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01 Selected merger decisions authorized by the CNMC July-December 2019.

Firms	Notification threshold	Economic sector	Decision
ACITURRI/ ALESTIS	Not disclosed	Manufacture of air and spacecraft and related machinery	Phase I clearance (4 July)
CHIESI FARMACEUTIC/ SANTHERA PHARMACEUTICALS	Market share	Manufacture of pharmaceutical preparations and wholesale trade, except of motor vehicles and motorcycles	Phase I clearance (4 July)
AVANZA/ GRUPO PESA	Turnover	Urban and suburban passenger land transport and other passenger land transport n.e.c.	Phase I clearance (4 July)
PARTS HOLDING EUROPE/ AD BOSCH RECANVIS	Market share	Sale of motor vehicle parts and accessories and wholesale	Phase I clearance (11 July)
KORIAN/ PICAFORT/ GERIÁTRICO MANACOR	Market share	Residential care activities	Phase I clearance (18 July)
ADVENT/ VITALDENT	Turnover	Medical and dental practice activities	Phase I clearance (25 July)
SONAE CAPITAL/ FUTURA	Not disclosed	Production of electricity; trade of electricity and trade of gas through mains	Phase I clearance (25 July)
BSC/ BTG – 2	Market share	Manufacture of basic pharmaceutical products; manufacture of computer, electronic and optical products; and manufacture of medical and dental instruments and supplies	Phase I clearance (25 July)
LYNTIA/ NEGOCIO IBERDROLA	Market share	Telecommunications	Phase I clearance with commitments (30 July)
CIRSA/ GGCO	Not disclosed	Gambling and betting activities	Phase I clearance with commitments (30 July)
MÉMORA/ MONTERO	Market share	Funeral and related activities	Phase I clearance (30 July)

JUST EAT/ CANARY	Not disclosed	Restaurants and mobile food service activities	Phase I clearance (10 September)
MSM GROUP/ SANTA BARBARA SISTEMAS – ACTIVOS	Market share	Manufacture of explosives and manufacture of weapons and ammunition	Phase I clearance (10 September)
MUTUA MADRILEÑA/ SILDOSCAN	Turnover	Renting and leasing activities	Phase I clearance (10 September)
ADVENT/ ICE	Market share	Manufacture of basic pharmaceutical products	Phase I clearance (10 September)
RENOLIT/ IBW/ ANJA FISCHER	Market share	Manufacture of plastic products	Phase I clearance (10 September)
UVESCO/ SIMPLY – ACTIVOS	Market share	Retail sale in non-specialised stores	Phase I clearance (19 September)
ARTÁ CAPITAL/ GRUPO PREVING	Turnover	Other business support service activities n.e.c.	Phase I clearance (19 September)
TAKEAWAY/ JUST EAT	Not disclosed	Restaurants and mobile food service activities	Phase I clearance (19 September)
VINCI ENERGIES ESPAÑA S.A.U./ SISTEM MELESUR ENERGÍA S.A.U./ SISTEM INFRAESTRUCTURAS Y OPERACIONES EPC S.L.U.	Not disclosed	Electrical installation; activities of head office and combined office administrative service activities	Phase I clearance (19 September)
PROA CAPITAL/ GRUPO GALLO	Turnover	Manufacture of grain mill products; manufacture of macaroni, noodles, couscous and similar farinaceous products; manufacture of condiments and seasonings and manufacture of other food products n.e.c.	Phase I clearance (19 September)
CIRSA/ SPORTIUM	Turnover	Gambling and betting activities	Phase I clearance (1 October)
GEOPOST/ TIPSA	Turnover	Other postal and courier activities	Phase I clearance (24 October)
BERKSHIRE/ ACUMED/ OSTEOMED/ MICROAIRE/ PRECISION EDGE/ SK PRODUCTS	Market share	Manufacture of medical and dental instruments and supplies	Phase I clearance (24 October)
MHI/ ACTIVOS BOMBARDIER	Not disclosed	Manufacture of air and spacecraft and related machinery and repair and maintenance of aircraft and spacecraft	Phase I clearance (12 November)
COFARES/ COFARTA	Not disclosed	Wholesale of household goods	Phase I with commitments (21 November)
RIBERA SALUD/ HOSPITAL POVISA	Turnover	Hospital activities	Phase I clearance (21 November)
EQUITIX/ TELECOM	Market share	Radio broadcasting and television programming	Phase I clearance (28 November)
EASYPARK – NEGOCIO SISTEMAS APARCAMIENTO IVIAL	Not disclosed	Other information technology and computer service activities	Phase I clearance (5 December)
DERICHEBOURG/ LYRSA	Not disclosed	Waste collection	Phase I clearance (5 December)
CDC/ GLP/ CNP	Not disclosed	Other postal and courier activities	Phase I clearance (5 December)
3I/ AGESA	Not disclosed	Construction of roads and motorways	Phase I clearance (5 December)
MIH FOOD DELIVERY HOLDINGS/ JUST EAT	Not disclosed	Other food service activities	Phase I with commitments (5 December)

