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01 Selected CNMC merger decisions, February-September 2022.

Firms	Notification threshold	Economic sector	Decision
PROMSA / HANSON	Market share	Other mining and quarrying	Phase I clearance (2 February)
ELYSIUS / JUANALS	Market share	Insurance	Phase I clearance (2 February)
KINGSPAN / THU PERFIL	Market share	Manufacture of structural metal products	Phase I clearance (2 February)
CLARIOS / MEMESA	Turnover	Manufacture of basic precious and other non-ferrous metals	Phase I clearance (16 February)
DELIVERY HERO / GLOBO	Market share	Other food service activities	Phase I clearance (23 February)
NORTON / AVAST	Market share	Computer programming, consultancy and related activities	Phase I clearance (23 February)
ALBIA / FUNERARIAS CANARIAS	Market share	Insurance	Phase I clearance (23 February)
CASTILLA HOLDING / GRUPO ITEVELESA	Turnover	Technical testing and inspection of motor vehicles	Phase I clearance (23 February)
VALL COMPANYS S.A.U. / INVERSIONES CÁRNICAS DE LA VEGA S.L.	Turnover	Manufacture of prepared foods for farm animals	Phase I clearance (23 February)
GRIFOLS / BIOTEST	Market share	Manufacture of basic pharmaceutical products and pharmaceutical preparations	Phase I clearance (2 March)
ERGON / SATLINK	Turnover	Manufacture of instruments and appliances for measuring, testing and navigation	Phase I clearance (9 March)
CURTISS – WRIGHT / UNIDAD DE NEGOCIO SAFRAN	Market share	Manufacture of other special-purpose machinery	Phase I clearance (23 March)
HIG / FE	Market share	Manufacture of machinery and equipment	Phase I clearance (11 April)
ALBIA / JORDIAL – ACTIVOS	Market share	Insurance	Phase I clearance (11 April)
SERCOMISA / MEDITERRANEA PITIUSA	Market share	Sea and coastal passenger water transport	Phase I clearance (11 April)
SNCF / TAKARGO	Market share	Freight rail transport	Phase I clearance (20 April)
US ZINC / EVERZINC	Market share	Manufacture of basic precious and other non-ferrous metals	Phase I clearance (20 April)
REDEXIS / CEPSA 4	Market share	Distribution of gaseous fuels through mains	Phase I clearance (28 April)
ALGECO / BALAT	Market share	Rental and leasing of construction and civil engineering machinery and equipment	Agreement to initiate Phase II (11 May)
CAJA RURAL NAVARRA / INVERSIONS FENEC	Turnover	Manufacture of grain mill products	Phase I clearance (11 May)
MUTUA – ECI / SECI - CESS	Turnover	Insurance, reinsurance and pension funding, except compulsory social security	Phase I clearance (11 May)
CARGIL / EQUUS	Market share	Manufacture of chemical and chemical products	Phase I clearance (11 May)
ITURRI / RODRÍGUEZ LÓPEZ AUTO	Not disclosed	Manufacture of bodies (coachwork) for motor vehicles; manufacture of trailers and semi-trailers	Phase I clearance (11 May)
MASMOVIL / AHI+	Market share	Telecommunications	Phase I clearance (18 May)
ITALFARMACO S.P.A. / ACTIVOS INIBSA	Not disclosed	Manufacture of basic pharmaceutical products	Phase I clearance (18 May)
ANICURA / VETSUM	Market share	Veterinary activities	Phase I clearance (25 May)
DK / GRUPO CERALTO SIRO	Turnover	Manufacture of grain mill products	Phase I clearance (1 June)
BBVA / TREE INVERSIONES	Turnover	Real estate activities	Phase I clearance (1 June)

INMOBILIARIAS			
UNICAJA / STA LUCIA / LIBERBANK VIDA – CCM VIDA	Turnover	Insurance, reinsurance and pension funding, except compulsory social security	Phase I clearance (22 June)
MARGUERITE/ RCC	Market share	Not disclosed	Phase I clearance (29 June)
ELYSIUS / SERVEIS FUNERARIS INCA	Market share	Funeral and related activities	Phase I clearance (12 July)
RODENSTOCK GMBH / PENASANDA INVESTMENTS	Not disclosed	Manufacturing of optical instruments and photographic equipment	Phase I clearance (12 July)
ARCHIMED SAS / NATUS MEDICAL INCORPORATED	Market share	Manufacture of computer, electronic and optical medical devices	Phase I clearance (12 July)
MAHOU / LEZIGAM Y CASA DARNES	Turnover	Beverage production	Phase I clearance (19 July)
SARIA / RESIDUOS ARAGON	Market share	Waste collection	Phase I clearance (27 July)
ARDIAN / GRUPO AIRE	Not disclosed	Telecommunications	Phase I clearance (27 July)
SIDENOR /MCD	Market share	Manufacture of parts and accesories for motor vehicles	Phase I clearance (27 July)
AHLSTROM MUNKSJO / AHLSTROM CAPITAL	Market share	Manufacture of paper and paperboard	Phase I clearance (27 July)
VIASAT / CONNECT PRO	Not disclosed	Satellite telecommunications activities	Phase I clearance (28 July)
EDILIANS / LA ESCANDELLA	Market share	Manufacture of clay building materials	Phase I clearance (14 September)
MAYR-MELNHOF KARTON AG / ESSENTRA PACKAGING	Market share	Manufacture of household and sanitary goods and of toilet requisites	Phase I clearance (14 September)
OPTRUST – USS – LOMA – ALTER / ALTER CÁCERES – ALTER MÉRIDA	Not disclosed	Production of electricity	Phase I clearance (27 September)
GARDA WORLD / ARCA	Market share	Manufacutre of office machinery and equipment (except computers and peripheral equipment)	Phase I clearance (27 September)
STAR MADRID RETAIL / ACTIVOS MERCEDES	Not disclosed	Sale of cars and light motor vehicles	Phase I clearance (27 September)
GRUPO RESINAS BRASIL / CAFOSA GUM	Market share	Manufacutre of gum base	Phase I clearance (27 September)
LOGISTA / EL MOSCA	Turnover	Freight transport by road	Phase I clearance (27 September)
KNORR-BREMSE / COJALI	Not disclosed	Wholesale trade of motor vehicle parts and accessories	Phase I clearance (27 September)
LGI – GLOBANT / LALIGA TECH	Not disclosed	Other information technology and computer service activities	Phase I clearance (5 October)
SOLARPARK / SOLAER	Turnover	Production of electricity	Phase I clearance (19 October)
CAIXABANK / SA NOSTRA VIDA	Not disclosed	Insurance, reinsurance and pension funding, except compulsory social security	Phase I clearance (19 October)

