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**01 The National Markets and Competition Commission (NMCC) approves the acquisition by Schibsted España S.L.U. (SCM Spain) of Milanuncios S.L.U. (MA) subject to remedies in a second phase merger.**

On 13 December 2014, the transaction of reference has been deemed authorized under Spanish merger control rules.

After an in depth (second phase) investigation, the NMCC concluded that horizontal effects resulting from the transaction could limit competition in the Spanish market for free online classified motor vehicle advertising platforms. In particular, first, because SCM Spain's main competitor MA is eliminated as an independent competitor and, second, because of the increased size of the merged entity which will display network effects deterring new entrance and making competition more difficult to the remaining players. The combined share of SCM Spain and MA will reach 60-70 % in the Spanish market for free online classified motor vehicle advertising platforms.

In order to solve the competition issues identified by the NMCC, SCM Spain offered the following commitments that were finally accepted by the NMCC.

Mainly, SCM Spain has committed to granting to a third party an exclusive exploitation licensee over the advertisements placed by professional motor vehicle advertisers in the motor vehicles section of *milanuncios.com*. SCM Spain has committed to enter into a binding agreement with a licensee endorsed by the SCA before closing the transaction.

In particular, SCM Spain has proposed four commitments:

- (i) Granting the licensee the exclusive right to electronically export advertisements from professional motor vehicle advertisers to the motor vehicle section of the *milanuncios.com* platform.
- (ii) Granting the licensee the exclusive right to access the contact details of professional motor vehicle advertisers using *milanuncios.com*.
- (iii) Granting the licensee the exclusive right to collect the revenue arising from the classified advertisements posted by professional motor vehicle advertisers in the motor vehicle section of *milanuncios.com*. The licensee will collect the revenues directly (in the first version of the commitments SCM Spain was to collect the revenues from advertisers, and the licensee would subsequently bill SCM Spain).
- (iv) Granting the licensee rights that will allow it to enhance its brand and improve traffic on its own platform (e.g. right to place a logo on advertisement pictures exported from licensee's platform).
- (v) Granting the licensee the following rights:
  - Right to require SCM Spain to delete any advertisement which is identical or similar to another advertisement already exported by the licensee under (i).
  - Right to be informed of any changes in the conditions that SCM offers to non-professional and professional advertisers in the motor vehicle section of *milanuncios.com*, and to adopt the new conditions offered to the advertisers.
  - Right to ask SCM Spain to modify those features of the service regarding which the licensee has a choice (billing system, notification systems to advertisers of exported advertisements, or others), without entailing the suspension of the license term.
  - Right to require SCM Spain to adopt, within the shortest time period, the necessary measures to amend the conditions of access to *milanuncios.com* or other conditions that are reasonable to preserve the value of the license (for instance those relating to the publication of advertisements in the motor vehicle section through automatic means).
  - Right to require SCM Spain to transfer to the motor vehicle section of *milanuncios.com* any general improvement introduced in the website, such as appearance, tools and others that may affect navigation in the website.

Moreover, SCM Spain has proposed two years as duration of the mentioned commitments and an implementation period that will have a maximum duration of ten weeks if the licensee decides to upload and modify the advertisements in real time.

According to the NMCC Council, the commitments are appropriate and proportionate to address the competition concerns identified. Additionally, the Council considers that the licence agreement will lead to the licensee expansion in the Spanish market of online motor vehicle classified advertising platforms and will turn the licensee in a relevant market operator during and after the license agreement.

Furthermore, the NMCC Council has approved, jointly with the commitments, the license agreement between SCM Spain and Autocasión Hoy S.A. (**Autocasión**) of 17 November. Thus, Autocasión has been appointed as the suitable licensee.

**02 The High Court has annulled inspections carried out by the National Competition Commission (NCC) in two separate infringement procedures (Judgments of 10 December 2014).**

In two recent landmark judgments, the High Court (HC) has annulled two inspections carried out by the former NCC, currently the National Markets and Competition Commission (NMCC), within the framework of the Competition Act (SCA).

