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News

Commission sends statement of objections to Meta over abusive practices benefiting Facebook Marketplace

The European Commission ("the Commission") has sent a statement of objections to Meta in which it explains that it preliminary considers that Meta has abused its dominant position in the market for personal social markets in two ways: (i) through tying online classified ads service Facebook Marketplace with its dominant personal social network Facebook and (ii) by means of the introduction of unfair trading conditions in competing online classified ads services which advertise on Facebook or Instagram.

Furthermore, the Commission has decided to close its antitrust investigation opened last 11 March into an allegedly anticompetitive agreement between Google and Meta for online display advertising services (the so-called "Jedi Blue" agreement). The Commission initially had concerns that the Jedi Blue agreement may exclude services competing with Google's advertising technology services (the Open Bidding Program). However, the Commission's investigation has not confirmed this concern and therefore the institution has decided to conclude the proceedings.

Commission accepts commitments by Amazon in investigation on the company's use of non-public marketplace seller data

The Commission opened in 2019 an investigation against Amazon to analyse the standard agreements between Amazon and marketplace sellers, focusing on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affected competition. In November 2020, the Commission (i) sent a statement of objections to Amazon in which it found that the company has breached EU competition rules, and (ii) opened a second investigation on the role of data in the selection of the winners of the "Buy Box" under the prime program, assessing whether Amazon favoured its retail business or of the sellers that use Amazon's logistics and delivery services.

In July 2022, Amazon offered commitments to address the Commission's competition concerns pursuant to Article 9(1) of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003"). That article allows the Commission to conclude disciplinary proceedings by accepting the commitments offered by a company that address its concerns; such decision does not reach a definitive conclusion as to whether the investigated company infringed competition rules.

Amazon offered regarding the data use concern (i) not to use non-public data relating to the

independent seller's activities on its marketplace for its retailed business and (ii) not to use such data for the purpose of selling branded goods as well as its private label products. Regarding the Buy Box concern, Amazon proposed to commit to (i) treat all sellers equally when ranking the offers for the purposes of the selection of the Buy Box winner and (ii) display a second competing offer to the Buy Box winner if there is a second offer from a different seller that is sufficiently differentiated from the first one on price and / or delivery. Finally, regarding the Prime concerns, Amazon proposed to (i) set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime, (ii) allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice and not use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistic services. In view of the market test that the Commission made of the commitments offered, Amazon updated the initial proposal and committed to (i) improve the presentation of the second competing Buy Box offer, (ii) increase the transparency and early information flows to sellers and carriers about the commitments and their new rights, (iii) lay out the means for independent carriers to directly contact their Amazon customers in line with data protection rules, (iv) improve carrier data protection from use by Amazon's competing logistic services, (v) increase the powers of the monitoring trustee, (vi) introduce a centralized complaint mechanism to allow sellers and carriers complaint from suspected non-compliance with the commitments, and (vii) increase to seven years (instead of five) the duration of the commitments relating to Prime and the second competing Buy Box offer.

New Foreign Subsidies Regulation published in the Official Journal of the European Union

On 23 December 2022, the **Regulation (EU) 2022/2560** of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market ("the FSR") was published in the official journal of the European Union. The FSR aims at addressing distortions created by foreign subsidies to companies operating in the internal market, which otherwise are not subject to control (for instance, State aid control before the Commission). The FSR will enter into force twenty days following its publication in the Official Journal of the European Union, that is to say, on 12 January 2023, and will be applicable six months after the date of entry into force of the FSR (i.e., on 12 July 2023).

Commission publishes its draft DMA Implementing Regulation and invites stakeholders to submit their comments

Last 1 November 2022, the **Regulation 2022/1925** on contestable and fair markets in the digital sector (also called the "Digital Markets Act" or "the DMA") entered into force. The DMA aims at preventing that companies with a strong market power in the digital sector (the so-called "gatekeepers") engage in abusive practices in the market by imposing them a series of

obligations and prohibitions. Pursuant to Article 46 DMA, the Commission can adopt implementing acts laying down detailed arrangements on how certain provisions of the DMA will be applied in practice.

