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01 Representative CNMC merger decisions, February 2024 – May 2024.

Firms	Notification threshold	Economic sector	Decision
GRUPO EHR / MOSCOSO	Market share	Production of electric power	Phase I clearance (14 February)
SINTOKOGIO / WINOA	Market share	Manufacture of other non-metallic mineral products	Phase I clearance (14 February)
GRUPO TRINITY – BEAUTY BY DIA - CLAREL	Market share	Retail sale of cosmetic and hygiene products in specialized stores	Phase I clearance (14 February)
COMITANS / RHEINMETALL COMITANS / RHEINMETALL – NEGOCIO DE PISTONES DE PEQUEÑO CALIBRE -	Market share	Manufacture of other components, parts and accessories for motor vehicles	Phase I clearance (14 February)
HAIYIGKANG – QINGDAO - / SRAAS	Market share	Manufacture of pharmaceutical specialties	Phase I clearance (14 February)
BSC / ACTIVOS B. BRAUN	Market share	Manufacture of medical and dental instruments and supplies	Phase I clearance with commitments (21 February)
JCDECAUX ESPAÑA / CLEARCHANNEL ESPAÑA	Market share	Advertising	Agreement to initiate Phase II (21 February)

PORTOBELLO / GRUPO PLEXUS / PLEXUS TECNOLOGIAS	Turnover	Technical engineering services and other activities related to technical consultancy	Phase I clearance (21 February)
LUXAVIATION PARTICIPATIONS – ACA HOLDING / SKY VALET SPAIN	Market share	Activities incidental to air transport	Phase I clearance (4 March)
GLOBAL ZUJAR – A. PEREZ / GLOBAL VERLONA	Turnover	Storage and warehousing	Phase I clearance (4 March)
GLACIER / GRUPO ALACANT	Market share	Manufacture of dairy products	Phase I clearance (4 March)
LUXIDA / LUZ ELÉCTRICA LOS MOLARES	Market share	Distribution of electric power	Phase I clearance (13 March)
MEMORA / TANATORIO LA SOLEDAD - ACTIVOS-	Market share	Funeral activities	Phase I clearance (13 March)
EASYPARK / MOBILITY 1 SAS	Market share	Manufacture of instruments and apparatus for measuring, testing and navigating	Phase I clearance (13 March)
QSI / WPT	Market share	Sports activities	Phase I clearance (20 March)
BASIC IFIT / RSG SPAIN	Market share	Gym activities	Phase I clearance (20 March)
TENSILE / PORTOBELLO / PLENOIL	Turnover	Electricity trading	Phase I clearance (20 March)
ASV FUNESER / LA RONDEÑA	Not disclosed	Funeral activities	Phase I clearance (20 March)
HOSPITALES COSAGA – CENTRO MÉDICO EL CARMEN	Market share	Health activities	Phase I clearance with commitments (3 April)
FREMMAN-LUNGOVEST / HEALTH TIME	Market share	Other health activities	Phase I clearance (3 April)
INDIGO / PARLIA	Market share	Activities incidental to land transport	Phase I clearance (17 April)
UVESCO / SUPERHIBER	Not disclosed	Retail trade in non-specialized establishments, with a predominance of food, beverages and tobacco products	Phase I clearance (17 April)
CAPSA / FLOR DE BURGOS	Turnover	Cheese production	Phase I clearance (17 April)
CONTROLAUTO / REVESA	Market share	Technical testing and analysis	Phase I clearance (17 April)
GENERALIFE / GINEMED	Market share	Specialized medical activities	Phase I clearance (30 April)
SENER / SCR	Not disclosed	Aeronautical and space construction and its machinery	Phase I clearance (30 April)

02 Merger control / Endoscopy vacuum therapy. The CNMC approves with commitments the acquisition of medical assets of the B. Braun Group by BSC (Decision of 21 February 2024, *BSC/ACTIVOS BRAUN*, file C/1421/23).

The Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia*, **CNMC**) has approved the acquisition of endoscopy vacuum therapy (**EVT**) assets of the B. Braun Group by Boston Scientific Corporation (**BSC**). In particular, BSC has acquired the following products manufactured by B. Braun: Endo-Sponge, Eso-Sponge and Endo-Sponge Fistula, along with their respective spare parts and accessories. Specifically, these products are used to treat anastomotic leaks and perforations in the upper gastrointestinal tract and colorectal area.

The acquisition of these assets affects the market for the development, manufacture and commercialization of endoscopy vacuum therapy medical devices.

According to the Decision, the transaction did not give rise to overlaps of any kind, however, there were risks of portfolio effects rooted on certain bundling practices in the purchase of endoscopy devices by public and private hospitals. These could amount to a barrier to entry and expansion for competitors.