The HC has considered in both cases that the NCC breached the fundamental right to inviolability of the home (Article 18 of the Spanish Constitution), since neither the content of the decision ordering the inspection nor the inspection itself complied with the legal guarantees required for the protection of such right in the course of entry, search and seizure activities within the company's premises.

In one of these cases, the breach is based on the discrepancy between the subject matter stated in the search warrant issued by the NCC, on the one hand, and the subject matter in the judicial order on the other hand, with the latter being more narrowly defined. In view of such discrepancy, the HC has concluded that the inspection, which was carried out following the broader definition of the search warrant, was not covered by the judicial authorization and shall be considered invalid.

In the second case, the infringement of the right to inviolability of the home is a consequence of non-compliance with the formal requirements under Articles 40 SCA and 13 of its implementing Regulation. The HC has interpreted and applied these provisions in line with the case law of the European Court of Justice (ECJ). In particular, the HC has considered that the statement of reasons in both the judicial order and the administrative decision ordering the inspection do not sufficiently specify the subject matter and purpose of the inspection (as they only referred generically to the existence of *possible anticompetitive behaviour* of the company).

The ECJ quotes its own case law according to which *the scope of the obligation to state reasons in the decisions ordering inspections cannot be limited by considerations related to the effectiveness of the inspection*. While the HC recognizes that the search warrant does not necessarily have to contain detailed information on the facts and other elements subject to the inspection, it must contain the minimum legal requirements regarding the subject matter and purpose of the inspection. A mere reference to the content of a previous NMCC's decision is not enough.

**03 The National Markets and Competition Commission (NMCC) has imposed fines totalling EUR 98.2 million on 39 companies and three trade associations active in the waste management and urban sanitation in Spain (Decision of 8 January 2015, file S/0429/12).**

According to the Directorate of Competition (DC), participants in the infringement have exchanged sensitive information, allocated customers and colluded in public tenders. The punished associations implemented the market sharing agreements through collective recommendations.

As a result, the NMCC Council imposed fines on the basis of a single continuous infringement of Article 1 of the Spanish Competition Act. Amongst other companies fined by the NMCC, the Decision includes some leading players like FCC, CESP (former Ferrovial group), Urbaser (from ACS group), Valoriza (from Sacyr group) and SAICA.

The Decision has distinguished three different sectors affected by the infringement: (i) industrial waste management (*i.e.*, waste generated by industrial costumers), (ii) paper and board recovery and, (iii) urban sanitation (*i.e.*, street cleaning and sewage treatment).

Regarding the industrial waste management sector, the collusive practice (costumer allocation, non-compete agreements) took place between 1999 and 2003.

Regarding the paper and board recovery sector, SAICA had reached several market sharing agreements with other market participants in different regions of Spain (Cataluña, Madrid, Sevilla and others). Additionally, the main companies in this sector, have jointly bid (under the umbrella of the trade association AREMA) for the recovered paper and board offered by the municipality of Madrid.

Finally, concerning urban sanitation, the NMCC has evidenced that the leading players (*i.e.*, FCC, Cespa, Urbaser and Valoriza) have colluded through the different public tenders organized in the regions of Madrid, Andalucía, Basque Country, Malaga, and, Ceuta and Melilla, between 2011 and 2013.

These companies were aided by the trade association ASELIP. In particular, the competitors meet to reach a common position regarding the public tenders in the framework of the trade association.

#### **04 The Spanish Supreme Court has issued a landmark judgment regarding the interpretation of the 10% turnover limit for cartel fines (Judgment of 29 January 2015).**

The Supreme Court (SC) has partially confirmed the interpretation followed by the National High Court (NHC) over the last two years regarding the limit of 10% of the company's turnover established under Article 63 (1) of the Spanish Competition Act (SCA) for the calculation of fines.

In its recent judgment, the SC has construed the legal provision as meaning that the percentage limits under Article 63 (1) SCA are the maximum limits of fines that may be imposed by the Spanish Competition Authority, the National Markets and Competition Commission (NMCC).

