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News

Commission publishes draft VBER Regulation and Vertical Guidelines

The European Commission (**"the Commission"**) published on 9 July its proposal for a block exemption regulation for vertical agreements (**"VBER"**) as well as guidelines on vertical restraints. Interested parties are invited to submit their comments on the draft rules by September 2021.

Among the most relevant suggestions, the Commission proposes limiting the scope of the exception of dual distribution (situations where a supplier not only sells its goods or services through independent distributors, but also sells them directly to end customers) to cases where it considers that there are no horizontal concerns. Indeed, Article 2(4) of the proposal limits the exception to cases of dual distribution where the aggregate market share of the manufacturer or importer and the distributor does not exceed 10%. If the supplier and its distributors have an aggregate market at the retail level of more than 10% and an individual market share of less than 30%, the agreement in question is exempted unless it concerns any exchange of information between them.

Concerning most favoured nation clauses, which are clauses that enable for example a platform to require that suppliers do not offer lower prices or better terms on other platforms (wide clauses) or on their own websites (narrow clauses), the VBER proposal accepts the validity of narrow parity obligations but excludes broad ones from its exemption.

Furthermore, Article 4 of the proposal no longer qualifies dual pricing (the practice whereby a manufacturer charges a different price for the sale of the same product, depending on whether the distributor will sell it online or offline) as a hardcore restriction entailing the withdrawal of the benefit of the VBER. Accordingly, suppliers will be able to set different prices for online and offline sales vis-à-vis the same distributor. The proposal also establishes a "shared exclusivity", which allows a supplier to appoint more than one exclusive distributor in a given territory or for a given customer group. The proposal details which restrictions suppliers operating a selective distribution can impose on their authorised distributors. For example, they may limit their active or passive sales to unauthorised distributors located in the exclusive distribution territory. In addition, the Commission will consider from now on that the criteria imposed by suppliers on their distributors in relation to online sales no longer have to be equivalent to the requirements imposed on physical shops, given the fact that the two channels are of an intrinsically different nature.

Commission broadens scope of application of the General Block Exemption Regulation

The General Block Exemption Regulation ("GBER") declares specific categories of State aid compatible with the Treaty if they fulfil certain conditions and it exempts these categories from the requirement of prior notification to the Commission. If an aid does not meet the criteria set out by the GBER, it does not mean that it is incompatible with the internal market, but that it has to be notified to the Commission, which will have to carry out a detailed analysis on the benefits and effects of the measure on the competition within the internal market. The Commission expanded the scope of application of the GBER[1] last 23 July.

The new rules concern these areas: (i) financing and investment operations supported by the InvestEU Fund; (ii) research, development and innovation, (iii) European territorial cooperation projects, (iv) European Innovation Partnership for agricultural productivity and sustainability and (v) operational group projects or community-led local development projects. In addition, the Commission has revised the rules in the following sectors: (i) aid for energy efficiency projects in buildings, (ii) aid for publicly accessible electric recharging and hydrogen refuelling infrastructure for road vehicles and (iii) aid for fixed broadband networks, 4G and 5G mobile networks, certain trans-European digital connectivity infrastructure projects and certain vouchers. These measures aim to accompany the new multiannual financial framework, support the transition to a green and digital economy and the recovery from the economic effects of the COVID-19 outbreak.

The Commission has also extended the exception to the general rule that excludes any undertakings in difficulty from receiving GBER aid: undertakings that were not in difficulty on 31 December 2019 but became undertakings in crisis during the period from 1 January 2020 to 31 December 2021 are eligible for aid under the GBER.

Commission fines car manufacturers € 875 million for restricting competition in emission cleaning for passenger cars

The Commission has found that Daimler, BMW and Volkswagen Group breached EU competition rules by colluding on technical development in the area of nitrogen oxide cleaning. The companies had for over five years regular technical meetings where they discussed the development of the selective catalytic reduction (SCR)-technology which eliminates harmful nitrogen oxide (NOx)-emissions from diesel passenger cars through the injection of urea into the exhaust gas stream.

