



# Brussels GA\_P

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Brussels Office

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## News

### **Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL**

In July the European Commission ("the Commission") opened an investigation into the effects of the proposed combination of Illumina and GRAIL, but shortly after, while the Commission's review was ongoing, Illumina publicly announced that it had completed its acquisition of GRAIL. After having heard the parties, the Commission has adopted interim measures in order to restore effective competition until it adopts a final decision on the Illumina / GRAIL merger..

It is the first time that the Commission adopts interim measures following a breach of the stand-still obligation (practice known as "gun-jumping"). These measures provide that (i) GRAIL will be kept separate from Illumina and be run by an independent hold separate manager, exclusively in the interest of GRAIL; (ii) both companies cannot share confidential business information, except where the disclosure is required to comply with the law or in line with the ordinary course of their supplier-customer relationship; (iii) Illumina will have to finance the necessary funds for the operation and development of GRAIL; (iv) the business interactions between the parties will be undertaken in line with industry practice and without unduly favouring GRAIL to the detriment of its competitors; and (v) GRAIL will have to actively work on alternative options to the transac-

tion to prepare for the possible scenario in which the deal would have to be undone in case the Commission were to declare the transaction incompatible with the internal market. These measures will be monitored by a Monitoring Trustee to be approved by the Commission.

### **Commission seeks feedback on commitments offered by T-Mobile CZ, CETIN, and O2 CZ concerning the Czech telecommunications market**

The Commission has invited comments on the commitments offered by T-Mobile CZ, CETIN, O2 CZ and their respective parent companies, Deutsche Telekom and PPF, to address the Commission's competition concerns in relation to the networking sharing agreements ("NSAs") between T-Mobile CZ, O2 CZ and then Czech telecom infrastructure provider CETIN, as well as the mobile network services agreement ("MNSA") between O2 CZ and CETIN. Interested parties can submit their views within one month from the publication of the commitments in the Official Journal.

In 2016 and in 2019, the Commission opened formal investigations into these agreements and according to its preliminary assessment, they may restrict competition in violation of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"). The concerned parties have offered the Commission the following commitments in order to address its concerns: (i) to modernise

the mobile network, through the deployment of multi-standard Radio Access Network (“RAN”) equipment in certain radio frequency layers, (ii) to set and review the financial conditions for unilateral network deployments, (iii) to improve the NSAs contractual provisions to limit information exchange to the absolutely necessary for the operation of the shared network and (iv) in relation to the MNSA, to implement measures to ensure that CETIN effectively prevent information spill-over between T-Mobile CZ and O2 CZ.

### **Commission invites comments on draft GBER proposal**

The Commission has opened a consultation that will run until 8 December 2021 on certain proposed amendments to the General Block Exemption Regulation (“the GBER”). The Commission has carried out a series of evaluations in the context of the Fitness Check of the State aid rules and as a result of these, it has started to revise a number of Guidelines (Energy and Environmental Guidelines; Regional Aid Guidelines; Research, Development and Innovation Framework and Risk Finance Guidelines). Given the fact that the GBER is complementary to these rules, the Commission has also started to revise it.

First, following the adoption of the Regional Aid Guidelines applicable as from 2022, the Commission considers it to be necessary to align the regional aid section of the GBER to avoid discrepancies. It is also evaluating extending the possibility to grant operating aid to prevent or reduce population and to adjust the notification thresholds. Secondly, it is considering to modify

the eligibility criterion that allows companies to receive risk finance aid up to 10 years after their registration and to clarify that for the calculation of the maximum aided risk finance investment per beneficiary it is the outstanding amount at the moment of granting that it is to be taken into account. Thirdly, it will clarify certain R&D&I items and introduce a new definition and compatibility criteria enabling support for testing and experimentation infrastructure. Fourthly, it will broaden the possibilities for Member States to support investments for the reduction of CO2 emissions and introduce a new specific category of exemption for investment aid for clean and zero-emission vehicles.

### **Commission carries out unannounced inspections in the wood pulp sector**

Last 12 October, the Commission conducted dawn raids in several Member States at the premises of companies active in the wood pulp sector since it has concerns that the inspected companies may have colluded (thus infringing Article 101 TFEU). The Commission officials were accompanied by their counterparts from the relevant national competition authorities.

### **Commission carries out unannounced inspection in the animal health sector in Belgium**

Last 25 October, the Commission conducted a dawn raid at the premises of a pharmaceutical company active in animal health in Belgium since it had concerns that the inspected company may

have infringed Article 102 TFEU. The Commission officials were accompanied by their counterparts from the Belgian competition authority.

### **Commission opens investigation into possible breach of Article 21 of the EU Merger Regulation by Hungary in the VIG/AEGON transaction**

The Commission has decided to open an investigation to assess whether the decision by Hungary to veto the acquisition of the two Hungarian subsidiaries of AEGON Group by Vienna Insurance Group AG Wiener Versicherung Gruppe, constitutes a breach of Article 21 of the EU Merger Regulation, which confers upon the Commission exclusive jurisdiction for concentrations having a Union dimension.

