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News

Commission examines proposed merger of GRAIL and Illumina

The European Commission ("the Commission") has accepted the requests submitted by Belgium, France, Greece, Iceland, the Netherlands, and Norway to assess the proposed acquisition of GRAIL by Illumina. They are both companies based in the Unites States and active in the healthcare sector.

The proposed acquisition does not reach the notification thresholds set out in the EU Merger Regulation, and France decided to submit a referral request to the Commission pursuant to Article 22(1) of the EU Merger Regulation, which allows Member States to request the Commission to examine a merger that does not have an EU dimension but affects trade within the single market and threatens to significantly affect competition within the territory of the Member States making the request. France was joined in its request by Belgium, Greece, Iceland, the Netherlands and Norway joined France's referral request. The Commission accepted the referral since it considered that the criteria set out in Article 22 of the EU Merger Regulation are met. In particular, the combined entity could restrict access to or increase prices of next generation sequencers and reagents. In addition, the Commission believes that GRAIL's competitive significance is not reflected in its turnover, as notably evidenced by the USD 7.1 billion dollar deal value.

It is the first time since EU competition commissioner Margrethe Vestager announced the Commission's new approach in terms of merger control of "below the threshold" transactions under Article 22 of EU Merger Regulation, that the Commission will examine a merger transaction that did not met any national thresholds in the EU.

On 29th April 2021, Illuminia **announced** that it has challenged the Commission's decision to accept the referral before the General Court. It also said that while the procedure before the General Court is pending, it will continue to collaborate with the Commission in the merger review.

Commission fines three railway companies for customer allocation cartel

The Commission fined last 20 April Österreichische Bundesbahnen (ÖBB), Deutsche Bahn (DB) and Société Nationale des Chemins de fer belges (SNCB) with a total of €48 million for participating in a customer allocation cartel.

The cartel concerned cross-border rail cargo transport services on blocktrains under the freight sharing model. That model is foreseen in international railway law and it allows railways companies performing cross-border rail services to set a single overall price for the service required

under a single multilateral contract. The Commission found that the three above mentioned companies coordinated by exchanging collusive information on customer requests for offers and provided each other with higher quotes to protect their respective business.

The three companies admitted their involvement in the case, cooperated with the Commission and agreed to settle the case. The fine of DB was increased by 50 % since it was considered a repeat offender because it had previously been held liable for another cartel.

Commission fines investment banks for SSA bonds trading cartel

The Commission has fined Bank of America Merrill Lynch, Crédit Agricole and Crédit Suisse with €28.494.000 for having taken part in a cartel in the secondary trading market of Supra-sovereign, Sovereign and Agency (SSA) bonds. Deutsche Bank was not sanctioned because it revealed to the Commission the existence of the cartel.

The cartel took place through a core group of traders of the four above mentioned companies, who updated each other on their trading activities, exchanged commercially sensitive information, coordinated on prices shown to their customers or to the market in general and aligned their trading activities on the secondary market for these bonds. The behaviour lasted five years.

Commission adopts revised Regional Aid Guidelines

The Commission had modified the rules under which Member States can grant State aid to companies to support the economic development of disadvantaged areas in the EU, which will enter into force on 1st January 2022. The modification is the result of the evaluation of the current rules carried out by the Commission in 2019 and of an extensive consultation of all interested stakeholders (including Member States).

In general, the structure of the regional aid guidelines has been simplified, definitions have been clarified and some changes have been introduced in the light of the Green Deal and the EU's Industrial and Digital Strategies. The Commission has increased the condition of overall regional aid coverage to 48 % of the EU population (previously 47 %), updated the list of assisted a-areas (areas eligible for regional aid under Article 107(3)(a) of the Treaty, which tend to be more disadvantaged within the EU in terms of economic development) and pre-defined c-areas based on the latest available Eurostat statistics on GDP (areas eligible under Article 107(3)(c) of the Treaty, which also tend to be disadvantaged but to a lesser extent).