According to the Commission, the above-mentioned companies colluded to avoid competition on cleaning better than what is required by the law despite the relevant technology being available. The institution has indicated that the companies reached an agreement on urea tank sizes and ranges and a common understanding on the average urea consumption, while exchanging confidential information on these elements, thereby

[1] https://ec.europa.eu/competition-policy/state-aid/legislation/regulations_en

avoiding uncertainty as regards NOx-emissions and urea refill ranges. The Commission considers that this behavior is an infringement of competition by object in the form of a limitation of technical development.

All parties acknowledged their participation in the cartel and agreed to settle the case. The Commission has imposed on BMW and Volkswagen Group a fine of €875 million (Daimler was not sanctioned because it revealed the existence of the cartel to the Commission).

Commission adopts new notice on the enforcement of State aid rules by national courts

The Commission adopted a New Notice on the enforcement of State aid rules by national courts (available here[2]), which will replace the 2009 Enforcement Notice. It aims at offering guidance to national courts when they apply State aid rules and at encouraging cooperation with the Commission. The notice is highly relevant due to the fact that both the Commission and national courts have different complementing roles in the application of State aid rules. In particular, national courts have to address all the consequences of an infringement of Member States' obligation to not implement any State aid without the prior authorisation of the Commission. However, the Commission is the only competent authority to declare that certain public support is incompatible with the internal market.

The new notice takes into account the most recent case law of the Union Courts and the evolution of the regulatory framework of State aid since 2009. For example, it has introduced the most recent case law on the principles of equivalence and effectiveness applied to national procedures. These principles mean that the applicable national legislation must not be less favourable when applying Article 108(3) TFEU than the one governing similar domestic situations (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by the EU law (principle of effectiveness). It also details when third parties have legal standing in cases concerning State aid granted through fiscal measures (to obtain the refund of the amount levied): only where the tax or levy to which they are subject forms part of the financing of the unlawful State aid; their legal standing does not rely on the existence of a competitive relationship with the aid beneficiary.

The new notice builds on the 2019 study on the enforcement of State aid rules and decisions by national courts[3] and takes into account comments submitted in a public consultation[4] that ended last April.

[2] https://ec.europa.eu/competition-policy/state-aid/legislation/procedural-regulation_es

[3] https://op.europa.eu/en/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1/language-en/format-PDF

[4] https://ec.europa.eu/competition-policy/public-consultations/2021-sa-enforecement-notice_en

Commission publishes findings of evaluation of Market Definition Notice

The Market Definition[5] Notice provides guidance on the Commission's approach to market definition in EU competition law. The Commission announced in March 2020 that it was going to evaluate the Notice with the aim of understanding how it has performed since its adoption in 1997 and of determining whether it is necessary to update it due to recent developments in, for example, the digital sector. During the evaluation procedure, stakeholders could submit their views through a public consultation that took place between June and October 2020, the national competition authorities were consulted as well and the Commission gathered an external evaluation support study. The Commission has now published a Staff Working Document[6] that summarises the findings of the evaluation of the Market Definition Notice.

Overall, the evaluation has shown that the notice remains generally relevant since it facilitates competition enforcement and provides transparency as the first step of many of the Commission's competition assessments. However, there might be areas where the market definition notice may not fully reflect developments in the Commission's approach (for instance, non-price competition, the use of the small significant non-transitory increase in price or the assessment of geographic markets in conditions of globalisation. and the latest developments in the Court of Justice's case law (specially, the merger control standard of "significant impediment to effective competition" which was introduced in 2004 has not been updated). Furthermore, the Commission notes that while the principles of market definition remain unchanged, their application in digital context may lead to additional complexities that may not be fully addressed in the market definition notice (for example, market definition for multi-sided platforms).

