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## News

### Commission adopts a Communication on a competition policy fit for new challenges

The European Commission (“The Commission”) has adopted a Communication on a competition policy fit for new challenges<sup>1</sup> that frames the important role of competition policy for Europe’s path towards recovery, the green and digital transitions, and for a resilient Single Market. The Communication highlights the in-built ability of competition policy to adapt to new market circumstances, policy priorities and customer needs. Furthermore, the Commission is currently pursuing a review of competition policy tools to make sure all competition instruments (merger, antitrust and State aid control) remain updated and fit to market’s needs.

Since the creation of the European Union, competition policy has contributed to preserving and fostering the Union’s economic prosperity. But today, the Union is facing new challenges: from climbing the steep path to recovery following the coronavirus crisis, to lead the twin green and digital transitions. An effective and well-calibrated competition policy can contribute to the success of this agenda. A few examples mentioned in the Communication are: (i) the sixth amendment of

the State aid Temporary Framework with a limited prolongation of existing measures until end of June 2022; (ii) the upcoming Climate, Environmental Protection and Energy State Aid Guidelines; (iii) the application of Article 22 of the Merger Regulation encouraging Member States to refer potentially problematic transactions for its review even if they do not meet national notification thresholds; or (iv) the support of ongoing Member State efforts to design pan-European Important Projects of Common European Interest (IPCEI) enabling breakthrough innovation and infrastructure investments in key green and digital priorities (such as hydrogen, cloud, health and microelectronics among others).

### Commission prolongs the State aid Temporary Framework

The Commission has decided to prolong until 30 June 2022 the State aid Temporary Framework<sup>2</sup> (currently set to expire by 31 December 2021), in order to further accelerate the recovery. The Commission has also decided to introduce two new measures; (i) to create direct incentives for forward-looking private investment (i.e. to help Member States to create incentives for investments undertaken by companies and use this tool

<sup>1</sup> [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2021\)713&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2021)713&lang=en)

<sup>2</sup> [https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework\\_en](https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en)

to accelerate the green and digital transitions); and solvency support measures (i.e. to leverage private funds and make them available for investments in small and medium-sized enterprises, including start-ups, and small midcaps in order to create incentives to invest in these types of companies and provide them with easier access to such equity financing that is often difficult for them to attract individually).

Furthermore, the Commission has: (i) prolonged from 30 June 2022 until 30 June 2023 the possibility for Member States to convert repayable instruments (i.e. guarantees, loans, repayable advances) granted under the Temporary Framework into other forms of aid, such as direct grants; (ii) proportionally adapted to the extended duration the maximum amounts of certain types of aid; (iii) clarified the use of the exceptional flexibility provisions of the Commission's Rescue and Restructuring Guidelines; and (iv) prolonged the adjusted list of non-marketable risk countries, in the context of the short-term export credit insurance, for an additional 3 months (from 31 December 2021 to 31 March 2022).

### **Commission adopts revised State aid rules on Important Projects of Common European Interest**

The Commission has adopted a revised Communication on State aid rules for Important Projects

of Common European Interest<sup>3</sup> (“IPCEI Communication”) that will apply from 1 January 2022. Though this Communication, the Commission sets the criteria to assess Member State support to cross-border IPCEIs projects that overcome market failures and enable breakthrough innovation in key sectors as well as technologies and infrastructure investments with positive spill-over effects for the EU economy at large.

The review reflects the Commission's experience stemming from its case practice, notably three decisions approving IPCEIs to enable breakthrough innovation in microelectronics<sup>4</sup> (December 2018) and in the battery value chain (December 2019<sup>5</sup> and January 2021<sup>6</sup>) as well as its decision approving an infrastructure namely the Fehmarn Belt fixed rail-road<sup>7</sup> link (March 2020).