02 Mergers / Phase I: The CNMC opens an in-depth review in connection with the purchase of Cemex España's assets by Çimsa Cimento (file C/1052/19: *ÇIMSA/ ACTIVOS CEMEX*).

This simultaneous shareholding could entail risks for competition in the relevant market by allowing MIH access to information regarding the strategic commercial policy of Glovo. Furthermore, through its presence in the Board of Directors of Just Eat's main competitor, MIH would have incentives to prevent the expansion of the business of that competitor.

Consequently, the transaction has been subject to the commitments seeking to: *(i)* guarantee that MIH cannot have access to sensitive commercial information both of Delivery Hero or its investee, Glovo; *(ii)* prevent MIH from influencing Glovo's strategy in competition with Just Eat in Spain; *(iii)* Delivery Hero (and, therefore, Glovo) shall not be able to access Just Eat's information considered sensitive from a competition law standpoint.

03 Mergers / Phase II: The CNMC opens an in-depth review in connection with the purchase of Cemex España's assets by Çimsa Cimento (file C/1052/19: *ÇIMSA/ ACTIVOS CEMEX*).

On 31 July 2019, the CNMC has open a phase II in connection with the purchase of Cemex España's assets by Çimsa Çimento Sanayi Ve Ticaret (**Çimsa Çimento**).

The CNMC's first analysis allowed it to conclude that the merger project is likely to have effects on competition in the market for the manufacture and sale of white cement and in the upstream market for the manufacture and sale of clinker for the production of white cement. It is a market where there is already a limited number of operators. Therefore, this acquisition would result in an increase of the manufacturers' bargaining power risking an increase in prices post-transaction.

04 Mergers – Gun-jumping: NUFRI, Sociedad Agraria de Transformación A.P.A. (NUFRI) has breached its obligation to notify a concentration prior to its implementation (file C/1047/19: *NUFRI/ INDULLEIDA*).

On 6 September 2019, the CNMC has initiated proceedings against NUFRI for having closed the acquisition of Grupo IDULLEIDA before gaining merger clearance.

On 11 July 2019, the CNMC cleared in first phase the transaction which had been notified on 21 June 2019. However, the CNMC has initiated proceedings for a possible breach of Article 9.1 Competition Act, which requires clearance prior to implementation of reportable mergers. Fines may be of up to 5% of turnover (with some precedents indicating that worldwide turnover is to be taken into account).

The market share threshold allows the CNMC to review certain transactions that otherwise often fly under the radar of competition authorities. High profile acquisitions such as *Facebook/WhatsApp* and *Apple/Shazam* (referred upwards to the EC) were caught by virtue of the market share threshold and the CNMC seems therefore aware that it has a role to play in connection with EU-wide enforcement. The Head of Investigations has recently reminded in a conference that the CNMC monitors reportable transactions in line with the trend of increased focus on gun-jumping by the EC and national authorities (*e.g.*, Toshiba, Altice cases etc).

05 Restrictive agreements – Milk supply: The CNMC has fined eight companies that operate in the raw milk market (Decision of 11 July 2019, *INDUSTRIAS LÁCTEAS 2*, file S/0425/12).

