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2021 December

News

Commission fines Abengoa EUR 20 million in ethanol cartel settlement

In 2013, 2014 and 2015, the Commission carried out inspections and, as a result of them, it opened a formal investigation in December 2015 against Abengoa, Alcorgroup SA of Belgium and Lantmännen ek för of Sweden together with their relevant subsidiaries. The institution suspected that these three ethanol producers had manipulated ethanol benchmarks published by a price reporting agency. Abengoa has admitted its involvement in the cartel and that it coordinated its trading behaviour with other companies on a regular basis with the aim of artificially increasing, maintaining and preventing from decreasing the levels of Platts' ethanol benchmarks. It also limited the supply of ethanol delivered to the Rotterdam area, in order to reduce the volumes available for delivery in the market on close. This behaviour lasted from 6 September 2011 to 16 May 2014. Abengoa agreed to settle the case, and in view of its financial situation, the Commission imposed on the company a fine of EUR 20 million.

Commission endorses the new Guidelines on State aid for Climate, Environmental protection and Energy

The College of Commissioners endorsed[1] last 21 December the new Guidelines on State aid for climate, environmental protection and energy ("CEEAG"). They will be formally adopted as soon as all linguistic versions are available and will be applicable from that moment.

The new guidelines broaden the categories of investments and technologies that Member States can support, such as Carbon Contracts for Difference. They also cover numerous areas that are relevant for the Green Deal, such as energy performance of buildings and clean mobility, covering all transport modes. The guidelines also modify the current rules on reductions on certain electricity levies for energy intensive users and introduce safeguards to ensure that the aid granted is effectively directed where it is necessary to improve climate and environmental protection. For instance, the guidelines promote stakeholder participation in the design of large aid measures. Furthermore, the guidelines

[1] https://ec.europa.eu/competition-policy/system/files/2021-12/CEEAG_Guidelines_with_annexes_I_and_II_0.pdf
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.508.01.0001.01.ENG&toc=OJ%3AC%3A2021%3A508%3ATOC

ensure coherence with the relevant EU legislation and policies. Therefore, State aid granted under the CEEAG will have to demonstrate that it is compatible with the Union's 2030 and 2050 climate targets.

Commission adopts revised Guidelines on State aid to promote risk finance investments

The European Commission ("**Commission**") adopted[2] last 6 December the revised Guidelines on State aid to promote risk finance investments, which will apply from 1 January 2022. They aim at enabling Member States to grant State aid to small and medium-sized enterprise ("**SMEs**") so that they attract additional private investments. The new guidelines limit the requirement to provide a funding gap analysis to the largest risk finance schemes (it will be required only for those which allow for investment amounts above EUR 15 million per individual beneficiary) and further clarify the evidence needed to justify the aid, in line with standard practice. The guidelines also introduce simplified requirements for the assessment of schemes targeting exclusively start-ups and SMEs that have not yet made their first commercial sale and align certain definitions included in the Guidelines with those included in the General Block Exemption Regulation in order to ensure consistency.

Commission adopts revised short-term export-credit insurance Communication

Export-credits allow foreign buyers of services and goods to defer payment but involves a credit risk for the sellers, against which they can insure themselves using export credit insurance. The short-term export credit insurance Communication provides that 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, meaning that there should be sufficient capacity provided by private insurers and such risks should, in principle, not be insured by the State or State-supported insurers. The Communication on short-term credit insurance has recently been revised by the Commission, which found that the existing rules worked well and that they only required minor adjustments to reflect market developments. Therefore, last 6 December, the Commission adopted[3] a revised communication,

[3] https://ec.europa.eu/competition-policy/state-aid/legislation/specific-aid-instruments_en

which for instance modifies the eligibility criteria for SMEs. It also phases out the adjusted list of non-marketable risk countries (from 31 December to 31 March 2022). The new Communication will enter into force on 1 January 2022 and will not have an expiry date.

Commission invites comments on Guidelines about collective agreements regarding the working conditions of solo self-employed people

According to EU Competition law, self-employed are regarded as "undertakings" and therefore they risk infringing EU competition rules if they negotiate collectively their fees and other trading conditions. The Commission has launched[4] a public consultation on the draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed people providing services. These aim at clarifying the circumstances in which Article 101 TFEU applies to self-employed. First, the draft guidelines describe the circumstances in which self-employed are compared to workers and therefore have no risk of infringing Article 101 TFEU. Second, they clarify that certain agreements would not trigger the Commission's intervention, such as when self-employed people are in a weak bargaining position and have therefore difficulties in influencing their working conditions. The public consultation will be opened until 24 February 2022.

