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01 Selected CNMC merger decisions, June 2023 – January 2024.

Firms	Notification threshold	Economic sector	Decision
ABAC / IBERCONSEIL	Turnover	Preparation of milk and manufacture of its derivatives	Phase I clearance (7 June 2023)
CHEPLAPHARM / NEGOCIO ZYPREXA	Not disclosed	Wholesale of pharmaceuticals	Phase I clearance (7 June 2023)
LOGISTA PUBLICACIONES / DISTRISUR	Market share	Intermediaries in trade in miscellaneous products	Phase I clearance (14 June 2023)
DISELCIDE / HEC	Not disclosed	Electricity distribution	Phase I clearance (14 June 2023)
ENAGAS TRANSPORTE / RED GASODUCTOS REGANOSA	Market share	Pipeline transport	Phase I clearance (14 June 2023)
FUNESER / ALBIA	Not disclosed	Funeral and related activities	Phase I clearance (14 June 2023)
ASTERION-SSG MATRIX / GRUPO SSG	Turnover	Other human health activities	Phase I clearance (20 June 2023)
SPAICOL / CADPET	Not disclosed	Health activities	Phase I clearance (20 June 2023)
GMH / DIAVERUM	Market share	Other human health activities	Phase I clearance (28 June 2023)
SERVIMATIC / TECNOCENTER	Market share	Gambling and betting activities	Phase I clearance (4 July 2023)
MEDIAN UNTERNEHMENSGRUPPE / GRUPO HESTIA	Turnover	Health activities	Phase I clearance (4 July 2023)
REGANOSA / ENAGÁS TRANSPORTE / MUSEL	Market share	Gas production; distribution by pipeline of gaseous fuels	Phase I clearance (7 July 2023)
REPSOL / CIDE / CHC	Not disclosed	Electricity trade	Phase I clearance (12 July 2023)
V-VALEY-ESPRINET / LIDERA	Market share	Wholesale of computers, peripheral equipment and computer software	Phase I clearance (12 July 2023)
NATURGY / ASR WIND	Turnover	Electricity production	Phase I clearance (19 July 2023)
TAYLOR FRESH FOOD / ETHERNAL LIFE CAPITAL / FOODIVERSE TECH FOODS S.L.U.	Market share	Potato processing and preservation	Phase I clearance (19 July 2023)
GRUPO HOSPITALARIO RECOLETAS / IVI SEVILLA / GINEMED ZARAGOZA / GINEMED MURCIA	Market share	Health activities	Phase I clearance (19 July 2023)
JAPAN INDUSTRIAL PARTNERS / TOSHIBA	Market share	Manufacture of electronic components and assembled printed circuit boards	Phase I clearance (26 July 2023)
ISS FACILITY SERVICES / FISSA	Turnover	Building services and gardening activities	Phase I clearance (19 July 2023)
ALBUS – USSL – FUNDADOR / DUKES EDUCATION	Not disclosed	Education	Phase I clearance (19 July 2023)
INDRA / PARK AIR	Market share	Not disclosed	Phase I clearance (19 July 2023)

INTRUM / HAYA	Not disclosed	Other activities auxiliary to financial services, except insurance and pension funding	Phase I clearance (19 July 2023)
COMERCIA / UNIVERSALPAY	Not disclosed	Other activities auxiliary to financial services, except insurance and pension funding	Phase I clearance (19 July 2023)
ABANCA / TARGOBANK	Not disclosed	Financial services, except insurance and pension funds	Phase I clearance (6 September 2023)
ROQUETTE / QUALICAPS	Market share	Manufacture of pharmaceutical specialities	Phase I clearance (6 September 2023)
CONCESUR – ACTIVOS MERCEDES	Turnover	Sale of automobiles and light motor vehicles	Phase I clearance (13 September 2023)
PERMIRA / ALTAMAR CAM PARTNERS	Turnover	Collective investment, funds and similar financial entities	Phase I clearance (13 September 2023)
MEMORA SERVICIOS FUNERARIOS / FUNERARIA LUIS NUEVO	Market share	Other personal services	Phase I clearance (13 September 2023)
HELVETIA / FUNERARIA EL RECUERDO	Market share	Funeral and related activities	Phase I clearance (13 September 2023)
COSTA BLANCA / GRUPO FUERTES / MARINA DOR	Turnover	Hotels and similar accommodations	Phase I clearance (27 September 2023)
RANDSTAD / SGS	Turnover	Activities of temporary employment agencies	Phase I clearance (11 October 2023)
SERVEO / SACYR FACILITIES	Turnover	Decontamination activities and other waste management services	Phase I clearance (25 October 2023)
TECNO FAST / ALQUIBALAT	Market share	Manufacture of metal structures and their components	Phase I clearance (16 November 2023)
CARREFOUR / ACTIVOS SUPERCOR	Turnover	Retail trade in non-specialized establishments	Phase I clearance (22 November)
BLUEVÍA / ACTIVOS EXCOM	Market share	Telecommunications	Phase I clearance (29 November 2023)
EBIQUITY / MEDIAPATH	Market share	Business management consulting activities	Phase I clearance with commitments (29 November 2023)
SME ESPAÑA / ALTAFONTE	Market share	Creative, artistic and entertainment activities	Phase I clearance (29 November 2023)
DFDS / FRS ESPAÑA	Market share	Maritime and inland waterway transportation	Phase I clearance (1 December 2023)
CASER SEGUROS / FDF PADRÓN	Market share	Funeral and related activities	Phase I clearance (1 December 2023)
LYNTIA / EVOLUTIO	Market share	Telecommunications	Phase I clearance (13 December 2023)
ABERTIS AUTOPISTAS / AUTOVÍA DEL CAMINO	Market share	Activities ancillary to land transport	Phase I clearance (13 December 2023)
KKR / GENERALIFE	Market share	Activities of specialised medicine	Phase I clearance (20 December 2023)
TANATORIOS DE CORDOBA / TANATORIO DE FUENTE OBEJUNA	Market share	Funeral and related activities	Phase I clearance (20 December 2023)
GED IBERIAN PRIVATE EQUITY / HELIOS SPAIN	Market share	Health activities	Phase I clearance (20 December 2023)
MÉMORA / TANATORIO DE PALENCIA	Market share	Funeral and related activities	Phase I clearance (17 January 2024)

02 Merger control / Gift boxes. The CNMC approves Wonderbox's acquisition of Smartbox (Decision of 15 March 2023, *WONDERBOX/SMARTBOX*, file C/1361/22).

The acquisition impacts the "multi-experience" voucher market in Spain, as both companies sell gift boxes containing vouchers for various activities such as dining, hotel stays and leisure. Gift vouchers can be distributed in physical format (inside boxes or chests) or digital format (electronic coupons).