Commission opens consultation on state aid RDI framework

The Commission has opened a public consultation on the revision of the State aid Framework for research, development and innovation (the RDI Framework), for which interested stakeholders can submit their views until 3 June 2021.

The RDI Framework aims to facilitate research, development and innovation activities which would not take place in the absence of public support. In its State aid Fitness Check, the Commission carried out an evaluation of the RDI Framework, which showed that the current rules work generally well and are an effective tool in facilitating research, development and innovation activities. Nevertheless, it also showed that some targeted modifications of the existing rules may be needed. Therefore, the Commission is now seeking for the stakeholders' views on the targeted modifications.

Among others, the targeted revisions consist in (i) improving and updating the existing definitions of research and innovation activities eligible for support under the RDI Framework, (ii) including new provisions to enable public support for technology structures and (iii) simplifying certain rules.

Commission approves up to € 4 billion French measure to recapitalise Air France

The Commission approved last 6 April the recapitalization of €4 billion of Air France through its Holding company under the State aid Temporary Framework. The State aid constitutes of the following steps: (i) the conversion of €3 billion loan already granted by France into a hybrid instrument and (ii) a capital injection by the State, through the subscription of new shares in a share capital increase, in a limit of €1 billion. Measures have been adopted in order to ensure that KLM, the other subsidiary of the Air France-KLM Group, will not benefit from the aid.

The Commission has found that the recapitalization meets the conditions established by the Temporary Framework, and in particular: (i) the conditions on the necessity, appropriateness and size of the intervention, (ii) the conditions on the State's entry in the capital and remuneration, (iii) the conditions regarding the exit of the State from the capital of Air France, (iv) the conditions regarding governance and (v) the prohibition of cross-subsidisation and acquisition ban. Furthermore, measures have been taken in order to preserve effective competition. In particular, Air France will make available up to 18 slots per day at Paris Orly airport to a competing carrier.

Spain transposes ECN+ Directive

The deadline for transposing Directive 2019/1 (Directive ECN+) expired on 4 February 2021. This directive aims at alleviating divergences between national competition authorities in the

application of competition law, as well at establishing mechanisms for mutual assistance between them. Due to Spain's failure to transpose the Directive within the deadline set by ECN+ Directive, the Commission opened infringement proceedings against Spain. Therefore, Spain transposed last 28 April the ECN+ Directive by means of a decree-law, which is decided by the government in cases of "extraordinary and urgent need". It addresses very different issues (competition, prevention of money laundering, credit institutions, tax measures, posting of workers, environment, etc.).

Although a majority of the provisions of the Directive are already incorporated into Spanish law, there are important novelties. For instance, the duty of collaboration with the Spanish competition authority ("CNMC"), as well as the agency's inspection functions are enlarged and specified. The CNMC will have the power to conduct interviews with any representative of a company or association, any representative of other legal persons, and any natural person who may have relevant data and information. Refusing to take part in an interview or incorrect or misleading information will be considered a serious infringement.

In addition, claims with little evidence and that refer to behaviours with limited effects on consumers and the market or can be eradicated by other means may be rejected, and the upper limit of the fines for all infringements of Articles 101 and 102 TFEU is revised to 10% of the total world-wide turnover.

The CNMC must inform the European Competition Network on the imposition of interim measures. The statute of limitations is also detailed: it is interrupted by the opening of proceedings before the competition authorities of other Member States or before the Commission with respect to the same facts that constitute an infringement of Spanish Antitrust Act or of Articles 101 and 102 TFEU. The CNMC must also approve a Code of Conduct for its staff, which will be published in the Official State Gazette.