The Commission has recently made use of Article 46 DMA and has published a draft implementing regulation ("the Draft Implementing Regulation"), **inviting** all interested parties to submit their comments from 9 December 2022 until 6 January 2023. Among others, the Draft Implementing Regulation explains how must companies that fulfil the criteria to be qualified as gatekeepers notify this condition. These companies have to use the form GD (for gatekeeper designation), which is attached as annex 1 of the Draft Implementing Regulation. Companies will have to explain, within a maximum number of 50 pages, how many core platform services they carry out (including an explanation of the companies' activities in that respect) and how do they fulfil the quantitative criteria to be designates as gatekeeper. If they sustain that even though they meet the quantitative criteria to be designated as gatekeeper but not the qualitative criteria, they will have to submit substantiated arguments with their notification, with a maximum of 25 pages (Annex 2 of the Draft Implementing Regulation). The Commission aims that the Draft Implementing Regulation enters into force on 2 May 2023.

Commission adopts a Statement of Objections outlining measures to unwind Illumina's acquisition of GRAIL

Following the referral requests by some Member States to the Commission and the acceptance of the latter to review the acquisition of Grail by Illumina by virtue of Article 22 of the Council Regulation 139/2004 on the control of concentrations between undertakings ("the EU Merger Regulation"), Illumina notified this transaction to the Commission on 16 June 2021. On 22 July 2021, the Commission opened the second phase of the review of the transaction and on 18 August 2021, Illumina publicly announced that it had implemented the transaction. The Commission then opened an investigation in order to ascertain whether Illumina had infringed the standstill obligation established in Article 7 of the EU Merger Regulation (i.e., companies cannot implement a concentration that meets the thresholds fixed at the EU Merger Regulation until the Commission clears it) and adopted interim measures on 28 October 2022 to keep both companies separate. On 6 September 2022, the Commission adopted a decision in which it prohibited the merger.

Last 5 December, the Commission adopted a statement of objections in which it explained to Illumina and Grail the restorative measures it intends for adoption following its decision to prohibit their concentration. The institution intends for adoption two types of measures: (i) divestment measures and (ii) transitional measures. As regards the former, the Commission has explained that after the dissolution of the merger, Grail's independence from Illumina has to be ensured; and Grail has to be as viable and competitive after the divestment as it was before Illumina's acquisition. Concerning the latter, the Commission intends to avoid further integration

between Illumina and Grail and to oblige Illumina to maintain Grail's viability. Grail and Illumina can now respond to the statement of objections and, after hearing the parties, the Commission can make the proposed measures legally binding.

Commission charges Deutsche Bank and Rabobank with operating bonds trading cartel

The Commission has sent a statement of objections to Deutsche Bank and Rabobank, in which it explains that it preliminarily considers that these companies have colluded when trading Euro-denominated Sovereign, SSA, Covered and Government Guaranteed bonds. The Commission believes that these banks exchanged sensitive information between 2005 and 2016 (through some of their traders) and coordinated their trading strategies.

Commission opens second phase into the proposed acquisition of VMware by Broadcom

On 15 November Broadcom (a hardware company which offers Network Interface Cards, "NICs", Fibre Channel Host-Bus Adapters, "FC HBAs" and storage adapters and recently expanded to the software market) notified its proposed acquisition of VMware (which is a software provider which offers products that interoperate with a wide range of hardware, including Broadcom's portfolio). The Commission has concerns that the proposed transaction may restrict competition in the market for the supply of NICs, FC HBAs and storage adapters. Therefore, it has decided to open a second phase in order to assess in detail the possible effects of the transaction. Under the second phase, the Commission has 90 working days to adopt a decision on the proposed transaction (i.e., in the case at stake, until 11 May 2023).

Commission adopts Q&A guidance on the referral mechanism set out in Article 22 of the EU Merger Regulation

The Commission has **published** a question and answer (Q&A) document on its intended use of Article 22 of the EU Merger Regulation referrals for transactions that do not meet either the EU thresholds or any Member State's thresholds. In that document, the Commission explains the criteria it took into account when it asked Member States for the referral of Grail / Illumina concentration: (i) the concentration threatened to significantly affect competition in markets that were likely wider than national, (ii) a coordination of investigative efforts at the EU level was desirable, as the concentration concerned detection of cancer (the Commission considers that this is a priority area), (iii) one of the products in development of the target was expected to capture a significant share of the addressable market, (iv) the target had raised significant amounts in equity financing by investors, (v) the value of the deal was particularly high compared to the turnover of the target at the time of the transaction and (vi) the concentration had not been implemented and notified in any Member State.