Commission publishes results of evaluation of EU State aid rules for deployment of broadband networks

The Broadband Guidelines of 2013 and the relevant provisions of the GBER set out the criteria for the allocation of State aid for competitive infrastructure deployment in certain areas. The Commission launched in 2020 an evaluation of these instruments in order to assess how they have worked in light of their objectives and whether they need updates given the recent technological and market developments.

Even though overall these instruments have been effective for their purposes, the Commission has found in a recently published staff working document[7] that there might still be room for a further adjustment of the scope and for further

[5] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29

[6] https://ec.europa.eu/competition-policy/system/files/2021-07/evaluation_market-definition-notice_en.pdf

[7] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12398-Broadband-network-deployment-evaluation-of-EU-state-aid-rules_en

improving the rules (for instance, in order to take into account the development in electronic communications sector and Green Deal ambitions). It has also observed that the guidelines do not fully align to certain provisions of the Gigabit Communication, the Broadband Cost Reduction Directive and the European Electronic Communications Code.

The Commission will take the results into consideration when reviewing the existing rules and is expected to publish soon a roadmap and a consultation of stakeholders so that they can give their feedback to the staff working document.

Commission consults on the horizontal block exemption regulations for research & development and specialisation agreements

The Commission launched on 13 July a public consultation on the revision of the R&D and specialisation block exemption regulations (Regulations 1217/2010 and 1218/2010), and accompanying guidelines, which will expire in December 2022.

The public consultation, which has the form of a questionnaire[8], is addressed to all stakeholders so that they can submit their views on the different policy options and additional proposals for revision outlined in the Inception Impact Assessment published by the Commission this year. The deadline for providing feedback is 5 October 2021. Following this, the Commission will publish for comments the draft revised rules. The evaluation phase showed that even though the current rules are seen as a useful tools for businesses, there are several areas where the rules are not sufficiently adapted, in particular, in relation to digitisation and the pursuit of sustainability goals. The Staff Working Document[9] published last 6 May concluded that legal certainty could be improved and the administrative supervision by national competition authorities and national courts could be simplified by addressing those areas.

Commission consults on short-term export credit insurance communication

The Commission has launched a public consultation[10], open from 22 July to 23 September 2021, on the evaluation of the Short-term export credit insurance Communication. Export-credits allow foreign buyers of services and goods to defer payment but implies 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

[8] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13058-Horizontal-agreements-between-companies-revision-of-EU-competition-rules/public-consultation_en

[9] https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf

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 Commission's evaluation showed that, overall, the communication remains relevant and helpful, but some amendments (most of them of a technical nature) might be needed. These concern (among others) the expansion of the application of its provisions beyond 2021 and the publication by the Commission of its decisions concerning the list of marketable risk countries on its website and through a communication in the Official Journal.

Commission publishes 2020 Competition report

The Commission has published its latest competition policy report[11], where it provides detailed information on the most important cases and legislatives initiatives that took place in 2020.

First, it highlights that EU competition law was used by companies and Member States in order to alleviate the impact of the COVID-19 pandemic. More precisely, the Commission adopted the COVID-19 Temporary Framework, which establishes the conditions the Commission would apply to declare aid compatible with Article 107(3)(b) TFEU. That article allows the grant of State aid in order to remedy a serious disturbance in the economy of a Member State. The Temporary Framework has been adapted several times in 2020 in order to adapt the rules to the rapidly evolving situation of the pandemic. In 2020, the Commission adopted 598 COVID-19 related State aid decisions and the authorised State aid can be estimated at EUR 3.08 trillion (the aid notified by Spain represented 4.8% of the entire amount of State aid approved).

Second, it also explains that it adopted in April 2020 a rulebook where it sets out the main criteria it uses when assessing cooperation projects aimed at addressing supply shortages of essential products and services during the pandemic, such as medicines and medical equipment. Moreover, the Commission guided companies on the types of cooperation that are likely to be unproblematic. It also issued regulations that allowed farmers and recognized Inter-Branch Organisations to take temporary collective actions to stabilise certain sectors. Furthermore, the European Competition Network issued a joint statement where its members expressed that (i) they would not actively intervene against necessary and temporary measures put in place by competitors to avoid a shortage of supply and (ii) they would not hesitate to take action against companies taking advantage of the pandemic by cartelizing or abusing their dominant position.

