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News

Commission announces new approach to merger review referrals falling below notification thresholds

Under EU Competition law, the Commission only examines mergers with an EU dimension, meaning that the merging firms must reach certain turnover thresholds in the EU and worldwide. However, these thresholds have recently been the subject of debate. Indeed, some very innovative companies have almost no turnover (for example in the digital sector) but have a great potential impact in the future of the sector. When taken over by other companies, the turnover threshold is not reached and therefore nothing is notified, even though the target could seriously affect competition on the market.

In this context, last 11 September, Competition Commissioner Margrethe Vestager announced that the Commission plans to change its approach towards referrals to the Commission from national competition authorities. More precisely, it intends to start accepting referrals from Member States of mergers that are worth reviewing at the EU level, even if national authorities do not have the power to review these mergers because they do not meet national notification turnovers. The Commission has explicitly refused to set thresholds based on the value of the merger due to the difficulty of establishing a correct threshold: if it is too high many relevant cases may not be notified and if it is too low the risk is that insignificant mergers will be subject to the Commission's control.

This new approach, which would merely amount to a change in practice on the part of the Commission and would not require changes to the EU merger regulation, will likely come into effect around the middle of 2021. In addition, Vestager plans to review the best practices on merger proceedings, the notice on the simplified procedure, and the merger implementing regulation in order to make it simpler for companies to file mergers.

Commission consults on State aid rules for broadband network deployment

In 2013, the Commission adopted the Broadband State aid Guidelines, which allow for public investment where there is a market failure and where such investments significantly improve the market in terms of service availability, capacity, speeds and competition. In addition, the Guidelines protect private investments by providing that no public intervention can take place where private operators have invested or credibly plan to invest. Separately, the General Block Exemption Regulation (GBER) exempts Member States from the obligation to notify State aid supporting the deployment of broadband networks in areas where no such network exists or where it is unlikely to be deployed in the near future, provided that certain conditions are met.

Since the adoption of the Guidelines and the GBER rules, broadband technologies have substantially improved and the users' needs have increased. In this context, the Commission has launched a public consultation inviting Member States and other interested parties to submit their comments on the current guidelines and rules by 5 January 2021. The public consultation is part of an overall assessment by the Commission to determine whether these guidelines and rules are still appropriate or whether they need to be updated in the light of the recent technological and market developments.

Commission publishes findings on the VBER review

Last 8 September, the Commission published in the form of a staff working document its first findings of the Commission's evaluation on the rules applicable to vertical agreements. These rules are the Vertical Block Exemption Regulation ('VBER') and the Guidelines on Vertical Restraints, in force since 2010.

The document confirms that the rules applicable to vertical agreements are still relevant as they are useful tools that allow companies to carry out a self-assessment of whether their agreements are compliant with EU competition rules. However, the Commission identifies a number of areas where improvements are needed. One of these concern the lack of guidance on how to assess retail parity clauses or restrictions on the use of price comparison websites. In addition, stakeholders remark that some rules are difficult to apply or are no longer adapted to the current business environment in the case of new market players that do not fit into traditional supply and distribution concepts and to new online sales restrictions. Furthermore, stakeholders find that some provisions lack clarity, that the complexity of the rules could be reduced and that diverging interpretations of the rules by national competition authorities and courts are a cause for concern.

In the following weeks, the Commission will carry out an impact assessment to analyse the issues identified during the evaluation. With a view to having revised rules in place by 31 May 2022 (when the VBER expires), the Commission will invite stakeholders to provide their views in a public consultation by the end of this year and, in the course of next year, the institution will publish a draft of the revised rules for stakeholders comments.

Entry into office of a new Advocate General at the Court of Justice

Last 2 September, the representatives of the Member States appointed Mr. Athanasios Rantos as Advocate General at the Court of Justice. The new Advocate General holds a master's degree from the Université Libre de Bruxelles and has worked at the Greek Council of State since 1979, until he was appointed president of that court last February. The entry into office of the new Advocate General has taken place in a very particular context.

Following the entry into force of the Brexit, on 31 January 2020, the British judges ceased their duties at the Court of Justice and at the General Court. This was not the case for Advocate General Eleanor Sharpston, Rantos's successor. As far as she was concerned, the Court declared her post vacant, but allowed her to continue her duties until her successor took office. Invoking interferences with the autonomy and independence of the Court of Justice and a misinterpretation of Article 50 of the Treaty establishing the EC, Sharpston appealed against the declaration of vacancy. She also challenged in summary proceedings the recent appointment of Rantos. While in first instance her application for suspension was allowed (leading to the suspension of the effects of the decision to appoint the Greek advocate general), in second instance the Court rejected the application, thus allowing Rantos to be sworn in last 10 September 2020.

