iv) in 26% of the cases, foreign investors used their existing EU subsidiaries to invest in the EU and (v) information and communications technology was the sector most affected by the FDI (with the 30% of foreign acquisition), followed by foreign greenfield investments, and wholesale and retail. The Report indicates that (i) Spain has introduced some legislative developments in 2021: it extended until 31st December 2022 the FDI authorisation regime for certain investments in specific sectors made by investors based in other Member States or in EFTA countries and (ii) the country is preparing in parallel a new FDI screening regulation.

Commission upgrades online leniency platform to grant companies online access to leniency and settlement documents

The "eLeniency" Platform was introduced in 2019 as a tool to allow companies and their legal representatives to submit statements and documents online as part of part of leniency, settlement and -cartel cooperation proceedings. However, access to documents subject to particular protection (i.e., corporate statements) was only possible at the Commission's premises. This will change with the new version of eLeniency, which will allow the Commission to easily display documents online. The platform provides the same protection in terms of confidentiality and legal protection to the parties as the traditional procedure at the Commission's physical premises. The use of eLeniency is still voluntary: if they wish to make use of the oral procedure to make statements or receive access to information physically at the Commission's premises, they can do so.

The CNMC fines Telefónica with EUR 5 million for failing to comply with part of the reporting obligations it undertook when it acquired DTS

The Spanish Competition and Markets Authority ("the CNMC") authorised in 2015 the Telefónica / DTS merger, subject to commitments. Among others, Telefónica undertook to (i) make available to operators an offer of premium TV channels at prices that would allow its competitors to replicate its offers and be competitive and (ii) provide the CNMC with regular information on the offers launched in the market. This obligation was extended in 2020 for another three years. The CNMC initiated disciplinary proceedings against Telefónica in 2021 because it considered that there were indicators of non-compliance with Telefónica's obligation to report information between May 2015 and June 2020. Since the CNMC found that Telefónica had infringed Article 62(4)(c) of the Spanish Competition Act (which sanctions failures to comply with the commitments of a merger), it has fined it with EUR 5 million.

The CNMC extends its investigation to new companies for possible manipulation of tenders for the supply of basic foodstuffs to communities dependent on public bodies

The CNMC has carried out on 14 and 15 September a series of inspections at the headquarters of some companies, in relation with the investigation initiated last March on a possible manipulation of tenders and coordination for the supply of basic foodstuffs to communities dependent on public bodies. This practice might be prohibited under Article 1 of the Spanish Competition Act.

CNMC submits for public consultation the second draft of the Guide on the quantification of damages for antitrust infringements

The CNMC has launched a public consultation on the second draft of the **Guide** on the quantification of damages for antitrust infringements, which includes part of the contributions received in the first consultation and in several working sessions. The aim of the Guide is to assist judges and courts, and facilitate their analysis of quantifications of damages resulting from infringements of competition law, helping them to determine which methods are more reliable and appropriate for each specific case. Interested parties can submit their observations on the draft until October 20 through **dp.sae@cnmc.es**.

ACCO opens sanctioning proceedings against different companies supplying signalling and communication systems incorporated into the Barcelona subway network

The Catalan Competition Authority ("ACCO") has opened sanctioning proceedings against SIEMENS, S.A., SIEMENS RAIL AUTOMATION, S.A. and COMSA INSTALACIONES Y SISTEMAS INDUSTRIALES, S.A. because it considers that these undertakings may have allegedly coordinated their behavior in tenders related to lines 9 and 10 of the Barcelona subway since at least 2017.

ACCO and the Anti-Fraud Office of Catalonia sign a collaboration protocol for the next four years

The ACCO and the Anti-Fraud Office of Catalonia have signed a protocol for the next four years. These entities will collaborate in the following areas: the exchange of information, development and use of IT tools and solutions for the use of their functions, promotion of training and dissemination activities in areas where synergies occur and monitoring of the Catalan Strategy for the improvement of public procurement and lastly, they have undertaken to provide each other with support in the exercise of their functions.

Case law

The General Court largely confirms Commission's decision on Google Android case

On 18 July 2018, the Commission adopted a decision in which it fined Google with EUR 4.34 billion because it found that the undertaking had abused its dominant position by imposing contractual restrictions on manufacturers of mobile devices and on mobile network operators. The restrictions found by the Commission were the following: (i) Google had required manufacturers to pre-install the Google Search app and Chrome, as a condition for licensing Google's app store, (ii) the undertaking made payments (a percentage of its advertising revenue) to mobile network operators dependent on the condition that they agree not to pre-install a competing general search service (abuse relating to the portfolio-based revenue share agreements) (iii) Google had prevented manufacturers from preinstalling Google apps from selling a smart mobile device running alternative versions of Android not approved by Google. Google appealed the Commission's decision before the General Court.

In its judgement of 14 September 2022 (case T-604/18), the General Court approves the Commission's definition of the relevant markets: (i) the worldwide market (excluding China) for the licensing of smart mobile device operating systems, (ii) the worldwide market (excluding China) for Android app stores, (iii) various national markets, within the EEA, for the provision of general search engines, which are distinct but interconnected markets. The General Court also finds that the Commission was right when considering that Google is dominant in those markets. Furthermore, the General Court believes that Google's behaviour was abusive. However, the General Court rejects the abuse found by the Commission relating to Google making payments to mobile network operators dependent on the condition that they exclusively pre-install Google Chrome, because (i) the Commission found that the agreements covered a "significant part" of the national markets for general search services without being supported by the evidence set out in the decision and (ii) the as-efficient competitor test carried out by the Commission contained several errors of reasoning (for instance, there were errors in the estimate of the costs attributable to such a competitor). Furthermore, the General Court considers that the Commission infringed Google's procedural rights (for instance, the undertaking was not granted a hearing to discuss the as-efficient competitor test). Therefore, the General Court annuls the fine of the Commission in so far as it concludes that Google committed an abuse concerning the portfolio-based revenue share agreements (the overall validity of the rest of the Commission's decision is not affected) and considers that it is appropriate to vary the fine of the contested decision and fixes it at EUR 4.125.000.000.