G A _ P
Gómez-Acebo & Pombo | 50 Aniversario

January | 2021

Brussels G A _ P Newsletter

Brussels Office

Design: José Á. Rodríguez and Ángela Brea
Layout: Rosana Sancho Muñoz • Translation and adaptation: John Woodger

Contents

News

Commission prolongs and further expands Temporary Framework to support the economy

On 19 March 2020, the European Commission approved a Temporary State Aid Framework that aimed to support companies affected by the coronavirus outbreak. The Commission has been successively amending this framework in order to incorporate more support measures or to extend the duration of the measures.

On 28 January 2021, the European Commission approved the fifth amendment to the Temporary Framework. The institution has stated that, due to the persistence of the pandemic, it has decided to extend the support measures that would otherwise have expired on 30 June 2021 (except for recapitalisation measures, which could be granted until 30 September 2021) until 31 December 2021.

Furthermore, the European Commission has increased the maximum limits for certain aid. In the case of aid granted for companies where their fixed costs are not covered by their revenues, the limit is increased to EUR 10 million per company (previously it was EUR 3 million). Other limits are doubled: companies active in the primary production of agricultural products will be eligible for up to EUR 225,000; companies operating in the fisheries and aquaculture sector for up to EUR 270,000; and all other companies for up to EUR 1,9 million. The European Commission also authorises Member States to convert, until 31 December 2022, reimbursable instruments granted under the Temporary Framework into other forms of aid. The conversion may not in principle exceed the new aid limits.

Commission opens formal investigation into possible trade restrictions by Mondelēz

The Commission has opened a formal investigation into Mondelez, which is one of the largest producers of chocolate, biscuits and coffee in the European Union. The institution has concerns on the parallel trade of products of Mondelez through agreements and unilateral practices.

In particular, the Commission is going to investigate whether it has limited the sales territories within the European Union through agreements that determine in which Member State a trader can or cannot sell the products, or that restrict passive sales. In addition, it is going examine whether the company has influenced the price, languages used on packaging or the quantity supplied to prevent the trade flows within the Union from lowering the final price of its biscuits, chocolates and coffees in Member States where the cost of living is higher.

The Commission has already been looking into these potential illegal practices for some time, and has stated that it carried out unannounced inspections at Mondelez in November 2019. It has also announced that it will carry out its in-depth investigation as a matter of priority.

Commission fines Valve and five publishers of PC video games EUR 7.8 million for geo-blocking practices

The Commission initiated in 2017 an investigation into five video games publishers and Valve. The latter operates online video gaming Steam, and the former had granted Valve a non-exclusive licence to exploit specific games worldwide. The publishers obtained from Valve a licence for the use of Steam activation keys for distribution of those games outside Steam. Then they provided those keys to their distributors for sale and distribution of the games in a number of EU Member States. As a result, users located outside those countries were prevented from activating a given game with Steam activation keys. The Commission found that the companies had engaged in geo-blocking practices that violate EU competition law.

The fines imposed on Bandai Namco, Capcom, Focus Home Interactive, Koch Media and ZeniMax Media, that amounted to more than EUR 6 million, have been reduced by 10-15% due to their cooperation with the Commission. Valve chose not to cooperate with the institution and was fined over EUR 1.6 million under the ordinary antitrust procedure. It has announced that it is going to appeal the sanction.

Commission approves EUR 2.9 billion public support by twelve Member States for a pan-European research and innovation project along the entire battery value chain

Austria, Belgium, Croatia, Finland, France, Germany, Greece, Italy, Poland, Slovakia, Spain and Sweden jointly prepared and notified to the Commission the project “European Battery Innovation”. The Commission has authorised the project on the basis of the Communication of Important Projects of Common European Interest, which enables Member States to intervene through public support when private initiatives supporting breakthrough innovation fail to materialise because of the significant risks such projects entail.

The notified project covers the entire battery value chain from extraction of raw materials, through design and manufacturing of battery cells and packs, to recycling and disposal in a circular economy. Notifying Member States expect the project to contribute to the development of a whole set of new technological breakthroughs, including different cell chemistries and novel production processes, and other innovations in the battery value chain. In particular, the Commission has considered that the project meets the requirements set by EU competition law, inasmuch as (i) it contributes to a common objective, (ii) it aims at developing technologies and processes that go beyond current technology, (iii) public support is necessary to provide incentives to companies to invest in the project, (iv) aid to individual companies is limited to what is necessary, proportionate and does not unduly distort competition and (v) the results of the project will be widely shared by participating companies.