02 Legislative activity / Reform of the Unfair Competition Act.

On 28 May 2022, the reform of Law 3/1991, of 10 January, on Unfair Competition Law (**UCL**) came into force through Royal Decree-Law 24/2021, of 2 November.

The reform introduces new examples of misleading and aggressive practices in, among others, the food, entertainment and online advertising sectors. In particular:

i. Deceptive acts (Article 5 UCL). The sale in other Member States of goods presented as identical to other goods but having significantly different compositions or characteristics is deemed deceptive.
ii. Covert commercial purchases (Article 26 UCL). Includes promotional communications that do not appropriately identify whether they are advertising paid-for content.
iii. New misleading practices (Article 27 UCL) relating to the resale of tickets for shows through the use of bots. In recent years it has been frequent that tickets for certain shows are sold out within a few hours, and several studies have shown that many are purchased by bots with the intent of reselling them on independent pages and at higher prices.
iv. Aggressive practices in relation to minors (Article 30 UCL). Advertising that impels children to purchase goods or use services, or to persuade their parents or other adults to contract the goods or services advertised is deemed an aggressive (and unfair) practice.

03 CNMC activity / National postal service. The CNMC fines Correos €32.6 million for the use of a selective discount system for large customers (Decision of 18 February 2022, *CORREOS 3*, file S/0041/19).

The CNMC fined Sociedad Estatal Correos y Telégrafos, S.A., S.M.E. (**Correos**), the national postal service company, €32.6 million for the application of an anti-competitive system of discounts to large customers prohibited by Article 2 of the Spanish Competition Act and Article 102 TFEU (Decision of 18 February 2022, *CORREOS 3*, file S/0041/19).

Correos is a dominant operator with market shares stable at around 85% of the volume of shipments in the traditional postal services offered to large corporate customers who send mass mailings, with slight variations between 84% and 87% troughout the relevant period. However, in 2018, after the disappearance of UNIPOST, the market share of Correos rose above 95%.

The anticompetitive conduct derives from a system of exclusionary discounts that, by incentivizing the loyalty of large business customers, prevented the entry into the market of Correos' competitors. The discounts system applied was conditional, non-transparent and retroactive, with long duration and automated extension of the contracts.

04 CNMC activity / Scrap purchase market. The CNMC fines three steel companies with €24 million for anti-competitive exchanges of information in the market for scrap iron (Decision of 4 March 22, *CHATARRA Y ACERO*, file S/0012/19).

The CNMC fines three steel companies €24 million for anti-competitive exchanges of information in the market for the purchase of scrap iron prohibited by Article 1 of the Spanish Competition Act and Article 101 TFEU.

The CNMC has fined two infringements involving, on the one hand, informaton exchanges between AG Siderúgica Balboa, S.A. and Sidenor Aceros Especiales, S.L.U. (**Sidenor**) and, on the other hand, between Sidenor and Arcelormittal Aceralia Basque Holding, S.L.

The investigation originated in information submitted to the European Commission on the possible existence of a cartel in the scrap purchase market in Spain. The CNMC found that the companies disclosed information concerning: *(i)* the future purchase prices they intented to offer to their iron scrap suppliers; *(ii)* technical stoppages at their steel mills, allowing them to anticipate reductions in the level of demand; and *(iii)* their own prices or prices of third party competitors.

05 CNMC activity / Big-rigging. The CNMC fines six of Spain's largest construction companies for altering the competitive process of infraestructure tenders over a period of 25 years (Decision of 5 July 2022, *OBRA CIVIL* 2, file S/0021/20).

The CNMC has imposed fines totalling €203.6 million on Spain's leading construction companies Acciona Construcción, S.A., Dragados, S.A., FCC Construcción, Ferrovial Construcción, Obrascón Huarte Lain, S.A. and Sacyr Construcción S.A.

The fined companies rigged thousands of public tenders for construction and civil works during 25 years. The conduct affected tenders issued by the Ministry of Public Works (currently the Ministry of Transport, Mobility and Urban Agenda) for the

construction and building of infrastructures such as hospitals, ports, airports or roads.

The companies met weekly since 1992 to analyse public works tenders and decided on the tenders in which they would share part or all of the work. The fined companies shared and exchanged information on the technical offers for the different works. This conduct reduced the variety and quality of technical bids submitted by the companies to the contracting Public Administration.

The anti-competitive conduct amounted to a continuous infringement going beyond the date of entry into force of the penalty of prohibition of contracting with the public administrations (October 2015). Therefore the matter is referred to the Public Procurement Advisory Board to determine the duration and scope of the prohibition to contract with the Public Administrations.

06 CNMC activity / Football. The CNMC shelves an investigation against the Royal Spanish Football Federation clearing it of a prior formal indictment for abuse of dominant position (Decision of 1 June 2022, *Second and Third Division Football*, file S/0042/19).

