

Brussels G A _ P Newsletter

Brussels Office



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

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News

Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns

In 2017, the Commission opened a formal investigation into Aspen's pricing practices regarding six critical off-patent cancer medicines mainly used in the treatment of leukaemia and other haematological cancers. The Commission believes that the company has progressively increased the prices of cancer medicines (often by several hundred percent) after it acquired the medicines from another company.

The Commission finds that there are no legitimate reasons for Aspen's very high profit levels for the sale of these medicines in Europe: they have been off-patent for half a century, which means that any R&D investment on the medicines has long been recouped. Furthermore, the Commission considers that the company could achieve these price increases since patients and doctors had mostly no alternatives to using these medicines, and added that when national authorities tried to reject Aspen's requests for price increases, the company threatened to withdraw the medicines from the national list of reimbursable medicines or even to withdraw from normal supply in the market.

In order to address the Commission's concerns, Aspen has committed to reduce its prices in Europe for six critical cancer medicines by 73% on average (which is on average below the existing prices when Aspen's price increases started) and to ensure their continued supply for a significant period. These commitments will remain in force for ten years and their enforcement will be monitored by a trustee, under the supervision of the Commission.

Epic Games files EU competition complaint against Apple

Epic Games has announced that it has denounced Apple to the European Commission, complaining about Apple's use of its iOS ecosystem. According to Epic Games, Apple uses its control of the iOS ecosystem to benefit itself while blocking competitors, thus committing an abuse of dominant position. The Commission is currently [investigating Apple's mobile payment solutions](#), Apple Pay, and [App Store](#), following a complaint by Spotify.

The complainant accuses Apple of using its iOS ecosystem to impose commercially unviable burdens on its rivals, quoting in particular Apple's 30% commission on App Store purchases. Epic alleges that when it gave players of its popular Fortnite game a choice on iOS between Apple payment and Epic direct payment, Apple 'retaliated' by blocking Fortnite updates and when it tried to bring the Epic Games Store to iOS, Apple declined. Lastly, while Apple has launched its own gaming distribution service, Apple Arcade, it has impeded competitors including Epic from doing the same.

Commission publishes additional State aid guiding template for data processing capabilities

The Commission has published a new template to assist Member States in the design of their national recovery and resilience plans in line with State aid rules, with respect to support for cloud and edge data processing capabilities. The Commission had already published twelve other templates that deal with topics such as the digitalisation of public administration, including healthcare, the acquisition of zero and low-emission road vehicles or the digitalisation of news media.

Under the [Recovery and Resilience Facility](#), each Member State has to expend a minimum level of 20% to support the digital transition. The new template published covers investment projects within the 'Scale Up' flagship of the Commission's Annual Sustainable Growth Strategy 2021. Such investments will directly contribute to the objective of doubling the share of EU companies using advanced cloud services and big data by 2025, and will help fulfil the European Strategy for Data.

The published template provides guidance as to when (i) support does not constitute State aid; (ii) support constitutes State aid, but no notification is necessary because it falls under an exemption; and (iii) support constitutes State aid and prior notification to the Commission is required.

Commission launches a public consultation on revised States aid rules on Important Projects of Common European Interest

The Commission has opened a public consultation on a proposed revision of the Communication on State aid rules for Important Projects of Common European Interest ("IPCEI Communication"), which aims at facilitating the emergence of cross-border projects of significant importance to the EU economy.

Following an evaluation on the IPCEI Communication, the Commission concluded that the current provisions work well overall and are an effective tool in facilitating the emergence of large-scale cross-border projects of significant benefit to the EU economy and its citizens, but some adjustments may be necessary to clarify relevant State aid rules and certain notions in line with the Commission's administrative practice.

Therefore, the Commission proposes: (i) to clarify certain notions and provide further guidance on certain criteria established in the Communication, (ii) to facilitate the direct and indirect involvement of small and medium-sized enterprises and (iii) to further enhance the open character of IPCEIs and their consistency with EU policies (specially, green and digital transformation). Interested parties can comment on the revision until 20 April 2021. The Commission intends to adopt the new IPCEI Communication in the second half of 2021.

Five judges and one advocate general are appointed to the Court of Justice of the European Justice and to the General Court

The representatives of the governments of the Member States have appointed four judges and an advocate general to the Court of Justice of the European Union and a judge to the General Court, as part of the partial renewal of the composition of the Courts. The terms of office of 14 judges and 6 advocates general will expire next 6 October.