The merger was approved subject to commitments on BSC for five years including a restriction not to link the public/private procurement of EVT products with that of other endoscopy devices in its portfolio, so BSC cannot participate in tenders in which it must submit bundled bids.

03 Merger control / Hospitals. The CNMC approves the acquisition of Centro Medico El Carmen y Hospitales Cosaga subject to commitments (Decision of 3 April 2024, *HOSPITALES COSAGA-CENTRO MÉDICO EL CARMEN*, file C/1438/24).

On 3 April 2024, the CNMC has granted phase I conditional clearance for the acquisition of Centro Médico El Carmen by Hospitales Cosaga (Recoletas Group) (**Cosaga**) in Orense. This transaction affected the following markets: *(i)* private provision of healthcare to private patients (in-and-out patients); *(ii)* private provision of healthcare to public referrals (in-and-out patients); and *(iii)* rental or leasing of in-patient facilities.

Post-transaction, Cosaga is the sole provider of in-patient healthcare services in Orense. The following competitive issues were identified: *(i)* deterioration of the quality of services (including a potential reduction in specialties and specialists); *(ii)* price increases; and *(iii)* access issues to in-patient facilities (operating rooms) by other competitors.

Cosaga offered a series of commitments that the CNMC considered sufficient to mitigate its competitive concerns:

- Quality assurance in healthcare services. Cosaga has committed to implement general and specific quality indicators, and to maintain the current quality certificates and maintain the existing relationship with medical professionals, guarantee their access to healthcare facilities, and invest in healthcare improvements over the next three years. Also, Cosaga committed to maintain the current global portfolio of services and medical staff under the existing quality levels.

- Price monitoring. Cosaga will report annually on the evolution of prices.

- Rental of hospital facilities to third parties. Cosaga commits to maintaining legal relationships with healthcare professionals already providing services in its hospitals.

04 Merger control / Padel. The CNMC clears conditionally the purchase of World Padel Tour by Qatar Sports Investments (Decision of 20 March 2024, *QSI/WPT*, file C/1430/23).

The transaction affects the market for the holding of exploitation rights of professional paddle tennis competitions. Both World Padel Tour (**WPT**) and Qatar Sports Investments (**QSI**) are two of the most relevant national and international professional padel circuits. The merger seeks to bring them both into a single tournament, called Premier Padel.

During the investigation, the CNMC conducted a market test with promoters, sponsors, sporting event broadcasting networks and players to see how they could be affected by the merger. In general, stakeholders did not oppose the merger,

although as a result thereof QSI would have a privileged position in deciding the conditions of participation of players. Therefore, the CNMC considered the following commitments proposed by QSI to be appropriate:

- Players will be able to participate in tournaments of the Premier Padel circuit in Spain without the need to sign an agreement or to be affiliated to any association.
- No exclusivity clauses will be applied to players for tournaments in Spain, regardless of whether they have signed contracts with Premier Padel or are affiliated to any association.
- In case of adherence to Premier Padel agreements, the conditions currently provided for tournaments held in Spain shall apply.
- Accordingly, other existing contracts will cease to apply when the transaction closes and will not be resumed in the future.
- QSI will inform the CNMC, for validation, if it adopts a new framework agreement or modifies the current conditions.
- Last, the commitments will last for three years, with the possibility of extending for two additional years.

05 Merger control / Gun-jumping. The CNMC fines PE firm KKR for Gun-Jumping (Decision of 1 April 2024, *KKR GENERALIFE*, file SNC/DC/077/23).

On 1 April 2024, the CNMC has fined KKR company KKR Génesis Bidco, S.L.U. (**KKR**) for implementing a transaction subject to merger control.[1]

Back in January 2022, KKR acquired sole control of Generalife Clinics (**Generalife**), one of the largest groups of fertility clinics in Europe. In August 2022 KKR notified to the CNMC the acquisition of IVI, a competitor of Generalife, for merger control approval (ultimately cleared subject to conditions). In the context of notification of the IVI acquisition, the CNMC detected that the acquisition of Generalife had met the market share notification threshold established in the Competition Act[2] in certain reproductive healthcare services markets in Seville and Madrid. On that basis, in July 2023 the CNMC directed KKR to notify the acquisition, which was cleared in phase I without conditions.

According to the CNMC's gun-jumping decision (**Decision**), KKR argued in the investigation that its conclusion on reportability of the transaction was based on the data provided by the seller of Generalife. The CNMC dismissed such line of defence, concluding that KKR was negligent in not verifying the market share estimates provided by the seller, or carrying out its own estimates. In addition, as is usually the case in gun-jumping decisions, the Decision highlights that in case of doubt it is possible to apply for formal guidance from the CNMC on the reportability of a transaction (in this matter the CNMC also cites for authority the Judgment of the CJEU *Altice Group*, case C-746/21-P).