Commission invites comments on railway company State aid guidelines revision

The Commission has launched[5] a public consultation on the 2008 Guidelines on State aid for railway undertakings. All interested parties can submit their comments until 16 March 2022. These guidelines establish the conditions under which State aid granted to railway companies may be considered compatible with the internal market, in particular on the basis of Article 93 of the Treaty on the Functioning of the European Union ("**TFEU**"). The institution has conducted an evaluation of the guidelines, which has shown that they are still relevant to encourage a modal shift to rail, but that some adjustments of the rules are necessary to reflect the latest market and regulatory developments (in particular, the Green Deal).

[4] https://ec.europa.eu/competition-policy/public-consultations/2021-collective-bargaining-2_en
[5] https://ec.europa.eu/eusurvey/runner/StateaidRailwayGuidelines2021

More precisely, the revision considers: (i) simplifying the rules on aid for coordination of transport that support the modal shift to more sustainable transport solutions, (ii) extending the scope of application of the guidelines, (iii) removing barriers to market entry or expansion of new market players, (iv) ensuring the modernisation of fleets and the networks' interoperability, (v) contributing to avoid cross-subsidisation between the commercial activities and those subject to public service obligations of vertically-integrated railway companies, (vi) assessing the need for rules on public transport services in all areas of rail transport that are not yet covered by the guidelines and (vii) assessing the need for adjusted rescue and restructuring rules applicable to railway undertakings.

EU-US launch Joint Technology Competition Policy Dialogue to foster cooperation in competition policy and enforcement in technology sector

Last 7 December 2021, the European Commissioner for Competition Policy, Margrethe Vestager, the Chair of the Federal Trade Commission, Lina Khan, and the Assistant Attorney General of the US Department of Justice Antitrust Division, Jonathan Kanter, launched[6] the EU-US Joint Technology Policy Dialogue. This dialogue aims at promoting cooperation between the EU and US, including sharing insights and experience. It also intends to explore new ways to facilitate coordination and knowledge and information exchanges to ensure that enforcements authorities are adequately equipped to address new challenges together. The joint dialogue will promote high-level meetings as well as regular staff discussion focused on the shared competition enforcement and policy issues arising in technology markets.

Commission approves Spanish scheme to support research, development, innovation, environmental protection and energy efficiency in automotive value chain

The Commission has approved a EUR 3 million Spanish scheme that supports research, development and innovation ("**RD&I**"), as well as environmental protection and energy efficiency integrated projects of companies active in the value chain for electric and connected vehicles ("**ECV PERTE**"). The scheme will be partially be funded by the Recovery and Resilience Facility.

[6] https://ec.europa.eu/competition-policy/system/files/2021-12/EU-US_Joint_Dialogue_Statement_12.6.21_1.pdf

The ECV PERTE will run until the end of 2023 and is open to consortia of interested companies, established both in and outside Spain. At least 40% of the partners of the consortia will be SMEs and the aid will take the form of direct grants and soft senior loans. The Commission has approved the scheme since it considers that it complies with EU State aid rules: (i) the aid is necessary to facilitate RD&I investments as well as environmental protection and energy efficiency measures in the supply chain for electric and connected vehicles, (ii) the aid has an incentive effect, (iii) the aid is proportionate and limited to the minimum necessary, (iv) Spain has adopted necessary safeguards to limit any undue negative effects (the maximum amount for a single beneficiary will be limited, appropriate participation of SMEs is guaranteed) and (v) the positive effects of the measure outweigh any negative effects in terms of possible distortions of competition.

Commission approves EUR 150 million Spanish scheme under Recovery and Resilience Facility to support deployment of passive infrastructure for mobile networks

The Commission has approved a EUR 150 million Spanish scheme that supports the deployment of passive infrastructure for the provision of mobile communications services in areas where there is currently no 4G mobile coverage with speeds of at least 10 Mbps download and 3 Mbps upload. It aims at tackling the digital divide in Spain, increasing the attractiveness for living and investing in rural areas, stimulating economic growth and creating jobs in structurally weaker regions. The scheme will entirely be made available through the Recovery and Resilience Facility. The approved scheme will run until 31 December 2025 and take the form of direct grants. The Commission has approved the scheme since it considers that it complies with EU State aid rules: (i) it has an EU objective (facilitating the development of an economic activity), (ii) it is necessary, (iii) it is proportionate and (iv) it has sufficient safeguards to ensure that the aid limits undue distortions of competition. Furthermore, the scheme can no be applied to municipalities of more than 10.000 inhabitants.