[10] https://ec.europa.eu/competition-policy/public-consultations/2021-revision-stec_en

[11] https://ec.europa.eu/competition-policy/publications/annual-reports_en

Third, concerning EU merger control, the Commission notes that despite the COVID-19 outbreak, it has received 361 notifications in 2020. Most of them (352) were speedily processed since they did not raise any competition concerns; 13 mergers were cleared subject to commitments in the first phase; 3 were cleared with remedies after a phase two investigation and one merger was cleared unconditionally in the second phase. The simplified procedure was used in 76% of all notified transactions.

Fourth, as regards new policy initiatives, the Commission highlights its proposal for a Digital Markets Act for contestable and fair digital markets, which aims at addressing structural problems in digital markets, in particular large digital platforms that act as gatekeepers. It also has tabled a proposal for Digital Services Act. These two initiatives will be discussed in the European Parliament and the Council during 2021.

Fifth, as regards enforcement of competition law, the Commission stresses that it has imposed interim measures on Broadcom, it has fined Meliá with EUR 6.7 million, sent a statement of objections to Amazon, opened a second formal antitrust investigation against Amazon and opened 4 investigations against Apple.

Commission clears EUR 1 billion Spanish COVID-19 recapitalisation scheme

The Commission has approved, under the State aid Temporary Framework, Spanish plans to establish a €1 billion recapitalisation fund that will invest in certain companies affected by the COVID-19 outbreak. The aid will take the form of debt and recapitalisation instruments (in particular equity and hybrid capital instruments).

Companies established in Spain and active in all sectors except the financial sector, with total net yearly revenues between €15 million and €400 million that are facing capital needs due to the pandemic, can benefit from the fund. Those who have already received support through the Solvency Fund for Strategic Enterprises, approved by the Commission last year, are not eligible for the new fund. Furthermore, only companies that were not in crisis on 31 December 2019 will benefit from this scheme.

The Commission approved the notified scheme since it complied with all the conditions established by the Temporary Framework. Indeed, as regards recapitalisation measures, (i) companies will only receive this aid if there is no other appropriate solution available and it is in the common interest to intervene, (ii) the quantity of the aid is limited to the amount necessary to ensure the viability of the beneficiaries, (iii) the scheme provides for appropriate remuneration for the State and incentivises beneficiaries to repay the support as early as possible and (iv) it provides for governance measures. Concerning subordinated debt instruments, if the fund's interventions exceed the limits on turnover and wage bill of the

beneficiaries, the aid will have to comply with the conditions established by the Temporary Framework for the recapitalisation measures.

The Committee on Economic and Monetary Affairs has published its draft opinion on the proposal for a regulation of the Digital Markets Act

The Committee on Economic and Monetary Affairs has published its draft opinion on the proposal for a regulation of the Digital Markets Act[12].

The Committee on Economic and Monetary Affairs stands for an acceleration of the notification of gatekeepers that they fulfil the requirements in order to be designated as gatekeepers (one month, instead of three). Furthermore, it adds certain elements that the Commission has to take into account when designating a gatekeeper: the conglomerate structure or vertical integration of the undertaking providing the essential platform services, allowing for example cross-subsidisation or the combination of data from different sources. The report also aims to strengthen the DMA's ban of narrow clauses and proposes to exempt business users to inform gatekeepers of the conditions or prices they charge through other distribution channels. In addition, it proposes impeding gatekeepers from imposing their payment service and their technical service supporting the provision of payment services as a condition of access to the platform's services. The report also aims at guaranteeing that the information provided by access controllers to publishers and advertisers under obligation 5(g) to be provided free of charge. It also proposes to add an obligation in Article 6 to prohibit gatekeepers from imposing licensing conditions on the use of their software.