On 12 July 2019, the CNMC found that the main milk producers had entered into anticompetitive information exchanges (at the national and regional level) on raw cow milk purchase prices and volumes purchased from farmers and milk suppliers. Altogether, the fines amount to €80.6 million.

The said exchanges of strategic information took place in different forums and involved different subject matters, although all of them had the common objective of agreeing to and adopting a joint strategy to control the raw cow milk wholesale supply market. This information would have allowed the companies to adjust their behaviour and avoid offering better prices and commercial conditions to the farmers, limiting competition in the raw milk wholesale supply market.

Interestingly, it should be noted that the case was first examined and decided upon in 2015. However, the High Court found on appeal that the CNMC had incurred in a procedural error during the investigation and ordered the proceedings to be brought back to the moment immediately prior to the error.

06 Restrictive agreements – Mercabarna: fines on the Wholesalers Fish Association of Mercabarna for imposing certain conditions in the sales to fish retailers (Decision of 28 June 2019, *Mayoristas Mercado Central de Pescado*, file nº 90/2017).

Under the constitutionally decentralized administrative law system in Spain, some Spanish regions have assumed competition enforcement powers regarding conduct which scope is limited to their respective territories. The Catalan Competition Authority (**ACCO**) has declared that the Association of fish and seafood wholesalers of Barcelona central market (**GMP**, in its Spanish acronyms) breached Article 1 Competition Act, by coordinating certain sales conditions on its members regarding sales made to fish retailers. The ACCO has fined GMP €2,667,970.52. This is the biggest fine imposed by the ACCO so far.

The file was initiated *ex officio* after having analysed a document submitted by the body pertaining to Barcelona's city council in charge of operating the central market (**Mercabarna**), in which Mercabarna reported a complaint lodged by the guild of Fishermen.

After having investigated the matter for a period of two years, the ACCO has declared the existence of the following restrictions of competition:

- The requirement of certain economic conditions to purchase in the central fish market such as the provision of guarantees, bank deposits or securities imposed by GMP; and

- The prohibition by GMP on all its members of selling their products to retailers having pending debts with any wholesaler.

The above limitations were enforced through a payment system common to all wholesalers, involving the mandatory use of a purchase card by fish retailers in order to make any purchase from a wholesaler. Since GMP is composed by 100% of all fish wholesalers of Barcelona, the ACCO considered that the forcing of unjustified limitations regarding the terms of sale of products illegally homogenized the commercial policy of fish wholesalers.

This is not the first time that competition enforcement in Spain has focused on fish wholesalers' associations, both nationally [1] and regionally.[2]

07 Restrictive agreements – Industrial assembly and maintenance sector: The CNMC has stripped down a cartel organized by 19 companies active in the industrial assembly and maintenance sector (Decision of 1 October 2019, *Montaje y Mantenimiento Industrial*, S/DC/0612/17).

In its Decision of 1 October 201 in case *Montaje y Mantenimiento Industrial*, S/DC/0612/17 (**Decision**), the CNMC has found the existence of a cartel organized by 19 companies active in the industrial assembly and maintenance sector. The said cartel affected mainly energy and petrochemical-related companies. Fines have totalled €54.26 million. In addition, fines to individual directors amounted to €280,000.

Due to the fact that industrial assembly and maintenance needs to comply with specific safety and/or environmental standards of great complexity, large companies often assign through private tenders the maintenance of their industrial facilities (warehouses, power plants, airports, etc.) to companies specialized in rendering these services. According to the CNMC, the cartel parties created a network to allocate customers and bids; and exchanged sensitive information to enable the bid-rigging. The CNMC also found evidence of retaliatory measures against cartel members deviating from the agreements. The cartel affected contracts of great economic significance with Spanish energy companies such as Repsol, Endesa or Cepsa and foreign companies such as Dow Chemicals or Atlantic Copper.