On the one hand, the terms of office of Mr Jääskinen (Finland) and of Mr Larsen (Denmark) as judges and of Ms Kokott (Germany) as advocate general of the Court of Justice have been renewed. On the other hand, Mr Gavalec (Slovakia) and Ms Spineanu-Matei (Romania) have been appointed judges to the Court of Justice for a first term of office. They all have been appointed for a term of office starting on 7 October 2021 and expiring on 6 October 2027. In addition, Mr Petrlik (Czech Republic) has been appointed judge to the General Court as a replacement for Mr Passer, who was appointed as judge of the Court of Justice for the remainder of his term of office (until 31 August 2025).

Commission clears a modification of the Spanish umbrella State aid scheme

In April 2020, the Commission approved the [first Spanish umbrella State aid scheme](#), a National Temporary Framework for State aid, on the basis of which Spanish authorities are able to grant aid to support companies affected by the Covid-19 outbreak through direct grants, repayable advances, tax and payment advantages, States guarantees and subsidised interest rates.

Spain has notified an amendment to the Commission in order to allow the provision of limited amounts of aid through financial intermediaries and a new measure to support the uncovered fixed costs of companies affected by the pandemic which aims to provide liquidity to companies that are still experiencing a decline in turnover of at least 30% because of the Covid-19 outbreak. The aid will take the form of direct grants, tax and payment advantages, repayable advances, guarantees, loans and equity and will be accessible to companies of all sizes active in all sectors, excluding the financial sector.

CNMC fines the two main pharmaceutical producers of PET radiopharmaceuticals in Spain for EUR 5.76 million

Considering that Advanced Accelerator Applications Ibérica, S.L.U (“AAA”) and Curium Pharma Spain, S.A. (“CURIUM”) have formed a cartel that, for at least four years, shared the market for supplying the radiopharmaceutical fluorodeoxyglucose (“18-FDG”), the Spanish Competition and Markets Authority (CNMC) has fined them for EUR 5.76 million and considers the need to initiate the procedure to determine the duration and scope of the prohibition to contract with government agencies.

The CNMC considers that both parties had a joint plan to distribute a large number of contracts for the supply of radiopharmaceuticals to public and private hospitals in Spain. The plan had two parts. On the one hand, the companies maintained a non-competition agreement in many centres in Spain, materialised through self-exclusions from bidding. On the other hand, in those hospitals subject to more competition, the company that was better positioned to supply the radiopharmaceutical due to the proximity of its cyclotron (particle accelerator) did not submit the best bid. As a result, that company was not awarded the contract, and the company with the cyclotrons furthest from the hospital was awarded the contracts at a higher price than would have been the case under normal conditions. Subsequently, the successful company subcontracted the service to its competitor at a price significantly lower than that charged to the hospitals.

CNMC settles the disciplinary case against the General Council of Official Associations of Dentists and Stomatologists of Spain and the Association of the 1st Region (COEM)

In 2019, the CNMC initiated disciplinary proceedings against the Official Association of Dentists and Stomatologists of Region I (COEM) and the General Council of Official Associations of Dentists and Stomatologists of Spain considering that there were reasonable indications of infringements of Article 1 of the Spanish Competition Act and of Article 101 of the Treaty on the Functioning of the European Union. More precisely, CNMC believed that those entities had coordinated actions through collegial agreements, advertising campaigns and other actions that aimed to impede the provision of services to commercial dentistry clinics and exclude them from the market.

After the investigation of the case, it was decided to conclude it through a conventional settlement, a proceeding where the commitments voluntarily offered by the alleged infringer are made binding without admitting to any wrongdoing. The commitments proposed are the following: (i) COEM and the General Council will eliminate any reference or link to the campaigns of social media accounts that the complainant commercial clinics had reported to the Spanish competition authority, (ii) any public expressions or promotions or coordination of advertising campaigns that could imply a preference for a specific business model will be cancelled, (iii) communications activities will be reported to the CNMC, (iv) the content of the CNMC's decision will be sent to all the members of the associations for publication on their respective websites and social media platforms and (v) COEM will manage the job listings under the principle of neutrality.

Cani Fernández explains in Lower House of Parliament the CNMC's independence regime

The president of the CNMC has pointed out that despite the fact that the act of parliament creating the CNMC (Act 3/2013) introduced an advanced independence regime, in line with the requirements set out by EU law, in terms of autonomy in the management of its own resources, the CNMC is

far away from the model Fernández considers to be optimal, which is the Spanish Bank. The CNMC must carry out its functions with organic and functional autonomy and full independence from the Government, public administrations and market agents.