The report also wants to make it possible that interested third parties (competitors, consumers), governments and competent authorities of the Member States are taken into account by the Commission when it monitors compliance with the DMA. It also aims to extend the gatekeepers' obligation to inform the Commission of their mergers in the digital sector to all mergers they carry out, at least two months before the transaction is carried out. It suggests that the Commission should be obliged to communicate this information to the national competition authorities and would have to publish each year the list of acquisitions made by gatekeepers.

[12] https://www.europarl.europa.eu/doceo/document/ECON-PA-693930_EN.pdf

[13] https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20210701_NP_Incoaci%C3%B3n_Apple_Amazon_en_GB.pdf

The CNMC initiates proceedings against Apple and Amazon for possible restrictive competition practices

The Spanish Competition Authority ("**the CNMC**") has opened proceedings[13] against the four subsidiaries through which Amazon operates in Spain and the three subsidiaries of Apple through which it provides its services in Spain.

The CNMC suspects that these companies had concluded agreements that have the effect of limiting (i) the retail sales of Apple's products by third parties in Amazon's marketplace in Spain and (ii) certain advertising of competing Apple products and certain campaigns directed at Apple customers by Amazon. Such behaviour would violate Articles 1 and 2 of the Spanish Competition Act, according to the CNMC.

Platforms with strong market power have recently come under scrutiny by competition authorities. For instance, the Commission is investigating[14] Amazon's use of third party data. The German Competition Authority is currently examining[15] to what extent agreements between Amazon and brand manufacturers, including Apple, which exclude third-party sellers from selling brand products on Amazon Marketplace, constitute a violation of competition rules.

CNMC fines Albia Gestión de Servicios with EUR 300.000 for gun jumping

In October 2019, Albia Gestión de Servicios ("Albia"), a subsidiary of the Santa Lucía insurance group, acquired the funeral home Tanatorios Móstoles. Since it had concerns that the operation might have reached the thresholds established in the Spanish Competition Act (the parties reached a market share superior to 50% in the retail market for funeral services in Móstoles), the CNMC required Albia to notify the operation, which was authorised in the first phase without commitments.

Failure to notify a concentration that is subject to clearance of the CNMC (practice known as "gun jumping") is a serious violation of Article 62.3.d) of the Spanish Competition Act and may be subject to a sanction of the 5% of the total turnover of the infringing company. In this case, the CNMC opened a disciplinary proceeding against Albia after the authorisation of the concentration and has consequently imposed a sanction of EUR 300.000 on Albia[16].

[14] https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291

[15] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html;jsessionid=261F1FCF6239F534265ACE59EE2A4B62.2_cid362?nn=3591568

[16] https://www.cnmc.es/sites/default/files/3614207_2.pdf

[17] https://www.cnmc.es/sites/default/files/3626347_10.pdf

The CNMC publishes a study on the online advertising sector in Spain

The CNMC has published its study on the competition conditions in the online advertising sector in Spain[17], which has become the main source of financing for disseminating content over the internet. According to the report, online advertising in Spain has generated around 3.450 million euros in 2019, with annual growth rates of around 20% per year. This volume of revenues clearly exceeds that of traditional media (such as television, radio or the press) combined. The report details that 1.500 million euros are generated through search advertising (in this market Google exceeds a weight of 90%) and 1.950 million euros are generated in display advertising, where Facebook and Instagram have a weight superior to 40%, with Amazon and Google at a notable distance. The CNMC notes that display advertising is growing on average more quickly than other forms of online advertising, in line with most developed countries. The CNMC also explains that there are two marketing models in online advertising: (i) inventory of platforms (platforms market their own offer directly – without intermediaries) and (ii) open display (inventory of publishers with a primarily national audience, where intermediaries are needed to close deals with advertisers and media agencies).