The CNMC has taken into account the competition from other companies that offer gift vouchers with a single type of experience (mono-experience) and even from service providers who have their own gift vouchers, such as a hotel chain or a spa that offers vouchers for its spa services. However, the merger strengthens Wonderbox's leadership by joining the two companies with the largest market share in the multi-experience gift voucher market in Spain, resulting in significant market share overlaps. However, according to the market test conducted by the CNMC, the main providers of Wonderbox and Smartbox would have enough alternatives in the market to market their services. However, Wonderbox could impose exclusivity on providers and distributors, limiting the capacity of its rivals to grow or even enter the market. The market is dynamic, with several relevant operators competing in recent years and trend changes with hotel chains and restaurants acting as providers and offering their gift vouchers directly.

Therefore, Wonderbox has committed to not including exclusivity clauses or incentives in contracts with service providers or distributors, not penalizing them for working with third-party competitors, and communicating these commitments to them.

03 Merger control / Shipping. The CNMC approves the acquisition of Terminal Ferry de Barcelona by the Grimaldi group subject to commitments (Decision of 26 April 2023, *GRIMALDI/TFB*, file C/1305/22.

The CNMC has authorized the Grimaldi Group to acquire Terminal Ferry de Barcelona (**TFB**) with commitments.

The operation affects two sectors: *(i)* the management of roll-on/roll-off (**ro-ro**) and passenger port terminals; and *(ii)* the regular ro-ro and passenger maritime transport.

Grimaldi's control of the only two public ro-ro and passenger terminals in the port of Barcelona and the absence of an alternative terminal to provide these services, would give Grimaldi the incentive and the ability to raise prices and change the conditions of access to its services.

Moreover, the CNMC also considered that Grimaldi could strengthen its position in the market for scheduled maritime transport of ro-ro and passengers (vertically related market) on the routes between Barcelona and the Balearic Islands, by applying less favourable conditions (timetables, frequencies or fares) to competing shipping lines needing access to these terminals than those of its own vessels.

Grimaldi offered commitments during the first phase that the CNMC considered insufficient to resolve the competition concerns, and therefore the transaction came under second phase scrutiny.

In second phase, Grimaldi proposed new commitments, which the CNMC considered appropriate. These focused on enabling the development of a new ro-ro and passenger terminal in the port of Barcelona. The commitments offered by Grimaldi and accepted by the CNMC to authorize the notified merger were the following:

- relinquishing to the Barcelona Port Authority (**APB**) part of its current terminal concession in the port with a view to enabling alternative terminal capacity;
- facilitating direct boarding from the gangway and finger of its current terminal to any third party occupying the divested area;
- providing maritime terminal services in the event that a new maritime terminal is not built on the divested area;

- not participating in the tender that the APB may call for the concession of the divested area in the future;
- maintaining the commercial conditions to third-party shipping companies to which TFB currently provides port services, until the effective entry of a third party in the area to be divested or until the fifth anniversary of the CNMC's decision without such entry.

04 Merger control / Auditing services. The CNMC approves Ebiquity's purchase of Mediapath with commitments (Decision of 29 November 2023, EQUIBITY/MEDIAPATH, file C/1406/23).

The CNMC authorized the acquisition of Mediapath Network AB (**Mediapath**) by Ebiquity plc (**Ebiquity**) subject to commitments to preserve competition in the market for advertising investment performance auditing or evaluation services in Spain.

Ebiquity is a market leader in the market for advertising investment performance auditing or evaluation services and, by acquiring Mediapath, its main competitor, Ebiquity would have quasi-monopolistic position, reinforcing its ability and the incentive to make it difficult for potential competitors to enter the market. The CNMC considered that the transaction led to horizontal overlaps with a significant addition of market share and strengthening its database (consisting of data on costs and qualitative variables of the advertising investment made by advertisers) entailing higher barriers to entry which could restrict competition.

However, due to the features of the market, the CNMC considered that factors such as the competitive pressure exerted by other smaller operators, potential competitors and the countervailing power of advertisers, would mitigate the risks of price increases or loss of quality for commercial users, provided that the parties do not employ exclusivity policies or long-term contracts.

Consequently, the CNMC authorized the notified merger subject to the following commitments offered by Ebiquity:

- Not to include exclusivity clauses or incentives in contracts with advertisers using advertising investment performance auditing services in Spain.
- Not to include clauses in contracts limiting the ability of advertisers to share their advertising investment data with third party operators.
- To limit the effective duration of contracts to one year.
- To inform their commercial users of the commitments.

05 Merger control / Energy (Gas). Acquisition of Reganosa's network of gas pipelines by Enagás, (Decision of 14 June 2023, *ENAGAS TRANSPORTE/RED GASODUCTOS REGANOSA*, C/1384/23).

The CNMC has authorized the acquisition of the network gas pipelines owned by Reganosa (a company devoted to regasification of natural gas in Northern Spain) in Northwestern Spain by Enagás (energy company and transmission system operator).

Despite the acquisition resulting in a merger to monopoly, the CNMC authorized the concentration in phase 1 on the main ground that gas transport is a highly regulated market. Pursuant to the sector regulation governing the transport of gas, third party access to the network is regulated regarding price and quality, and transport companies can refuse access under a very limited set of circumstances. In addition, prices applicable to transport services are established by the CNMC attending to the costs of the gas market system. Therefore, the CNMC concluded that the acquisition did not put the maintenance of effective competition in gas markets at risk.

06 Merger control / Energy (Gas). The CNMC approves the acquisition of joint control by Enagás and Reganosa of a regasification plant previously solely controlled by Enagás (Decision of 7 July 2023, *REGANOSA/ENAGÁS TRANSPORTE/MUSEL*, file C/1385/23).

In a second, parallel transaction between Enagás and Reganosa, the CNMC has authorized in phase 1 the acquisition of a 25%

stake conferring joint control by Reganosa in Enagás's regasification plant in El Musel (Galicia).

The CNMC concluded that the concentration did not significantly alter the competitive situation prior to the transaction, on the grounds of the regulated nature of the liquified natural gas (**LNG**) logistics services provided by the regasification plants operated by Enagás and Reganosa. The CNMC also considered the existence of competition exercised by other operators at international level. In addition, the CNMC found that the transaction did not modify the structure of the market, so phase 1 unconditional clearance was granted.

07 CNMC antitrust activity / Database services. Cartel in the area of database services in Spain, Decision of 10 July 2023, *BUREAU VAN DIJK/INFORMA D&B,* file S/0002/21.

The CNMC has fined two of Spain's leading business information database services companies, Bureau Van Dijk Publicaciones Electrónicas (**BVD**) and Informa D&B (as well as their parent companies, Moody's Corporation and Compañía Española de Seguros de Crédito a la Exportación), for customer sharing and price fixing.

The two firms have recognized that a meeting took place on 16 September 2002 in which both parties formed an agreement that would act as the basis on which their relations would operate from then until 2021.

According to the CNMC, the main purpose of the agreement was to avoid interference with the other company's customer acquisition and to bypass competitive pricing in the marketing of Amadeus, Sabi and Orbis products. Subsequently, the assignment of customers was orchestrated through various procedures, namely by frequently sharing customer lists to avoid the risk of interfering with clients, in the other company's negotiations and in the purchase of the three products which are indicated as forming part of the 'non-aggression pact'. These schemes were persistent throughout the duration of the cartel that was instituted by the two major Spanish business database services firms.

