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01 Selected merger decisions authorized by the NMCC between December 2017 and March 2018.

Firms	Notification threshold	Economic sector	Decision
Bankia / BMN	Turnover	Monetary intermediation	First-phase clearance (14 December)
Amgen /Kirin-Amgen	Market share	Manufacture of pharmaceutical products	First-phase clearance (14 December)
Ultra / Sparton	Market share	Defence	First-phase clearance (14 December)
Mémora / Funeraria Miranda	Market share	Funeral and related activities	First-phase clearance (14 December)
GBT Euro Travel Holdings / Global Business Travel Spain	Turnover	Travel agency activities	First-phase clearance (14 December)
Ardian / Panasa / Bellsola	Turnover	Manufacture of bread and biscuits	First-phase clearance (10 January)
Cinven / Dareva / Planasa	Market share	Manufacture of vegetables, tropical and subtropical fruits and pome fruits and stone fruits	First-phase clearance (10 January)
Aurelius / Abelan Board Industrial	Market share	Manufacture of corrugated paper	First-phase clearance (18 January)
Travel Service / Ceske Aerolinie	Market share	Passenger air transport	First-phase clearance (18 January)
Sidenor / Capresa	Market share	Manufacture of basic iron and steel	First-phase clearance (25 January)
Sika Holding Gmbh / Grupo Faist	Market share	Manufacture of other parts and accessories for motor vehicles	First-phase clearance (25 January)
SRG – Invista Equities ATT Business	Market share	Chemical Industry and manufacture of synthetic and artificial fibres	First-phase clearance (22 February)

02 Spain – Restrictive agreements – Cables: The National Markets and Competition Commission (NMCC) imposes fines totalling € 44.7 million in low and medium voltage cables cartel case (Decision of 21 November 2017, file S/DC/0562/15, *CABLES BT/MT).*

On 21 November 2017, the National Markets and Competition Commission (**NMCC**) imposed fines

totalling €44.7 million on eleven undertakings and one trade association (the Spanish

Association of Cable Manufacturers (**FACEL**)) for their involvement in a cartel related to the supply of low and medium voltage cables, in breach of Articles 1 of the Spanish Competition Act (**SCA**) and 101 of the Treaty on the Functioning of the European Union (**TFEU**).

The NMCC found that the companies had fixed prices and other commercial conditions as well as shared projects in five different cartels: amongst cable manufacturers, amongst cable manufacturers and three distributors and between distributors.

(i) The cartel between the seven main manufacturers of low and medium voltage cables lasted 13 years and was implemented within the framework of FACEL. The NMCC found that the cable manufacturers had systematically agreed on: (i) applicable tariffs and discounts for the supply of cables; (ii) the dates when new tariffs would enter into force; (iii) the dates when those tariffs would be communicated to clients and the justification to be given; (iv) the applicable payment terms; and (v) the conditions of supply. The NMCC also found that the members of the cartel had shared more than 332 projects or contracts for cable supply.

(ii) The cartel involving cable manufactures and three distributors (Peisa, Nicsa and Amara) lasted seven years and concerned the market for distribution of low and medium voltage cable. The NMCC concluded that these companies were involved in bid rigging practices.

(iii) Finally, the NMCC imposed fines on two distributors for dividing between themselves over a period of four years more than 20 cable supply contracts.

The facts have been accredited in the e-mails, WhatsApps and notebooks compiled by the NMCC in the dawn raids, proving 52 meetings held with FACEL between 2002 and 2015 to design and monitor their *modus operandi*. One of the manufacturers denounced the anticompetitive practices before the NMCC requesting the leniency program.

03 Spain – Abuse of Dominance – Associations: the NMCC fines the national horse breeders association for abusing its dominant position (Decision of 21 November 2017, file S/DC/0580/16, *CRIADORES DE CABALLOS 2*).

The NMCC has fined the National Association of Purebred Spanish Horse Breeders (**ANCCE**) € 187,677 for abusing its dominant position in the markets of contest regulations and lineage management for purebred Spanish horses.