The CNMC has drawn a series of conclusions on the online advertising sector. First, that it implies substantial efficiencies: (i) capacity for personalisation, which allows advertisers to better reach their audience, (ii) capacity for measuring the performance of campaigns, (iii) and entry of new players of media and (iv) emergence of new forms of contracting. At the same time, this sector has brought risks for competition: (i) notable concentration in very few players, with Google and Facebook estimated to account for more than 70% of revenues in the sector in Spain, (ii) opacity and lack of transparency in the sector (actors at the ends of the value chain face a problem of asymmetric information that hinders their optimal decision-making and distorts market power in favour of platforms and intermediaries and (iii) risks of competition-distorting behaviour (some platforms market their own inventory on an exclusive basis while at the same time they take part in brokering third party inventory).

In order to address the competition challenges, the CNMC recommends (i) that competition authorities continue to enforce competition policy as the first line of defence in the online advertising market, (ii) a regulation on digital platforms be used (for instance, the DMA), (iii) interaction between consumer and privacy protection and competition in digital markets be taken into consideration

[18] http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20210702_resolucio_exp_104_2019_esp.pdf

by legislators, (iv) a multidisciplinary and cooperative approach be adopted between the institutions concerned (both competition and data authorities) and (v) the capacities and means of competition and regulatory authorities be strengthened (to that respect, it affirms that the existing framework in Spain is not enough to provide the CNMC with full autonomy to manage its human resources, organisational structure and budget).

Catalan Competition Authority fines Catalan football association with EUR 0.87 million for abuse of dominant position

The Catalan Competition Authority ("**ACCO**") has fined[18] the Catalan Football Federation with a EUR 876,827.67 fine for abusing its dominant position in the market for the issuing of federation licences for the practice of football in Catalonia. The sanctioning procedure was initiated as a result of a complaint by the Catalan Union of Psycho-technical Medical Centres, which revealed that any medical examination centre wishing to issue sports aptitude certificates had to carry out telematics processing via the Federation's intranet and pay certain amounts related to its use. The investigation showed that the Federation imposed certain obligations on the medical examination centres for the issuance of certificates, namely; (i) the signature of an agreement for the centres to be authorised by the Federation, (ii) the introduction of the certificate data into the Federation's computer system, and (iii) the payment of certain fixed and variable amounts to contribute to the costs of the telematics system implemented for this purpose. The Federation's actions limited the activity of the medical examination centres authorised by the health regulations to issue certificates and consequently harmed the athletes who apply for the certificates in order to obtain the federation licence.

Catalan Competition Authority fines medical-services providers for bid rigging

The ACCO has imposed[19] a EUR 21,343 fine on medical services providers Certificación de Lesiones España and Klynos Consultoris for colluding in a public tender for the management of specialist medical services. ACCO found that the companies coordinated and even overlapped their prices for the tender, offering different prices for the same services in separate lots without economic justification. The tender included 56 lots, grouped depending on the medical speciality and the province. For the Biomechanics speciality, there were five different lots for the province of Barcelona. ACCO found that CL and Klynos submitted offers for lots 1 to 4 of the Biomechanics speciality in Barcelona, offering different prices depending on the lot, although they correspond-

[19] https://app.parr-global.com/login?onSuccess=%2Ffiles%2Fcases%2F2010387%2F20210519_resolucion_exp_103_2019_esp_no_conf.pdf&d=1

ed to the same specialty, the same type of tests and the same geographical area. Moreover, the ACCO observed that the two offers, for lots 1 to 4 and each of the tests, were closely correlated and almost overlapping. Thus, it concluded that CL and Klynos interspersed the prices of the offers in a way that, in the lots where CL offered the lowest prices, Klynos submitted the highest prices, while for the lots where CL submitted higher prices, Klynos offered the lowest. From the analysis of the facts the CCA determined that Klynos and CL coordinated in the tender, since there is no alternative explanation nor economic justification for the price differences. Apart from the penalty, the authority has imposed on the companies a prohibition to contract for the same type of services with the same administration for 12 months.