The CNMC has recently closed an investigation into an alleged abuse of dominance by the Royal Spanish Football Federation (*Real Federación Española de Fútbol*, or **RFEF**) concerning the commercialization of the broadcasting rights of the Second B and Third football divisions (both are non-professional competitions organized by the RFEF).

The investigation was triggered by the complaint submitted by a football clubs association (Proliga) in 2019, according to which the RFEF would have abused by misappropriating the broadcasting commercialization rights of the clubs. In particular, Proliga argued that the RFEF exerted pressure to obstruct the commercialization of broadcasting rights by the clubs.

By Decision of 1 June 2022, following the conclusions of the Competition Directorate, the CNMC Council has now declared that the RFEF has not abused its dominant position. According to the Decision, the RFEF has authorized the requests by clubs to commercialize their rights. Moreover, the RFEF has not opened disciplinary proceedings against clubs commercializing broadcasting rights, nor did the RFEF condition the granting of financial aid to the said rights being assigned to the RFEF. On those grounds, the Decision concludes that there is no evidence to prove an abuse of dominant position.

Importantly, although not mentioned in the Decision, pursuant to the latest amendment to Royal Decree-Law 5/2015, of 30 April, on commercialization of football broadcasting rights (**RDL**) (the key legal tool establishing the centralized marketing of football broadcasting rights), football clubs should assign the exploitation of broadcasting rights of non-professional competitions to the RFEF to be jointly sold. Therefore, even if it had been proved that the RFEF had tried to sell the broadcasting rights of the complainants, then the conduct would have been legally exempted.

07 CNMC activity / Excessive pricing of orphan drugs. The CNMC fines Leadiant €10.25 million for excessive pricing of its drug for the treatment of cerebrotendinous xanthomatosis or XCT (Decision of 14 November 2022, *CDCA Leadiant*, file S/0028/20).

XCT is an ultra-rare metabolic disease affecting 200-250 diagnosed patients in Europe of which around 50 are in Spain. XCT has been based on an active principle denominated CDCA. Leadiant has been the only provider of CDCA based pharmaceuticals in Spain since 2010. The investigation was started upon a complaint from the Health Authority and a consumer association. Since 2007 Leadiant managed to become the exclusive provider of CDCA based pharmaceuticals, withdrew from the market its hitherto marketed CDCA based pharmaceutical product (Xenbilox) and reformulated it to launch it into the market as a rebranded and repriced orphan drug with a price nearly 15 times higher (from €984 per box to €14,618 per box). The CNMC finds instances of both exclusionary conduct (based on the exclusivity clauses with the sole provider of CDCA) and exploitative conduct (excessive pricing).

08 CNMC activity / pharma entry delaying tactics. The CNMC fines Merck Sharp € 39 million for abuse of dominant position (Decision 25 October 2022, file S/0026/19).

This matter revolves around the disputed expiration of the patent behind Nuvaring, a vaginal ring anti-conceptive product. When Insud Pharma, the complainant in the case, entered the market using an alternative product which Merck considered stepped on its existing rights and filed a patent action seeking to restrict entry by Insud Pharma through an injunction against the

manufacturing and marketing by the latter of its vaginal ring product.

The matter is a rare instance of abuse in the form of vexatious litigation (*ITT Promedia*, *Boosey Hawkes* at EU level). In particular, the CNMC goes a long way to justify that Merck's legal action is a sham seeking to prevent entry, rather than a genuine action to protect its existing IP rights. The CNMC criticizes both legal actions by Merck before court, *i.e.*, discovery and interim measures (injunction) against the complainant, considering that they were unnecessary, disproportionate and devoid of any purpose other than merely to restrict new entry. Furthermore, the CNMC relies on the EU *Astra Zeneca* case law making a parallel between that precedent and the lack of transparency or untrue factual assertions by Merck.

The CNMC qualifies in its Decision that vexatious litigation can refer solely to court litigation. Administrative complaints before competition authorities, for instance, cannot qualify as vexatious litigation contrary to the prohibition of abuse of dominant position because administrative agencies can decide which complaints to pursue and which not, unlike commercial courts, which are, in essence, obliged to decide on the lawsuits and petitions filed before them.

09 CNMC activity / Recycling market. The CNMC formally initiates antitrust proceeding against Ecoembalajes España, S.A. for possible abuse of dominant position (5 October 2022).

On 5 October 2022, the CNMC has initiated antitrust proceedings against Ecoembalajes España, S.A. (**Ecoembes**), a non-profit organization acting as manager of the Integrated Management System for plastic packaging in Spain.

The investigation has taken place as a result of a complaint filed by PET Compañía para su Reciclado, S.A.U., a company dedicated to the recycling of PET bottles (Polyethylene Terephthalate, a type of plastic commonly used in containers and bottles of soda, water and oil, amongst others).

The CNMC is investigating possible abusive practices, including the processing of an arbitrarily executed auction process that did not guarantee the transparency and integrity of the bids submitted since (at least) 2004. In addition, the CNMC investigates the establishment of access barriers to participate in these auctions.

In December 2021, the CNMC conducted dawn raids at the headquarters of Ecoembes and a recycling company and sent several requests for information to market operators.

10 CNMC activity / Hotels and online travel agencies. The CNMC initiates a antitrsut proceedings against Booking.com B.V. for possible abuse of a dominant position (17 October 2022).

On 17 October 2022, the CNMC has formally initiated an antitrust investigation against Booking.com B.V. (**Booking**), a travel fare aggregator and metasearch engine for accommodation bookings, for possible anticompetitive practices prohibited under Articles 2 (abuse of dominant position) and 3 (unfair conduct with impact on competition) of the Spanish Competition Act and Article 102 TFEU. The investigation stems from two complaints filed by the Spanish Association of Hotel Managers (Asociación Española de Directores de Hotel) and the Regional Hotel Association of Madrid (Asociación Empresarial Hotelera de Madrid).