ANCCE is an association of purebred Spanish horses' breeders, whose purpose is to represent and defend the breeders and the economic and social sector in which they develop their activity, as well as promoting and preserving the breed. Since 2007, ANCCE has been entrusted with the management of the studbook for purebred horses, along with the organization of competitions and the drafting of their regulations. ANCCE has also marketed a horse management program, and owns different websites with information and photographs from the competitions.

After an investigation prompted by a complaint filed by MELPI, a company specialized in computer, commercial and promotional activities for purebred horses, the NMCC found evidence of the abusive practices performed by ANCCE.

Firstly, since 2011, and following the changes that ANCCE carried out in the contest rules for purebred Spanish horses, the only computer tool that was considered valid for data management activity in those competitions was the one developed by ANCCE itself. Until then, a wide variety of third-party computer tools for data management (including the MELPI program) had been used in competition events. However, since January 2011, ANCCE decided that any program other than its own was not approved

Additionally, as of 2013, ANCCE imposed new obligations on the organizers of competitions, such as a duty to publish the results of the competitions on the ANCCE website in real time and to record and photograph the shows to then send ANCCE copies.

Finally, in 2016, ANCCE introduced new changes in the contest regulations that implied that ANCCE would be the only body allowed to contract certain services that had previously been entrusted to the different external organizing committees, such as the computerized management of the results and photography and video at the shows.

This conduct resulted in a restriction of competition in the technical secretariat services for these contests, as well as the reinforcement of ANCCE's position in the market for the promotion of the purebred horse. The NMCC considered this conduct as "*arbitrary, discriminatory or not objective*". On this basis, the NMCC declared that ANCCE had breached Articles 2 SCA and 102 TFEU.

04 Spain – Remedies – Renfe: The NMCC limits Renfe so that their competitors can count on enough machinists and develop their activity (Decision of 21 December 2016, file STP/DTSP/053/17).

The Private Railway Companies Association (representing most of Renfe's competitors) filed a complaint against Renfe before the NMCC denouncing the situation created by Renfe after calls for tenders in 2015 and 2016.

The NMCC has adopted a Resolution in which it orders Renfe to comply with a series of remedies ensuring that private companies competing with Renfe in the transport of goods have enough machinists and can offer their services in equal conditions. Currently, Renfe employs 97% of machinists in Spain.

In 2012, Renfe paralyzed the driver training courses, which are an essential requirement for the job. The calls were not resumed until 2016, but in 2015 Renfe hired new machinists from their competitors, who could not match Renfe's conditions. This recruitment policy seriously impaired Renfe's competitors position.

Given the current importance of the machinists for the private enterprises' development, as well as the needs that Renfe foresees for the coming years, the NMCC has adopted the following measures:

(i) Renfe must report annually (before 31 January) to railway companies, training centers, and the NMCC its best estimate of driving staff needs, including possible training programs, for a minimum period of 2 years;

(ii) Renfe must guarantee a period of 3 months between the publication of the call and the first exam to enable the candidates to prepare.

(iii) Renfe must offer a wholesale traction service in a non-discriminatory way and oriented to its direct costs to companies that have lost, as a result of a call for Renfe, to more than 20% of their driving staff.

05 Spain – Judicial activity: The High Court has annulled the fine on Rua Papel Gestión SL (Rua Papel) resulting from the investigation on market allocation practices in the markets for waste removal services (High Court Judgment of 28 December 2017, case 139/2015).

This Judgment results from the review of the NMCC Decision declaring that the participants in the infringement exchanged sensitive information, allocated customers and colluded in public tenders. As a result, the NMCC Council imposed fines on the basis of a single, continuous infringement of Article 1 SCA.

Amongst other companies fined by the NMCC, the Decision included FCC, CESPA (from Ferrovial group), Urbaser (from ACS group), Valoriza (from Sacyr group) and SAICA, which were active in each of the three different sectors affected by the infringement: *(i)* industrial waste management (*i.e.*, waste generated by industrial costumers); *(ii)* paper and board recovery and; and *(iii)* urban sanitation (*i.e.*, street cleaning and sewage treatment).

Rua Papel was only active in the sector for paper and board recovery, but the NMCC did not take this into account and considered that Rua Papel had participated in the single and continuous infringement affecting the three different sectors, sharing the same common plan and objective in the same measure as the rest of the participants.