The revised IPCEI Communication includes some adjustments from the previous 2014 IPCEI Communication, aligning the relevant rules to the current EU priorities. Among these adjustments IPCEI's projects must: (i) involve at least four Member States and require that the projects are designed in a transparent and inclusive manner (i.e. ensuring that all Member States are informed of the possible emergence of an IPCEI project enabling to participate if interested); (ii) facilitate and encourage the participation of small and medium sized enterprises (“SMEs”) and enhance the benefits of their involvement through specific facilitations for the assessment of the

<sup>3</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_689](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_689)

<sup>4</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_18\\_6862](https://ec.europa.eu/commission/presscorner/detail/en/ip_18_6862)

<sup>5</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_6705](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6705)

<sup>6</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_226](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_226)

<sup>7</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_501](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_501)

compatibility of the aid to SMEs; (iii) align the project objectives with the current EU priorities (i.e. supporting the environmental strategies of the EU or accelerating EU's green transition); (iv) provide evidence of compliance of the notified projects with the 'do no significant harm' competition principle; and (v) deliver significant positive spill-over effects across the EU while maintaining strong safeguards to ensure that aid is limited to what is necessary.

### **Commission publishes first Foreign Direct Investment screening annual report**

The Commission published its first report<sup>8</sup> on foreign direct investment ("FDI") screening, which covers the period between the entry into force of the Regulation in October 2020.

The report provides transparency around the operation of FDI screening in the EU and developments in national screening mechanisms. It contributes to the accountability of the Union in an area where, transparency regarding individual transactions is neither possible nor appropriate and sets out the trends of the FDI in the European Union.

The report is divided in four chapters: (i) on figures and trends for FDI into the EU (i.e. it states that foreign transactions mainly came from the US and Canada, the UK and the EFTA states, being China was the fourth foreign investor in the

EU in 2020); (ii) on legislative developments in Member States (i.e. stating that since the Regulation was proposed in 2017, seven member states have introduced new FDI screening rules and further changes have been made in 13 jurisdictions. Six further countries have plans to introduce a screening mechanism); (iii) on screening activities by Member States (i.e. stating that out of the 20% of dossier that required a formal screening by Member States, the vast majority of them (91%) were approved, whilst a very small portion were prohibited (2%) or aborted (9%); and (iv) on the functioning of the EU cooperation on FDI screening (i.e. stating that 90% of the total notification were submitted by Austria, France, Germany, Italy and Spain across three main sectors as manufacturing, Information and Communication Technology and wholesale and retail).

### **Commission publishes summary of comments received on draft VBER and vertical guidelines**

On 9 July 2020, the Commission launched a public consultation on draft revised rules in the context of the impact assessment for the review of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices ("Vertical Block Exemption Regulation" or "VBER"), together with the Guidelines on Vertical Restraints ("Vertical Guidelines").

<sup>8</sup> [https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc\\_159935.pdf](https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf)

Stakeholders were invited to submit comments on the draft revised rules that reflected the Commission's proposed changes. The Commission received 152 submissions from stakeholders and from six National Competition Authorities. The consultation<sup>9</sup> showed that the VBER and the Vertical Guidelines are useful tools that facilitate the assessment of vertical agreements and help reduce compliance costs for businesses. It also showed room for improvement, notably the need to adapt both texts to new market developments.

Stakeholders mainly commented on the four areas for which the Commission identified policy options, as reflected in the Inception Impact Assessment and the draft revised VBER and the draft revised Vertical Guidelines, namely: (i) dual distribution (i.e., main topics of discussion were related with the threshold introduced in Article 2(4) of the draft revised VBER and with the extension of the dual distribution exception to cover wholesalers and importers); (ii) parity obligations (i.e., main points of discussion relates to the proposal to exclude wide retail parity obligations, whether it was needed and if whether it went far enough), (iii) active sales restrictions (i.e., the debate was focused among the three types of distribution systems – exclusive distribution, selective distribution and free distribution - and some stakeholders also commented on the changes proposed to extend the block exemption to certain active sales restrictions);

and (iv) indirect measures restricting online sales (i.e., the main topic relates to the proposed threshold above which dual pricing and the imposition of non-equivalent criteria in selective distribution would amount to hardcore restrictions and therefore would not be block-exempted).

In addition, stakeholders commented on other areas of the rules for which the Commission has proposed updates or clarifications such as: (i) RPM; (ii) other online restrictions or (iii) Platforms, among others for which it was expressed a need for further clarification among different stakeholders.