The conduct under investigation covers several practices that may constitute an abuse of dominant position in the provision of intermediation services to hotels by online travel agencies (**OTAs**). The investigated practices relate to:

(i) The imposition of unfair trading conditions on hotels located in Spain; and

(ii) commercial policies that may have exclusionary effects on other OTAs, as well as other online sales channels.

The alleged conduct also covers practices that may entail the exploitation of a situation of economic dependence of hotels located in Spain (a practice which may qualify as unfair under the Unfair Trade Act and potentially contrary to Article 3 Competition Act).

11 Commercial Courts' activity / Antitrust litigation. The Commercial Court nº3 of Madrid finds that the Royal Spanish Football Federation (RFEF) has abused its dominant position condemning to compensate for damages (Judgement of the Commercial Court nº3 of Madrid of 10 January 2022, appeal number 2087/2019).

The Judgment has found the RFEF liable for abusive conduct contrary to Articles 102 TFEU

and 2 of the Spanish Competition Act. The Court further ordered the RFEF to pay compensation for damages.

By way of background, Mediapro had filed a lawsuit before the Court against RFEF arguing a breach of Articles 102 TFEU and 2 of the Spanish Competition Act, seeking *(i)* damages and *(ii)* the Court to declare void a number of conditions (related to prior liabilities, high definition broadcasting requirements and sub-licensing bans) requested by RFEF. The Court reached the conclusion that the RFEF had abused its dominant position in the bidding process for the commercialization of the broadcasting rights of the "*Copa del Rey*" competition:

(i) by requiring bidders to be able to broadcast in HD (High Definition);
(ii) by requiring a prior authorisation to sub-license in non-objective and disproportionate terms, and
(iii) by setting a disproportionate reservation price (in the absence of a bid).

Consequently, the Court awarded damages to Mediapro, including the lost profits that Mediapro would have earned if the bid had been awarded to it. The exact amount of the damages will be specified when the judgment is enforced. However, regarding the motion to declare void such clauses, the Court understood that neither the Spanish Competition Act nor the TFEU foresee, as a direct consequence of the breach of Articles 2 Competition Act and 102 TFEU, the declaration of nullity of the clauses that caused the abuse.

12 Commercial Court activity / World Padel Tour. The Commercial Court No. 15 of Madrid rejects the request for interim measures requested by World Padel Tour to stop the Premier Padel circuit (Order of the Commercial Court n. 15 of 22 November 2022).

The Commercial Court nº 15 of Madrid has dismissed the request for interim measures seeking to halt the Premier Padel circuit competition and preventing players from participating in this championship.

In May 2022, World Padel Tour (**WPT**) filed a lawsuit before Madrid Commercial Court No. 15 against the International Padel Federation, the Professional Players Association, Qatar Sports Investments and seven individual players for unfair competition. WPT sued the defendants for encouraging players to breach the exclusivity obligations in their contracts with WPT in order to take part in Premier Padel tournaments.

WPT also sought an injunction aimed at stopping celebration of the Premier Padel circuit, which WPT claimed that breached the players' contract obligation to participate exclusively in all WPT tournaments.

The Commercial Court No. 15 of Madrid has stated that professional players have the right to seek opportunities and better conditions in other circuits. Furthermore, the Court has established that the existence of WPT as a tour should depend on open competition and should not pressure players to abstain from exclusivity.

It is understood that the Commission is separately considering a complaint regarding WPT's anti-competitive behavior under EU competition law. Also, the dispute seems to bear parallelisms with the ISU and Superliga cases currently pending before the EU Court of Justice.

13 High Court activity / Security companies. The High Court overturns the CNMC's fines on Prosegur and Loomis. (Judgment of the High Court of 20 July 2022, appeal number 3109/2022).

In 2016 the CNMC fined Prosegur for a single and continous infringement contrary to Articles 1 of the Spanish Competition Act and 101 TFEU. These companies allegedly shared the market, fixed prices and exchanged sensitive commercial information for seven years in the transport and handling of funds by authorized private security companies.

The High Court has now ruled on review in favour of security firms Prosegur and Loomis, overturning antitrust fines totaling €46.4 million levied in 2016.

The High Court has found that there is no evidence in the administrative file proving that the behavior of the fined companies was due to a previously agreed plan between them. The only documentary evidence referred to in the Decision of the CNMC as proof of the concerted practices are internal e-mails of each of the companies, the content of which was used by the CNMC as basis to conclude that the companies were sharing the market.

The Court has stated that it cannot accept as evidence for the prosecution the statements contained in mere internal e-mails of the companies when the context or reasons leading employees to make the relevant statements is not known. Clearly, a stark reminder that the quasi-criminal nature of antitrust fines requires well

substantiated evidence of agreement, even if circumstantial.

14 High court activity / consortia. The High Court upholds the appeal of JEZ Sistemas Ferroviarios, S.L. and quashes the CNMC cartel Decision in connection with high speed train infrastructure (Judgement of the High Court of 27 December 2021, appeal number 432/2016).

The High Court, by Judgement of 27 December 2021, upheld the appeal filed by JEZ Sistemas Ferroviarios, S.L. (**JEZ**) against the Decision of the CNMC of 30 June 2016, *INFRAESTRUCTURAS FERROVIARIAS*, file S/0519/14 (**CNMC Decision**).

The CNMC Decision fined JEZ €1.076 million for a single and continuous infringement of Article 1 of the Spanish Competition Act and Article 101 TFEU for market sharing, price fixing and exchange of sensitive commercial information in relation to the supply of railway switches in the framework of the procurement procedures issued by GIF/ADIF (national railway infrastructure operators). The case involved joint-bidding through a consortium.

The judgement of the High Court focuses on the relevance conferred by the CNMC Decision to the fact that the companies had participated by means of consortia in almost all the tenders issued by GIF and ADIF. According to the CNMC these consortia reduced competition by enabling their members to make a single offer instead of competing offers.