Relying on the ECJ case law related to single and continuous infringements, the High Court finally considered the NMCC should have differentiated the participation of Rua Papel as there was no evidence supporting its participation in the global single and continuous sanctioned practice, all of which is a cause of invalidity of the Decision.

06 EU law - Judicial activity - Coty: The ECJ rules that companies may restrict online distribution of luxury goods (ECJ Judgment of 6 December 2017, case C-230/16).

Coty Germany sells luxury cosmetic goods in Germany through a selective distribution network Under Coty Germany's selective distribution system, shops of authorised distributors must comply with a number of requirements (setting, decoration and furnishing). Authorised distributors can sell the goods online, provided that they use their own e-commerce or third-party platforms if such platforms are not discernible from the point of view of the buyer.

Coty Germany brought an action before a first instance Court against Parfümerie Akzente (an authorised distributor of Coty), seeking an injunction preventing the said distributor from distributing Coty's products through Amazon.

The ECJ states that a producer of luxury goods may, under certain conditions, prohibit authorized retailers from selling its products on third-party online marketplaces. According to the ECJ, this prohibition cannot as such be considered illegal under competition rules because it aims to preserve the luxury image of products if it fulfils certain conditions:

(i) The purpose of limiting sales through third party platforms is preserving the luxury image of the goods in question;

(ii) The limitation is laid down uniformly and not applied in a discriminatory fashion; and

(iii) It is proportionate in the light of the goal pursued.

07 EU law - Judicial activity - Uber: The ECJ declared Uber a transport company, not an information service provider (ECJ Judgment of 20 December 2017, case C-434/15).

In 2014, Elite Taxi brought an action before the Commercial Court No 3 of Barcelona seeking a declaration from that court stating that Uber was infringing transport regulation in force and the Spanish Unfair Competition Act.

Central to the discussion was whether or not Uber requires prior administrative authorisation to operate as a transport company. In order to

ascertain the issue, the Spanish Court referred a preliminary ruling to the ECJ in order to determine if the services provided by Uber are to be regarded as transport services, information society services or a combination of both. Indeed, whether or not prior administrative authorisation may be required depends on the classification adopted. If the service at issue was covered by the directive on services in the internal market (Directive 2006/123/EC) or the directive on electronic commerce (Directive 200/31/EC), Uber's practices may not be regarded as unfair practices.

According to the ECJ, an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey, is a separate service from a transport service consisting of the physical act of moving persons from one place to another.

However, the Judgment concludes that the intermediation service provided by Uber must be regarded as forming an integral part on an overall service whose main component is a transport service. This is because the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which those drives would not be able to provide transport services and passengers would not be able either to use the services provided by those drivers.

08 EU law – Judicial activity – Schweppes: The ECJ defines criteria on imports of UK Schweppes products to Spain (ECJ Judgment of 20 December 2017, case C-291/16).

In its Judgment of 20 December 2017, the ECJ has ruled that Schweppes Spain may not oppose the import of bottles of tonic water under the trademark "Schweppes" imported from the UK.

By way of background, Schweppes International or Schweppes Holding (**Orangina Schweppes**) is the proprietor of the trademark "Schweppes" in Spain, where the Spanish Schweppes entity (**Schweppes Spain**) has an exclusive right to exploit that trade mark. In the UK the trademark "Schweppes" is owned by the Coca Cola Group, which bought the rights to the name in 13 European Economic Area (**EEA**) countries from Orangina Schweppes in 1999.

In 2014, Schweppes Spain initiated trademark infringement proceedings against a series of independent distributors for having imported in Spain bottles of tonic water bearing the trademark "Schweppes" from the UK, *i.e*. bottles of tonic water from Schweppes UK, owned by Coca Cola.

According to Schweppes Spain, those actions were unlawful, given that the bottles of tonic water were manufactured and placed on the market, not by itself or with its consent, but by Coca-Cola, which, Schweppes Spain argues, has no connection with Orangina Schweppes.