The CNMC imposes a fine of €850.000 euros on Repsol Comercial de Productos Petrolíferos

The CNMC **has fined Repsol** with 850.000 euros for failing to comply with two of the commitments that the Company voluntarily submitted so that the CNMC accepted its acquisition of Petrocat in 2014. Specifically, Repsol breached Petrocat's obligation in 2015 to source a minimum quantity from third party operators in order to avoid market foreclosure to third party suppliers. Likewise, Repsol failed to comply with the obligation to send the CNMC the annual periodic report on compliance with the commitments for 2015. Failure to comply with commitments to which merger operations are subordinated constitutes a very serious infringement of Article 62.4.c) of the Spanish Antitrust Act.

The CNMC initiates disciplinary proceedings against Audax Renovables S.A. for alleged practices prohibited by Antitrust Act

The CNMC suspects that Audax Renovables may have distorted free competition through unfair acts. Said company may have carry out acts with the aim of making household gas and electricity customers to switch their suppliers to Audax Renovables itself and to its marketers. This practices would have lasted from at least 2018 to the present.

The investigation is the result of various complaints filed with the CNMC as well as information provided by the Organisation of Consumers and Users.

The CNMC initiates disciplinary proceedings against Albia Gestión de Servicios for gun-jumping

Last 15 April, the CNMC opened disciplinary proceedings against Albia Gestión de Servicios for not having notified the purchase of Tanatoria Móstoles. The fact of not notifying a concentration is known as "gun jumping" and constitutes a violation of the Spanish Antitrust Act. By virtue of Article 9 of said act, parties have to notify to the CNMC a merger before executing it. If they fail to do so, they can be fined with up 5% of their total turnover of the preceding year.

In this case, the CNMC considered that the market share thresholds were met in the retail market for funeral services in Móstoles and required, *ex oficio*, Albia to notify the transaction, which was authorized in phase I and without conditions in April.

The CNMC publishes the results of the public consultation on trade and wholesale distribution of medicines in pharmacies

The CNMC is conducting a report on the conditions of competition in the sector of trade and wholesale of medicines, which is part of the Strategic Action of the 2020 Action Plan: "Advancing in the preparation of reports in sectors that directly affect the welfare of citizens, with an emphasis on the most vulnerable groups". During that evaluation, a public consultation was carried out from 13 January 2021 until 12 February 2021. The CNMC **has now published** the results. A total of 33 answers have been provided to the public consultation (the majority come from pharmaceuticals).

With regard to the issue of conditions of competition between branded original medicines and generics and biosimilars, there does not seem to exist a consensus between consumers and pharmaceutical companies. Some stakeholders state that there is a lack of incentives to dispense generics and biosimilars, while others point out that branded medicines are discriminated against compared to generics and biosimilars, which would have a negative impact on innovation. Many

stakeholders have criticised the current system of price regulation, as the equality of prices between generics and original drugs foes not allow a differentiation between the two types of products. In addition, many stakeholders have suggested a reform of both the wholesale and retail remuneration system.

The CNMC publishes a guide on competition for consumers

The CNMC has published **a guide** on competition for consumers, where it answers frequently asked questions from consumers about how markets work and why competition is necessary. Among others, the guide answers the following questions: (i) what is competition and why does it benefit us all, (ii) why do some companies prefer not to have competition and what do these companies do, (iii) does the CNMC play any role in preventing these situations, (iv) are there any real cases of companies that have infringed competition rules and (v) does defending competition mean advocating for no regulation. The guide also lists the instruments through which citizens can collaborate with the CNMC. In addition, the CNMC's YouTube channel has included a series of videos and infographics aimed to help students and teachers to approach matters related to competition and market regulation.

Catalan competition authority opens collusion investigations into events companies

The Catalan Competition authority ("ACCO") **has initiated proceedings** against Arcoiris Lighting Systems and Iniciativas Eventos for an alleged infringement of competition law. Specifically, the ACCO suspects that both companies have coordinated their behaviours in public tenders and in the commercial conditions offered to private clients. As part of this investigation, the ACCO has carried out an inspection at the domicile of one of the companies under investigation, during which supposedly the inspection work may have been obstructed. The authority has 18 months now to adopt a decision.