The Court starts by clarifying that participation in a tender through a consortium cannot lead to a presumption of illegal collusion. The Court admits that both the applicable public procurement law and the competition rules on horizontal co-operation require an analysis of the objective need for the formation of a consortium. A joint offer (instead of competing offers) by a consortium can only be allowed if individual offers by the consortium members are either not possible, or they are objectively more burdensome and result in a worse competitive outcome.

The CNMC Decision focused on the absence of justification or necessity of the consortium. The CNMC stated that the companies had sufficient capacity to compete against each other by submitting individual bids. GIF/ADIF chose a mixed technology for the construction of the high speed railway infrastructure. This technology was based on patents owned by foreign companies, so the CNMC considered that there were alternatives to joint-bidding through a consortium. The CNMC states that, for example, bilateral contracts could have been signed to enable each consortium member to access the required technology individually.

Yet according to the High Court the reasoning of the CNMC is based on hypothetical scenarios that have not been confirmed. The Court concludes, reversing the CNMC Decision, that the circumstances of a highly specialized industry and technological needs do constitute a reasonable objective explanation of the need for joint bidding.

The judgment considered is relevant for various reasons. First, the economic and industrial importance of high-speed railway infrastructures in Spain (which has one of the most extensive high-speed infrastructures in the world and the largest in Europe according to various sources). Second, from a competition enforcement standpoint, the Judgement is a serious blow to the CNMC in an important investigation in the priority area of bid-rigging. Finally, the judgment is a welcome reminder to the CNMC that it needs to qualify and justify any accusations regarding the need to form consortia on economic grounds.

15 Judicial activity / Time limits of administrative investigations. The High Court has annulled an antitrust decision due to the expiration of the administrative time limits for antitrust decisions (Judgment of the High Court of 27 July 2022, appeal number 92/2016).

The CNMC fined the General Council of Associations of Dentists and Stomatologists (Ilustre Consejo General de Colegios Oficiales de Odontólogos y Estomatólogos in Spanish) (**Dentists Professional Association**) € 234,738 for an infringement of Article 1 of the Spanish Competition Act consisting of an agreement to impose the choice of dental prosthodontics by dentists in a manner restrictive of competition and for the recommendation of fees (Decision of 15 December 2015, *CONSEJO DE ODONTÓLOGOS Y ESTOMATÓLOGOS*, file S/0299/10).

The Dentists Professional Association filed an appeal before the High Court, which was upheld and the antitrust decision was annulled on the basis that the CNMC breached the right to be heard of the interested parties (the Council did not grant the 15-day period for parties to be heard in connection with the change of the legal characterization of the infringements set in the Decision Proposal of the Competition Directorate,

which characterized the practices as very serious infringements.

Subsequently, once the Council of the CNMC received the High Court's judgment, it changed the legal characterization of the infringements, qualifying them as very serious and included within the first conduct the acts that the former Investigation Directorate had considered as unfair competition practices, and gave a period of 15 days for both the interested parties and the Competition Directorate to present their allegations before issuing its new sanctioning decision.

The Dentists Professional Association filed a new appeal against the new CNMC Decision explaining that the administrative procedure was time-barred. It stated that the 18-month limitation period began to run on 11 July 2011, with the formal initiation of antitrust proceedings, so that the end of the initial period was 11 January 2013. The CNMC issued its Decision on 9 January 2013, *i.e.*, only two days before the expiration of the initial expiration period. Once the proceedings were retroacted as ordered by High Court, the CNMC had only two days to issue a new Decision from 6 October 2015, the date on which the judgment of the High Court was notified to the CNMC. However, 44 days lapsed before the CNMC decided to stop the clock on 19 November 2015.

Consequently, the High Court upheld the Dentists Professional Association appeal, declaring the expiration of the antirust proceedings and, therefore, quashing the Decision of the CNMC.

16 Judicial activity / Prohibition to contract with the Public Administration. The Superior Court of Justice of Cataluña establishes that the Competition Authority can decide on the scope of the prohibition to deal with Public Administrations (These judgements have not yet been published).

One of the matters of most serious concern for companies in Spain refers to the possibility of excluding companies from public bids as an antitrust penalty.

When adopting an antitrust decision which includes the prohibition to participate in public bids, the CNMC normally chooses to send the file to the State Public Procurement Advisory Board (*Junta Consultiva de Contratación Pública del Estado*), under the Ministry of Finance, so that it decides on the scope of the prohibition. However, the Ministry of Finance has indicated that it will not decide on any prohibition to contract with the public sector until the CNMC decisions are final. This risks substantially delaying the enforcement, since most of the CNMC's decisions are appealed.

In two recent rulings, the Superior Court of Justice of Cataluña has stated that the Competition Authority can determine the scope (which contracting authorities) and duration of the prohibition to contract, which is likely to make exclusion from public bidding much more expedient.

17 EU Commission activity / Hungary breached the EUMR. The EC finds that Hungary breached Article 21 EUMR by vetoing an acquisition with EU dimension on the basis of the national foreign direct investment screening regime (21 February 2022).

Vienna Insurance Group AG Wiener Versicherung Gruppe (**VIG**) decided to acquire AEGON Group's subsidiaries in Hungary. The acquisition was prohibited by Hungary on the grounds that it threatened Hungary's legitimate interests and on the basis of its new emergency FDI screening legislation enacted during the pandemic.

However, the EC cleared the acquisition on 12 August 2021. Indeed, according to the EC, this acquisition was part of a plan of VIG to acquire some businesses from AEGON Group in several European countries (*i.e.*, Hungary, Poland, Romania, and Turkey).

Following its investigation, the EC had reasonable doubts as to whether the veto genuinely aimed to protect Hungary's legitimate interest within the meaning of Article 21 EUMR, since the Hungarian authorities failed to show that the measure was justified, suitable and proportionate.