In addition, evidence was collected to corroborate these dealings, which included agreements to match prices, fixing direct prices and maximum discounts between the two.

Thus, the CNMC imposed fines amounting to € 236,737 on BVD and €5,083,049 on Informa D&B. However, since BVD reported the practice requesting leniency and Informa D&B also collaborated with the CNMC and admitted its wrongdoing, BVD was finally exempted from paying its fine and Informa D&B's fine was reduced to €3.55 million. Moreover, the CNMC states that both companies should be excluded from the prohibition to contract with the public sector outlined in the Law 9/2017, of 8 November, of the Public Sector Contracts-.

08 CNMC antitrust activity / Defense. The CNMC fines four companies and six company executives for collusion in several defence tenders (Decision of 19 July 2023, *LICITACIONES MATERIAL MILITAR* ("Defense material tenders"), file S/0008/21).

On 25 July 2023, the CNMC fined four companies and six executives for bid-rigging.

First, the CNMC has fined Comercial Hernando Moreno Cohemo S.L.U. (**Cohemo**), Star Defence Logistics & Engineering S.L., and Grupo de Ingeniería, Reconstruccion y Recambios JPG S.A for bid-rigging in tenders concerning the supply, maintenance and modernisation of military vehicles from January 2016 to June 2021.

Second, the CNMC fined Cohemo and Casli S.A. for scheming to acquire military containers between September 2019 and November 2021 and allocate contracts among themselves by entering into non-competitive agreements, disclosing cover bids, withdrawing bids without justification, and exploiting the system of temporary joint ventures.

These anti-competitive agreements impacted approximately one hundred contracts. Specifically, they affected 13 framework deals, the corresponding 81 contracts, as well

as 10 other public contracts. These tenders were all involved in the maintenance of both military vehicles and camp equipment.

09 CNMC antitrust activity / Apple and Amazon: The CNMC fines Apple and Amazon €194 million for limiting competition on Amazon's website in Spain (Decision of 18 July 2023, *AMAZON/APPLE BRANDGATING*, file S/0012/21).

The CNMC has issued a decision condemning both companies for restricting the possibility of competing Apple products being advertised in Amazon's platform. According to the CNMC, Amazon and Apple reached a deal which comprised a series of clauses in the contracts managing Amazon's conditions as an online platform distributing Apple products which had a direct impact on the sale of Apple devices in Spain.

Effectively, the CNMC considers that the two companies unfairly controlled the number of resellers of Apple products; and that they restricted Amazon's capacity to target customers of Apple products on its Spanish website with advertisements offering competing products.

The two contracts updating Amazon's conditions as an authorised supplier of Apple products were signed in October 2018 and contained anti-competitive clauses altering the online sales of digital devices in Spain, according to the CNMC. Specifically, the watchdog states that within the contracts there was evidence of exclusion as well as "brand gating" clauses. The distribution of Apple products focused on the Amazon platform, diminishing competition between other resellers, and contributing to a significant rise in the prices paid by consumers for the purchase of Apple products on the Amazon e-commerce site in Spain.

Additionally, the CNMC points to the fact that both companies restricted the opportunity for Apple's competitors to obtain advertising space on Amazon's online platform when searches for Apple products are attempted or during their purchase.

Marketing limitation clauses were another issue detected by the regulator in the 2018 contracts. Amazon was not allowed marketing and advertising directly to customers who have purchased an Apple product in Spain on its website without having first received Apple's consent. This signified that Amazon's page was incapable of suggesting Apple competitors' products.

The CNMC considers that the above covenants adversely affected consumers as they restrained their chances of finding new brands and amounted to a single and continuous infringement of Articles 1 Competition Act and 101 TFEU. The CNMC imposed fines of €143,640,000 on Apple and of €50,510,000 on Amazon.

10 CNMC antitrust activity / Internet platforms. The CNMC shelves a complaint against Amazon, Booking and TripAdvisor for distortion of competition due to unfair acts (Decision of 6 November 2023, *OPINIONES FALSAS PLATAFORMAS* ("Fake reviews in platforms"), file S/0053/19).

The Organization of Consumers and Users (**OCU**) filed a complaint against Amazon, Booking and TripAdvisor for publishing false reviews and opinions of sellers, thereby altering free competition in violation of unfair competition regulations. According to the OCU, such practice constitutes an infringement of Article 3 LDC, which requires, on the one hand, an act of unfair competition, as established in Law 3/1991, of 10 January, on Unfair Competition (**UCA**) and, on the other hand, that this act is sufficiently serious to cause a disturbance of the mechanisms that regulate the functioning of the market, affecting the public interest. It is not sufficient, therefore, to affect a private interest, such as that of a specific operator (a matter which under the UCA would be adjudicated by the commercial courts).

The CNMC understands that online reviews are a crucial instrument because consumers cannot carry out an on-site assessment, which makes the reviews or evaluations of other users highly relevant for consumers to reach their decisions.

The OCU acknowledges that the described misleading practices are not being carried out by the abovementioned platforms, but by both sellers and intermediaries, by contacting users through different channels with the purpose of getting them to publish a fake review in exchange for either financial compensation or the receipt of the product free of charge.

According to the OCU, the platforms' infringement would derive from the fact that, because of a lack of sufficient control, they publish reviews from users who have not purchased the product or have not used the service, applying insufficient controls.

However, it was shown that the platforms do have tools to detect fake reviews and invest in improving these tools. Moreover, the platforms punish those responsible and have even initiated legal actions and collaborate with ongoing investigations. Therefore, the CNMC considers that the OCU has not proven that the platforms denounced have infringed Article 5 UCA (prohibiting misleading practices) or Article 26 (prohibiting the practice of providing results and responses to online searches and queries made by a consumer, without clearly disclosing any paid advertising or payment specifically aimed at ranking the goods or services higher in those results).

Consequently, the CNMC decided to shelve the complaint as it considered that Article 3 LDC was not infringed; additionally, the CNMC considered that the described practices could infringe consumer protection regulations. Therefore, the CNMC decides to forward the OCU's complaint to the Directorate General for Consumer Affairs.

11 CNMC activity / Renewable energy facilities. The CNMC fines Luminora for favouring access of its own renewable energy facilities to the electricity grid over a competitor (Decision of 20 December 2023, *LUMINORA*, file S/0003/23).

On 20 December 2023, the CNMC has fined Luminora Solar Doce, S.L. (**Luminora**) €384,672 for having prioritised the processing of its renewable energy plants with Red Eléctrica (**REE**) over those of competitor and its parent company Soltec Development, S.A. has been declared jointly and severally liable for the payment of the fine.

The investigation stemmed from a decision by the CNMC's Regulatory Supervision Board in access dispute CFT/DE/134/20, where the CNMC found that Luminora had acted improperly as the Sigle Node Agent of the Fausita 400 KV node vis-à-vis a competitor.

According to the CNMC, Luminora abused its dominant position as a Single Node Agent and failed to include its competitor's facilities in the various coordinated requests sent to REE, in contravention of its obligations. The interest of the case stems from the fact that Luminora acted in compliance with an existing State regulation which gave the company a regulatory role in the management of the requests for access to the network, and therefore could result in an Article 106 TFEU case. The argument has been dismissed by the CNMC in the administrative proceedings.

