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News

The Commission opens investigation into possible anticompetitive conduct of Facebook

The European Commission (hereinafter, “the Commission”) announced last 4 June that it has opened a formal investigation against Facebook. The institution fears that the platform might have used advertising data gathered from advertisers in order to compete with them in markets where Facebook is active such as classified ads. The investigation will also assess whether Facebook ties its online classified ads service “Facebook Marketplace” to its social network.

The Commission has concerns that Facebook may be distorting competition through the use of the data obtained from competing providers in the context of their advertising on Facebook’s social network, to help Facebook Marketplace outcompete them. By this way, Facebook might be receiving receive precise information on users’ preferences and use such data in order to adapt Facebook Marketplace. The Commission will also examine whether the way Facebook Marketplace is placed in the social network constitutes a form of tying which gives it an advantage in reaching customers and forecloses competing online classified ads services.

The UK Competition and Markets Authority (“the CMA”) announced¹ as well that it is investigating Facebook’s use of data, assessing whether Facebook has gained an unfair advantage over competitors in providing services for online classified ads and online dating, through how it gathers and uses certain data. Both the CMA and the Commission will investigate the same behaviour of the same company at the same time. This is the first time that this happens since the entry into force of Brexit.

Commission opens investigation into Google for restricting access to user data for advertising purposes

The Commission announced last 22 June that it has opened a formal investigation into Google for favouring its own online display advertising technology services. The institution fears that Google may be distorting competition by restricting access by third parties to user data for advertising purposes on websites and apps, while reserving such data for its own use.

¹ <https://www.gov.uk/government/news/cma-investigates-facebook-s-use-of-ad-data>

² <https://www.autoritedelaconurrence.fr/en/article/autorite-de-la-concurrence-hands-out-eu220-millions-fine-google-favouring-its-own-services>

The investigation will focus on display advertising where Google offers a number of services both to advertisers and publishers, such as Display & Video 360 (DV360) and/or Google Ads to purchase online display advertisements on YouTube. In addition, the Commission will examine the obligation to use Google Ad Manager to serve online display advertisements on YouTube, and potential restrictions placed by Google on the way in which services competing with Google Ad Manager are able to serve online display advertisements on YouTube, as well as the restrictions placed by Google on the ability of third parties, such as advertisers, publishers or competing online display advertising intermediaries, to access data about user identity or user behaviour which is available to Google's own advertising intermediation services, including the Doubleclick ID. Finally, the Commission will examine Google's announced plans to prohibit the placement of third party 'cookies' on Chrome and replace them with the 'Privacy Sandbox' set of tools, including the effects on online display advertising and online display advertising intermediation markets, and Google's announced plans to stop making the advertising identifier available to third parties on Android smart mobile devices when a user opts out of personalised advertising, and the effects on online display advertising and online display advertising intermediation markets.

In 2017, the Commission fined Google with €2.42 billion for giving advantage to its own

comparison shopping service; in 2018, the institution sanctioned Google with a fine of € 4.34 billion for having imposed restrictions on Android device manufacturers and mobile network operators to strengthen its dominant position in general internet search and in 2019, the Commission fined Google with €1.49 billion for having imposed restrictive clauses in contracts with third parties websites that avoided that Google's competitors placed their ads on these websites. Furthermore, last 7 June the French Competition Authority announced² that it has sanctioned Google for favouring its own services in the online advertising sector.

National competition authorities urge Commission to share DMA enforcement with national agencies

The European Competition Network has published a joint paper³ by the heads of the national competition authorities of the European Union on the DMA proposal. The paper welcomes the DMA as an additional powerful tool that will help to address ex ante some of the most harmful behaviour of gatekeepers in the digital market. It also notes that the DMA is built on the evidence provided by competition law cases of various European competition authorities. In order to ensure effective enforceability of the DMA from the start, the paper stresses that it is essential to make full use of the know-how and resources of the nation-

³ <https://www.autoritedelaconurrence.fr/sites/default/files/DMA%20-%20Joint%20EU%20NCAs%20paper.pdf>

al competition agencies. It also points out that the way forward to ensure an effective implementation of the DMA should include the primary application of the DMA by the Commission, a complementary possibility of enforcement of the DMA by national competition authorities and the establishment of a mechanism for close coordination and cooperation between these agencies, as well as with national courts implementing both the DMA and EU and national competition law.