On 6 April 2021, basing itself on an emergency legislation on foreign direct investments introduced in the context of the coronavirus outbreak, the Hungarian government vetoed the transaction. Meanwhile, on 12 August 2021, the Commission unconditionally cleared the transaction. The Hungarian government did not communicate the measure to the Commission prior to its implementation nor has it to date provided an adequate explanation of the reasons underpinning this veto in the insurance sector. Therefore, the Commission decided to investigate whether Hungary's decision to veto the said merger constitutes a breach of Article 21 of the EU Merger Regulation.

### **Commission approves acquisition of IHS Markit by S&P Global, subject to conditions**

The Commission has approved the proposed acquisition of HIS Markit by S&P Global subject to conditions. These two companies are major global providers of commodity and financial data. Following its assessment, the Commission was concerned that the transaction would reduce competition in the markets for (i) price assessments for oil, coal, biofuels and petrochemicals, (ii) loan identifiers, (iii) leveraged loan market intelligence and (iv) leveraged loan indices.

In order to address the Commission's concerns, the parties offered the following commitments: (i) in commodity price assessments, the divestment of OHS Markit's Oil Price Information Service, (ii) in financial data and infrastructure, the divestment of a number of S&P Global businesses: CUSIP issuance and data licensing business and S&P Global's leveraged loan 100 index family and its leveraged loan market intelligence product Leveraged Commentary and Data. The Commission found that the proposed commitments addressed its competition concerns and therefore approved the transaction.

### **Spanish and Italian Competition Authorities strengthen their strategic cooperation**

<sup>1</sup> [https://www.cnmc.es/sites/default/files/editor\\_contenidos/Competencia/20211027\\_MoU%20CNMC\\_AGCM\\_eng.pdf](https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/20211027_MoU%20CNMC_AGCM_eng.pdf)

The president of the Spanish Competition and Markets Authority (“CNMC”) and the president of the Italian Competition and Markets Authority (“AGCM”), Roberto Rustichelli, signed a memorandum of understanding<sup>1</sup> (“MoU”) to further the institutions’ strategic cooperation.

The agreement aims to promote the sharing of experiences and best practices between the two bodies, and joint work on identifying cartels and carrying out antitrust investigations and actions to foster competition in both countries.

The MoU also includes the regular coordination of positions during European regulatory reform procedures, considers potentially conducting joint antitrust campaigns in Spain and Italy, and promotes cooperation through bilateral technical assistance, visits and expert training programmes.

### **CNMC closes film distribution case with commitments**

The CNMC concluded with commitments the infringement proceedings that it was conducting against the main motion picture Paramount and Paramount Pictures International Limited S.L.; Sony Pictures and Columbia Pictures Corporation Ltd.; TWDC, the Walt Disney Company Limited and Hispano Foxfilm; Universal Pictures; Wbee and Warner Bros. Entertainment Nederland BV); and an audience measurement company Rentrak BV. The CNMC made binding the commitments that the companies themselves presented for a ruling on the conduct under investigation.

In its investigation, the CNMC analysed the convergent commercial policies of these companies and the company Ymagis in the movie theater digitalization process. Similarly, the CNMC investigated the sharing of commercially sensitive information (i.e. release dates, number of viewers, box office sales) among large distributors with the collaboration of the audience measurement company Rentrak.

The audience measurement company and the distribution companies have presented to the CNMC commitments through which they will eliminate: (i) the sharing of certain non-public information and (ii) the access to certain data relative to the Spanish film distribution market. On the one hand, film distributors will not provide audience companies (non-public) information about releases (expected premiere dates). On the other hand, the audience measurement company will not provide film distributors information from other distribution companies on (i) box office revenues disaggregated by screen in real time or at a disaggregated level or (ii) the number of screens on which a movie is to be shown. The companies offered these commitments to be mandatory for a period of five years.

### **CNMC imposed fines of more than EUR 127.8 million on the main security, signalling and communications systems companies of AVE’s medium-distance and commuter network in Spain**

The CNMC has imposed fines totalling EUR 127.3 million on Alstom, Bombardier, Cafs, Cobra,

Nokia, Siemens Rail, Siemens S.A. and Thales, and 10 of their executives (total amount of EUR 483.000) for their participation in a cartel.

The cartel arose in 2002 at the initiative of the two main companies in the sector in that market, Alcatel (from 2007, Thales) and Dimetronic (from 2013, Siemens Rail), with the aim of not competing and divvying up the tenders through the establishment of a joint venture. The two companies shared the amounts awarded as well as the signaling technology used in the projects. They were thus able to introduce their IT systems into the tenders of which they had won 50%, and they also ensured for themselves the maintenance contracts. As of 2003, other companies joined the cartel such as Siemens S.A. in 2003, NSN (now Nokia) in 2007, or Cobra in 2008.

During its 15-year existence, the companies were awarded tenders for a total amount of EUR 4.142 million. In some cases, the awarded contracts are to continue to be performed until 2035, 2037, 2038 or 2040; hence their effects go beyond the duration of the cartel itself.