12 CNMC activity / merger remedy compliance. The CNMC fines Cemesa Amarres Barcelona and Mooring Port Services (Decision of 20 December 2023, *MOORING & PORT SERVICES/CEMESA AMARRES BARCELONA*, file SNC/DC/065/23).

The CNMC has fined Cemesa Amarres Barcelona, S.A. (**Cemesa**) and Mooring & Port Services, S.L. (**Mooring**) €80,000 for failing to comply with one of the commitments undertaken in 2021 when they created Amarres de Barcelona, S.L., JV (**Amarres de Barcelona**), currently the only mooring company in the port of Barcelona.
Amongst other commitments, the companies agreed not to worsen the commercial conditions and not to increase the previous prices for mooring and unmooring services above the CPI index.

In particular, the companies were obliged to submit an annual report with prices of services and confidential copies of contracts renewed in 2022 within the first 15 days of the year. The present proceedings are related to a delay in filing the annual report, as a result of which the CNMC has fined Cemesa and Mooring.

13 CNMC activity / Damages. The CNMC releases guidelines facilitating the estimation of damages in private actions for competition law violations (Published 21 July 2023, file G-2020-03).

On 21 July 2023, the CNMC released guidance aimed at judges, lawyers, experts and consumers involved in damages actions for competition law violations.

Essentially, the document outlines three fundamental points:

- Parties affected by competition law infringements are entitled to claiming compensation before the courts;
- Offers clarification for the calculation of the amount of damages caused by infringements of competition regulations;
- Establishes practices to enhance the quality of expert reports.

This guidance sets out pertinent economic and statistical concepts with practical examples as well as checklists.

Infringements of competition regulations have an impact on markets and the economy by impeding competitiveness, innovation and the creation of employment. Additionally, they can be harmful for consumers, private operators and public sector organisations.

Competition law enables individuals who have sustained damages to seek redress before court. Nevertheless, the difficulty of establishing the sum of damages in certain instances may diminish the efficacy of the claims. The CNMC's guidelines have the intention to help quantify the damages induced by competition law infringements.

These guidelines act as an answer for the commitment of the Action Plan 2023 to reinforce the competition culture along with good regulatory practices. The Advocacy Department, the Legal Department, the Economic Department and the Competition Directorate of the CNMC all contributed to the elaboration of the guidelines.

14 The FDI Implementing Regulation enters into force in Spain (Royal Decree 571/2023, of 4 July, on Foreign Investments or Regulation).

In March 2020, Spain put into place a new foreign direct investment (**FDI**) screening system applicable to non-EU/non-EFTA companies covering also some specific EU investments. The main issue with this regime was that of the excessive ambiguity of the law, which it was hoped would be tackled by an implementing Regulation, finally approved last week by Royal Decree 571/2023, of 4 July, on foreign investments (**Regulation**). The Regulation enters into force on 1 September 2023 and does not apply to FDI applications filed before 1 September.

The Regulation provides much-needed guidance in various key aspects, such as the scope of the industries covered or the concept of affected investors, including the following.

(i) Clarification of the scope and meaning of sensitive industries.

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 the target.

Industries (other than 'critical infrastructures', above) subject to prior FDI screening:

- *Critical technologies*: telecommunications, AI, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum, nuclear energy, biotechnology and nanotechnologies.
- *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.[1]

Essential inputs are those indispensable and non-replaceable for the rendering of essential services to society and the State, whose 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 databases 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 subject to compulsory evaluation of impact on personal data pursuant to Article 35.3 of EU Regulation 2016/679, on personal data protection.

(ii) **FDI screening in connection with sensitive industries that have no impact on public security.**

The Regulation states that investments in sensitive industries are not subject to FDI approval when they bear no relation, or they bear only scarce relation, to public security, health or public order.

(iii) **FDI screening in connection with industries 'ad hoc' declared as sensitive**.

The Regulation contemplates the possibility of the Government requiring authorization for foreign investments in industries not listed as sensitive (and therefore as a general rule not subject to FDI screening). In these cases, FDI approval would be required if the Government considers, by means of an express decision, that security, public health or public order may be affected, regardless of the industry.

(iv) Affected persons – nature of 'foreign investor'.

Foreign investors are those where the ultimate entity having control (under the Competition Act) is a non-EU/EFTA entity. The residence of general partners

[1] Amongst others, those benefiting 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.

(GPs) of investment entities (private equity, pension funds, etc.) is looked at for these purposes.

Foreign ownership is also deemed to exist where the foreign ultimate owner controls (individually or in concertation with others) 25% of the capital or voting rights of the investor.

In the case of investments in defence businesses, also EU investors are deemed as foreign for FDI purposes.

Qualified investors regarding which FDI authorization is required regardless of the sector of the economy where the investment takes place include *(i)* foreign State-controlled investors; *(ii)* investors having invested in sensitive sectors in other EU countries; and *(iii)* investors posing risks of illegal activities affecting public security. This provision is far too broad in the existing law and is now subject to some clarification as explained below.

- *'Sovereign funds' investments may be excluded from FDI screening.* To ascertain if a given investor is related to a foreign government for these purposes, the following criteria are to be borne in mind: *(i)* the existence of 'control' pursuant to the criteria in the Competition Act; *(ii)* control by means of significative financing or subsidies from a third country; *(iii)* in the case of investment vehicles channelling State investments, they are deemed not to be controlled by a foreign State if it flows from their governance and nature of the management that the investment policy is independent and focuses solely in the profitability of the investments without foreign State interference.

- *Investors having invested in sensitive sectors in other EU countries having potentially affected public order in another EU Member State.* To determine these, reference is made to the information received in the framework of the cooperation mechanisms in EU Regulation 2019/452.

- *Risk of foreign investors carrying out criminal activities affecting public security.* Final decisions (*i.e.*, against which no further appeal is possible) in the prior three years against the investor for criminal or administrative breaches in areas such as money laundering, environment, tax or protection of sensitive information, are to be taken into account.

(v) Exemptions.

Internal restructurings and marginal shareholding increases. The following shall not be considered direct investments: *(i)* internal restructurings within a group of companies; and *(ii)* increases in corporate shareholdings by a shareholder who already has a shareholding of more than 10% and which are not accompanied by changes in control.

Investments in the energy sector are exempted where *(i)* the 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 sensitive industries which are not regarded as critical infrastructures or defence related are exempted from FDI approval 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. This exemption would not be available to investments in electronic communications companies *(i)* holding licences for radioelectric spectrum use or using orbit-spectre resources within Spanish sovereignty; *(ii)* with significant market power any electronic communications market; or *(iii)* when the target relates to research activities and exploitation of mineral deposits of strategic raw materials.