The Commission also sets out examples that it may consider as suitable candidates for a referral based on Article 22 of the EU Merger Regulation: for instance, an undertaking that offers music distribution systems acquires a company that has a music recognition app that collects data regarding the preferences of consumers. Furthermore, the Commission explains what data parties should submit to it if they suspect they may be potential candidates for a referral (e.g., information concerning the affectation of trade between Member States). In addition, the Commission explains that the Commission has no legal deadline to reply to a request for guidance made by the merging parties, but will try to carry out a first review within five working days from receipt. Afterwards, it will either request follow-up information or confirm that it does not have more questions and indicate the approximative timeframe within which the Commission will get back to the parties seeking guidance.

Commission extends duration of the two Horizontal Block Exemption Regulations

Last October, the Commission consulted on the extension of the validity of the horizontal block exemption regulations on Research & Development & Specialisation Agreements, which were due to expire on 31 December 2022. Finally, last 8 December, the Commission extended them until 30 June 2023. Until that date, the institution will continue its review process of such documents with the aim of adopting the new regulations and guidelines in the first half of 2023.

Commission adopts revised broadband State aid guidelines

The Commission had adopted on 12 December 2022 a revised Communication on State aid for broadband networks, which is a document that sets out the criteria that the Commission will take into account to assess the compatibility with the internal market of State aid related to the deployment and take-up of broadbands in the European Union ("the EU", "the Broadband Guidelines"). The Broadband Guidelines align the threshold for public support with the latest technological and market developments; they also introduce new criteria to assess the compatibility of aid granted to support the deployment of mobile networks (for instance, 5G). Furthermore, they update the criteria used for balancing the positive impact of the aid against its negative effects on competition and trade (which is one if the criteria that the Commission takes into account to assess the compatibility of State aid with the internal market), in order to take into account the contribution of the public support to the EU's digital and green transition objectives.

Commission adopts new rules for State aid in agriculture, forestry and fishery and aquaculture sectors

The Commission has adopted revised Agricultural Block Exemption Regulation ("ABER") and Fishery Block Exemption Regulation ("FIBER"). These documents declare certain categories of public support compatible with EU State aid rules and exempt them from the requirement of prior

notification and approval by the Commission (if they fulfil certain criteria). Among others the Commission has introduced new categories of block-exempted measures, such as aid to prevent or repair damage caused by adverse climatic situations in the fishery and aquaculture sector. Furthermore, the Commission has adopted new Guidelines for State aid to the agricultural and forestry sectors and in rural areas, and the new Guidelines for State aid in the fishery and aquaculture sector. These documents set out the criteria that the Commission will take into account when assessing the compatibility with the internal market of a State aid measure that does not fulfil the conditions of the FIBER and ABER. All these instruments will be applicable since the 1 January 2023.

In addition, the Commission has prolonged the validity of the **Regulation 717/2014** on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (the "Fishery de minimis Regulation"), which was going to expire on 31 December 2022, until 31 December 2023. According to said regulation, Member States can grant aid to undertakings active in the fishery and aquaculture sector if they fulfil certain conditions. For instance, the aid (i) cannot be used to buy fishing vessels or engines or to increase fishing capacity and (ii) may not be above the ceiling of EUR 30.000 for any undertaking in a 3-year period, or 2.5% of the annual catching, processing and aquaculture turnover per Member State.

Commission holds first workshop on DMA's obligations

The Commission held last 5 December 2022 a workshop on one of the obligations imposed by the DMA: the prohibition to the gatekeepers to rank their own products or services in a more favourable manner compared to those of third parties ("self-preferencing") (Article 6(5) DMA). The workshop "Applying the DMA's ban on self-preferencing: how to do it in practice?" had two panel sessions, which were both moderated by the Commission: (i) how to identify self-preferencing practices on concrete examples and (ii) how to ensure compliance with the self-preferencing prohibition based on concrete proposals.

Commission seeks feedback on State aid rules on small aid amounts for services of general economic interest

The Commission has launched a call for evidence on the review of the **Commission Regulation 360/2012** on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest ("the SGEI de minimis Regulation"), which is set to expire on 31 December 2023. According to said regulation, aid granted to undertakings providing services of general economic interest ("SGEIs") that falls below a certain threshold (EUR 500.000 over any period of three fiscal years) can be exempted from the requirement of prior notification to the Commission. SGEIs are service that meet social needs such as health and long-term care, childcare, access to and reintegration in the

labour market, social housing and the care and social inclusion of vulnerable groups.