As positive aspects of the CNMC's autonomy regime, Fernández pointed out the following: (i) the system for appointing the CNMC's decision-making body members, (ii) the duration of their terms (6 years without renewal, which is consistent with the general instructions of organisations such as the OECD), (iii) the rules on incompatibility (exclusive dedication during the term and after it no prohibition in respect of private professional activities) (iv) transparency (the CNMC must report to the appropriate committees in the lower House on its actions and submit a plan of future actions), (v) accountability (the CNMC is obliged to appear before the Parliament on a regular basis and is subject to the supervision of the Spanish Comptroller's Office and the Court of Auditors) and (vi) the acts of the CNMC are subject to judicial review.

However, Fernández considers that the CNMC has limitations in the execution and use of the budget allocated to it. The obstacles, according to Fernández, derive both from the regulatory framework governing the CNMC and from the interpretation of the regulations by the ministries. She explained that when the merger of the regulators and the competition authority was carried out eight years ago, the unified assimilation of the existing work groups at that time was not undertaken. This resulted in a great disparity in the management of human resources. The president also criticised the fact that the CNMC is incapable, due to the rules to which it is subject, of adapting its structure to the changing needs of production models and the digital society.

Finally, the president of the CNMC pointed out that, despite having surpluses, the CNMC cannot hire staff, recalling that the CNMC receives approximately 56 587 000 euros from the State, while the total funds that the CNMC sent to the Public Treasury for the collection of fees and penalties in 2019 was 246 million euros. She invited deputies to change CNMC's capacities in the coming months, when the ECN+ Directive will be transposed into national law.

Case law

The General Court delivers its first rulings on the Temporary State Aid Framework

In March 2020, France notified the Commission of an aid measure in the form of a deferral of the payment of civil aviation tax and solidarity tax on airline tickets due on a monthly basis during the period from March to December 2020. The measure applied to airlines holding a French licence, which means that they must have their principal place of business in France. The Commission authorised the notified measure since it considered that it was compatible with Article 107(2)(b) TFEU, which enables State aid to make good the damage caused by natural disasters or exceptional occurrences.

In April 2020, Sweden notified the Commission of an aid measure in the form of a loan guarantee scheme to support airlines holding a Swedish operating licence. The maximum amount of the loan guaranteed under that scheme is five billion SEK. The Commission authorised the scheme because it considered it to be compatible with Article 107(3)(b) TFEU, which enables aid intended to remedy a serious disturbance in the economy of a Member State.

Ryanair brought actions to quash both decisions before the General Court, arguing that there had been an infringement of the principle of non-discrimination and the principle of free provision of services, and a breach of the principle of proportionality.

As regards the argument relating to a supposed discrimination on grounds of nationality, the General Court has stated that Article 18 TFEU prohibits any discrimination on grounds of nationality, without prejudice to any special provisions contained therein. The General Court affirms that both Article 107(2)(b) and 107(3)(b) are included in those special provisions. It explains that the Covid-19 pandemic and travel restrictions and lockdown measures (i) constitute an exceptional situation within the meaning of Article 107(2)(b) TFEU and (ii) the pandemic has caused a serious disturbance in the Swedish economy, within the meaning of Article 107(3)(b) TFEU.

The limitation of the granting of aid to airlines in possession of a Swedish or a French licence is appropriate for achieving the objective of remedying a serious disturbance in Sweden's economy and of making good the damage caused by the exceptional occurrence in question. The General Court has pointed out that, under Regulation No 1008/2008, possession of a French/Swedish licence means in practice that the principal place of business of the airlines is on French/Swedish territory and that they are subject to financial and reputational monitoring by the French authorities. According to the General Court, the provisions of that regulation create reciprocal obligations between the airlines holding a French/Swedish licence and the French/Swedish authorities and, therefore, a, specific, stable link between them that adequately satisfies the conditions laid down in Article 107(2)(b) TFEU and Article 107(3)(b) TFEU.

In addition, the measures are proportionate since the airlines eligible for State aid are those most severely affected by the travel restrictions and lockdown measures imposed by France; in the case of Sweden, the airlines eligible for the aid contribute most to Sweden's regular air service, which meets the objective of ensuring Sweden's connectivity.

Furthermore, the General Court states that the principle of the free provision of services is not infringed. The air transport sector is subject to specific rules which define the conditions for applying the principle of the free provision of services within the air sector. However, Ryanair has not alleged any infringement of that regulation.