The Commercial Court No 8 of Barcelona asked the ECJ for a preliminary ruling in order to determine whether, in the light of the conduct of Schweppes and Coca-Cola following the territorially limited assignment of the trade mark "Schweppes", EU law precludes Schweppes Spain from relying on the exclusive right which it enjoys under Spanish legislation, to oppose the import and/or the marketing in Spain of "Schweppes" products originating in the UK (where the trademark is owned by Coca-Cola).

The ECJ ruled that EU law precludes the proprietor of a national trade mark from opposing the import of identical goods bearing the same trademark originating in another Member State in which that trademark, which initially belonged to that proprietor, is now owned by a third party which has acquired the rights thereto by assignment, when, following that assignment, the proprietor, either acting alone or maintaining its coordinated trademark strategy with that third party, has actively and deliberately continued to promote the appearance or image of a single global trade mark, thereby generating or increasing confusion on the part of the public concerned as to the commercial origin of goods bearing that trademark. The Court recalled that the essential function of the trademark is to guarantee the identity of the origin of the product under that trademark to the consumer or end user by enabling him, without any possibility of confusion, to distinguish that product from goods having a different origin. By behaving in a way that favours that a trademark no longer independently fulfils its essential function within its own territorial field of application, the proprietor has itself compromised or distorted that function. Consequently, the proprietor may not rely on the necessity of protecting that function to oppose the import of identical goods bearing the same trademark originating in another Member State where that mark is now owned by a third party.

In addition, the Court found that, even in the event that the proprietor has not promoted the image of a single global trademark, he may not oppose the import of the goods in question where there are economic links between himself and the third party, inasmuch as they coordinate their commercial policies or reach an agreement in order to exercise joint control over the use of the trademark (as it seems to be the case), so that it is possible for them to determine, directly or indirectly, the goods to which that trademark is affixed and to control the quality of those goods.

09 EU law – Judicial activity – Remedies: The ECJ questions validity of commitments procedure under EU competition law (ECJ Judgment of 23 November 2017, case C-547/16).

In its Judgment of 23 November 2017, the ECJ analysed the implications of the Commission commitments procedure (Article 9 of Council Regulation 1/2003) when it comes to the adjudication by national courts on the same facts. The commitments procedure is a mechanism whereby the European Commission may reach a settlement with companies to take or refrain from

a particular action, in exchange for an end to any investigation, without admitting the existence of an infringement.

The case concerned a referral from the Spanish Supreme Court regarding a question of law: whether national courts are barred from declaring an agreement to be an infringement of competition law in a case where the European Commission has accepted commitments regarding the agreement in question.

The ECJ held that a commitments decision by the European Commission does not preclude a national Competition Authority or court from applying Articles 101 and 102 TFEU and considering any agreement anti-competitive. The ECJ considered the nature of a commitments decision, declaring that such kind of decision does not consider if an infringement has taken place.

The ECJ observed "*the commitment decision cannot 'legalise' the market behaviour of the undertaking concerned, and certainly not retroactively*". The ECJ went further, and held that a commitments decision itself is an indication of the anti-competitive conduct in question, stating that such a decision could be regarded "*as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue*". Therefore, the existence of a settlement decision is not an obstacle for a party seeking damages before the national courts.

10 EU Law – Judicial activity – State aid digital terrestrial television platforms The ECJ clears DTT subsidies in Spain (ECJ Judgement 20 December 2017, case 70/16P).

The case concern a series of measures implemented by the Spanish authorities in relation to the switch-over from analogue broadcasting to digital broadcasting throughout Spain. The Spanish authorities divided the Spanish territory into three separate areas: "Area I", "Area II" and "Area III". Area II, the area at issue, includes remote and less urbanised regions representing 2.5% of the Spanish population. Due to the lack of commercial interest, broadcasters did not invest in digitisation, which led the Spanish authorities to put public funding in place. The Spanish authorities made provision for the grant of public funding, in order *inter alia* to support the terrestrial digitisation process in Area II.

On 18 May 2009, SES Astra, S.A. filed a complaint before the European Commission concerning a State aid scheme implemented by Spain in relation to the switch-over from analogue television to DTT in Area II. According to SES Astra, S.A., the challenged scheme constituted non-notified aid liable to distort competition between the terrestrial and satellite broadcasting platforms.