IAG and Globalia announce their withdrawal from proposed sale of Air Europa to IAG

IAG and Globalia announced that they have decided to abort their proposed agreement according to which IAG intended to acquire sole control over Air Europa. The proposed transaction was notified to the Commission on May 2021, and on 29 June 2021 the institution decided to open an in-depth investigation. According to the commissioner of competition policy, Margrethe Vestager, the phase II investigation had indicated that the merger would have negatively affected competition on some domestic routes within, to and from Spain. She also stated that taking into account the results of the market tests, the remedies submitted by the companies did not fully address the Commission's competition concerns.

The CNMC fines several companies for imposing minimum commissions in the real estate brokerage market

Last November, the Spanish Markets and Competition Authority ("**CNMC**") fined[7] Anaconda with EUR 1749, Idealista with EUR 730.000, Inmovilla with EUR 83.149, Look & Find with EUR 31.486, MLS with EUR 9.942, Remax with EUR 375.720 and Witei with EUR 18.925 for entering into real estate brokerage price-fixing and information-sharing agreements. The CNMC initiated disciplinary proceedings in February 2020 against these companies after carrying out dawn raids in 2019.

The fined companies used the multiple listed system ("**MLS**"), which allows to share a database that shows property listings and sales on an exclusive basis. If a member of the MLS finds a property, it can decide to put it in the system so that the other members can make the sale. In such cases, the finder and the seller split the commission for the brokerage service. The developers of this system in Spain set a series of binding rules and regulations for members, which included a minimum commission of 4%. If this rule was infringed, disciplinary penalties and even suspension of membership could ensue.

The CNMC opens disciplinary proceedings against several database marketing companies

The CNMC has opened disciplinary proceedings against Informa D&B, S.A.U. and its parent company, Compañía Española de Seguros de Crédito a la Exportación, and against Bureau Van Dijk Publicaciones Electrónicas and its parent company, Moody's Corporation. The agency believes that these companies may have concluded customer-sharing and price-fixing agreements that could affect the marketing of business information products in Spain. This follows the simultaneous on-site inspections that were carried out in June by the CNMC and the Portuguese Competition Authority.

Case law

Advocate General Rantos sets out the criteria for classifying an exclusionary practice as an abuse of a dominant position

The Autorità Garante della Concorrenza e del Mercato ("**AGCM**") conducted in 2017 an investigation into the alleged strategy implemented by three companies of the Enel group aiming

[7] https://www.cnmc.es/sites/default/files/3831141.pdf

to make it more difficult for competitors to enter the liberalised market. Following that investigation, the AGCM adopted a decision in 2018 finding that Enel group (which consists of Servizio Elettrico Nazionale S.p.A. ("**SEN**") and Enel Energia SpA ("**EE**")) had abused its dominant position in breach of Article 102 TFEU. More precisely, the abuse consisted in the discriminatory use of data relating to customers on the protected market which, prior to the liberalisation in the energy sector, were only available to SEN in its capacity as manager of that market. The objective of the sanctioned practice was to use that data to make commercial offers to customers on that market with the aim of transferring those customers within the ENEL Group (from SEN to EE, which is the company active in the liberalised market). The decision of the AGCM was appealed before the Consiglio di Stato, which decided to stay proceedings and to submit five preliminary questions to the Court of Justice of the European Union in relation to exclusionary practices.

In his Opinion[8] presented last 9 December 2021 (case C-377/20), Advocate General Athanasios Rantos treats the five questions referred by the Consiglio di Stato.

First, he affirms that a practice carried out by a dominant undertaking, irrespective of its legality under branches of law other than competition law, cannot be regarded as abusive within the meaning of Article 102 TFEU, solely on the grounds that it is able to produce a foreclosure effect on the relevant market. In principle, an exclusionary practice that can be replicated by competitors in an economically viable manner is not conduct that may lead to anticompetitive exclusion but rather constitutes conduct based on competition on the merits. According to the Advocate General, in order for conduct to be classified as abusive, such conduct must be capable of having a restrictive effect on the relevant market (i.e. in this particular case, by demonstrating that the dominant undertaking has used methods other than those which are part of 'normal' competition and that those created an anti-competitive exclusionary effect on the market).

In order to draw the line between practices which are part of 'normal' competition (i.e. 'competition on the merits') and those which are not, the Advocate General does the following observations: (i) first, 'competition on the merits' must be interpreted in close correlation with the principle that an undertaking in a dominant position has a 'special responsibility' not to allow its conduct to impair effective competition; (ii) second, conduct which clearly departs from normal market practice may be regarded as a relevant factor to be taken into account in the assessment of whether or not there is an abuse; (iii) third, conduct which does not fall within the concept of 'competition on the merits'

[8] https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62020CC0377&from=es

should be generally characterized as not based on obvious economic or objective reasons; (iv) fourth, 'competition on the merits' normally lead to situations in which consumers benefit through lower prices, better quality and a wider choice of new or improved goods and services.