Commission invites comments to inception impact assessment on scope of application of EU competition law to collective bargaining agreements for the self-employed

The European Commission has published an inception impact assessment as part of the process that aims at ensuring that EU competition rules do not stand in the way of collective bargaining for those who need it. Digitisation is profoundly affecting the way people work, creating new opportunities also in the labour markets. Evidence shows for instance that a growing number of individuals engage in platform work. However, digitisation can also create challenges for individuals and put pressure on working conditions. These challenges are also present in certain forms of self-employment outside the platform economy.

European competition rules do not apply to collective bargaining by workers but collective bargaining by self-employed persons considered as “undertakings” could be caught by competition rules. Whilst it is not for competition policy to address the social challenges faced by vulnerable self-employed workers, EU competition rules should not be an obstacle to collective negotiations or agreements that aim at improving the working conditions of these individuals. In the inception impact assessment, the Commission has set out initial options to clarify that, provided that certain conditions are met, working conditions can be improved through collective agreements not only for employees but also for those self-employed persons who need protection, in line with EU competition rules. The Commission proposes to assess these different options through an impact assessment. The published inception impact assessment is an opportunity for the public and for all relevant stakeholders to comment on the form and scope of the initiative. Stakeholders are invited to provide input by 03/02/2021. A more detailed public consultation, based on a questionnaire, will take place during the first quarter of 2021.

The CNMC fines six companies for altering the solid fuels trading market

The CNMC has fined six companies that market different types of solid fuels for taking part in three cartels that are prohibited by Article 1 of the Competition Act and Article 101 of the Treaty on the Functioning of the European Union. Six executives have also been fined by the agency.

The practices that have been sanctioned by the CNMC have taken place from at least 1999 to 2018. During that period of time, the companies divided the market and fixed the final prices of products that the agency has qualified as essential for various industries in Spain. In addition to that, the fined companies have exchanged sensitive business information with one another through emails, calls, meetings and by other means.

The total fines amount to EUR 3.5 million, and the sanctioned companies can appeal the CNMC's decision within two months at court.

The CNMC receives new complaints involving the terms of ICO Covid loans

The CNMC set up a complaints inbox in order to centralise the complaints from citizens on the application rules during the pandemic. The financial sector has generated the most inquiries and as a result of these and other stories published in the media, the CNMC initiated preliminary proceedings. More particularly, the CNMC is analysing (i) the cross-selling of products when marketing ICO Covid loans, (ii) the use of said loans as a mechanism to restructure pre-existing financial products and (iii) the requirement to loan recipients to pay upfront fees before the funds associated with the loans are disbursed.

It has also announced that given the particular economic and social crisis provoked by the Covid-19 outbreak and the possible granting of new loans of this nature or the extension of existing loan programmes, it will be "especially vigilant" and will thus continue to require the relevant information from the financial institutions affected by the investigated practice in order to ascertain whether their actions are infringing competition law.

The CNMC publishes its annual State aid report

The CNMC has recently published its annual State aid report, which concerns the State aid granted to Spain in 2018, the latest year for which data are available. The CNMC notes that the aid granted represented 0.39% of national GDP in 2018, up from 0.37% of GDP in 2017. In terms of impact of the State aid on the GDP of Member States, the CNMC has drawn attention to the fact that Spain tends to be among the Member States with the lowest volume of State aid granted, together with Ireland, the United Kingdom, Italy and the Netherlands. The increase of aid granted is mainly due to horizontal aid, i.e. aid that is not restricted to specific economic sectors. The resources have been allocated mainly to aid individual consumers (e.g. aid to non-mainland residents) and not so much, compared to the EU average, to promoting the green transition.

The report also briefly summarises the main actions carried out by the CNMC in relation to State aid. In particular, it has done reports on aid for the deployment of new generation broadband in different regions in Spain, on telecommunications and energy regulations and on Market Unity regulation.

Finally, the report contains an annex that explains the Temporary State Aid Framework in order to support companies affected by the Covid-19 outbreak, where the CNMC details which Spanish measures have been approved and what are the objectives pursued by them.

The CNMC opens a public consultation on the trade and wholesale distribution of medicines in pharmacies

The CNMC is conducting a report on the conditions of competition in the sector of trade and wholesale of medicines, which is part of the Strategic Action of the 2020 Action Plan: "Advancing in the preparation of reports in sectors that directly affect the welfare of citizens, with an emphasis on the most vulnerable groups". Interested stakeholders can participate in the public consultation open by the CNMC on the trade and wholesale distribution of medicines in pharmacies from 13 January 2021 until 12 February 2021.