Exceptions to FDI approval in connection with national defence. The Regulation exempts investments from prior authorization in the following cases: *(i)* investments in Spanish companies when they do not reach 5% of the share capital, provided that they do not allow the investor to form part, directly or indirectly, of its governing body; and *(ii)* acquisitions leading to holdings of 5-10% of the capital stock, provided that the investor notifies the transaction and certifies in public deed not to form part of the board of directors or governance body, nor to use, exercise or transfer to third parties its voting rights in listed companies (a suggestion that this latter requirement does not apply to privately held companies).

Transitory investments, *i.e.,* of a short duration (hours or days) in which the investor does not have capacity to influence the management of the acquired company because they are underwriters and underwriters of share issues and public offerings for sale or subscription of shares. It is the end-investors who, if necessary, require authorization.

(vi) Substantive test, competent authorities, administrative guidance, timing of approvals and others.

The substantive test is the 'preservation of security, health and public order, in accordance with Article 65 TFEU'.

Competent authorities to receive and process FDI screening applications are *(i)* the Directorate General of International Commerce and Investment of the Ministry of Industry, Commerce and Tourism (which refers the file to the Foreign Investment Board); and *(ii)* the Directorate General for Armaments at the Ministry of Defence regarding investments in defence related companies. These two Directorates also decide on the consultations submitted.

The Government (Cabinet) is responsible for deciding on the authorization, with the exception of investments below €5 million, which are decided by the Directorate General of International Commerce and Investment.

Administrative guidance. The Regulation contemplates the possibility of filing for guidance regarding whether or not a transaction must be filed for FDI screening. A response must be provided within 30 working days from filing of the consultation (*i.e.*, six weeks in the absence of official holidays). In case no response is provided within 30 working days, this is deemed as a decision that FDI approval is required.

Three-month deadline. FDI screening applications will be subject to a three-month deadline. In the absence of a decision after three months, the request for authorization is deemed rejected. Waiting periods can be stopped for instance in case of information requests.

There is an *anti-circumvention provision*, linking two acquisitions in less than two years as a single transaction.

Timing of investment. Authorised investments must be executed within six months from approval, unless an extension is obtained. Substantial variations of the investment structure must be subject to a new FDI application.

Monitoring of FDI Decisions. Is regulated in terms comparable to those under the Competition Act.

(vii) Infringements and Penalties.

Infringements include gun-jumping, in terms similar to those of merger control, including early implementation; providing false or incomplete information.

Penalties include *(i)* administrative fines ranging between €30,000 to up to the economic value of the investment; *(ii)* invalidity of the corporate or transactional agreements (*e.g.*, suspension of voting rights of shares).

15 High Court / Media agencies. The High Court has confirmed the fines imposed by the CNMC on several media agencies (Judgments of 26 October 2023, appeal number 371/2018, of 25 October 2023, appeals number 370/2018, 362/2018 and 372/2018, of 24 October 2023, appeal number 369/2018).

On 3 May 2018, the CNMC fined five companies and three managers for exchanging sensitive commercial information to allocate institutional advertising contracts (Decision of May 3, 2018, *AGENCIAS DE MEDIOS*, file S/0548/16).

The conduct took place from December 2014 to May 2016. The penalties imposed on the five companies total €7.23 million and the fines on the three managers total €190,000.

In October 2023 the High Court issued five rulings dismissing the appeals filed by Carat España, S.A.U., Inteligencia y Media, S.A., Persuade Comunicación, S.A., and a director.

The High Court states that the content of the e-mails shows that the companies and executives communicated with each other prior to the submission of bids, each of them knowing which was the bid that was going to be submitted in order to alter the competitive system in the awarding of the contracts derived from the Framework Agreement.

However, in the case of Media By Design Spain, S.A. (**Media By Design**), the CNMC found it was liable for its participation in the cartel. With regard to the fine, since Media by Design had no turnover in 2017, the CNMC could not impose a financial penalty on Media By Design. Moreover, the CNMC's Council has urged the Competition Directorate of the CNMC to investigate if the requirements demanded by the case law to appreciate the *economic unity* between Media By Design and other companies of its group, from which the responsibility of another entity for the infringement can be derived, for the purposes of initiating a sanctioning procedure.

The High Court concluded in this case that there is reasonable doubt as to the participation of Media by Design in the infringement, since the evidence described above was insufficient to formulate a rational conviction as to its responsibility in the infringement and, therefore, it upheld the appeal filed by Media By Design Spain.

16 High Court / Financial derivatives. The High Court annuls the CNMC's fine of €91 million against Santander, CaixaBank, BBVA y Sabadell for the financial derivatives cartel (Judgements of 28 December 2023, appeal numbers 197/2018, 188/2018, 201/2018 and 131/2018).

The High Court has annulled the fines imposed by the CNMC on Banco Santander S.A. (€23,900,000), Banco Bilbao Vizcaya Argentaria (BBVA) (€19,800,000), CaixaBank, S.A. (€31,800,000) and Banco de Sabadell, S.A. (€15,500,000).

The conducts sanctioned by the CNMC in its Decision of 13 February 2018, *DERIVADOS FINANCIEROS*, file S/DC/0579/16, took place in the contracting of interest rate derivatives used as risk hedging instruments for syndicated loans intended for project finance. The CNMC concluded that the four banks participated in a concerted action aimed at fixing the price, above arm's length prices, of derivatives used to hedge the interest rate risk associated with syndicated loans for project finance.

The High Court declared that the CNMC had not demonstrated the continuity of the conduct. Therefore the Hight Court declared that the conduct carried out by the four appellant entities was time-barred, which led to the nullity of the decision because there was no continuity from the date of the last accredited transaction carried out in February 2012, such that when the sanctioning

proceedings were opened in April 2016, the four-year period foreseen for the prescription of very serious infringement had already elapsed.

17 Provincial Court of Madrid / Unfair delay. The Provincial Court of Madrid debates on the concurrence of unfair delay in the exercise of its right by the plaintiff (Judgment of the Provincial Court of 21 November 2023, appeal number 173/2023)

In 1992, a company granted Repsol Comercial de Productos Petrolíferos, S.A. (**Repsol**) a right of use over its land and the service station located on that land in Orense. In turn, a private individual entered into a contract with Repsol for the transfer of the operation of that service station under an industrial lease for 25 years.

During this contractual relationship, the European Commission assessed the duration of exclusivity supply clauses (both in Regulation EC 2790/99 and in its Decision of 12 April 2016, Case COMP.38348). In turn, the Supreme Court issued two judgments in 2009 and 2015 on the possibility of a defect of supervening nullity in industrial lease contracts with exclusive supply. Further to both the European Commission and the Supreme Court's pronouncements, Repsol tried several times to contact the counterparty (individual lessee) to offer a solution, but did not received a reply.

In 2018 the contractual relationship was extinguished and four years passed without the counterparty lessee claiming anything, until in May 2022 the counterparty filed a lawsuit against Repsol requesting the declaration of ineffectiveness of the exclusivity clause and the nullity of the legal relationship they had maintained for 25 years.

At first instance, the Commercial Court partially upheld the claim. Later, the Provincial Court upheld Repsol's appeal, analyzing the undue delay in bringing the action. The Provincial Court concluded that the plaintiff, by omitting to file the lawsuit for such a long time, had created a reasonable expectation in Repsol that would have led to an abandonment of the right to claim.