The EC ordered Hungary to withdraw its veto by 18 March 2022.

This matter is a continuation of the Article 21 EUMR cases where the Commission had to intervene in the past to oppose (not always successfully) Member State intervention in mergers with European dimension (*e.g.*, *E.ON / Endesa*, *Acciona / Enel / Endesa, Abertis / Autostrade*), though the 'legitimate interest' invoked by the Member State is connected to the national FDI investment regime. From a formal standpoint it appears clear that, whenever the national interest invoked is not one of those listed in Article 21 EUMR, Member States would have to notify the EC prior to taking action. The question would then be what power the EC has to

disagree with Member States regarding the public interest invoked. Likely, however, cases where there is clearly not any general interest goal being affected will be opposed by the EC.

18 EU Commission activity / Internet of things. The European Commission publishes the report of the sector inquiry on Internet of things (20 January 2022).

The EC has published the final report concerning the sector inquiry on Internet of Things (**IoT**) launched in July 2020. Some of the relevant competition issues identified are as follows:

(i) Interoperability: the main providers of voice assistants (*i.e.*, Amazon's Alexa, Apple's Siri or Google's Google Assistant) are of paramount importance in the integration processes: since they have their own operating system, they are able to unilaterally determine the terms and conditions applicable to third companies wishing to integrate. They may limit the interoperability of their voice assistants with third companies by imposing strict technical requirements in order to favour their own IoT services and devices.

(ii) Standardisation: basic level technologies that are necessary in the sector are mainly standardised (*e.g.*, WiFi or Bluetooth) while the rest of technologies are very heterogeneous. This may lead, according to stakeholders, to an increase of the market power held by the main providers, by means of leveraging their position as patent owners, or increasing barriers to intercommunication between IoT devices.

(iii) Data: many potential problems are associated with data treatment by the main providers of voice assistants, the most relevant one being the possibility to deny access to data on the basis of privacy claims, thereby reserving certain data to themselves. That "lock up" could enable the main providers to improve their IoT devices and services, while hindering competition.

To conclude, stakeholders believe that both regulation and competition enforcement are necessary in order to address the identified concerns.

19 EC activity / Draft Notice on Market Definition (October 2022).

Following its Staff Working Paper on evaluation of the 1997 EC Notice on definition of the relevant market for the purposes of Community competition law issued last year, the EC has published draft guidelines on market definition.[1]

The first surprise is the footnote in the cover of the draft document indicating that the document is ultra-secret and is not to be carried openly and copies must be shredded. More substantively, it does appear appropriate to review the existing Market Definition Notice which is already 25 years old, a time span where significant developments have taken place in areas such as technology presenting some distinct features meriting a recapitulation of the market definition principles critical for any competition law analysis.

The draft Notice is considerably longer than its predecessor and, to an extent, it compiles existing practice and principles already largely present in the 1997 Notice. This is the case with points such as the methodology of defining product and geographic markets or the substitutability tests on the demand and supply side including areas of analysis such as switching costs etc. There are some interesting elaborations and reflections include the following:

- Recognition that in non-monetary products (social networks and other typical Internet products) the SSNIP test cannot be an appropriate tool (*e.g.*, at point 53).
- Pipeline products may conform new markets limited to those pipeline products and their substitutes (if any) (*e.g.*, at point 90).
- Possible approaches to market definition of multi-sided platforms (*e.g.*, at point 95).
- Possible approaches to market definition of after markets and connected markets (*e.g.*, at point 99).
- Some relevant considerations in areas such as price discrimination as basis for potential market segmentation (*e.g.*, at point 88).

The EC awaits comments from stakeholders until 13 January 2023.

20 CJEU activity / Intel. The General Court annuls in part the EC's fine against Intel (Judgement of the General Court of 26 January 2022, *Intel Corporation v. European Commission*, case T-286/09).

In May 2009, the EC levied a fine on Intel of €1.06 billion for breaching Article 102 TFEU. The abuse of dominant position happened when Intel granted discounts to CPU makers on condition that they bought all of the x86 processors from Intel. Furthermore, Intel had also made payments at distributor level so that the latter sold only computers integrating Intel

[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528

processors, which was condemned as a reduction in consumer choice and of the incentives to innovate.

The CJEU latter understood that the General Court had relied on the presumption that the application of loyalty rebates by an undertaking in a dominant position is by its very nature capable of restricting competition. The General Court should have addressed all of Intel's arguments related to the application of the AEC (as efficient competitor) test, on which the EC had based much of its argumentation.

The judgment referred the appeal back to the General Court to rule on the ability of the rebates to restrict competition in light of Intel's arguments. Consequently, the General Court, on January 2022, quashed the EC Decision on the basis that:

(i) The EC has an obligation to analyse the anticompetitive effects of rebates. Thus, if the undertaking under investigation provides evidence that its rebates are not anticompetitive, the EC has the obligation to assess the ability of those discounts to restrict competition in light of the explanation provided;

(ii) Even though the EC did conduct the AEC (as efficient competitor) test, the results were not sufficient to consider the rebates abusive. In this case, the EC had indicative evidence, but as Intel argued that such evidence did not prove an abuse, the EC had the obligation to examine those allegations. Therefore, the EC failed in its duty to prove the infringement by not properly examining the effects of the rebates in light of Intel's allegations and explanations.

In conclusion, the General Court annuls the Decision because the analysis carried out by the EC is incomplete and, in any event, does not establish that Intel's rebates were capable, or likely, to have anticompetitive effects.

The EC has appealed the case before the CJEU.

21 CJEU activity / *Non bis in idem* principle. The Court of Justice specifies the protection against double jeopardy provided by the EU law (Judgments of the Court of Justice of 22 March 2022, in cases *Bpost*, C-117/20 and *Nordzucker and others*, case C-151/20).