### **Commission fines Conserve Italia €20 million for participating in canned vegetables cartel**

The Commission has fined Conserve Italia Soc. coop. agricola and its subsidiary Conserves France S.A. (together “Conserve Italia”) a total of € 20 000 000 for breaching EU antitrust rules. For more than 13 years, Conserve Italia took part with other market participants in a cartel for the supply of certain types of canned vegetables to retailers and/or food service companies in the European Economic Area (EEA).

From 15 March 2000 to 1 October 2013 Conserve Italia and the other cartel participants fixed prices, agreed on market shares and volume

<sup>9</sup> [https://ec.europa.eu/competition-policy/system/files/2021-11/contributions\\_summary\\_draft\\_revised\\_VBER\\_and\\_VGL.pdf](https://ec.europa.eu/competition-policy/system/files/2021-11/contributions_summary_draft_revised_VBER_and_VGL.pdf)

quotas, allocated customers and markets, exchanged commercially sensitive information and coordinated their replies to tenders. Their goal was to preserve or strengthen their position on the market, maintain or increase selling prices, reduce uncertainty for their future commercial conduct and control marketing and trading conditions to their advantage.

The Commission's investigation revealed the existence of a single infringement comprising three separate agreements: (i) an agreement covering private label sales of canned vegetables such as green beans, peas, peas-and-carrots mix and vegetable macedoine to retailers in the EEA; (ii) an agreement covering private label sales of canned sweetcorn to retailers in the EEA; and (iii) an agreement covering both own brands and private label sales (sold under retailers' brands) of canned vegetables to retailers and to the food service industry specifically in France.

## **Spain extends FDI screening restrictions to December 2022**

Spain's government has extended<sup>10</sup> restrictions on the acquisition of Spanish strategic companies by foreign operators from December 2021 to 31 December 2022.

Foreign investments are considered those transactions implemented by investors from outside the EU and the European Free Trade Association

("EFTA"), as a result of which the investor would acquire a 10% or more of a Spanish company and it relates to certain companies listed in Spain, or to operations where, despite concerning non-listed companies, the value of the investment exceeded EUR 500m.

In November 2020, the government decided to apply this protection to acquisitions implemented by investors from the EU and EFTA under certain circumstances. This measure was extended in June this year until the end of 2021. Now, the government has decided to further extend it until the end of 2022.

## **Spanish National Competition Authority concludes its disciplinary proceedings against EURO 6000**

The Spanish National Competition Authority ("CNMC") has concluded through a "commitment decision" the disciplinary proceedings against EURO 6000 S.L. for infringing Spain's anti-trust law in the country's ATM market.

The CNMC's proceedings against EURO 6000 stemmed from a claim by ING BANK NV, Spain Branch. In September 2019, the Commission conducted several inspections at bank headquarters and network administrators, gathering information on potential anti-trust behaviour by Euro 6000. Specifically, it looked into whether EURO 6000 denied ING access to its ATM

<sup>10</sup> [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2021-19305](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-19305)

network under the same terms and conditions as other entities with which EURO. 6000 had entered into agreements. As a result, in February 2020, the Commission initiated disciplinary proceedings.

EURO 6000 applied for a commitment decision of the proceedings and presented several commitments to address the competition matters investigated by the CNMC, among them: (i) implementing a new fee system that will include defining a base fee based on the characteristics of the entity applying for access (e.g. network size and geographical overlap with EURO 6000's network) and offering volume discounts based on the number of annual transactions carried out by the applicant in the EURO 6000 ATM network; (ii) publishing the new fee system on EURO 6000's web site along with the reciprocal agreements entered into with third parties; (iii) drawing up a detailed procedure for handling applications for reciprocal third-party access to its network; and (iv) sending ING a binding offer with the new fee and entering into a reciprocal agreement with ING.

### **Spanish National Competition Authority investigates military equipment companies for possible bid-rigging**

The CNMC is investigating potential anti-trust practices involving bid rigging and sharing agreements in tenders called by the Spanish Ministry of Defense related to the supply, maintenance and upgrade of military equipment, especially military vehicles.

Last November, the CNMC conducted on-site inspections at several undertakings with operations in Spain's military equipment market. The actions stem from the investigation launched in June. At that time, the National Competition Authority carried out a first round of inspections at a number of companies' headquarters in conjunction with the regional competition authorities where they are located.