According to the paper, it is reasonable to assume that national competition authorities will be well placed to enforce the DMA when a potential infringement has a substantial direct actual or foreseeable effect within a limited number of Member States, which is likely to happen with respect to some of the activities or services provided by gatekeepers. Furthermore, cooperation is necessary in order to ensure that DMA, EU and national competition law will be applied in a coherent manner. The possible joint application of the DMA by the Commission and national competition authorities would not put into question the coherent application of the instrument throughout the Union, since this working approach already exists with competition law. The paper states that national competition authorities should be given the opportunity to initiate or enforce proceedings or carry out certain investigative actions at the request of the Commission when they are well placed to deal with the case.

Commission publishes initial findings of consumer Internet of Things sector inquiry

The Commission has published the preliminary results of its competition sector inquiry into markets for consumer Internet of Things (IoT) related products and services in the European Union. During the inquiry that was launched on 16 July 2020, the Commission has gathered information from over 200 companies of different sizes, which have shared with the institution more than 1000 agreements.

Most of respondents to the inquiry have indicated that the main barriers to entry or expansion are the cost of technology investment and the competitive situation, especially in the market for voice assistants. A considerable number of respondents has reported difficulties in competing with vertically integrated companies that have built their own ecosystems within and beyond the consumer IoT sector (e.g. Google, Amazon or Apple). They stated that since these operators provide the most common smart and mobile device operating systems as well as the leading voice assistants, they determine the processes for integrating smart devices and services in a consumer IoT system. The respondents also claimed that there might be some issues concerning certain exclusivity and tying practices in relation to voice assistants, as well as practices limiting the possibility to use different voice assistants on the same smart device. Furthermore, the report analyses the position of voice assistants as intermediaries between users and smart devices or consumer IoT services is key in the generation and collection of data, which would allow the former to control user relationships. The access of large amounts of data, according to respondents, would allow voice assistants the chance to leverage more easily into adjacent markets.

The preliminary results will now be subject to a public consultation until 1 September 2021. The Commission aims to publish the Final Report in the first half of 2022. The Commission has announced that the final report will help it for its future enforcement and regulatory activity, including its proposal for the Digital Markets Act.

Commission confirms that Spain has to recover aid from certain digital terrestrial operators

In 2013, the Commission found that the aid received by terrestrial operators between 2005 and 2008 for the digitalization and extension of the terrestrial television network in remote areas of Spain was incompatible with EU rules on State aid. The aid aimed at helping the transition to digital terrestrial television in remote areas in Spain, covering around 2.5% of the population. However, in 2017 the Court of Justice of the European Union (“the Court of Justice”) annulled the Commission’s findings because it lacked adequate reasoning as to the selectivity of the measure.

After the Court of Justice’s annulment, the Commission carried out an additional investigation during which it re-analysed the selectivity of the Spanish measure, taking into account new evidence submitted by Spain and some beneficiaries. The institution concluded that the public support gives a selective advantage to the beneficiaries and that it fulfils the conditions in order to qualify as State aid. Being the aid incompatible, Spain

has to recover it from the beneficiaries. The new Commission’s decision will be published on the State aid register of the institution.

Commission invites comments on draft climate, energy and environmental state aid guidelines

The Commission has launched a consultation on the proposed revision of the Guidelines on State aid for environmental protection and energy until 2 August 2021. The institution has found that overall the rules are fit for purpose but that some adjustments might be needed. In particular, the preliminary Commission’s assessment showed that the scope of application of the guidelines needs to be extended in order to include areas as clean mobility and decarbonisation. Furthermore, the guidelines need to be aligned with the European Green Deal.