According to the CNMC, the conduct under investigation was very difficult to detect, both by competition authorities and by clients, because of the secrecy of the agreements. For instance, cartel members submitted cover offers to tenders carefully

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[1] See among others, Decision of the Tribunal for the Defense of Competition of 30 December 1999, *Mercamálaga*, case r 366/90, *Mercamálaga*; of 21 September 2000, *Lonja Pescados Vigo*, file 479/99; of 3 April 2002, Mercacórdoba, case 516/01; of 26 July 2007, *Mercacórdoba 2*, file 516/01; of 8 June 2004, *Cofradía de Pescadores de Santa María de Sábada*, file 564/03; or, more recently, Decision of the National Competition Commission of 2 October 2013, *Mayoristas Pescado Alcantarilla*, file 558/03.

[2] See Decision of the Catalan Tribunal for the Defense of Competition of 12 March 2008, *Gremi de Peixaters*, case AR 26/08; of 4 February 2009, *Gremi de Peixaters 2*, case AR 29/08; and Decision of the ACCO of 22 September 2015, *Cofradía de Pescadors L'Ametlla de Mar-2*, case nº 50/2012.

drafted to give an appearance of competition between the parties. Finding evidence of these agreements was only made possible through a request for leniency submitted by cartel members.

Once again, the CNMC has applied the prohibition to participate in public biddings, except for the leniency applicants.[3] The exact scope and duration of the prohibition shall be decided under the rules on public procurement by a separate body, following the procedure under Article 72 of the Law 9/2017, of 8 of November, regulating Public Sector Contracts.

07 Vertical restraints: network of vertical agreements foreclosing the television advertising market (Decision of 12 November 2018, *Atresmedia/Mediaset*, case S/DC/0617/17).

Open television operators Mediaset and Atresmedia have received fines of €38.9 million and €38.2 million respectively for vertical conduct in the television advertising markets. These are remarkably high fines for vertical restraints conduct. This case was interesting as it concerned a network of vertical agreements covering more than 50% of the relevant market, between each of the two largest open TV operators and the media buying agencies, which forecloses competition by alternative television operators willing to compete in the television advertising market.

The Atresmedia/Mediaset matter coupled with the ongoing investigations in the electronic markets area may signal some new trend of verticals enforcement in Spain.

08 Judicial activity – Repsol: The Supreme Court rules against Repsol and confirms the CNMC's fine, overturning the prior High Court Judgements of 28 July 2017, appeal number 7/2015 and of 22 December 2017, appeal number 3/2015 (Supreme Court Judgements of 23 May 2019, appeal number 2117/2018 and of 27 May 2019, appeal number 5326/2017).

In 2015, the CNMC fined Repsol S.A. (**Repsol**), the parent company of the energy group, €20 for coordination through exchanges of information with competitors; and €22.6 million for price-fixing of fuel, respectively.

[3] This is the third time that the CNMC activates the said prohibition. The CNMC also applied this provision in its Decision of 14 March 2019, *Electrificación y Electromecánicas Ferroviarias*, file S/DC/0598/2016 and of 20 June 2019, *Transporte Escolar Murcia*, file SAMUR/02/18.

Article 61.1 Competition Act states that legal entities breaching the Competition Act are regarded as infringers; Article 61.2 Competition Act states that *the conduct of a company is also attributable to the companies that control it, except when its economic behavior is not determined by any of them*. Under EU law, there is a presumption *iuris tantum* that when a parent company owns 100% (or almost) of the shares of its subsidiary, the parent company will be deemed to effectively exercise "decisive influence" on its subsidiary and its behavior will also be attributable to it.

Repsol appealed the abovementioned fines through the special procedure of protection of fundamental rights, on the basis that the CNMC had fined Repsol as author of the said infringements, pursuant to Article 61.1 Competition Act, even though Repsol did not provide services in the said markets (Repsol Comercial de Productos Petrolíferos, S.A., a subsidiary, is the company active in those markets). Therefore, Repsol argued that by imputing direct liability for the infringement to the parent company, the CNMC was violating the principle of individual liability. However, the CNMC decided that Repsol subsidiary's conduct can be imputed to the parent company exerting decisive influence. In the case at hand, the CNMC considered it could be presumed that the parent company had in fact exercised decisive influence over the subsidiary's commercial policy because it owned almost 100% of the shares of the subsidiary.

Repsol claimed that a parent company may be held joint and severally liable for the payment of the fine imposed on the subsidiary; however, it was not lawful to declare the parent company directly liable for the infringement, as it was acknowledged in the appealed decisions.