The investigation concluded that the companies created a cartel that fraudulently divvied up at least 82 tenders from the Ministry of Development, from the Railway Infrastructure Manager between 2002 and 2017, for construction, execution of work, supply, installation, commissioning and maintenance relating to the security and

communications installations of the AVE and conventional rail network.

## **Andalusian Agency opens Malaga school transport bid-rigging probe**

The Competition and Economic Regulatory Agency of Andalusia (“Andalusian Agency”) has agreed to initiate penalty proceedings against several transport companies in the province of Malaga due to the existence of indications of possible anticompetitive practices. The investigated conduct would consist of agreements between companies in this sector to share lots in public tenders for school transport in the province of Malaga promoted by the Andalusian Public Agency of Education of the Ministry of Education and Sports.

During 2021, in the field of public procurement in the school transport market, the Andalusian Agency has already concluded penalty proceedings for anticompetitive conduct consisting of market sharing in the provinces of Almeria and Huelva, sanctioning 27 and 17 companies, respectively, with fines totalling EUR 767,974 and EUR 1,134,277, respectively.

The Andalusian Agency is also promoting various measures aimed at ensuring procurement procedures free of anticompetitive behaviour, such as the guide *“Recommendations to facilitate access and promote competition in*

<sup>2</sup> <https://www.juntadeandalucia.es/defensacompetencia/sites/all/themes/competencia/files/RecomendacionesContratacionPublica.pdf>

*Andalusian public procurement*<sup>2</sup>, which contains guidelines to prevent and detect agreements between two or more parties in public tenders.

## **Andalusian Agency raids road maintenance firms for bid rigging**

The Andalusian Agency has carried out two simultaneous inspections in the headquarters of thirteen companies that carried on their business activity in the market of road maintenance and conservation services, which it is believed that they could be grouped in one or more cartels. The subject matter of the inspections refers to the conclusion and execution of agreements to distort competition in public tenders, coordinating their activity in the presentation of bids in order to influence the awarding of contracts. The companies under investigation carry out their business activities in all the provinces of the

Autonomous Community of Andalusia, although some of them have their registered offices outside the region.

The defence of competition in the markets in which public tenders are integrated constitutes an essential element for the correct economic development of the Autonomous Community of Andalusia, noticing that in 2020 the Administration of the Regional Government of Andalusia, its Instrumental Entities and Consortiums promoted 98,371 contracts for a value of close to EUR 5,000 million.

Andalusian Agency is currently updating its “Guide on competition in the field of Andalusian public procurement” in order to incorporate: (i) the new measures provided for in the ECN+ Directive and (ii) the latest amendment of the Competition Act and the Promotion and Defence of Competition (Andalusia) Act.

## **Case law**

### **The Court of Justice affirms that the victim of an infringement of EU competition law committed by a parent company may seek compensation from that company’s subsidiary for the resulting loss**

By a decision of 19 July 2016, the Commission sanctioned some truck makers (including Daimler AG) for an alleged cartel which took place between January 1997 and January 2011.

Following that decision, Sumal brought an action for damages against MBTE (Daimler AG’s subsidiary), seeking payment for loss resulting from that cartel.

Sumal’s action was rejected at first instance on the grounds that MBTE was not referred to in the Commission’s decision, but rather its parent company, Daimler AGE. Sumal brought an appeal against that judgment before the Provincial Court of Barcelona, which decided to stay



proceedings and to refer four questions to the Court of Justice of the European Union (“**the Court of Justice**”). More precisely, it questioned whether the doctrine of the single economic unit developed by the **Court of Justice** allowed to extend liability from the parent company to the subsidiary.

In accordance with settled case law, any person is entitled to claim compensation from undertakings’ which have participated in a cartel or practices prohibited under Article 101 TFEU for the harm caused by those anticompetitive practices. Given that such actions for damages are an integral part of the system for enforcement of EU competition rules, in the same way as their enforcement by public authorities, the concept of an ‘undertaking’, within the meaning of Article 101 TFEU, cannot have a different meaning in the context of the imposition of fines by the Commission on ‘undertakings’ (public enforcement) and in actions for damages brought against those ‘undertakings’ before the national courts (private enforcement).

According to the Court’s case law, the concept of an ‘undertaking’, within the meaning of Article 101 TFEU, covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed, and thus designates an economic unit even if in law that unit consists of several natural or legal persons. This concept of ‘economic unit’ gives rise to the

joint and several liability across the entities of which the economic unit is made up at the time that the infringement was committed.

In that regard, the Court observes that the concept of an ‘undertaking’ as the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue. Thus, where the existence of an infringement of Article 101(1) TFEU has been established as regards a parent company, it is possible for the victim of that infringement to seek to engage the civil liability of a subsidiary of that parent company on the condition that the victim proves that, having regard to, (i) the economic, organizational and legal links that unite the two legal entities and, (ii) the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible, that subsidiary, together with its parent company, constituted an economic unit.

In addition, the Court also states that in the context of such an action for damages brought against a subsidiary company of a parent company which has been found to have infringed Article 101 TFEU, that subsidiary company must dispose of all the means necessary for the effective exercise of its rights of the defence, in particular so as to be able to dispute that it belongs to the same undertaking as its parent company.