The Commission initiated a review procedure of the SGEI de minimis Regulation in 2019, in which stakeholders reported that, overall, said regulation is fit for purpose but its ceiling defining what constitutes de minimis aid is too law and there are certain inconsistencies with the general de minimis Regulation. Therefore, the Commission has announced that it intends to revise the SGEI de minimis Regulation in order to update the exempted amounts in light of the inflation and to align some concepts with the general de mimimis Regulation ("single undertaking" or "undertakings in difficulty"). Stakeholders can submit their views on the call for evidence of the Commission until 9 January 2023.

Commission approves amendments to Spanish scheme to support companies in the context of the war in Ukraine

The Commission has approved the proposed amendments to an existing Spanish scheme to support companies in the context of the war in Ukraine, since it has consider that they are compatible with the **Communication** from the Commission – Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia ("the Temporary Framework"). The original scheme was **approved** on 10 June 2022 and subsequently **modified** on 18 August. Spain has introduced the following changes: (i) extension of the period in which aid can be granted (until 31 December 2023), (ii) extension of the maximum aid ceilings for limited amounts of aid, (iii) extension of the period during which debt instruments can be converted into other forms of aid until 30 June 2024 and (iv) an adjustment of the base rate applicable for the calculation of the reduced interest rates.

CNMC initiates disciplinary proceedings against several food distribution companies

The Spanish Competition Authority ("CNMC") has initiated disciplinary proceedings against (i) Asesores Llangón, S.L., (ii) Frutícolas Ateca, S.L., (iii) Hermanos Vidal, S.L., (iv) Leonesa de Patatas, S.L., (v) Plataforma Femar, S.L., (vi) Serviline Foods, S.L. and (vii) Distribuciones Cebollada, S.L., for an alleged infringement of the prohibition of collusive agreements between companies (Article 1 of the Spanish Competition Act, "SCA", and, possibly, of Article 101 of the Treaty on the Functioning of the European Union, "TFEU"). The opening of the investigation follows from the inspections carried out by the CNMC in March and September 2022 in the premises of Plataforma Femar, S.L., Vifrusa, S.L., Leonesa de Patatas, S.L. and Serviline Foods, S.L. The CNMC suspects that the above-mentioned companies may have colluded in relation to the allocation of customers and the awarding of tenders for the supply of foods to schools, nursing homes and prisons, as well as they might have exchanged commercially sensitive information.

CNMC initiates disciplinary proceedings against Telefónica

In 2015, the CNMC **authorized** in second phase the acquisition of DTS (formerly Sogecable) by Telefónica subject to commitments (that Telefónica refrained from including long-term obligations directly or indirectly related to pay-TV services), with a duration of five years which was subsequently **prolonged by** three additional years. In April 2021, Telefónica launched its offer Fusión, which included pay.TV services. The CNMC has now initiated proceedings in order to ascertain whether that offer breaches Telefónica's commitments of 2015.

CNMC initiates sanctioning proceedings against the Spanish General Council of Procurators ("CGPT")

On 29 December 2022, the CNMC **initiated** sanctioning proceedings against the Spanish General Council of Procurators ("CGPT") for practices restricting competition in the intermediation sector for the conduct of extra-judicial auctions of goods and rights by specialised persons or entities, through electronic means in Spain.

The CNMC has detected two possible types of unlawful conduct. On the one hand, the possible establishment of fixed, minimum and maximum prices that the CGPT and the procurator associations would earn for their intervention in the out-of-court auctions of goods and rights through its auction website. The CNMC believes that these prices would have been fixed in documents drawn up by the CGPT, which could constitute a decision by an association of companies or a collective recommendation.

On the other hand, the CNMC points out that the CGPT would have advertised its intermediation activity as if it offered additional guarantees due to its status as a statutory corporation when in fact, in this type of activity, it intervenes as a private agent.

CNMC adopts interim measures to ensure publicity and transparency for the upcoming auctions organised by Ecoembes

On 29 December 2022, the CNMC **adopted** interim measures with the aim of guaranteeing publicity and transparency for the upcoming auctions of PET and HDPE plastic waste organised by Ecoembes. This decision has been taken after the CNMC initiated in October 2022 sanctioning proceeding against Ecoembes, for its possible abuse of its dominant market position for the auction procedure used by Ecoembes since at least 2004. During the investigation, the Competition Directorate submitted to the Council of CNMC a proposal for interim measures to ensure the transparency and publicity of Ecoembes' waste auctions.