The ACCO publishes its annual programme for 2021

The ACCO **has published** the priority areas where it will carry out its competition promotion functions in 2021. Prior to this, it carried out a public consultation in order to identify the economic sectors and markets in Catalonia where operational problems and potential restrictions on competition may occur. The programme for 2021 focuses on four axes: (i) analysis of the need to modify the regulation of the activity of technical vehicle inspection to open the market to competition, (ii) assessment of the degree of concentration in the banking sector in Catalonia, (iii) examination of the development of the electric vehicle charging market and (iv) tasks to promote competition in the area of public procurement.

The ACCO publishes the document "low-value contracts: risks for competition and proposals for improvement"

In a **recently published document**, the ACCO has addressed the risks involved in low-value contracts. This is a type of tender procedure where the public contract is directly awarded to an economic operator, due to the low economic value of the object of the contract. By this way, expensive procurement procedures are avoided. Since this is an exception to the principle of free competition, recourse to this procedure must be justified on grounds of extreme necessity and proportionality.

In Catalonia, a total of 197.752 low-value contracts were carried out, which amounted to a total of 332 million euros in 2019. The ACCO points out that the data shows that this is a figure that is being used excessively. To remedy this problem, the ACCO proposes to improve the planning and programming of public procurement and to use other alternatives provided for in public procurement legislation (e.g. simplified open procedure). The ACCO also suggests that the intention of the contracting authority to use low-value contracts should be made public prior to the award of the contract and that administrative bodies should adopt guidelines of good conduct.

The Basque Competition Authority initiates proceedings against two companies in the funeral sector in Gipuzkoa for alleged violation of competition law

The Basque Competition Authority **is investigating** a possible abuse of a dominant position in the local market for mortuary and crematorium services in Gipuzkoa. At the moment, the companies concerned are awaiting the CNMC's decision in relation to the Memora group's acquisition of other funeral parlours **(file C/1151/20).**

Case law & Analysis

According to Advocate General Pitruzzella, a national court can order a subsidiary company to pay compensation for the harm caused by the anticompetitive conduct of its parent company in case where the Commission has imposed a fine solely on that parent company

Following the 2016 Commission Decision imposing fines on a number of companies in the automotive sector for collusive arrangements on the pricing of trucks, the Spanish company Sumal S.L. asked the Spanish courts to order Mercedes Benz Trucks España S.L. ('MBTE') to pay a

compensation of approximately EUR 22 000. According to Sumal, that amount corresponded to the increased price paid to MBTE when purchasing certain trucks manufactured by the Daimler Group as compared with the lower market price that it would have paid in the absence of those collusive arrangements. In that context, the Audiencia Provincial de Barcelona asks the Court of Justice whether a subsidiary (MBTE) can be held liable for an infringement of the EU competition rules by its parent company (Daimler) and under what conditions such liability can arise.

Advocate General Giovanni Pitruzzella proposes that the Court should apply the economic unit theory –used previously in order to impose penalties on a parent company for the anticompetitive conduct of its subsidiaries ('bottom-up' liability) –. Following the same reasoning, he suggests that it would be possible to find a subsidiary liable for harm caused by the anticompetitive conduct of its parent company ('top-down' liability). To impose 'bottom-up' liability on the parent company two separate factors must be taken into account: (i) the first concerns the decisive influence which the parent company must exercise over its subsidiary - whereby the latter simply follows the instructions given to it by the former; (ii) the second, relates to whether the parent company and the subsidiary constitute an economic unit and act jointly on the market in spite of the formal 'veil' of their separate legal personalities.