Second, as regards the interest protected by Article 102 TFEU, the Advocate General states that Article 102 TFEU must be interpreted as being intended to prohibit not only exclusionary practices but also those conducts which may adversely affect consumers indirectly, as a result of its effect on the structure of the market. For the competition authority to show that the conduct of that undertaking was capable of restricting competition, the probative value varies according to whether the theory of harm was based on a risk of foreclosure having an actual or a potential effect on competition.

Third, the referring court wanted to know whether it is relevant in order to establish a breach of Article 102 TFEU the evidence produced by a dominant undertaking that even though it has the capacity to produce restrictive effects, the conduct implemented by it did not actually produce any effects on the market. Rantos recalls that competition authorities are only required to demonstrate the harmful potential of the conduct at issue, irrespective of whether the anticompetitive effects have actually occurred. He believes that competition authorities should examine the proofs provided by undertakings on the absence of effects on the market since: (i) the absence of effects is relevant in assessing the gravity of the infringement and (ii) the absence of actual effects may conclude that the practice was not of a nature, even theoretical, to harm competitors,

Fourth, the referring court also asked the CJEU whether conduct is to be classified as abusive only on the basis of its (potential) restrictive effects, or whether the restrictive intention such be included in that assessment. The Advocate General observes that the abuse of a dominant position is an objective concept under settle case-law. Therefore, it is not necessary to establish the subjective intention of the undertaking to exclude its competitors. However, the intention may nevertheless be taken into account, as a factual circumstance in order to establish that this conduct is capable of restricting competition.

Fifth, as regards whether liability for the conduct of a subsidiary may be attached to the parent company which owns 100% of the share capital of the subsidiary, the Advocate General recalls that the fact that a parent company belongs to a corporate group consisting in particular of wholly owned subsidiaries which have engaged in abusive conduct, within the meaning of Article 102 TFEU, is sufficient basis to presume that that parent company has exerted a decisive influence on the subsidiaries' policies without having to produce evidence of the latter's involvement in the abusive practice. This presumption may however be rebutted by the parent company, by adducing sufficient evidence to show that the subsidiaries acted independently on the market.

Spanish Audiencia Nacional annuls nougat information exchange fine for insufficient evidence

In 2016, the CNMC fined[9] six nougat manufacturers (Almendra y Miel, Delaviuda Alimenación, Enrique Garrigós Monerris, Sanchís Mira, Turrones José Garrigós and Turrones Picó) with EUR 6.1 million for market sharing. These companies represented 58% of the Spanish nougat market and are the main retailers of own-brand nougat in Spain, particularly supermarkets such as Alcampo, Carrefour, Mercadona, Día and El Corte Inglés. The agency found that the producers exchanged information about prices and clients in the market for nougat supply, between April 2011 and November 2013, by phone, email, SMS and instant messaging.

The manufacturers appealed the CNMC's decision before the Audiencia Nacional, which has rendered four rulings in November. The Audiencia Nacional noted that the content of some of the exchange used by the CNMC as evidence corresponded to product labelling and historic or public data and therefore lacked incriminatory value. Furthermore, regarding a Sanchís Mira email sent to the other companies to organise a meeting, the Audiencia Nacional stated that there is no proof that the meeting finally took place, not even an indicative reference of its content or that it aimed at exchanging information. The Audiencia Nacional also dismissed the probatory value of other documents seized at the premises of Almendra and Miel, such as the prices of the products of the other fined companies classified as "confidential information". That information, contrary to what the CNMC affirmed, had not been written by the directors of the other fined companies, but by the director of Almendra and Miel, and described the prices of that company. The Audiencia National also dismissed some emails and Whatsapp conversations because they took place after the orders of the distributors had been closed.

Currently at GA_P

GA_P advises the Government on the ECV PERTE

GA_P has participated, as an external advisor of Spain, in the notification to the Commission of the PERTE for electric and interconnected vehicles. GA_P team was formed by Miguel Troncoso Ferrer, our Brussels-based partner, Laura Lence de Frutos and Ana Rebollar Corrales, associates of the Brussels office, and by Carlos Vázquez Cobos, partner of the Public Law practice in Madrid.

The GA_P Competition team wishes our readers a Happy New Year!

[9] https://www.cnmc.es/sites/default/files/921617_35.pdf