The Commission is also considering the introduction of a simplified assessment of cross-cutting measures under a single section of the guidelines and to eliminate the requirement for individual notifications of large green projects within aid schemes previously approved. The Commission also wants to introduce mechanisms to ensure that the aid is effectively directed where it is necessary to improve climate and environmental protection, is limited to what is needed to achieve the environmental goals and does not distort competition or the integrity of the internal market.

Commission invites comments on the impact assessment of R&D horizontal block exemption rules

The Commission is seeking feedback on the inception impact assessment concerning the Horizontal Block Exemption Regulations which exempt certain research and development and specialisation agreements from the prohibition of anticompetitive agreements between companies.

Among others, in the impact assessment, the Commission considered the potential introduction of a specific category of research and development agreements covered by the exemption where such agreements are concluded by SMEs. It also assessed the addition of further clarifications to the definition of competing undertakings where research institutes are involved in such agreements. Furthermore, the Commission considered widening the scope of the specialisation block exemption regulation by (i) expanding the definition of unilateral specialisation (agreements whereby one party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party) in order to include more parties or (ii) verifying whether horizontal subcontracting agreements with a view to expanding production in general would meet the requirements of Article 101(3) TFEU.

Air Europa / IAG merger referred to phase 2 investigation

The Commission has opened an in-depth investigation to assess the proposed acquisition of Air

Europa by IAG, in order to address its concerns that the operation may reduce competition in the markets for passenger air transport services on Spanish domestic routes and on international routes to and from Spain. IAG and Air Europa are respectively the first and third largest providers of scheduled passenger air transport services in Spain.

The Commission's preliminary market investigation revealed that the proposed transaction could significantly reduce competition on 70 origin and destination city pairs within and to/from Spain, on which both airlines offer direct services. On some routes, IAG and Air Europa are the only airlines operating flights. Furthermore, the Commission has concerns on the incidence of the operation on routes on which airlines rely on Air Europa's domestic and short-haul network for their own operations at the Madrid airport and a number of other EU airports.

During the first phase of the assessment, the Commission investigated the extent to which the pandemic would impact merged companies and their competitors' operations and hence the competitive landscape in the mid- and long-term. However, the information available was not enough for the Commission to conclude whether in the long-run the companies would continue to compete on each and every route on which they used to compete before the crisis.

European Parliament publishes draft DMA report

The Member of the European Parliament in charge of the DMA, Andreas Schwab, has pub-

lished a draft report containing amendments to the Commission's initiative. According to the report, the DMA should be clearly targeted to those platforms that play an unquestionable role as gatekeepers due to their size and their impact on the internal market. Therefore, it proposes to amend Article 3 DMA by increasing the quantitative thresholds required for a gatekeeper to be qualified as such: instead of 6.5 billion EEA turnover, it suggests 10 billion; and 100 billion market capitalization instead of 6.5. It also proposes that gatekeepers operate at least two core platform services instead of only one. The report wishes a stronger involvement of national competition authorities, who according to it should also (i) be informed of all mergers that gatekeepers conclude in the digital sector (so that they can assess whether they can refer a case to the Commission) and (ii) support market investigations.

In addition, the report stands for an acceleration of the notification to gatekeepers that they fulfil the requirements in order to be designated as gatekeepers (one month, instead of three), and the deadline to comply with obligations (4 months instead of 6). Furthermore, the imposition of structural remedies such as divestments could be facilitated due to the fact that the document suggests that if companies receive two non-compliance fining decisions, they are systematically infringing the Regulation. That Finally, the report proposes to delete the option for gatekeepers to propose commitments. Indeed, it states that commitment decisions do not appear to be justified due to the ex ante and self-executing nature of the DMA.

AdC and CNMC conduct simultaneous investigations into possible anti-competitive practices in Spain and Portugal

The Portuguese and Spanish markets and competition authorities AdC (Autoridad da Concorrência) and CNMC (Comisión Nacional de los Mercados y la Competencia) are conducting simultaneous investigations for possible anti-competitive practices in Portugal and Spain, which concern agreements or concerted practices relating to customer allocation and the fixing of sales prices or discounts applicable to subscriptions to business information products.