Catalan Competition Authority fines beach bars for bid-rigging

ACCO has imposed a EUR 15.000 fine[20] on four companies and two individuals for bid-rigging (that is to say, for manipulating a tender). One company has been banned to contract with the concerned city council for the same services for a period of eight months. The authority has found that the companies colluded when they presented their offers for a tender for the operation of beach bars in the municipality of Sant Andreu de Llavaneres from 2018 to 2021 (the tender was divided into lots). More precisely, the companies agreed not to compete against each other and to simultaneously renounce to the submission of bids ¡in several lots, thus predetermining the award of the remaining lots according to what they had previously agreed. The renouncing of the bids took place almost simultaneously, in an interval of time between 10.52 a.m. and 12.01 a.m. According to the ACCO, this circumstance has not been duly justified before the contracting authority.

Catalan Competition Authority warns that the restrictions of sale of COVID-19 self-diagnostic tests is detrimental to consumers and users because it hinders access and reduces price competition

By virtue of Royal Decree 588/2021, pharmacies are able to dispense, without medical prescription, self-diagnostic test for the detection of COVID-19. Even though ACCO welcomes the fact that these tests will be available for the public without medical prescription, it criticises that the distribution channel for these tests is unjustifiably limited, i.e. that they can only be purchased in pharmacies. The ACCO considers that there are no reasons of general interest that justify, in accordance with the principles of efficient economic regulation of markets, that these tests can be sold in other sales channels that guarantee the quality of the products marketed (for instance through the retail channel). It also believes that there are

[20] http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20210714_resolucio_exp_105_2019_esp.pdf

no health reasons that justify that these products have to be exclusively sold in pharmacies, as these tests do not require the intervention of any health professional. The ACCO highlights that if there are more channels, the diagnostic capacity will be increased and the pressure on primary care will be reduced. Moreover, if there are no restrictions, there will be (i) an improvement of the accessibility of the tests to the general public and (ii) an introduction of greater competitive pressures in the market, which can have positive effects in terms of process.

Case law

The Court of Justice clarifies the courts with jurisdiction over actions for damages

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 Companies Court No. 2 of Madrid. This court had doubts as to the application of Article 7(2) of Brussels I Recast Regulation and decided to stay proceedings and submit a preliminary request to the Court of Justice of the European Union ("**the Court of Justice**").

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 Article 7(2), which deals with non-contractual matters and allows the claimant to sue the defendant at the place where the harmful event took place or is likely to take place. The Spanish court believed 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 judgment of 15 July 2021 (case C-30/20), the Court of Justice recalls that it has interpreted Article 7(2) of Brussels I Recast Regulation as including both the place of the event giving rise to the damage and the place where the damage occurred. It notes that the referring court tries to identify the place where the damage occurred. The Court of Justice then affirms that the cartel decision established that the damage covered the entire EEA market, of which Spain forms part. It explains that this way of determining jurisdiction is consistent with the law applicable to non-contractual obligations established by Rome II Regulation, which is, in the case of an act restricting competition, that of the country where the market is, or is likely to be, affected.

It then confirms that it is clear from the very wording of Article 7(2) of Brussels I Recast Regulation that it confers directly and immediately both international and territorial jurisdiction on the courts for the place where the damage occurred. The delimitation of the court's jurisdiction within which the place where the damage occurred is a matter for the organisational competence of the Member State to which that court belongs. The Court of Justice affirms, in that sense, that Member States can decide to confer a type of dispute to a single court, which has exclusive jurisdiction irrespective of where the damage occurred within that Member State. In the absence of such a court, the determination of the competent court within the Member State concerned has to comply with the objectives of proximity, predictability of the rules governing jurisdiction and of the sound administration of justice, established in Brussels I Recast Regulation. The Court of Justice adds that this solution applies irrespective of whether the goods in question were purchased directly or indirectly from the defendants and irrespective of whether the transfer of ownership took place immediately or at the end of the leasing contract.

However, in case of purchases made in several places, the materialisation of the damage occurs, in principle, in the victim's registered office. By this way, it is possible to identify a court that meets the requirements of proximity and foreseeability, since the cartel members cannot be unaware that the purchasers of the goods are established in the market affected by the collusive practices.