In the *Bpost* case, two national authorities fined Bpost €2.3 million for applying a rebate system that discriminated against some of Bpost's clients; second, the Belgian Competition Authority fined 37.4 million for abuse of dominant position because of the same rebate system.

According to the Court of Justice, the two sets of proceedings must have been conducted in a sufficiently coordinated manner and the overall penalties must be proportionate to the seriousness of the offences committed. If that is not the case, the second public authority involved infringes the prohibition of double jeopardy.

In the *Nordzucker* case, the Austrian Competition Authority had declared that Nordzucker infringed EU and Austrian competition law, a matter that was being litigated in the national courts. Those proceedings are based on a telephone conversation during which two companies discussed the Austrian sugar market. That conversation had already been referred to by the German Competition Authority, in a decision which had become final.

According to the Court of Justice, Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding an NCA from initiating proceedings against an undertaking and, where appropriate, imposing a fine on that undertaking for an infringement of Article 101 TFEU and the corresponding provisions of national competition law on account of conduct which has had an anti-competitive object or effect in the territory of that Member State, where such conduct has already been mentioned by another NCA a final decision adopted by it in relation to that undertaking following proceedings for infringement of Article 101 TFEU and the corresponding provisions of the competition law of that other Member State, provided that such decision is not based on a finding of the existence of an anti-competitive object or effect in the territory of the first Member State.

22 CJEU activity / Damages Directive. The CJEU clarifies the temporal scope of the Damages Directive (Judgement of Court of Justice of 22 June 2022, case C-267/20).

The CJEU Judgement of 22 June 2022, *Volvo and DAF Trucks*, case C-267/20, has provided clarity regarding the temporal scope of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 (**Damages Directive** or **Directive**).

The dispute in the main proceedings relates to the selling of two trucks in 2006 and 2007 to the defendants, when the Trucks Cartel was active, according to the EC Decision of 19 July 2016, *Trucks*, case AT.29824. The Commercial Court of León upheld the claimant's action and ordered the defendants to pay a compensation corresponding to 15% of the price. The Judge quantified the amount to be paid on the basis of the Damages Directive.

The defendants appealed the judgment arguing that the trucks at issue were bought before the Damages Directive went into force, thus not falling under either the statute of limitations of 5 years or, in fact, any other provision contained in the Directive. The High Court of Leon decided to refer three questions to the CJEU regarding the temporal scope of the Directive:

(i) Regarding the statute of limitations (Article 10 of the Directive), the CJEU has ruled that it is a substantive provision and, therefore, the limitation period will be of 5 years) in so far as the action is not time barred by the time limit for transposition of the Directive.

(ii) Regarding the quantification of harm (Article 17.1 of the Directive), the CJEU finds it to be a procedural provision. Therefore, any action brought after the entry into force of the Directive falls within the scope of the said Directive, even when the infringement at hand had already ceased by that date.

(iii) Regarding the presumption of harm (Article 17.2 of the Directive), the CJEU confirms that it is a substantive provision, which means that an action referring to an infringement that took place before the time limit for transposition of the Directive, such as the one in the main proceedings, falls outside the temporal scope of the Directive.

The matter refers to a recurrent question in Spain, i.e., the temporal application of the Damages Directive and national implementing legislation, which is key because under the Spanish law applicable pre-Directive statute of limitation was of only one year (although it could be extended by one-year periods at will of the claimant).

23 CJEU activity / Illumina. The General Court rejects Illumina's appeal of EC decision to void Grail, Illumina concentration (Judgment of the European Court of Justice of 13 July 2022, *Illumina, Inc., v. European Commission*, case T-227/21).

The General Court (**GC**) has issued its judgment on case T-227/21 between Illumina, Inc., and the European Commission. This much awaited decision adjudicated on the issue of whether or not Article 22 of Council Regulation (EC) No 139/2004, on concentrations between undertakings (**EUMR**) empowers the European Commission to review mergers which do not meet either the EUMR, or the national revenue thresholds, provided that the merger has been referred upwards by a Member State. This issue became the subject of great attention when the Commission openly declared, on 22 July 2021, its intention to follow such an interpretation of Article 22 EUMR. This would potentially substantially expand the scope of the Commission's jurisdiction enabling it to review an enormous range of concentrations hitherto flying below the radar of merger control.

By means of its 13 July 2022 judgment, the GC confirmed the European Commission's interpretation. It decided that the Commission does in fact have the authority to review concentrations which fall below both national or European competition regulation thresholds, provided that it has been requested to do so by a national competition Authority.

Consequently the decision that the acquisition of Grail should not be allowed to proceed should be upheld, this is despite the merger having already been closed. Indeed, the background to this is that on 21 of September 2020, Illumina and Grail publicly announced their intended transaction. Grail and Illumina are both companies active within the biotechnology sector. More precisely both firms are part of the burgeoning gene-sequencing industry. Grail uses next-generation sequencing, in an effort to develop an early screening for cancer, whilst Illumina is concerned with various potential applications of the technology. Illumina is considered to have a 80% market share of this technology globally and so naturally the potential concentration raised concerns as to whether the transaction was anti-competitive in nature.

The immediate practical result of the July 2022 judgment, is that the Illumina transaction is at risk of being prohibited, and Illumina may be subject to fines for gun-jumping.

24 Foreign Investment Screening – Draft Regulation implementing the Foreign Direct Investment Act (December 2021).

Two and a half years ago, Spain put in place a new foreign direct investment (**FDI**) screening system applicable to non-EU/non-EFTA companies.[2] A much announced implementing

[2] Royal Decree-Law 8/2020, of 17 March, of urgent exceptional measures to face the social and economic

regulation has been delayed until publication of a (still) draft in late 2021. This implementing regulation is essential because the framework law entering into force two years go after the surge of the pandemic, and subsequently amended, was far too broad, inconclusive and imprecise in some aspects. A worrying matter taking into account that it is a key tool for foreign investment in Spain.