CaixaBank and Bankia to merge

On 3 September, the third and fourth largest Spanish banks, CaixaBank and Bankia informed the Spanish Securities Market Authority ('CNMV') that they were considering a possible merger. If the operation were to go ahead, the merger would create the largest bank in Spain in terms of assets and market share: it would hold €650 billion in assets and 6.600 offices.

While the boards of directors of both banks have already given the go-ahead, the operation is still pending government approval, as the latter controls Bankia through the Fund for Orderly Bank Restructuring. This state control would be substantially reduced to 14% while the new lender's main shareholder would be "La Caixa" Foundation with around 30%. Apart from the government approval, the first banking merger of the COVID-19 crisis needs clearance from the Spanish Competition and Markets Authority ('CNMC').

Transposition of Directive (EU) 2019/1 and amendment of the Spanish Competition Act

In the context of the necessary transposition of Directive (EU) 2019/1 into our legal system, the Spanish Ministry of Economic Affairs and Digital Transformation has published and submitted for public consultation the draft bill amending the Competition Act.

Although a majority of the provisions of the Directive are already incorporated into Spanish law, the proposal includes important changes. For instance, the upper limit of the fines for all infringements of Articles 101 and 102 TFEU is revised to 10% of the total worldwide turnover, and claims with little evidence and that refer to conduct with limited effects on consumers and the market or that can be eradicated by other means may be rejected. In addition, the proposal introduces a settlement procedure in the framework of sanctioning proceedings. This new procedure entails the recognition by the company concerned of its participation in the infringement and the reduction of the fine by 15% if the settlement agreement is reached before the notification of the statement of objections or by 10% if it is reached at a later stage. These reductions also apply to fines imposed on the legal representatives of the company and at to those resulting from a leniency procedure.

Other new measures include the extension of the time limits of procedures. Indeed, in sanctioning procedures, the period for resolution is extended to 24 months, the time limit for the resolution of appeals will be 3 months and the deadline for lodging an appeal will be 30 days. Furthermore, the CNMC may impose fines up to €400,000 on managers who engage in anticompetitive practices, which is a substantial change from the previous regime, which limited the liability to €60,000.

Cani Fernández's views on COVID-19 and competition law

The president of the Spanish competition authority took part in the Annual Competition Conference's session relating to the action of the authorities in the face of the crisis generated by the outbreak of COVID-19.

Among other things, the president highlighted the willingness and promptness of the CNMC to provide informal guidance to companies on the compatibility with the rules of competition law of certain agreements between companies during the COVID-19 pandemic. In this regard, it is worth noting the creation of a specific letterbox for consultations and complaints related to competition rules in the context of the pandemic, which has already received more than 700 complaints.

The president also pointed out that the COVID-19 crisis could lead to the reconfiguration of certain markets. The product and geographical market definition could therefore be changed, thus affecting merger control and abuse of a dominant position. She also stated that she expects an increase in company concentrations seeking economic viability; such cases will require more urgency in their analysis.

Case law

The Spanish tax system applicable to certain finance lease agreements entered into by shipyards constitutes an aid scheme

In 2013, the Commission adopted a Decision in which it found that the Spanish Tax Lease System ("the STL system") constituted State aid that was partially incompatible with the internal market and ordered the national authorities to recover the aid. The STL system made it possible to finance, through a specific legal and financial structure, the construction of ships by shipyards and their acquisition by shipping companies at a 20-30% price discount. For this purpose, a leasing company and an economic interest grouping ('EIG') intervened as intermediaries.

The action brought by the Spanish Government and the company Lico Leasing y Pequeños y Medianos Astilleros Sociedad de Reconversión ('the applicants') led to an initial ruling by the General Court of the European Union, which in 2015 annulled the Commission decision on the grounds that is was insufficiently reasoned. However, this ruling was again appealed by the Commission to the Court of Justice of the European Union ('CJEU'), which approved the Commission's reasoning and referred the case back to the General Court.