The report focuses on an activity that is much regulated in Spain and in which State intervention is based on principles such as the special protection of people's health, the existence of market failures in the sector, the importance of the sector in the economy and the impact of pharmaceutical services on public accounts. While the CNMC recognises the necessary protection of the public interest, it states that it is also necessary to defend another general interest consisting of the functioning of the market, which should promote a correct level of effective competition. In addition, the CNMC believes that the regulation should comply with the principles of necessity and proportionality.

The CNMC publishes public consultations on the Strategic Plan and Action Plan

The CNMC has opened a public consultation until 22 February 2021 on its proposed strategy for action for the six next years (Strategic Plan, 2021-2026) and the actions planned for the next two years (Action Plan 2021-2022). The CNMC has set as its priorities the protection of consumers, the digitalisation of all the sectors it oversees and the ecological transition.

The CNMC has indicated that it intends to closely monitor all production sectors, with a special focus on the digital sector, and others affected by the Covid-19 outbreak (pharmaceuticals, insurance, funeral services and finance). It will also focus on detecting possible fraudulent practices in public procurement. With regard to ecological transition, the CNMC believes that this will be reflected in the liberalisation of the railway sector in Spain, which will culminate in the coming months.

Case law

The Court of Justice rules that cartel involving submission of rigged bids ends when the contract is signed

Following a leniency application made by Empower, the Finish competition authority initiated an investigation regarding a cartel in a tender competition on construction works for a transmission line between Keminmaa and Petäjäskoski in Northern Finland. The Finish competition authority considered in 2014 that Eltel, the company that submitted the winning bid, had entered into bid-rigging contacts with another company before submitting the offer. Therefore, the competition authority proposed the Market Court Markkinaoikeus to confirm the cartel findings and to impose a EUR 35 million fine. Said court rejected the request on the grounds that the competition authority had only proven that the cartel functioned until 2007, and since Finland has a five-year limitation period for competition cases, the national competition's decision was time-barred. The competition authority appealed this decision before the Supreme Administrative Court of Finland, which decided to stay proceedings and to refer a question to the Court of Justice of the European Union for a preliminary ruling.

The Court considers that Eltel's participation in the cartel cannot be extended beyond the date in which the essential characteristics of the tender were determined, in particular concerning the global price for the works. Therefore, according to the Court, an infringement of Article 101 TFEU lasts as long as the restriction of competition resulting from it remains. In bid-rigging infringements concerning a public tender, the restrictive competition effects caused by the cartel disappear, generally, at the moment in which the essential characteristics of the procurement are determined, usually with the signature of a contract between the awarded entity and the contracting authority. Indeed, according to the Court, the signature of the contract is the last moment in which the contracting authority was deprived of the possibility of obtaining goods or services under normal market conditions.

The Court of Justice extends the presumption of decisive influence

Last 27 January, the Court of Justice gave an important judgment on presumptions in EU competition law. There is a rebuttable presumption in competition law according to which the conduct of a subsidiary can be attributed to its parent company where the subsidiary does not act independently on the market. In particular, the European Commission applies this presumption in cases where the parent company holds all or almost all the capital of the subsidiary.

The facts of the case concerned Goldman Sachs, which is an investment company and was indirectly the parent company from 29 July 2005 to 28 January 2009 (though GS Capital Partners V funds) of Prysmian SpA and its subsidiary Prysmian CS. The latter two companies took part in a cartel for submarine power cables and the Commission fined them both, and Goldman Sachs by the virtue of the presumption of the exercise of decisive influence.

Goldman Sachs appealed the Commission Decision before the General Court, which agreed with the European Commission and held that where the parent company holds all the voting rights of its subsidiaries, as almost all their shares, it exercises decisive influence over the conduct of its subsidiaries. Goldman Sachs considered that this presumption only applies in cases where a company holds almost all the capital of its subsidiary and not where it holds the its voting rights. Therefore, it appealed the judgement before the Court of Justice.

In its judgement in case C-595/18P, the Court of Justice has dismissed the company's appeal. The Court of Justice has stated that the basis of the presumption is the degree of control of the parent company over its subsidiary, and not the mere holding of the subsidiary's capital. Thus, a parent company holding all the voting rights attached to the shares of its subsidiary is in a comparable situation to a company holding all the subsidiary's capital, so that it can influence the subsidiary's economic and commercial strategy.