The Commission adopted a decision establishing that: *(i)* the agreements concluded between the Ministry of Industry and the Autonomous Communities constituted the basis of the aid scheme for the extension of DTT in Area II; *(ii)* the measure at issue had to be regarded as State aid within the meaning of Article 107(1) TFEU; *(iii)* the measure could not be regarded as compatible with the internal market, notwithstanding the fact that the measure was indented to achieve a well-defined objective in the public interest and that there was a market failure on the market concerned; and *(iv)* the Commission considered that the operation of a terrestrial platform had not been sufficiently clearly defined as a public service and therefore, the measure could not be justified under Article 106(2) TFEU.

The Court of Justice has now annulled the Commission's decision, on the grounds that it is not sufficiently reasoned. The ECJ reminds that the condition relating to the selectivity of the advantage is a constituent factor in the concept of "State aid" within the meaning of Article 107(1) TFEU, since this provision prohibits aid "favouring certain undertakings or the production of certain goods". According to the applicable case-law, the assessment of the selectivity condition requires the Commission to establish that, under a particular legal regimen, a national measure is such as to favour "certain undertakings or the production of certain goods" over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.

11 Analysis of the NMCC Decision on price-fixing of financial derivatives negotiated in connection with syndicated loans (Decision of 13 February 2018, file S/DC/0579/16, *DERIVADOS FINANCIEROS*).

The NMCC has just issued its Decision on financial derivatives (**Decision**), fining the accused banks (Santander, Sabadell, Caixa, BBVA) €91 million. The Decision refers, in particular, to the derivative products ancillary to syndicated loans, which goal is to insure borrowers against fluctuations of the interest rate to which the cost of the syndicated loan is indexed. The Decision considers that the accused banks have fixed such cost of the derivative products in a manner and at a level which breaches Articles 101 of TFEU and the national equivalent (Article 1 SCA).

The Decision is over a hundred pages long, much of it dealing with factual explanations. This note provides an initial reading of the legal grounds of the Decision.

A possible starting point from an antitrust analysis perspective is that:

The Decision does not question the rationale of the syndicated lending (it does not question the need for competing banks getting together to offer a loan). Nor does it question the fact that pricing of the derivative product insuring against fluctuations in the interest rates must be a single, common price.

(i) The Decision acknowledges that the methodology of calculation of the derivative "market" price varies from bank to bank and is not easily identifiable. The price cannot be known by the customer, who may (if the customer had

specialised advice) estimate it, although not with absolute accuracy.

On first reading, the assessment of the NMCC seems somewhat unusual from an antitrust standpoint. The Decision, as indicated, does not contain any analysis of the merits of the joint selling. Failing that, the Decision scrutinizes the manner in which the joint selling is taking place and, particularly, the pricing level at which the joint selling is taking place. One is left with a feeling that the analysis process might have been the reverse: focus on the legality of the joint selling as such (in this case, the legality of the joint offering of the derivative product by the members of the syndicate of banks); if the joint selling is legal (the typical rationale under antitrust law would be because without joint selling the banks would not be able to offer the product at all), then price-fixing would be justified; conversely, price-fixing would be illegal if joint selling is not justified. It seems the NMCC wished to avoid the "hot potato" of having to decide on whether syndicated loans and their ancillary derivative products are justified as a form of joint selling. The point was raised by one of the banks in the proceedings (stating that because credit syndication –and joint pricing of the ancillary derivative product– is legitimate, the pricing level is not an antitrust issue). However, the Decision does not really tackle the argument, ignoring any analysis of whether or not the joint selling should be allowed and focusing instead, as already indicated, on the *manner* of the joint selling, which according to the Decision takes place in an illicit way, by exploiting an information asymmetry which results in a price for the customer above the market price.