These interim measures include (i) the participation of a notary during the auction procedure, (ii) the publication on Ecoembe's website, in an accessible format for the public, of the terms of the call for bids and the notarial act containing all the bids submitted and the result of the award, and (ii) it establishes a limit on the quantity that

can be awarded to a single recycler in auctions for light packaging and PET solid urban waste. The CNMC has established that the interim measures will remain in force until the end of the infringement proceedings in question or, until Ecoembes adopts an electronic auction system in accordance with the legal provisions.

CNMC opens Phase II review into the proposed merger between Logista Publicaciones and Distrisur

On 28 October 2022, Logista Publicationes notified to the CNMC its intended acquisition, through its subsidiary Logista Regional, of the sole control of Distrisur, a subsidiary over which it currently has joint control with Boyacá. As consideration for this concentration, Bocayá will obtain a 35% shareholding in Logista Regional (and thus have the right to appoint a member of the board of directors of Logista Regional).

The CNMC fears that the concentration may hinder effective competition in the market and therefore has **decided** to open a second phase review phase. Indeed, the CNMC has pointed out that the transaction strengthens the structural link between Logista Publicaciones and Bocoyá, which might reduce competition between these two operators. The CNMC fears that Bocayá could have access to sensitive information on the operations of its competitor Logista Regional, which it could use to expand its business in several regional markets or hinder the expansion of its competitor. Furthermore, the CNMC has concerns that the presence of competitors in the same board of directors might incentivize them to coordinate their behaviour; the possibility of collusion is facilitated, according to the CNMC, due to the maturity of the sector and the barriers to entry.

CNMC recommends changes to the marketing of futsal broadcasting rights to ensure competition between TV operators

The Royal Spanish Football Federation ("RFEF") asked on 10 November 2022 the CNMC to prepare a report prior to the marketing of broadcasting rights of first and second division of futsal for seasons 2023/2014, 2024/2025 and 2025/2026. The CNMC has published its **report** on 30 November 2022, in which it explains why it considers that the proposal of the RFEF does not comply with the conditions set out in Royal Decree-law 5/2015.

Among other recommendations, the CNMC points out that RFEF should ensure an award procedure in accordance with the principles of competition, transparency, and non-discrimination. More precisely, the CNMC recommends the RFEF to describe the weighting criteria that will lead it to determine which is the most economically advantageous bid. The CNMC also recommends establishing Q&A sessions during the procurement procedure in order to clarify the doubts that eventually may have the bidders and to grant them sufficient time for preparing, submitting and adapting their bids.

CNMC investigates several operators in the Spanish energy sector

Between 28 November and 2 December 2022, the CNMC carried out inspections at the premises of companies active in the energy sector, in the framework of a confidential inquiry opened following some complaints. The CNMC believes that these companies may have infringed Articles 1 and 2 of the SCA and Articles 101 and 102 of the TFEU.

Basque Competition Authority publishes report on State aid

The Basque Competition Authority ("LEA/AVC") has published its **report** on State aid granted in the Basque Country between 2015 and 2021. According to the report, the global amount of State aid granted in said territory amounted to 0.27% of the GDP in 2020 and 0.23% in 2021. It also states that, in 2020 and 2021, the aid granted by the Basque Country under the Communication from the Commission – Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak ("the Covid-19 Temporary Framework") accounts for 15% of the total aid. Furthermore, the report indicates that the instrument of State aid most used in 2019 was direct subsidies, followed by subsidized loans. In addition, it points out that most of aid granted in the Basque Country is exempt from prior notification to the Commission: only 0.63% of the State aid granted between 2015 and 2021 was notified to the Commission; the rest has been granted under the Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ("the General Block Exemption Regulation").

CNMC closes the sanctioning proceedings against ISDIN S.A. in a termination by commitments

The CNMC initiated in 2020 sanctioning proceedings against ISDN, S.A. for possible anticompetitive conduct consisting in the fixing of resale prices of certain skin care products through the company's online channel. ISDN requested the termination by commitments of the proceedings. In that type of termination of proceedings, the investigated company offers a series of commitments in order to address the competition concerns detected by the CNMC. The CNMC then accepts them and makes them binding for the company, which does not receive a fine.