The main consequence of this interpretation is that the calculation method for fines established by the Notice of the NMCC of 6 February 2009 "implies in most cases the establishment of an upward bias in the amount of the fine, which is contrary to the principle of proportionality, and the subsequent application of the 10% of the turnover as a mere way of correction". The interpretation of Article 63 (1) SCA currently followed by the NMCC is incompatible with Spanish administrative law and, in particular, with the principle that penalties must have a proper legal basis, which requires the "legal predetermination of the upper and lower limits of fines".

Secondly, the SC has rejected the interpretation followed by the NHC in its later decisions according to which the percentage limits established in Article 63 (1) SCA must be applied to the turnover corresponding to "the sector of the company's economic activity where the infringement has taken place, that is to say the market sector directly or indirectly affected by the infringement". The SC has established that according to a literal interpretation of the legal provision the turnover to be considered in this regard must always be the total turnover. The use of this magnitude for the calculation of the maximum amount of fines is not contrary to the Spanish Constitution.

With this judgment the SC has addressed the existing doubts related to the calculation of fines as regulated under Article 63 (1) SCA, doubts which emerged as a result of the appeals against the NMCC's decision in case *Vinos Finos de Jerez* (S/0091/08). The judgment also amounts to a deviation from the usual practice of the European Commission and the European Union Court of Justice caselaw regarding calculation of fines, on the grounds that the calculation of fines and penalties for infringement of the fining subject is a strictly national matter, as opposed to the application of the material rules on competition law which must be consistent throughout Europe on the basis of EC Reg. 1/2003. Finally,

the SC expressly states that the SCA's Notice on Calculation of Fines is no longer adequate; likely, hence, the entire fining practice of the SCA will have to be revisited at the administrative level.

**05 The National Markets and Competition Commission (NMCC) has imposed fines totalling EUR 4 million upon three companies that supply bearings to RENFE, which had formed a cartel (Decision of 29 January 2015, file S/0453/12).**

The NMCC has imposed fines totalling EUR 4.057 million upon three companies for operating a cartel regarding the supply of industrial bearings for railway vehicles to Renfe (S/0453/12, Railway Bearings).

In particular, the NMCC has fined SKF Española SA with EUR 2.860 million, Schaeffler Iberia SL with EUR 1.072 million and NSK Spain SA with EUR 123,815. NSK Ltd. and its subsidiary NSK Spain SA have been granted with the immunity from the imposed fine, pursuant to the leniency program.

The companies held a price fixing and market sharing agreement in the Spanish market for industrial bearings for railway vehicles. This would have affected the tenders called by Renfe and, subsequently, by Renfe - Operadora in 2004, 2007 and 2011 for the supply of bearings for railway vehicles.

According to the Decision, the cartel was organized and developed through meetings and phone calls involving NSK, SKF and Schaeffler managers, which were coincidental with each call for tender. The managers of the concerned companies held contacts, by telephone or directly in meetings, in order to agree on the offers to be submitted in connection with each tender, each company maintaining the references (each reference corresponds to a specific type of bearing) which, historically, had been supplied to Renfe by each of those companies.

#### **Proved conducts and fines**

In particular, in the 2014 [sic] tender, the companies met and agreed a price rise and supply quotas for each company. At the 2007 tender, whose estimated value amounted to EUR 15 million (excluding VAT), maintained phone contacts and agreed to increase their prices to Renfe – Operadora between 14 and 16%. Despite of the increase, the participating companies maintained the awarding of 41 over 51 references in which have submitted their offers. In the 2011 tender, which estimated value amounted to EUR 11 million (excluding VAT), maintained contacts again and agreed a price increase between 25 and 30%. In this last tender, the outcome of the tender was not really successful for the participating companies in the cartel since a fourth company (outside the cartel) submitted offers with a price reduction of 17%.

These actions are considered a single and continuous infringement, prohibited by Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the European Union. Such infringement consisted in an agreement concerning the fixing and progressive rise of prices, and supply sharing of the Spanish market, amounting to a cartel.