18 Provincial Court of Madrid / Negative action. The Provincial Court of Madrid has upheld the lower court's decision declaring that certain agreements did not constitute an infringement of Article 1 of the LDC as they did not prevent the parties from competing in the market for children's education in the Community of Madrid (Decision of the Provincial Court of Madrid of 21 November 2023, appeal number 121/2023).

Following the death of the owner and manager of the management and operation of the Brains educational centres (nurseries and schools), through various companies, the deceased's estate was distributed among his heirs. As a consequence of this distribution, an Agreement/Protocol was signed by the heirs, where it was recognized that the deceased formed those educational centres as constituting a homogeneous, coordinated educational group, under the same principles, which each heir must respect.

The heir of the schools brought an antitrust denial action, requesting from the Court a declaration that the Protocol signed by the heirs does not prevent them from competing in the infant education market and, in the alternative, brought a declaratory action of nullity, stating that in the event that the Court considers that the signed inheritance Protocol prevents the plaintiff from competing in the aforementioned market, said Protocol should be declared null and void for infringing Article 1 of the LDC.

The Commercial Court of Madrid upheld the claim as it considered that the Protocol only contained covenants of collaboration between the heirs (schools and nurseries) and an obligation to comply with project commitments (among others, the bilingual character, the corporate image or the non-confessional character) and eligibility criteria, but no non-compete agreement was established in a clear manner. The Provincial Court of Madrid confirmed the judgment.

19 European Commission / Renfe / Abuse of dominant position. The European Commission accepts commitments by Renfe opening up competition in online rail ticketing in Spain (European Commission

Decision of 17 January 2024, case AT.40735).

In April 2023, the Commission opened a formal investigation into suspicions that Renfe may have abused its dominant position in the Spanish rail passenger transport market by refusing to provide competing ticketing platforms with the full content of its ticketing range and real-time data related to its services.

Renfe competes with other companies that provide online ticketing services to their customers through applications or websites. These third-party ticketing platforms must have access to all Renfe content in real-time, *i.e.*, data displayed on Renfe's own digital channels, in order to tailor their offers to customers' needs and compete effectively with Renfe's online distribution channels.

On a preliminary basis, the European Commission concluded that Renfe's refusal to provide its full content in real time could have prevented platforms from competing with Renfe. Therefore, in order to address the Commission's concerns, the following commitments have been adopted:

- Make all current and future content and real-time data available to third-party ticketing platforms.
- Make this data available by 29 February 2024.
- Require third-party ticketing platforms to have a maximum monthly average Look-to-Book ratio (**L2B**) of no less than either 600, 200 or 140, depending on the number of availability requests made by the platforms. L2B is the ratio between the number of availability requests related to the sale of tickets ("look") made to Renfe's ticket sales system and the number of actual sales ("book") during a given period of time. Renfe will be allowed to temporarily suspend a rival platform's access to its sales system only if it exceeds the applicable maximum L2B ratio, and this either negatively affects Renfe's sales system or immediately threatens to impede sales of Renfe's tickets. This mechanism guarantees parity between these third-party platforms and Renfe's own platforms.
- Not to exceed a maximum error rate of 4% from 2024 and a maximum monthly unviability rate of 1% from 2025. The error rate is the ratio of the number of failed booking requests to the total number of booking requests, while the availability rate refers to the level of availability of Renfe's sales systems between 6 and 23 hours.

The commitments include a non-circumvention clause whereby Renfe undertakes not to use unfair, unreasonable or discriminatory technical or commercial measures that prevent or hinder access to and distribution of Renfe's content and real-time data.

20 European Commission/Antitrust: The European Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines.

The European Commission has amended its Horizontal Block Exemption Regulations on Research and Development (**R&D**) and Specialisation agreements (**HBERs**), accompanied by revised Horizontal Guidelines,[2] after a comprehensive analysis of the current regulations. The updated HBERs and Guidelines clarify the current guidance directed towards businesses with the aim of facilitating the process of evaluating the compatibility of their horizontal cooperation agreements with EU competition rules.

The HBERs exempt R&D and specialisation agreements from the prohibition in Article 101 (1) of the TFEU contingent upon certain conditions.

As part of the amended rules, the scope of the Specialisation Block Exemption Regulation is extended in order to cover a greater range of production agreements settled by more than two parties. Furthermore, the revised regulations institute a less rigid approach in the calculation of the market shares for the objective of implementing the block

[2] Regulation 2023/1067, of 1 June 2023, on specialization agreements, OJ L143/20, 2 June; Regulation 2023/1066, of 1 June 2023, on R&D agreements, OJ L143/20, 2 June; Commission Horizontal Cooperation Guidelines 21 July 2023, OJ C 259, 21 June.

exemption. They also grant greater importance to the protection of innovation competition, particularly in circumstances where it is impossible to estimate market shares, and in such situations it is possible for the Commission and national competition authorities to remove the advantage of the exemption in individual cases.

The Introductory Chapter of the Guidelines has been revised and presently includes the latest case law on key principles such as concerted practices, possible competition, limitations by object and effect, and ancillary controls. Moreover, there is added guidance on the application of Article 101 TFEU to agreements between joint enterprises and their parent companies.

As well, a new section on Mobile Telecommunications Infrastructure Sharing Agreements which acknowledges the latest enforcement practice has been inserted in the Horizontal Guidelines on Production Agreements chapter.

The existing chapters of the Guidelines on Purchasing Agreements and Commercialisation Agreements have been expanded as well as clarified. The chapter on Purchasing Agreements outlines the difference between joint purchasing and buyer cartels, while the chapter on Commercialisation Agreements comprises a new section on bidding consortia, offering advice on the distinction with bid-rigging.

The chapter on Information Exchange have been reframed to mirror the latest case law and enforcement experience. Additionally, the Standardisation Agreements chapter has been revised to enable greater freedom with regards to the demand of open participation in the standard-setting procedure.

Finally, a new chapter covering Sustainability Agreements has been added to the Horizontal Guidelines to shed light on the antitrust rules which do not obstruct agreements between competitors that wish to attain a sustainable outcome. This guidance is formed on the base of the UN's Sustainable Development Goals and grants a safe harbour for sustainability agreements.

21 European Court of Justice / Abuse of dominant position. The attribution of distributors' behaviour to the supplier, and the presence of contractual provisions that establish exclusivity in distribution agreements (Judgement of 19 January 2023, case C-680/20).

On 19 January 2023, the Court of Justice of the European Union (**CJEU**), held a ruling in the case *Unilever Italia*. Unilever, a manufacturer and marketer of consumer goods including ice creams, was accused of abusing its dominant position in the market for individual ice creams sold for consumption at leisure locations in Italy. It was found to have imposed exclusivity clauses on distributors, which obstructed competitors' growth. These clauses required operators of sale points to exclusively purchase ice creams from Unilever, while receiving discounts and commissions. These incentives aimed to persuade them to continue buying exclusively from Unilever, discouraging them from buying from competitors. For these reasons, the Italian Competition Authory (**AGCM**), fined €60 on Unilever.