Pitruzzella specifies that, in this particular case where it is the parent company that commits the infringement, the subsidiary's 'top-down' liability results not only from the decisive influence exercised by the parent company, but also from the fact that the subsidiary's business is in some way necessary to give effect to the anticompetitive conduct (for instance, because the subsidiary sells the goods that are the subject of the cartel). Therefore, in order for top-down liability to be incurred, the subsidiary must operate in the same area as that in which the parent company has engaged in anticompetitive conduct and must have been able, through its conduct on the market, to give effect to the infringement.

The Advocate General concluded that the liability of the companies comprising that same economic unit is joint and several - therefore, each of those companies may be required to pay the entirety of the fine or the compensation. Thus, granting a private individual the option of bringing an action against the subsidiary domiciled in that private individual's Member State increases the chances that the claims for compensation will be satisfied in full.

According to Advocate General de la Tour, Regulation Brussels I Recast determines both international and local jurisdiction for damages claims

Case C-30/20 concerns a Spanish court's request for a preliminary ruling in a truck cartel damages case. A claimant domiciled in Córdoba, who had purchased five Volvo vehicles in that city, filed an action against four entities of the Volvo group, three of them domiciled in different member states, before the Juzgado de lo Mercantil No. 2 of Madrid. The Spanish courts had concerns on the application of Article 7(2) of Brussels I Recast Regulation.

More precisely, Brussels I Recast Regulation establishes, as a general rule, that the defendant's domicile courts are those that have jurisdiction. In addition, 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 plaintiff 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. The Spanish court believes that Article 7(2) can be applied to the case at stake, but required clarification on whether said Article is a rule purely related to international jurisdiction, or whether it is a combined rule that also determines local territorial jurisdiction.

In its conclusions of 22 April 2021, Advocate General Richard de la Tour has considered that the purpose of Article 7(2) is to govern the competence of jurisdictions not only among member states, but also at internal level. In order to conclude so, he argued that it follows from a literal interpretation of the regulation: while Article 4 refers to "the courts of that [Member] State", Article 7(2) refers to a claim "in another Member State" (other than that in which the defendant is domiciled) and, within that State, to "the courts for the place where the harmful event occurred or may occur". Furthermore, Article 7(2) contains an exceptional rule that aims to protect the weak party. Finally, this interpretation is in accordance with the principle of proximity and of good administration of justice.

In addition, the Advocate General took the opportunity to provide clarifications on the scope of *Tibor-Trans* judgement of 2019 in the light of the new case-law (judgements of *Verein für Konsumenteninformation* and *Wikingerhof*). He proposed to use *Verein für Konsumenteninformation* judgement (where the court held that the place where the harmful event took place was the one in which the vehicle was acquired) as a basis, since it has several points in common with the case at stake. However, he also considered that there should be an exception for a situation where the location of the alleged damage is not consistent with the location of the victim's activity. Therefore, in cases in which the harmful event happened in a place different from that where the harmed party carries out its activity, the opinion proposed to rule that the action can be introduced in the jurisdiction where the injured party has its head office.

Currently at GA_P

GA_P's Competition Law Practice hosts webinar on Vertical Block Exemption Regulation review

On 28 April 2021, GA_P's Competition Law Practice hosted a webinar on the revision of the Vertical Block Exemption Regulation (VBER). 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, explained the structure and rationale of the VBER and shared their views on the expected changes of the Regulation, which are likely to take place in 2022.

The following topics were discussed: the issues of dual distribution, dual pricing, incidence of marketplaces in vertical relationships, most favoured nation clauses, resale price maintenance, geoblocking and future of the selective distribution.

The next webinar will deal with the reform of the Spanish Antitrust Act and take place next month.

GA_P's Competition Lawyers ranked in Legal 500 2021

Our Lisbon based partner Mário Marques Mendes has been ranked in hall of fame as leading individual, Iñigo Igartua, head of GA_P's Competition Law Practice, has been as leading individual, and our Barcelona based associate Andrea Díez de Uré has been ranked as rising star. GA_P's Competition Law Practice has been ranked Band 3 in Portugal and Band 3 in Spain.