### **Aragón Competition Authority opens ski resort abuse case**

The Aragón Competition Authority has opened an investigation into ski resort Estación Invernal Valle de Astún ("EIVASA") for possible abuse of dominance. The competition authority of the Spanish region of Aragón received a complaint saying that EIVASA might be abusing its authorization as an operator of services on a publicly-owned mountain. Officials will investigate whether EIVASA is precluding access to essential infrastructure to restaurant businesses that are its direct rivals in the connected market of restaurant services, in which EIVASA's subsidiary HOS-ERVAL operates.

### **Catalan Competition Authority fines beach transport tourist services for bid-rigging**

The Catalan Competition Authority penalises several companies for their coordinated action in a tendering process organised by a local administration for the operation of tourist passenger transport services on the town's beaches.

The local government brought the facts to the attention of the Catalan Competition Authority. As a result of the investigative actions carried out, it has been proven that the offenders agreed on the presentation of the bids for the

local government tender procedure through the design of a joint strategy to distort competition, with the aim of predetermining the award of the lots in favour of each of the companies and thus dividing up the market under tender.

## Case law

### **The General Court largely dismisses Google Shopping appeal against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison-shopping service over competing comparison-shopping services**

By decision<sup>11</sup> of 27 June 2017, the Commission found that Google had abused its dominant position on the market for online general search services in 13 countries in the European Economic Area, by favouring its own comparison-shopping service, a specialised search service, over competing comparison shopping services. The Commission found that the results of product searches made using Google's general search engine were positioned and displayed in a more eye-catching manner when the results came from Google's own comparison-shopping service than when they came from competing comparison-shopping services. In respect of that infringement, the

Commission imposed a pecuniary penalty on Google of EUR 2.42 billion, of which EUR 523.518.000 jointly and severally with Alphabet, its parent company.

Google and Alphabet brought an action against the Commission's decision before the General Court of the European Union.

By its judgment, the General Court dismisses for the most part the action brought by the two companies, and upholds the fine imposed by the Commission, on the following grounds:

First, the General Court recognises the anticompetitive nature of Google's practice of favouring its own comparison-shopping service on its general results pages through more favourable display and positioning, while relegating the results from competing comparison services in those pages by means of ranking algorithms. The Court found that google departed from competition

<sup>11</sup> [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf)



on the merits and that the practice was liable to lead to a weakening of competition on the market, on account of three specific circumstances, namely: (i) the importance of the traffic generated by Google's general search engine for comparison shopping services; (ii) the behaviour of users, who typically concentrate on the first few results; and (iii) the large proportion of 'diverted' traffic in the traffic of comparison shopping services and the fact that it cannot be effectively replaced.

Next, the General Court considers that Google's practice relates to a difference in treatment by Google of its conditions of supply general search services, and not on a mere refusal to supply practice. The court rules that Google favours its own comparison-shopping service over competing services, rather than a better result over another result, even if the results from competing comparison-shopping services were more relevant, they could never receive the same treatment as results from Google's comparison-shopping service in terms of their positioning or their display.

Second, the General Court rejects Google's arguments on the consequence of the practice at issue on comparison-shopping services traffic and regarding the presence of merchant platforms on that market. Contrarily, it recognises that the

Commission correctly found harmful effects on competition after having measured the actual effects of the conduct concerned on comparison shopping services' traffic from Google's general results pages, the Commission had a sufficient basis for showing that traffic accounted for a large share of their total traffic could not be effectively replaced by other sources of traffic, such as advertising (AdWords) or mobile applications, and that the potential outcome was the disappearance of comparison shopping services, less innovation on their market and less choice for consumers, characteristic features of a weakening of competition.

However, the General Court considers that the Commission did not establish that Google's conduct had had – even potential – anticompetitive effects on the market for general search services and therefore annuls the finding of an infringement in respect of that market alone.

The General Court concludes reaffirming that Google has not demonstrated enough efficiency gains linked to its anticompetitive practice that would counteract its negative effects on competition and taking into account the serious nature of the infringement and its intentional, and not negligent, nature it therefore confirms the amount of the penalty.