In this case, the commitments offered by ISDN include the implementation of an objective, transparent and non-discriminatory system of discounts, the improvement of its policy of communication of recommended prices to its distributors, fostering its internal culture of compliance with competition regulations and ensuring that its commercial department staff does not have access to certain information related to sales prices of pharmacies.

The CNMC has considered that these commitments adequately solve its competition concerns and has **approved** the termination of the sanctioning proceedings.

Case law

According to Advocate General Rantos, the FIFA-UEFA rules under which any new football competition is subject to prior approval are compatible with EU Competition law

The Fédération internationale de football association ("FIFA"), which is football's world governing body and is composed of national football federations (and recognises the existence of regional football confederations), and the Union of European Football Association ("UEFA"), the football's governing body at the European level, are two Swiss bodies governed by private law that hold a monopoly in respect of the authorisation and the organisation of international professional football competitions in Europe. Professional football clubs are indirect members of these two associations and are bound by their statutes and regulations.

On the other hand, the European Super League Company ("ESLC") is a company governed by Spanish law which was set up by prestigious European football clubs with the aim of organising the first closed (or "semi-open") annual European football competition, called the "European Super League" ("ESL"), independently of UEFA and whose clubs could continue to participate in the football competitions organised by the national football federations and UEFA and FIFA. The ESLC is not affiliated to FIFA and UEFA. Following the announcement of the creation of the ESL, FIFA and UEFA issued a statement on 21 January 2021 refusing to recognise the ESLC and warned that any club or player taking part in the ESLC would be expelled from competitions organised by FIFA and UEFA.

ESLC complained before the Companies Court of Madrid that the conduct of FIFA and UEFA was incompatible with Articles 101 and 102 TFEU and the provisions of the TFEU relating to the fundamental freedoms of movement. The Commercial Court of Madrid requested then a preliminary ruling the Court of Justice of the European Union ("CJEU") on whether Articles 101 and 102 TFEU prohibit the statutory regulation of a dominant position, which may be abusive, by UEFA and FIFA on the prerogative of prior authorization in relation to all international competitions. In addition, the Companies Court of Madrid adopted, different measures without an inter partes hearing, aimed at preventing any conduct on the part of FIFA or UEFA intended to thwart or hamper the preparations for and the establishment of the ESL, as well as the participation of clubs and players, inter alia, through disciplinary measures or sanctions involving the exclusion from competitions organised by these two associations.

Advocate General ("AG") Rantos has issued his opinion on the matter on 15 December 2022 (case C-333/21), in which he observes first the special nature and the social and educational function of sports, and the "European Sports Model" reflected in Article 165 TFEU. According to him, on the one

hand, this model is based on a pyramid structure, ranging from amateur sport (at the base), and at its summit, professional sport. On the other hand, Rantos stresses that one of the main objectives of the European Sports Model include the promotion of open competitions ("which are accessible to all by virtue of a transparent system in which promotion and relegation maintain a competitive balance and give priority to sport merit") and financial solidarity ("which allots the revenue generated through events and activities at the elite level to be redistributed and reinvested at the lower levels of the sport"). In that sense, AG Rantos considers sports federations play a key role as they guarantee respect for and uniform application of the rules governing the sporting disciplines in question. AG Rantos emphasises that Article 165 TFEU was introduced in order to protect the special social character of the economic activity generated by sport, "which may justify a difference in treatment in certain respects" (opinion, point 34). He also states that "within its field, Article 165 TFEU is a specific provision as compared with the general provisions of Articles 101 and 102 TFEU, which apply to any economic activity" (opinion, point 35). Furthermore, AG Rantos notes that UEFA holds a dual role: (i) it adopts rules concerning professional football (regulatory) and (ii) organises sporting competitions (economic). According to AG Rantos, since the UEFA also has the power to authorise competitions organised by third parties, its dual role might give rise to situations of conflict of interest. However, Rantos points out that the mere fact that a body holds a dual role does not entail, in itself, an infringement of competition law. He therefore concludes that "sports federations may, subject to certain conditions, refuse third parties' access to the market, without this constituting an infringement of Articles 101 and 102 TFEU, provided that that refusal is justified by legitimate objectives and that the steps taken by those federations are proportionate to those objectives" (Opinion, point 49).