**06 The National Markets and Competition Commission (NMCC) has fined totalling EUR 88.2 m various Spanish milk suppliers (Decision of 26 February 2015, file S/0425/12).**

The NMCC has imposed fines totalling EUR 88.2m on nine companies and two associations operating in the country's raw cow milk supply market for an infringement of Article 1 of the Spanish Competition Act (SCA) and Article 101 TFEU.

The NMCC initiated proceedings as a result of a report on the dairy industry referred by the Regional Competition Authority from Castilla y León. This report referred to *(i)* the existence of an alleged anticompetitive conduct in the raw cow milk supply market and *(ii)* a complaint submitted by Unions Agrarias (a small farmer trade union) against milk processing companies.

Following an investigation, which included dawn raids in the main companies of the sector, the NMCC has considered that Asociación de Empresas Lácteas de Galicia (AELGA), Calidad Pascual (before Grupo Leche Pascual S.A.), Central Lechera Asturiana (CLAS), Central Lechera de Galicia (CELEGA), Corporación Alimentaria Peñasanta (CAPSA), Coprimeo Danone, Gremio de Industrias Lácteas de Cataluña (GIL), Grupo Lactalis Iberia, Nestlé España, Puleva Food y Senoble Ibérica have been involved in anticompetitive practices. Lácteas Asturias (ILAS), Leche Río, Feiraco, Leche Celta, Forlactaria, would have also been responsible, although these could not be subject to the NMCC Decision since the infringement was time-barred.

The anticompetitive practices carried by the infringers consisted of information exchanges, at national and regional level, regarding purchase price of raw cow milk, farmer's purchase volumes and milk surplus.

Such information exchange took place in various meetings and had the common purpose of agreeing on the adoption of a common strategy to control the supply of raw cow milk. In addition, at certain times, this strategy would have materialized in concrete agreements to coordinate pricing and allocate clientele.

For instance, the processing companies agreed and exchanged information concerning: *(i)* purchase prices offered by the processing companies to their respective farmers, *(ii)* the identity of farmers and the acquired volumes, and *(iii)* the identity of farmers who had the intention of switching processing company and possible measures to avoid it.

This information allowed companies to adapt their behaviour and avoid offering better prices and trading conditions to farmers, limiting competition in the raw cow milk supply market.

As a result, farmers were not free to set the price of their product (and were forced to depress their prices), distorting the normal functioning of the market for the benefit of the processing companies.

These agreements aggravated the situation in a market which is already concentrated on the demand side. In particular, the downstream industry (processing companies) has great bargaining power *vis-à-vis* farmers, a far more fragmented sector, who are forced to sell their production to preserve their milk quota allocated under the agricultural regulations of the common agricultural policy.

Furthermore, some of the companies exchanged information with the purpose of controlling the surplus of milk and its conversion into milk powder, artificially conditioning the price of raw cow milk supply.

In these information exchanges two associations played an important role: Aelga and Gil, acting as facilitators, for which they are considered co-authors of the infringement.

The NMCC Council has imposed the following fines:

- Danone: EUR 23.2m
- Corporacion Alimentaria Penasanta: EUR 21.8m
- Grupo Lactalis Iberia: EUR 11.6m

- Nestle Espana: EUR 10.6m
- Puleva Food: EUR 10.2m
- Calidad Pascual (former Grupo Leche Pascual): EUR 8.5m
- Senoble Iberica: EUR 929,644
- Central Lechera Asturiana: EUR 698,477
- Gremio de Industrias Lacteas de Cataluna: EUR 200,000
- Asociacion de Empresas Lacteas de Galicia: EUR 100,000
- Central Lechera de Galicia: EUR 53,310

In the case of Industrias Lacteas Asturianas, Grupo Leche Rio, Feiraco Lacteos, Leche Celta and Forlactaria Operadores Lecheros, the NMCC concluded that the infringement was time-barred.