The Decision relies on a recent Judgment of the European Court of Justice of 23 January 2018, *Hoffmann la Roche v. Autorità Garante della Concorrenza*, case C-179/16, which refers to deceptive conduct infringing Article 101 TFEU in the context of pharmaceutical marketing authorizations. In that matter, Roche and Novartis agreed to disseminate deceptive information that the therapeutical use of Avastin for eye care would not be entirely safe. Roche and Novartis were, respectively, licensees for Avastin and the competing product –Lucentis– (the licensor of both products being another company – Genentech), so that by virtue of the licensing system both Roche and Novartis could have bound themselves not to compete in Italy. The NMCC Decision relies on point 71 of the ECJ Judgment, which states that the focus of restraints ancillary to a main restraint (a licence) must be whether the main restraint (in that precedent, the license) would be *possible* without the ancillary restraint (the joint dissemination of the information). If the response to that question is that the main restraint would be possible (even if less profitable or less convenient), then the ancillary restraint would not be justified. On that basis, the NMCC reaches the conclusion that although the joint selling and pricing by the banks of the derivatives is not questioned, pricing above the market price is not an allowed ancillary restraint, as it is not strictly necessary for the main restraint, but merely makes it more profitable (*even accepting that a single price for the derivative product were required, it would be required that the price offered is the best of the possible prices, i.e., the price in market conditions that ensures fulfilment of the condition that no cost for the client is implied and to achieve that the process of determination of the price must be clear, and transparent for the client*).

The Decision quotes point 71 of the commented *Roche* Judgment but it does not, however, quote points 72 and 73 of that Judgment, which state that the dissemination of deceiving information had effects beyond the parties to the main restraint, *i.e.*, it sought to influence third parties, particularly medics; and that the dissemination of deceptive information could not be considered as objectively necessary for the licence. It may be questioned whether borrowers in syndicated loans (same entities that take the price of the derivative at stake in the Decision) are or not third parties; and it appears debatable that the joint pricing system chosen is not objectively justified (at least from a purely antitrust standpoint).

No doubt the NMCC considers it appropriate to intervene in a bargaining process that takes place between buyer and seller (lender and borrower, even if in this case the lender is a syndicate of banks, the validity of whose syndication is not being scrutinized). To achieve that end, the Decision seems to dissociate the price calculation mechanism as something distinct from the joint selling. In that context, the NMCC seeks to ensure that the pricing level is fair or oriented to market price. This seems novel, as antitrust (assuming that there is no illegal joint pricing) would generally not be expected to intervene in the price level (other than in situations of predatory, discriminatory, exclusionary, excessive pricing by dominant companies, which is not the case here). Furthermore, when setting prices, any seller plays with the information available to that seller with the goal of pricing optimally. Naturally, the (civil, consumer protection, prudential) laws require that some key information is disclosed in the framework of a transaction (on matters such as known product defects, legal or economic charges, etc.). But, generally speaking, the information on price elaboration, costs, etc. is not required to be disclosed and is generally accepted as a natural part of the bargaining process (and indeed, would seem to be a key factor of product differentiation and profit maximization, which is the quintessential ultimate goal of companies in free markets). One potential policy risk behind the Decision is that competition authorities may start to question pricing levels as "unfair" in various instances hitherto outside the scope of antitrust.

The Decision relies on the fact that an information asymmetry has been (illicitly) exploited, though the doubt arises as to whether civil law or financial regulation would not be better suited to address the concerns.

Unsurprisingly, the matter has received ample coverage from the press nationally and internationally. Beyond the immediate repercussions of the case on syndicated loans in

the project finance transactions investigated, the legal principles relied upon by the Decision could arguably be applied to other project finance transactions in Spain, to the same banks as those accused, but also to other banks operating similarly. Likewise, those legal principles may apply to transactions relying on comparable mechanisms, even beyond Spain. The Decision itself states that the conduct has had economic effects (as the price of the derivatives is above the "market" price). Under Spanish law arguably the starting point for statute of limitations period accounting is the Decision (moment when the harmed party knows the basic factors causing harm), which means that syndicated loans subject to this type of ancillary derivative transaction may potentially be at the core of damages claims even if the transactions go well back in time for years or decades.

Competition agencies' interest in syndicated lending seems recent, but not entirely new. In its 2017 Management Plan, the European Commission signalled its concern with close cooperation in the credit derivatives market following action against the International Swaps and Derivatives Association (ISDA). The European Commission also signalled at the time that it would commission an independent study on potential competition issues of loan syndication.

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The information contained in this bulletin must not be applied to particular cases without prior legal advice.