The High Court (High Court Judgements of 28 July 2017, appeal number 7/2015 and of 22 December 2017, appeal number 3/2015) endorsed Repsol's arguments, declaring that in competition law there is a clear distinction between joint and several liability for the conduct of a subsidiary (Article 61.2) and direct imputability for participation in that infringement (Article 61.1). In this respect, EU competition law is founded on the principle of liability of the economic unit (undertaking) that has infringed. Thus, regardless of the legal characterization of Repsol's actions -a question which was not subject to debate in the said proceedings – the law does not allow transferring the conduct of an undertaking to another as if it had been committed by the latter.

The Supreme Court, in its Judgments of 23 May 2019 and 27 May 2019, departs from the High Court's reasoning and confirms the CNMC's position declaring that *"it is consistent with the* *principles of liability and of individual nature of fines, included in Articles 24 and 25 of the Spanish Constitution, to fine a parent company as having participated in a collusive conduct constituting a competition law infringement undertaken by one of its subsidiaries in which it owns 100% of the share capital or almost (99.78%), when the said company has supplanted and replaced its will, carrying out the said conduct as an economic unity, in accordance with Articles 61.1 and 61.2 Competition Act*".

09 Preliminary ruling – Harbors/cargo handling sector: The CNMC seeks a preliminary ruling from the CJEU in connection with the Framework Agreement for the cargo handling sector (Agreement of 12 June 2019 requesting a preliminary ruling to the CJEU pursuant Article 267 Treaty of the Functioning of European Union (TFEU) and staying proceedings, Acuerdo Marco de la Estiba, file S/DC/0619/17).

The CNMC has requested a preliminary ruling from the CJEU on the legality of the proposed stevedoring framework agreement, within the context of the ongoing investigation launched by the said Authority in November 2017 (file S/DC/0619/17, *Acuerdo Marco de la Estiba*). The move is remarkable, given that it is rather unusual that an administrative agency such as a Competition Authority refers a preliminary ruling to the CJEU (and the EU law precedents are not univocal in this area).

By way of background, in its Judgment of 11 December 2014, *European Commission v. Spain*, case C-576/13, the CJEU condemned Spain for breaching the EU rules on freedom of establishment and provision of services (**CJEU Judgment**). The CJEU declared as contrary to EU law the special regime applied to the stevedoring sector, which restricted the hiring of workers by cargo handling companies to members of the port management companies (known as **SAGEPs**). In May 2017, the Government of Spain enacted legislation to comply with the CJEU Judgment, *i.e.*, Royal Decree-law 8/2017, of 12 May (**RDL**) modifying the regime of dockworkers in the area of cargo handling/cargo handling services. The RDL was confirmed by Parliament.

Within this context, ANESCO, the cargo handling companies' trade association, signed an agreement with the trade unions amending the applicable collective bargaining agreement of the sector. One of the new provisions attracted the attention of the CNMC. For this reason, the CNMC initiated formal antitrust proceedings against ANESCO and the trade unions in November 2017. In particular, the CNMC is investigating whether the so-called subrogation of staff provision has foreclosing effects. Simplifying, the said provision establishes that any cargo company abandoning a SAGEP is, nonetheless, obliged to hire workers from the common pool of workers of each port linked to the SAGEP. Against the above framework, on 31 March 2019 a new Royal Decree[4] (**RD 9/2019**) entered into force providing legal coverage to the abovementioned subrogation of staff mechanism. According to the RD 9/2019, subrogation of staff is permitted under certain circumstances, with the purpose of protecting the employment in the stevedoring sector.

Due to the fact that RD 9/2019 provides a legal exemption to the allegedly anticompetitive conduct, the CNMC is now seeking guidance from the CJEU on whether the provision in question breaches the Article 101 TFEU prohibition on anticompetitive agreements and, if that is the case, whether Royal Decree 9/2019 should be unapplied.