Unilever appealed the AGCM's decision and the action was dismissed in its entirety by the court of first instance. Unilever lodged a second appeal before the Consiglio di Stato (Council of State), which issued a request for a preliminary ruling to the CJEU to clarify if the coordination between formally independent economic operators can be considered a single decision centre where the actions of one can be attributed to the other. In its judgement, the CJEU sets out detailed rules for the implementation of Article 102 TFEU in relation to a dominant undertaking whose distribution network is organised exclusively on a contractual basis and the CJEU clarifies, in that context, the burden of proof borne by the national competition authority.

First, the CJEU explains that a dominant undertaking may be held solely liable for the conduct of its distributors "*if it transpires that it was adopted in accordance with the specific instructions given by that undertaking and therefore as part of the implementation of a policy that was decided unilaterally by that*

undertaking and with which the relevant distributors were required to comply."

Moreover, the court added that this situation is especially true when the conduct "*takes the form of standard contracts, drawn up entirely by a producer in a dominant position and containing exclusivity clauses for the benefit of its products which the distributors of that producer are required to have signed by the operators of sales outlets without being able to amend them, unless that producer expressly agrees.*"

With regards to the second preliminary question, the CJEU ruled that competition authorities must consider economic arguments showing no likelihood of foreclosure when determining if a conduct is abusive under Article 102 TFEU. In cases of exclusivity clauses, the competition authority must analyse "*first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market*" Here, the Court followed an approach comparable to that in the *Intel* case.[3]

Additionally, the court emphasised that the goal of Article 102 TFEU is not to ensure less efficient competitors remain on the market, and authorities must consider evidence presented by the dominant undertaking itself. The 'as efficient competitor' test is one method of determining whether a practice is exclusionary, but it may not be suitable for non-pricing practices such as refusal to supply. However, competition authorities must consider evidence based on this test before ruling it out.

As a conclusion, the CJEU's approach to attributing liability departs from previous cases, and the burden is on the Competition Authority to prove exclusionary effects of exclusivity clauses. The use of the "as efficient competitor" test is not obligatory, but authorities must evaluate its probative value if submitted by a dominant undertaking.

22 In-depth: European Court of Justice / An Initial Analysis of the Court of Justice Judgment on the 'Super League' dispute (case C-333/21).

1. Background to the Dispute.

On 21 December 2023 the Court of Justice of the EU (**CJEU**) issued its Judgement in the famous (or infamous, depending on whom you ask) Super League related dispute. The Judgment is issued in response to a request for a preliminary ruling by a Spanish court on the legality of the restrictions inherent to the existing organization in the world of football competition.

The case can be traced back at least to April 2021 when twelve European football clubs[4] signed a framework agreement to form the European Super League. The Super League was announced as a major European football tournament in competition with the UEFA Champions League. According to the Real Madrid president and one of the main sponsors of Super League, the Super League was essential for the continuity of football, since it would allow a significant increase in revenues for the whole business.[5] Indeed, there has been a perception shared by at least some football actors in Spain that football competition as it stands currently has been losing attractive for spectators generally for quite some time and that a Super League competition would reawaken commercial interest. This view has been opposed by countless aficionados and spectators throughout Europe, as well as national

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[3] Judgement of the European Court of Justice of 6 September 2017, case C-413/14 P.

[4] AC Milan, Atlético de Madrid, Arsenal, Chelsea, FC Barcelona, Internazionale Milano, Juventus FC, Liverpool FC, Manchester City FC, Manchester United FC, Real Madrid CF and Tottenham Hotspur. Most clubs withdrew from the project under considerable media and political pressure, with the notable exceptions of Real Madrid and Barcelona.

[5] https://english.elpais.com/usa/2021-04-21/real-madrid-president-we-are-creating-a-european-super-league-to-save-soccer-the-situation-is-dire.html

governments, who have sided together against the Super League.

FIFA and UEFA governance rules subject alternative competitions arranged by UEFA and FIFA members to prior authorization. In the absence of such prior authorization to the Super League, the governing bodies took action against the Super League members under threat of exclusion from FIFA, UEFA and national competitions (organized under the national federations who, in turn, are member federations of UEFA). One of the first steps of the Super League was to file a lawsuit against UEFA and FIFA (for breach of Articles 101 and 102 TFEU), and a request for interim relief, which were granted few days after, ordering UEFA and FIFA to refrain from any measures preventing the development of the Super League.[6]

The national court referred to the CJEU several questions on whether the course of conduct adopted by UEFA and FIFA is contrary to Articles 101 and 102 TFEU, and whether those same activities would unlawfully restrict Articles 45, 49, 56 and/or 63 TFEU. The counts of conduct connected with the request for a preliminary ruling included in particular *(i)* the need for prior authorisation by UEFA and FIFA (to participate in UEFA and FIFA competitions) to clubs wishing to (simultaneously) organize alternative competitions, given the lack of an objective, transparent and non-discriminatory procedure for approval, including the related power to open disciplinary proceedings against Super League clubs and players; and *(ii)* the assumption by UEFA and FIFA of the original rights of the competitions, depriving the clubs of such ownership and the derived marketing rights.

The root of the dispute lies in the refusal of FIFA and UEFA to allow the Super League's sponsoring clubs to participate in FIFA and UEFA competitions. For the Super League, the dispute is about an attempt by UEFA and FIFA to preserve their monopoly in the organization and management of football competitions by trying to exclude competition from a new product such as the Super League. For UEFA and FIFA, on the contrary, this is a matter of protecting the European football model and its values, in the face of an entity such as the Super League, which is focused on profit and is capable of threatening the aforementioned sporting model.

2. The Conclusions of the Advocate General Rantos of 15 December 2022.

Advocate General Rantos issued his Conclusions a year ago (15 December 2022). In essence, the Advocate General sided with the arguments put forward by the existing sports model incumbents, UEFA, FIFA, national federations and Member States. The starting point of the debate concerns the existence of certain sporting values which could provide a legitimate justification for the alleged restrictions on free competition by UEFA and FIFA. According to the Advocate General, Article 165 TFEU would recognize the existence of such a European sports model endowed with a number of values such as solidarity, openness or equality of opportunity. The Advocate General refers to UEFA’s conflict of interest recalling that the fact that an entity such as UEFA simultaneously regulates professional football and organizes competitions is not illegal *per se* (a view which is shared by the Court as depicted below). In this line, UEFA's refusal to allow the clubs promoting the Super League to participate in UEFA competitions (national Leagues, Champion’s League) was justified according to the Advocate General precisely by the need to safeguard the legitimate objectives deriving from the safeguarding of the values of the football competition referred to above.

3. The Judgment.

The Judgment has been issued on 21 December 2023. The Judgement does not question the position (*i.e.*, monopoly or quasi regulatory position) of the governing bodies UEFA and FIFA as a general matter, as under

[6] One year later, after hearing the parties in connection with the interim relief, the first instance court lifted the injunction, on the grounds that there was no evidence that the threat of sanctions by UEFA and FIFA could derail the Super League project (which had independent financing). However, in January 2023 the Provincial Court of Madrid upheld the appeal of the Super League, reinstating the injunction.