Ryanair has already announced that it will appeal both judgements to the Court of Justice of the European Union. They are the first two judgements of the 16 appeals that Ryanair has brought against the Commission over aid granted to airlines under the Temporary State aid Framework. Ryanair has also challenged the rescue of Air Europa, which received 475 million in aid.

The Court of Justice holds that Slovak Telekom, found liable by the Commission for abusing its dominant position on the market for certain telecommunication services, could also be subject to sanctions imposed by the Slovak authorities for such abuse on the market for other telecommunication services

Considering that Slovak Telekom's refusal to supply with respect to unbundled access to its local loops and that it had carried out margin squeezes as regards wholesale access to its unbundled local loops and to other broadband access services and corresponding retail access services in Slovakia constituted an abuse of a dominant position, the European Commission fined Slovak Telekom and Deutsche Telekom (its majority shareholder) with 38 838 000 euros in 2014. In 2009, the Slovak competition authority fined Slovak Telekom for abuse of a dominant position resulting from the adoption of a margin squeeze strategy as regards its margins between the prices for retail telecommunications services and those for wholesale interconnection services with 17 453 326 euros.

The Supreme Court of Slovakia, which is ruling on the dispute between Slovak Telekom and the Slovakian competition authority, had doubts about the application of the principle of *ne bis in idem* in this case. Therefore, it decided to stay proceedings and to refer a preliminary ruling to the Court of Justice of the European Union ("the Court of Justice").

In case C-857/19, the Court of Justice has ruled that the principle of *ne bis in idem* does not apply to the case at hand. First of all, it notes that national competition authorities lose their power to apply the provisions of the Treaty on Functioning of the European Union ("TFEU") relating to competition cases where the Commission has initiated proceedings in order to adopt a decision finding an infringement of those provisions. National competition authorities are relieved of their power solely in respect of the facts which are the subject of the proceedings initiated by the Commission. In this case, while the Commission initiated proceedings against Slovak Telekom for alleged abuses of dominant position on the market for wholesale broadband access services, the Slovakian competition authority dealt with abuses of a dominant position on the wholesale and retail markets for telephone services and low-speed internet access services.

Currently at GA_P

GA_P's Competition Law Practice hosts webinar to discuss main developments in Competition law in 2020 and on what to expect from 2021

On 3 February 2021, GA_P's Competition Law Practice hosted the webinar "What happened in Competition Law in 2020 and what to expect from 2021" (the link to the recording of the webinar is available [here](#), and the PowerPoint presentation [here](#)).

Iñigo Igartua, head of GA_P's Competition Law Practice, Miguel Troncoso, Brussels' managing partner, Eduardo Gómez de la Cruz, Of counsel in this practice, and our lawyers Andrea Díez de Uré, Ricardo Alonso Soto, and Jesús Urriza analysed the main competition law developments that took place during 2020, at the EU and Spanish level, and shared their views on the trends they expect in 2021.

The following topics were discussed: two rulings of the Audiencia Nacional on limitation periods and the qualification of anticompetitive infringements as single infringements, a Supreme Court ruling on the question of whether a company can be sanctioned for participating in a cartel if it is not active in the relevant market, the Commission's decision in the Meliá case, Interflora case, the judgement of the Court of Justice in the *Kone II* case providing clarification on who can claim damage caused by a cartel, and other interesting highlights of 2020 such as the CNMC's guidelines on compliance programmes. Furthermore, as regards 2021, our experts discussed the future review of the regulation on vertical restraints, the digital markets act, the relationship between the Green Deal and competition policy, the State aid authorised under the Temporary Framework, some of the Commission's ongoing cases (Facebook and Amazon) and the amendments to the Spanish competition act.

GA_P's Competition Law Practice organises a webinar on distribution

The second event of the series of debates on current competition law issues organised by GA_P (#Edistribution Reloaded) took place last 24 February. Iñigo Igartua discussed the decision of the French Competition Authority in the Apple case, focusing on the economic dependence doctrine. The next session will take place on 24 March and will discuss the new perspectives on price recommendations.

GA_P's Competition Law partner Miguel Troncoso Ferrer ranked in 2021 "Chambers & Partners global edition"

Our Brussels-based partner Miguel Troncoso Ferrer has been ranked in the 2021 "Chambers & Partners global edition" under Foreign Expertise in Spain for Competition: EU - Belgium and Expertise Based Abroad in Spain for Corporate/M&A: Competition- Spain.