**07 The National Markets and Competition Commission (NMCC) has imposed fines totalling EUR 9 m to 45 car dealer companies operating in the country's car distribution market for an infringement of Article 1 of the Spanish Competition Act (SCA) (Decisions of 5 March 2015, files S/0486/13, S/0488/13 and S/0489/13).**

The NMCC has imposed fines totalling EUR 9 m 45 car dealer companies operating in the country's car distribution market for an infringement of Article 1 of the SCA.

In the summer of 2013 the NMCC, following prior dawn raids, opened a far-reaching investigation comprising car dealerships pertaining to various car brands. The original file included car dealerships of the following brands: CHRYSLER ESPAÑA, S.L., FIAT GROUP AUTOMOBILES SPAIN, S.A., FORD ESPAÑA, S.L., GENERAL MOTORS ESPAÑA, S.L.U., HONDA AUTOMÓVILES ESPAÑA, S.A., HYUNDAI MOTOR ESPAÑA, S.L.U., KIA MOTORS IBERIA, S.L., NISSAN IBERIA, S.A., PEUGEOT CITROEN AUTOMÓVILES ESPAÑA, S.A., RENAULT ESPAÑA, S.A., SEAT, S.A., SNAP-ON BUSINESS SOLUTIONS, S.L., TOYOTA ESPAÑA, S.L., URBAN SCIENCE ESPAÑA, S.L.U., VOLKSWAGEN AUDI ESPAÑA, S.A., AUTOMÓVILES CITROËN ESPAÑA, S.A., B&M AUTOMÓVILES ESPAÑA, S.A. (MITSUBISHI DISTRIBUTOR IN SPAIN), BMW IBÉRICA, S.A.U., CHEVROLET ESPAÑA, S.A., MAZDA AUTOMÓVILES ESPAÑA, S.A., MERCEDES BENZ ESPAÑA, S.A., ORIO SPAIN, S.L. (SAAB DISTRIBUTOR IN SPAIN), PEUGEOT ESPAÑA, S.A., PORSCHE IBÉRICA, S.A., RENAULT ESPAÑA COMERCIAL, S.A., VOLVO CAR ESPAÑA, S.L.U. Subsequent to the original indictment decisions, additional brands were added such as OPEL and LAND ROVER.

The NMCC has divided the matter into as many files as car brands and given that the file affects distribution the number of car dealerships involved has made this, quite likely, the most complex case the NMCC has ever had to handle, with more than a hundred companies involved overall. The files are quite similar as far as we know regarding the facts, but they have variations and some files include the car manufacturer as a indicted party (for instance because that car manufacturer also has distribution business) and some do not. The entire investigation, it has transcended, has been triggered by a leniency application by Volkswagen (this was filtered to the press a few months ago, since the Volkswagen file is not yet public, so no decision is available yet).

The practices which the NMCC regards as anticompetitive consist of fixing of commercial conditions (discounts) and exchanging commercially sensitive information, at regional level, regarding specific car models.

Such information exchange took place in various meetings and dealt with different matters, although all had the ultimate common purpose of agreeing and adopting a common strategy to control the price of cars sold by these car dealers. The effects of the alleged cartel are in any event limited since the price-fixing would be only regarding the discounts that the dealerships have commercial margin to apply (and which are only a small component of the final car price). In any event, the NMCC treats this as a *per se* infringement.

In addition, according to the CNMC, the members of the alleged cartel hired a “Mystery shopper” company, who sent “ghost clients” to the premises of the members of the alleged cartel in order to monitor the effective application of the agreed discounts by the members of the cartel, and put into place a fining system for every breach of the agreement by members of the agreement.

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*Editorial Board:*

Pedro Callol García ([pedro.callol@callolcoca.com](mailto:pedro.callol@callolcoca.com))

Jorge Manzarbeitia Pérez ([jorge.manzarbeitia@callolcoca.com](mailto:jorge.manzarbeitia@callolcoca.com))

Manuel Cañadas Bouwen ([manuel.canadas@callolcoca.com](mailto:manuel.canadas@callolcoca.com))

Santiago Roca Arribas ([santiago.roca@callolcoca.com](mailto:santiago.roca@callolcoca.com))

More information at: [www.callolcoca.com](http://www.callolcoca.com)

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