This draft regulation reflects, at least to an extent, existing experience and practice by the competent authorities, so we have deemed it relevant to publish this notice regarding this projected regulation. Below we refer briefly to *(i)* the scope and meaning of the sensitive industries; *(ii)* clarification of the concept of 'foreign investor'; and *(iii)* various procedural matters.

1. Clarification of the scope and meaning of the industries listed as sensitive for FDI screening purposes.

Critical infrastructures are those included in the National Catalogue of Strategic Infrastructures and the real estate required for their operation. The Catalogue is secret, which means that, in practice, investors will know about this circumstance only when carrying out their due diligence of an investment target.

Industries listed in the applicable law as sensitive include:

- critical technologies: telecommunications, AI, robotics, semiconductors, cyber security, aerospace, defense, energy storage, quantum, nuclear energy, biotechnology, advanced materials and advanced manufacturing systems. This list may be enhanced or narrowed down by Royal Decree;
- dual-use technologies: those defined in Article 2.1 of EU Regulation 2021/821;
- key technologies for leadership and industrial capacitation: those referred to by EU Decision 2021/764 establishing the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation, including advanced materials, nanotechnology, photonics, microelectronics and nanoelectronics, life sciences technologies, advanced manufacturing and transformation systems, AI, digital security and connectivity;
- technologies developed under the auspice of programs and projects of special interest to Spain, implying a substantial amount or percentage of financing from the national or EU budget.[3]

Essential inputs are those indispensable and non-replaceable for the rendering of essential services to society and the State, which loss or destruction would have a significant impact. In particular:

- software provided for use by critical infrastructures in: *(i)* power generation, hydrocarbons and energy transmission networks and plants generally; *(ii)* water treatment; *(iii)* telecommunications installations and systems for voice transmission and data storage and processing; *(iv)* financing and insurance sector for operation of installations or systems used in the supply of cash, card payment systems, payment settlement and insurance provision; *(v)* health sector for hospital management, distribution of prescription pharmaceuticals and laboratories information systems; *(vi)* transportation installations and systems by air, sea or road; *(vii)* management of installations or systems for food supply.
- Other indispensable and non-replaceable inputs to guarantee the integrity, security or continuity of critical infrastructures.

Companies with access to sensitive information are *(i)* those with access to specific data on strategic infrastructures which, if revealed, could be used to carry out actions to destroy or perturbate their normal performance; *(ii)* companies with access to data bases related with the operation of essential services in the critical sectors listed under 4.3 above; *(iii)* those with access to official databases not accessible to the public; *(iv)* those carrying out activities

impact of COVID-19. The legal reform does not repeal Royal Decree 644/1999, of 23 April, on Foreign Investments, which remains in force to the extent it is consistent with RDL 8/2020 (particularly, with regard to the authorization regime for transactions related to national defence companies active in the production or trade of weapons, ammunition, explosives and war material).

[3] Amongst others, those benefitting from financing by instruments contemplated in the Annex "list of projects or programs of interest to the Union" referred to by Article 8.3 of EU Regulation 2019/452 on direct foreign investment into the European Union.

subject to compulsory evaluation of impact on personal data pursuant to Article 35.3 of EU Regulation 2016/679, on personal data protection.

2. Clarification of the concepts of 'foreign investor' and 'sensitive investment in another EU country'.

To ascertain if a given investor or investment vehicle must be attributed to a foreign government the following criteria are to be borne in mind: *(i)* the existence of 'control' under competition law; *(ii)* control by means of significative financing or subsidies from a third country; *(iii)* in the case of investment vehicles or funds channeling State investments, they are deemed not to be controlled by a foreign State, and therefore excluded from FDI investments, if it flows from their governance and nature of the management that the investment policy is independent and it focuses solely in the profitability of the investments without foreign State political interference.

Another important matter which was hitherto too broad and imprecisely defined in the law refers to risky foreign investors carrying out criminal activities affecting public security. It is now clarified that such an investor must have been condemned by a final decision (i.e., against which no further appeal is possible) for criminal or administrative breaches in the prior three years in areas such as money laundering, environment, tax or protection of sensitive information, are to be taken into account.

3. Exemptions.

A number of important exemptions is now specified which should limit the (broad) scope of the law.

Investments in the energy sector are exempted where the investor is not a foreign State, has not carried out investments in sensitive sectors in the EU, or does not pose a risk of illegal activities affecting public security, provided that *(i)* the investment target does not carry out energy regulated activities (in general, power generation plants or projects, as well as commercialization activities are not regulated within this context); *(ii)* that as a result of the investment, the investor does not become a dominant operator within the meaning of the sector regulation; *(iii)* when the investment targets power generation plants, that the resulting power share of the relevant generation technology controlled by the investor does not exceed 5%; *(iv)* when the target is an energy commercialization company, that the number of customers does not exceed 20,000.

Investments in other sensitive industries are exempted from FDI screening if the turnover of the target company does not exceed €5 million in the prior year, provided its technology has not been developed within the framework of programs or projects of particular interest to Spain, with the exception of investments in electronic communications companies holding licenses for spectrum use or with significant market power any electronic communications market. This is in contrast to the prior exemption limited to investments in Spain of €1 million which was too small.

4. Questions of procedure.

The draft Regulation contemplates the possibility of filing for guidance regarding whether or not a transaction must be filed for FDI screening. This has informally taken place, but this innovation would now include that the competent Authority must in principle provide a response within 30 working days from filing of the consultation. In case no response is provided with 30 working days, this is deemed as a decision that an FDI filing (and prior approval) is required prior to closing of the transaction.

FDI screening applications will be (once the draft Regulation enters into force) subject to a three-month deadline. In the absence of a decision after three months, the request for authorization is deemed rejected. This is in contrast to the six-month deadline currently in force, so it is an improvement for legal certainty.