During the investigation KKR admitted its liability and proceeded to pay the fine in accordance with Article 85 of the Administrative Procedure Act. According to the said provision, the recognition of liability and early payment of fines can reduce the amount of the fine. Thus, the CNMC decided to apply a 40% reduction to the amount of the proposed sanction of € 1,138,870, leaving a total fine of € 683,322 euros.

Comment and takeaways.

The fine imposed to KKR is another indication that the CNMC is intensifying enforcement against gun-jumping with higher fines which (however) are still well below the legal maximum of 5% of global turnover of the infringer.

The existence of market share threshold compels buyers to carry out a careful analysis, which can be far more difficult than the turnover threshold assessment that is mostly common. First, the relevant markets should be defined. Second, the acquirer needs to check if the market share threshold is met. In the absence of publicly available information (such as market studies),

[1] Decision of 1 April 2024, *KKR / GENERALIFE*, file SNC/DC/077/23.

[2] Pursuant to the Spanish merger control thresholds, a transaction should be notified if either (a) the combined annual turnover the parties exceeds €240 million in Spain, and at least two parties realize individually more that €60 million in Spain; or (b) a 30% market share is reached in a relevant market in Spain or within Spain (or 50% if the target's Spanish turnover is below €10 million).

in most cases the market share estimates are provided by the seller/target.

The need to manage the market share threshold intelligently cannot be underestimated, particularly bearing in mind that gun-jumping cases in Spain usually take place for ignoring the market share threshold. The Decision highlights the importance of double-checking market share estimates when deciding not to notify a transaction, if possible, by carrying out an independent assessment. If the only available source of information is the seller, then the buyer should consider asking for the necessary safeguards to be included in the transaction agreement. In addition, the Decision encourages buyers to ask for the views of the CNMC on reportability, although often such action is impractical and time consuming.

06 Sanctions / Failure to comply with commitments. The CNMC sanctions Naviera Armas for failing to comply with the commitments to which the *NAVIERA ARMAS/TRANSMEDITERRANEA* merger was subject to in 2018 (Decision of 20 March 2024, *NAVIERA ARMAS/TRANSMEDITERRANEA*, file SNC/DC/083/23).

In 2018, the CNMC approved conditionally the purchase of Compañía Transmediterránea, S.A. by Bahia de las Isletas, S.L. parent company of the Naviera Armas group (Decision of May 22, 2018, *NAVIERA ARMAS/TRANSMEDITERRANEA*, file C/0922/18).

To comply with the merger conditions, Naviera Armas entered into a charter agreement with Förde Reedereu Steetouristik Iberia, S.L.U. (**FRS**) for the provision of maritime transport services of cargo, passengers and vehicles under its own brand on the Huelva-Canarias line, so that Naviera Armas would cease to operate such line.

The CNMC received a letter from Fred Olsen denouncing that Naviera Armas was commercializing the insular sections of the Huelva-Canary Islands route with the vessel Volcán del Teide, while FRS only commercialized the routes that had origin or final destination in Huelva. This breached the merger conditions, so the CNMC opened a proceedings against Naviera Armas, and declared the infringement of a very serious infringement.

The CNMC proposed a fine of €750,000. Naviera Armas submitted a document in which: *(i)* it acknowledges its responsibility for the commission of the alleged infringement; *(ii)* it undertakes to pay the proposed sanction before the issuance of the sanctioning resolution; and *(iii)* it waives any administrative appeal action. Pursuant to the applicable administrative procedure rules, the acknowledgment of liability and prompt payment of fines may reduce their amount. The CNMC applied a 60% reduction and so the fine was reduced to €450,000.

07 Public consultation on cloud services markets.

The CNMC has opened a consultation on the functioning of cloud services (here), which is of great importance in Spain due to the relevance of the digital economy and high percentage of companies that use them. The consultation is open until 21 June 2024.

08 Judicial activity / Damages. First claims for damages against the Association of Basketball Clubs (Judgment of the Commercial Court nº10 of Barcelona of 7 December 2023, appeal number 1628/2019).

By a Decision of 11 April 2017, *ACB*, file S/DC/0558/15, the CNMC fined the Association of Basketball Clubs (**ACB**) €400.000 for an infringement of Article 1 of Law 15/2007, of July 3, 2007, on the Defense of Competition (**LDC**) for conduct consisting of adopting agreements that impose disproportionate, inequitable and discriminatory conditions with respect to basketball clubs entitled to be promoted from the LEB ORO League to the ACB League for sporting merits, and that have not previously been members of the ACB.