In its renvoi judgement, the General Court examined if the tax measures could be classified as State aid. It considered that the STL system was selective because its regulation was vague and imprecise, which gave the Spanish authorities a high degree of discretion. The General Court held that these discretionary elements allowed the beneficiaries to be treated more favourably than other taxpayers in a comparable factual and legal situation. In this respect, it does not matter if the aid was granted to all EIGs operating in the sector because what it is important is the de jure discretionary nature of the national legislation. Considering that the STL constitutes illegal State aid, the General Court confirmed the obligation to recover the aid from the investors (the members of the EIGs) and rejected the pleas raised by the applicants concerning the infringement of the principle of legitimate expectations. The General Court also refused to take into account the arguments raised by the applicants regarding the referral of the tax benefits from the investors to the shipping companies and affirmed that the investors are those who actually benefited from the aid, since the applicable legislation did not require them to pass part of the aid to third parties.

According to the CJEU, the CNMC cannot file a preliminary ruling request

Article 267 of the Treaty on the Functioning of the European Union ('TFEU') establishes the mechanism of the preliminary ruling procedure on the interpretation of Union law, according to which the CJEU engages in an indirect dialogue with national courts that have a key role in the daily application of EU law. The Treaty itself establishes that any court or tribunal of a Member State can make a reference for a preliminary ruling. In its judgement in case C-462/19, *Anesco*, the CJEU ruled that the CNMC cannot file a preliminary ruling request because it did not have the necessary conditions to be classified as a judicial body within the meaning of EU law.

The CNMC's preliminary request was made in the context of competition proceedings initiated by the agency itself against Anesco and various trade unions concerning the conclusion of a possible anti-competitive collective agreement. Having doubts about the interpretation of Article 101 TFEU and considering itself to be a judicial body, the CNMC decided to stay the proceedings and to submit four questions for a preliminary ruling.

The CJEU notes that the CNMC does not have the status of “third party” in relation to the authority which adopted the decision forming the subject matter of the proceedings. Indeed, the Board of the CNMC has an organisational and operational relationship with the Competition Directorate of the CNMC, which makes proposals for decisions which the Board is called upon to adjudicate on. Furthermore, the CJEU explains that the CNMC’s decisions are similar to decisions of an administrative nature, which excludes them from being adopted in the exercise of judicial functions. In fact, the dispute at issue in the main proceedings is of a punitive nature, initiated by the Competition Directorate of its own motion. This fact constitutes, according to the CJEU, an indicator of the administrative and non-judicial nature of the decision which it was called upon to make in the proceedings. Other additional elements that the CJEU takes into consideration is the maximum period within which the CNMC may adopt decisions and the consequence of the expiration of that period, which is the lapse of the proceedings, irrespective of the will of the parties. Likewise, CNMC decisions putting an end to the proceedings are of an administrative nature which, whilst being final and immediately enforceable, are not capable of acquiring the attributes of a judicial decision, in particular the force of *res judicata*. On the basis of the above, the CJEU declare the CNMC’s request inadmissible.

Advocate General Henrik Saugmandsgaard Øe recommends the CJEU to rule that a jurisdiction clause does not apply in an antitrust suit

A German hotel sued Booking.com before the German courts alleging that the platform operator holds a dominant position and that the conditions for reservations it had agreed with the platform were unfair and led to exploitative abuse. The German courts found that they were not competent on the grounds that the contract between the hotel and Booking.com included a provision that stipulated that the Amsterdam courts had exclusive jurisdiction over any dispute. As the Federal Court of Justice had doubts as how to interpret Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereinafter, ‘Brussels I’), it decided to stay proceedings and to refer a question to the CJEU for a preliminary ruling.

First of all, the Advocate General draws attention to the fact that infringements of competition law fall within the scope of Brussels I and that the general rule contained in that Regulation is that the defendant’s domicile courts are those that have jurisdiction. He also points out that there are special rules which, depending on the subject matter, allow proceedings to be brought elsewhere. This is the case with Articles 7(1) and 7(2), which deal with contractual and non-contractual matters respectively and allow the claimant to sue the defendant at the place of performance of the obligation and at the place where the harmful event took place or is likely to take place. Although the case law of the CJEU has historically recognised that civil actions based on anti-competitive infringements relate to non-contractual matters, the case in question was special because the claimant based its claim on the fact that the anti-competitive infringement resulted from the conditions set out in the contract with the defendant. The Advocate General believes that which provision of Brussels I applies (Article 7(1) or 7(2)) depends on what the claim is based on.

Since the hotel invoked a breach of German competition law, it should be seen as a tort claim. Indeed, the hotel claims that Booking.com has infringed a duty imposed by a law, that is to say, irrespective of a contract or other voluntary commitment. Finally, the Advocate General points out that its interpretation is in accordance with the principle of proximity set out in Brussels I, since the local judge is better placed to assess the conduct and obtain information on the relevant market, market power and the effects of the alleged infringement.