This investigation is being conducted by the AdC and the CNMC in parallel, respectively in Spain and Portugal, in cooperation within the European Competition Network (ECN), with the assistance of the Commission. As part of this cooperation, the AdC and the CNMC have conducted simultaneous unannounced inspections from 2 June to 8 June 2021 at companies in this sector in their respective territories.

CNMC opens investigation into possible anti-competitive behaviour of four banks

The CNMC has opened proceedings against Banco Sabadell, Banco Santander, Caixabank and Bankia for possible anti-competitive practices in the marketing of ICO Covid-19 credit lines. These credit lines have been granted for companies and freelance workers to address the impact of the pandemic. The CNMC is assessing whether

(i) the above-mentioned banks have linked different products to access ICO credits and (ii) the loans have been used as a means to restructure pre-existing financial debts.

The CNMC believes that the actions described differ from the good faith required of companies in their relations with customers and that therefore these practices altered the behaviour of economic operators. This investigation follows information that the CNMC has received through the covid.competencia@cnmc.es, which was established in order to allow citizens to report, anonymously, abuses committed during the pandemic.

CNMC clears Liberbank / Unicaja merger subject to undertakings

The CNMC has cleared in phase I the merger by absorption of Liberbank by Unicaja subject to the fulfilment of certain undertakings.

After analysing the most affected market by the operation (the retail banking market), the CNMC concluded that the transaction will not pose a threat to effective competition because the market share increase is small and there are other significant operators in the market. Nevertheless, the Spanish authority has found issues in the province of Cáceres, after the transaction in three postal codes (of the 18 of the province) only the merged entity and a single competitor will remain. After analysing the productions and conditions offered by the merged entity and the competitor, the CNMC found that there may be risks for clients, such as more fees or poorer con-

ditions for current Liberbank clients in relation to certain products.

In order to address these issues, Unicaja has undertaken to notify Liberbank client of the possible changes to the conditions of the products that are modified as a result of the merger. In particular, it will communicate (i) new fees, (ii) the products offered to Unicaja clients for which clients from Liberbank meet the eligibility criteria established, (iii) that the modifications will come into force within a minimum of 60 days in the case of clients who are natural persona and within 30 days in the case of remaining clients, (iv) the clients' rights in the event of a change of the conditions and (v) the clients' freedom to change their bank. Furthermore, in what regards the three above-mentioned postal codes of Cáceres, Unicaja has undertaken, for three years, to offer its products under commercial conditions that are no worse than those offered by the resulting entity that has the largest physical presence of branches of competing financial institutions.

Euskaltel/MásMóvil cleared in Spain in Phase I by CNMC

The CNMC has approved, in phase I, the acquisition by MásMóvil of the sole control of Euskaltel through a public takeover bid for the shares representing the entire share capital of the latter. MásMóvil and Euskaltel are, respectively, the fourth and the fifth largest electronic communications operator in Spain.

The CNMC has considered that the merger does not substantially affect competition in the

markets concerned. Even though MásMóvil will strengthen its position in the national market as the fourth operator in the retail markets, Euskaltel's presence was still limited, so the addition of market shares will not be significant. In the case of the regions where Euskaltel's presence is more significant, the CNMC has no concern since there are other significant operators that will continue to exert competition pressure. Furthermore, although the resulting entity will strengthen its position as the main demander of wholesale services, the CNMC does not expect that the competition conditions will be substantially modified given the existence of vertically integrated operators with significant shares in retail markets.

CNMC finds two passenger transport cartels in Cantabria

The CNMC has fined two cartels formed by five passenger transport companies in the region of Cantabria, and sanctioned an association for having made a collective price recommendation.