Article 102 TFEU generally a dominant position is not as such illegal – only its abuse. As we know, in some instances in the case law of Article 106 TFEU in connection with Article 102, the mere granting of a monopoly position by the State in circumstances where the beneficiary company is bound to abuse that position, might be questionable. The Super League case is not an Article 106 TFEU case, so the acquisition of a monopoly position is as such not discussed. Article 106 TFEU somewhat surprisingly does turn out in the Judgment though, to enable the Court to draw some noteworthy analogy, as noted below.

The Court acknowledges (at point 142) that *associations which are responsible for a sporting discipline, such as FIFA and UEFA, are able to adopt, implement and ensure compliance with rules relating not only generally to the organization and conduct of international competitions in that discipline, in this case professional football, but also, more specifically, prior approval and participation by professional football clubs and players therein.*

The Court emphasizes that it is the manner in which the organization powers are wielded that may breach Article 102 TFEU. Indeed, illegality lies in arbitrary exercise of power. In order for the adoption and implementation of prior approval powers to be compatible with competition law, such powers must be subject to a framework of substantive criteria and detailed procedural rules ensuring the powers are transparent, objective, precise and non-discriminatory (point 147 of the Judgment, *a contrario*). Such rules must also be known beforehand to interested parties.

Furthermore, the Court does not generally or in a *per se* manner criticize that the powers of organizing the sports competition and authorizing participation are vested simultaneously on the same organization (points 141 and following). Clearly, the Court does not seem enthusiastic on intervening judicially in a rather radical manner to separate structurally along the lines of different roles of governing bodies. This is an important point in that there may have been some expectation from the claimants that UEFA and FIFA should be broken in separate entities performing separate roles. Drawing some analogy with network industries, vertical disintegration, unbundling etc., are matters which seem best suited to legislation and regulatory design, not administrative or judicial action (though as we know such measures are legally possible if proportionate, for instance under Article 7 EU Regulation 1/2003).

Therefore, while generally accepting that UEFA and FIFA's powers are not *per se* forbidden, the Court subjects them to strict requirements; and the Court goes further than the Advocate General's Conclusions by (surprisingly) inserting some criticism of UEFA and FIFA's past conduct, going beyond merely setting out general legal principles as one would generally expect in a preliminary ruling context. Hence, the Judgement considers that in the actual (and narrow) facts of the underlying dispute, there was no prior procedure in place attached to the proportionality, non-discrimination etc. principles required to consider the authorization regime compliant with EU competition law.

The Judgement makes an interesting parallel with Article 106 TFEU, a provision which is not applicable to the dispute because no act of the State is at the source of UEFA/FIFA's monopoly – yet, the parallel with that case law is clear in an economic sense because UEFA and FIFA have monopoly power to authorize access to market of competing entities or competitions such as the Super League. This is a power akin to an exclusive right under Article 106.1 TFEU – though again such provision does not apply because the powers do not stem from acts of the State. The Court stresses that (even if the Article 106 TFEU case law does not apply) the principles are the same, so that a monopolist cannot be in a position to ban access to a market where it is present unless subject to procedures preventing arbitrary exclusion or discrimination (points 132 and following).

The parallel with Article 106 TFEU is also interesting because there are some resemblances (not mentioned either in the Conclusions or in the Judgment, but raised, for instance, in the oral hearing) also with Article 106.2 TFEU case law, where competition restrictions can be justified in order to

preserve financial or other equilibriums necessary for the preservation of goals of general interest (services of general economic interest). In the world of football these could be the values sought by Article 165 TFEU, but also the system of cross-subsidies established which trickles down to grassroots football amongst others.

The rationale for the Court's application of Articles 101.1 TFEU is similar: FIFA and UEFA's authorization powers must be regarded as a restriction by object (so no effects analysis required) *where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate* (point 178). Conversely, it can be inferred from that part of the Judgment that if there is a regulatory (in this case, self-regulatory) framework of criteria and procedural rules ensuring transparency etc., that would still be a restriction, though not by object, so the effects-based criteria should in that case be analyzed.

If the requirements under Article TFEU 101.1 are met, the application of the *(i)* legitimate justification exceptions (not applicable to the case as the requirements for ancillary character are not met) and *(ii)* Article 101.3 TFEU/objective justification in an Article 102 TFEU context, should be explored; subject to evidencing the requirements of such provisions and applicable case law, a matter for the national court.

The Judgment also appears to open the door to questioning the existing systems of centralized sales of media rights related to football events, though the Court itself suggests that such centralized system may well be justified in terms of efficiency gains and fairness (points 234 and following). On balance, the centralized system of marketing in countries such as Spain is the result of a 'competition law' evolution: in Spain there was a wide antitrust investigation around football media sports event rights earlier in the century where media platforms as well as football clubs and their commercialization arrangements were aimed. The result was an antitrust decision by the Spanish Competition Authority narrowing the duration of long-term exclusivity agreements and, ultimately, a regulatory intervention by the government to put in place a centralized system. This means that, arguably, the existing centralized system should be considered a lesser evil in view of the pre-existing network of arrangements (declared contrary to competition). Of course the existing centralized system is the result of national laws (in that case a 2015 government Royal Decree later confirmed by Parliament), which must be compliant with EU law under the principle of primacy (and are therefore potentially subject to criticism under EU law, though for the reasons stated such national laws are the result of a 'pro-competition' evolution).

The Judgement does not dwell on the merit or demerit of the Super League and, foremost, is limited to answering questions posed in the context of particular facts at the particular time where the lawsuit was filed before the referring national court. The facts are likely to have evolved as it is understood that UEFA, for instance, has also evolved its authorization procedures.

However, it is far from true (as the claimants in the Super League litigation have rushed to state on the date of the Judgement) that the Judgment has ended FIFA or UEFA's monopoly. The Judgment has expressly opted out for not breaking or dividing the organization and management roles of the governing bodies; and the position of monopoly or dominance is a matter of fact, not law, and is therefore untouched by the Judgment. If anything, the Judgment has issued some guidelines to tame or limit the arbitrary use of economic power, along lines which are at the moment rather vague and will have to be specified in time, potentially leading to more litigation.

In conclusion, Super League members would still require authorization from FIFA, UEFA and the national associations to which they belong to participate in UEFA/FIFA competitions (if they wish to do so simultaneously to the Super League) – provided of course FIFA/UEFA's authorization powers are designed in compliance with the principles set out in the Judgement to guarantee competition. In this regard, press sources indicate that the Super

League management company is now seeking a revamped Super League which varies from the initial close competition presented at the outbreak of the current litigation and which would encompass 64 participating clubs with three different categories of clubs, promotions, relegations, a feminine Super League etc.[7] From a factual perspective, it remains to be seen whether there is appetite for such a competition and (as pointed out) whether such a system can be reconciled with the existing competitions or can be authorized under any (revamped) rules.

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[7] https://www.relevo.com/futbol/superliga-formato-20231221122557-nt.html