It is noteworthy that the CNMC argues that it satisfies the criteria in order to be considered as "*a court or a tribunal*" for the purposes of Article 267 TFEU. On the one hand, the CNMC argues that it is a body established by law, which is permanent and independent. On the other hand, the CNMC argues that its jurisdiction is compulsory, its procedure is *inter partes* and it applies legal rules. Furthermore, the CNMC invokes a precedent in which the former Spanish Competition Authority, the Tribunal for the Defence of Competition, referred a preliminary ruling that was answered by the CJEU, thus, considering it had jurisdiction (Judgment of the CJEU of 16 July 1992, case C-67/91).

10 Spain follows up on the European Commission Regulation on Coordination of Foreign Investment with its own Foreign Investment Screening Regulation.

Earlier this year, the EU adopted Regulation (EU) 2019/452 of 19 March (**Regulation**), establishing a framework for the screening of foreign direct investments (**FDI**) into the EU. The Regulation, dealing with FDI which may affect *security* or *public order*, came into force on 19 April 2019 and will be applicable from 11 October 2020. Amongst other things, the Regulation:

(i) creates a cooperation mechanism whereby Member States and the European Commission are able to exchange

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[4] Royal Decree 9/2019 of 29 March, modifying Law 14/1994, of 1 June, regulating temporary employment agencies, adapting it to cargo handling activities and concluding the legal regime of workers rendering port cargo handling services.

information and raise concerns related to specific investments;

(ii) empowers the European Commission to issue opinions when an investment poses a threat to the security or public order of more than one Member State, or when an investment might undermine a project or program of EU interest (*e.g.*, Horizon 2020, Galileo);

(iii) encourages cooperation between Member States on investment screening, best practices and information exchange on issues of common interest:

(iv) sets requirements for Member States who wish to maintain or adopt a screening mechanism at national level.

The Regulation represents the EU's first attempt at coordinating Member State security reviews[5] at a time of growing protectionism worldwide. However, as indicated, the Regulation does not give the European Commission or any other European institution the power to suspend or block FDI (the European Commission may only issue non-binding opinions on given types of FDI), a power reserved to Member States. Likewise, the Regulation does not require Member States to introduce or implement FDI screening mechanisms at national level; however, it does set some minimum standards for Member States deciding to regulate the matter.

The Regulation focuses on FDI likely to affect security or public order, such as *(i)* critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, sensitive facilities and investments in land and real estate; *(ii)* critical technologies and dual-use (*e.g.,* artificial intelligence, robotics, semiconductors, cybersecurity, quantum technology, aerospace, defense, energy storage, nuclear technologies, nanotechnologies and biotechnologies); *(iii)* supply of critical inputs, including energy or raw materials, as well as food security: *(iv)* access to sensitive information, including personal data or the ability to control such information; and *(v)* freedom and pluralism of the media.

The Regulation adds an additional requirement to many mergers and acquisitions in the EU. Even though, as stated, the European Commission as such does not enjoy any powers of veto in connection with concentrations, the Regulation has potential to complicate foreign investment screening by enabling a system of communications and commentary between authorities and the European Commission; moreover, as illustrated by the example of Spain (see below), the Regulation has, in practice, triggered new regulatory initiatives at the national level.

The national follow-up.

The Ministry of Industry has issued a draft regulation (**Draft Regulation**), which will supersede the existing regulation (limited to war material and to statistical purposes regarding foreign investment) and which seeks consistency with the EU regime preconized by the Regulation. The new communication and authorization powers can be segmented in the following categories:

(a) Perhaps most noteworthy is the possibility that the Government reserves itself to derogate from the general regime of freedom of investment (and therefore subject acquisitions to administrative authorization) in connection with FDI in companies or assets involved or related to the exercise of public authority or activities related to public order, security or public health.

    The administrative authorization granted by the Government can contain conditions aimed at preserving security such as *(i)* maintenance [in Spanish territory] of industrial or R&D activities and capabilities; *(ii)* integrity and security of infrastructures; *(iii)* restrictions of access to technology or data by the investor; *(iv)* assignment of activities or businesses carried out in Spanish territory; *(v)* restrictions on voting rights by non-EU investors; *(vi)* granting of special voting rights or observation rights to State entities present in the target company; *(vii)* financial bonds or deposits aimed at guaranteeing the obligations ordered by the Government.