After this brief introduction, AG Rantos analyses whether Article 101 TFEU precludes the provisions of FIFA and UEFA Statutes concerning the system of prior approval and the sanctions envisaged by those federations. AG Rantos considers that the conditions for the application of Article 101 TFEU are met: (i) the provisions at issue can be regarded as "decisions by associations of undertakings" within the meaning of Article 101(1) TFEU and (ii) the decision is capable of affecting trade between Member States. He then analyses whether the decision has the object or effect of restricting competition in the internal market. If a conduct constitutes a restriction of competition by object, there is no need to take account of its concrete effects. In that respect, he points out that the provisions can be compared to non-competition and exclusivity clauses, which according to the case-law do not constitute restrictions to competition by object. He also points out that the legal and economic context of which the UEFA's rules form part has to be taken into consideration: for instance, only a specific analysis of the discretion the UEFA has to authorise third parties' competitions can establish whether its use of that discretion has been discriminatory and inappropriate to demonstrate anticompetitive effects. Furthermore, according to AG Rantos, the fact that the approval scheme has approval criteria that are not clearly defined, transparent,

non-discriminatory and reviewable does not automatically entail that the approval mechanism constitutes a restriction by object, but rather indicates the existence of restrictive effects that must be confirmed on the basis of an in-depth analysis. In addition, Rantos explains that the approval of FIFA and UEFA is not essential, because third parties can create freely and without these bodies' intervention an alternative competition.

Rantos therefore carries out an analysis of the effects of UEFA and FIFA's conduct. To that respect, he notes that it should be taken account of (i) the market access and whether there are real and concrete possibilities for a competitor to create an alternative competition and (ii) the central role and discretion of UEFA and (iii) the economic power of ESL and its football clubs, AG Ramos then assesses whether the restrictions caused by the UEFA rules are inherent in the pursuit of legitimate objectives and proportionate to them. He considers that the system of prior approval of a third parties' competition stems from the "European Sports Model" and therefore from EU primary lay (thus, the legitimacy of UEFA's rules cannot be disputed). AG Rantos considers that the approval mechanism is essential to ensure the uniform application of the rules of football, compliance with common standards and coordinate the competition calendars in Europe. He believes that without this model, it would be impossible for UEFA or FIFA to achieve their objectives pursued. He also notes that: (i) third parties still can create alternative competitions without FIFA and UEFA's approval, and (ii) the system is necessary to achieve the objective of solidarity.

Furthermore, AG Rantos finds that the restrictions are inherent and directly related to the legitimate objective being pursued. In that sense, he states that the ESL could undermine those legitimate objectives pursued by UEFA and FIFA as the ESL may have a negative impact on the domestic leagues, by reducing the appeal of those competitions. In that sense, ESL clubs would continue to participate in other competitions and that would create imbalances since the ESL clubs will be guaranteed participation in the ESL while other clubs do not. He also notes that the fact that the ESL's founding clubs are protected in their national leagues from competing against rival clubs for a high-level European competition (i.e., the ranking obtained at the end of the regular season because their participation in the ESL is guaranteed) is incoherent with the principle of participation in competitions based on "sporting merit". Furthermore, he states that the competition may have as well an impact on the principle of equal opportunities, since the clubs participating in the ESL would book an additional revenue while facing rivals in the domestic leagues that would not be able to generate revenue on a comparable scale. As regards the proportionality of the sanctions imposed by UEFA and FIFA, Rantos considers that imposing sanctions on players who have not decided on the creation of the ESL seems disproportionate (for instance, not allowing them to play for their national team), whereas the sanctions to the teams participating in the ESL seems proportionate taking into account the role played by them in the organisation and creation of the ESL.

The AG then analyses whether Article 102 TFEU precludes the provisions of the FIFA and UEFA

Statutes concerning the prior approval scheme and the system of sanctions. Due to its position of dominant undertaking in the market, it is UEFA's responsibility to examine if the requests for authorisation of a new competition would unduly deny third parties' access to the market. Rantos also explains that he does not consider that UEFA and FIFA can be regarded as an "essential facility": (i) the approval of these bodies is not necessary for a third party to organise a new football competition, (ii) the creation of a new competition does not require the reproduction of the structures of UEFA and FIFA, (iii) hardly the refusal of access is liable to eliminate or render excessively difficult competition on the market and (iv) UEFA's refusal may be objectively justified.

The GA_P Competition team wishes our readers a Happy New Year!