According to the CNMC, the fined companies adopted strategies in order to share public procurement proceedings between them in the passenger school transport market, with the some aim of eliminating competition in the tenders of many school transport routes. The companies adopted agreements to offer coverage offers in negotiated procedures without advertising in order to guarantee the award of the tender to the company requesting the coverage. Furthermore, the CNMC has found that the companies have made an illicit use of the joint venture corporate vehicle to attend tenders. In the market for discretionary passenger transport, two companies distorted bidding procedures affecting at least 15 contracts between the years 2013 and 2019.

Furthermore, the CNMC considers that the Unión Patronal de Autotransporte de Viajeros de la Provincia de Cantabria ("UPAVISAN") made a collective price recommendation, which is contrary to antitrust rules. Therefore, the CNMC has fined this company with 5.000 euros.

Case law

According to Advocate General Pitruzzella, a single and continuous infringement of competition law does not imply that it is composed of several separate infringements

In October 2015, the Commission sanctioned five optical disk drive suppliers for coordinating

their behaviour in tenders for optical disc drives for laptops and desktops produced by Dell and

Hewlett Packard, in breach of Article 101 TFEU. In the operative part of its decision, the Commission found a single and continuous infringement and added the words “consisting of several separate infringements”. However, the fined companies affirmed in their appeals against the Commission’s decision that the “dual characterisation” (a single and continuous infringement and separate infringements) was not clearly stated in the statement of objections and the decision did not contain sufficient explanation on the issue.

This argument was rejected in first instance by the General Court, which held that a single and continuous infringement presupposes multiple instances of unlawful conduct by affirming that *“It is therefore apparent from the very concept of a single and continuous infringement that it presupposes a complex of practices. The applicants cannot therefore claim that the Commission changed its conclusions by finding, in addition to a single and continuous infringement, several bilateral contacts, given that those bilateral contacts are precisely what constitute that single infringement”* (Judgement of the General Court of 12 July 2019, case T-762/15, *Sony Corporation*, point 239).

Advocate General Pitruzzella has a different position on the matter and has stated in his recent opinion of 3 June 2021 (cases C-697/19 P to C-700/19 P) that *“a single and continuous infringement is continuous conduct consisting of a series of actions or forms of conduct, but it is not the sum of multiple instances of unlawful conduct in violation of Article 101 TFEU”* (point 62). Therefore, Pitruzzella considers that certain behaviours, acts or contacts, which occurred during the period indicated for the single and continu-

ous infringement might not as such be infringements of competition rules (point 63). He recalled that the aim of the theory of single and continuous infringement is that it resolves a number of practical issues that may arise in any complex allegation of collusion regarding the application of a limitation period and reduces the burden of proof necessary to satisfy a judicial review.

Pitruzzella affirms that the Commission can use the dual characterisation, but it must make this explicit in the statement of objections to the parties and discharge the associated burden of proof and duty to give proper reasoning (point 83). In this case, Pitruzzella found that the Commission failed to make its position clear by providing a legal characterisation of each of those contacts before the final decision (it merely classified all bilateral contacts between the cartel participants as a single and continuous infringement, referring to the simple possibility of classifying each individual contact as a separate infringement) and thereby prevented the companies from fully exercising their rights of defence. Moreover, Advocate General affirmed that a dual characterisation that is delayed until the final decision can have numerous effects, not only in public enforcement, but also in private enforcement in terms of possible actions for damages before national courts.

Pitruzzella suggested the Court of Justice to set partially aside the General Court’s judgments and to give a final judgment on the matter and rule that the Commission’s decision should be annulled in part. More precisely, Pitruzzella considers that the error committed by the General Court does not affect the rest of the scheme of its judgements or of the Commission’s decision.

Currently at GA_P

GA_P hosts webinar on online platforms

On 23 June 2021, GA_P's Competition Law Practice hosted a webinar on online platforms and the Digital Markets Act. Iñigo Igartua, head of GA_P's Competition Law Practice, Miguel Troncoso, Brussels' managing partner and Eduardo Gómez de la Cruz, Of Counsel in this practice

area exposed recent EU and US competition cases concerning Amazon, Facebook and Google and analysed what the perspectives of regulating online platforms are, focusing on the DMA proposal. The next webinar will take place in September 2021.