(b) In connection with national defence, including the industrial capabilities and areas of knowledge required for the procurement of the armed forces and those destined to the design and production of weapons and weapons systems; and in connection with civil explosives, the freedom of investment is suspended and subject to administrative authorization. Acquisitions of stakeholdings below 5% or those below 10% (provided in the latter case that the investor formally undertakes not to use any voting rights) are exempted.

[5] Our understanding is that at least 13 out of 28 Member States have FDI screening mechanisms in place, differing widely in scope: Austria, Denmark, Germany, Hungary, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain and United Kingdom.

(c) Finally, The Draft Regulation contains a system of communication by foreign (non-EU) investors, applicable to FDI in:

- Critical infrastructures;
- Information systems and digital networks;
- Dual-use products;
- Private security activities;
- Gaming activities;
- Activities that are, or may be linked to, the financing of terrorism.

Investors seeking to carry out an acquisition in those areas can be asked to provide information; and transactions can be referred to the Council of Ministers, who has the power to condition the specific investment to administrative authorization.

The Draft Regulation contains an anti-avoidance provision to tackle indirect investment structures; and it is without prejudice to investment and ownership restrictions on investments already in force in regulated industries such as energy, infrastructures, transportation, telecoms, media, water, health, raw materials and mining, financial system, amongst others.

The Draft Regulation has, therefore, potentially far-reaching implications. It is not yet known when precisely the Draft Regulation will become binding.

11 Regulation: new regulated remuneration of renewable generation in Spain.

In 2013 the Spanish government abandoned the highly favourable "special regime" for renewable generation based on a premium scheme and replaced it by a new scheme hitherto in place.

Under the economic regime post-2013, the following applied:

- The following was considered for the calculation of the specific remuneration for each type of renewable asset operated: (a) the income generated by such renewable asset in the electricity market; (b) operational costs and (c) initial investment of such renewable asset.

- Regulatory periods are of 6-years (each of them, a "**Regulatory Period**"). The first Regulatory Period started on 14 July 2013 and will end on 31 December 2019. At the start of a Regulatory Period, some of the remuneration parameters that are used to calculate the specific remuneration could be reviewed.

- The concept of reasonable return of investment is defined as return of investment (**RoI**), before taxes, which is the same as the average yield of 10-year Spanish bonds plus an adequate margin.

  The reasonable RoI, including the adequate margin, may be reviewed at the start of a new Regulatory Period as long as an Act of Parliament approves such review.

  In 2013 the reasonable return, before taxes, for operating renewable projects was the average yield of the 10-year Spanish bonds during the last 10 years plus a 300 bps margin (*i.e.* 7,398%, per cent.).

The latter level of reasonable return implied a sharp reduction of the remuneration of renewable assets (estimated by the Spanish energy regulator in 1.5 billion euros) as compared with the prior regime. This led to a substantial number of international investment disputes before courts and arbitrators.

What's new?

Under Royal Decree-Law 17/2019, of 22 November 2019:

- On the basis that the first Regulatory Period expires 31 December 2019, the RoI for renewables generators operating before year 2013 shall be kept unchanged (*i.e.*, it is not reduced as a result of the decreasing yield of the 10-year Spanish, maintaining current rate of return of 7.398%. Moreover, renewable generation operating post-2013 is remunerated at RoI of 7.09%.

  Finally, the new Regulation provides added certainty, as the RoI shall be fixed for the next two Regulatory Periods (*i.e.* 12 years).

- A defensive mechanism is introduced in view of the wave of international arbitration and litigation as a result of the prior change of regime which resulted in a reduced remuneration of the system: investors that give up their rights under ongoing and/or future arbitration proceedings, or the payment of any future compensation already decided in their favour, would be entitled to receive the RoI of 7,398% during the next two Regulatory Periods (i.e. 12 years).

In conclusion, greater certainty about the RoI for the next twelve (12) years mitigates the regulatory risk that existing renewable generation companies faced at the end of the First Regulatory Period (after 31 December 2019). Therefore, some of them could have now more bargaining power to negotiate better conditions to refinance or restructure with funders their project finance facilities for their renewable portfolio that were structured under such uncertainty.

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