First, the ACB established the "canon ACB" (a registration fee), a mechanism that retained in part the future revenues of the teams; according to the CNMC, the "canon ACB" is disproportionate, as it is higher than the average annual revenues of any ACB member. Second, the ACB created a relegation and promotion fund (*Fondo de Ascensos y Descensos* or **FRAD**). Participating teams were required to contribute to the FRAD to compensate for the economic loss caused by relegation from the ACB to a lower division. Finally, the CNMC considered that these conditions have prevented

the promotion of several clubs to the ACB League and have distorted the ability of the promoted clubs to compete. Both the High Court and the Supreme Court have confirmed the CNMC's decision.

The team BÀSQUET CLUB ANDORRA, S.A. filed a claim for damages before the Commercial Court No. 10 of Barcelona requesting a compensation of €1,181,036.10. This amount was calculated on the basis of the consequential damage suffered by the plaintiff, plus the legal interest on said amount. The Court fully upheld the claim of the basketball team, and ordered the ACB to pay the costs.

09 Draft Law on Collective claims in Spain.

Last 12 March 2024 the Council of Ministers approved the Draft law on measures regarding the efficiency of public justice, which includes the much expected regulation of collective actions for the protection of consumers. The Draft law seeks to implement EU Directive 2020/2018 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of collective and consumer interests.

Only claims by consumers are covered, excluding claims by harmed companies. The Draft considers the *opt-out* system, *i.e.*, affected consumers are represented by the collective action unless they expressly opt-out. Not surprisingly, this opt-out regime is being strongly contested by industry at this preparatory phase.

Qualified entities are independent consumer associations meeting the requirements set out by the Consumer Protection Act, including at least a 12-month track record defending consumers. The legitimation of the consumer association can be questioned at the certification phase.

The stages foreseen for the judicial process applicable to compensatory class actions include the following:

- In the complaint, the claimant entity must refer to: *(i)* the conduct from which the damage has been derived; *(ii)* consumers and users affected by the collective action; *(iii)* causal link between the conduct and the damage; *(iv)* the existence of homogeneity amongst claims; *(v)* damages sought; and *(vi)* disclosure of the sources of financing of the legal action.

- The second step is the certification hearing, which purpose is to establish whether the class action is appropriate and its scope.

- In the certification Order, the Court determines the infringing conduct to which the class action is to be limited. Likewise, the Court will also determine the consumers affected. In the event that individualized identification is not possible, the Court will establish the characteristics and requirements that must be met to fall within the class.

  Likewise, the Court will establish the manner and time limit within which the affected consumers can opt-out. Exceptionally, the Court may decide that only those consumers who have expressed their will to be bound by the class action shall be affected by it when it is necessary for a better administration of justice, provided that the amount claimed or the value of the benefit requested for compensation for each beneficiary does not exceed € 3,000.

- Third party financing will be rejected by the Court if there is a conflict of interest. A conflict of interest is deemed to exist when the defendant is a competitor of the funder or a business from whom the funder is dependent.

  If the Court finds that a conflict exists, it shall require the claimant to waive or modify the financing within no more than a month. The Court may also ask the claimant to produce the financing agreement.

10 European Commission activity / Antitrust in Labor Markets (2 May 2024).

The European Commission has published a new policy brief on Antitrust in Labor Markets, available here.

The brief focuses on the enforcement against restrictive labor market agreements, particularly wage-fixing and non-poaching agreements, which have become a hot-topic in international competition enforcement. Wage-fixing agreements limit wage and benefits competition between employers. Non-poaching agreements prevent employers from hiring or soliciting each other's employees (these can take forms such as

non-hire agreements and non-solicit agreements).

As the European Commission points out, wage-fixing and non-poaching agreements typically qualify as restrictions by object under Article 101(1) TFEU and are subject to scrutiny due to their potential to harm the competitive process by artificially depressing wages and restricting labor mobility. The Commission also stresses that such agreements harm employees by suppressing wages and benefits and reduce labor market dynamism, which can dampen productivity and innovation. Despite potential arguments for their legality based on economic efficiencies or protection of investments (e.g., training costs), these agreements rarely meet the strict criteria required for exceptions under EU competition law, such as being indispensable and proportionate to a legitimate aim. Such agreements are also unlikely to qualify as ancillary restraints or be exempted under Article 101(3) TFEU, as any pro-competitive effects are typically overshadowed by their restrictive nature.

Regarding future implications for enforcement, the policy brief underscores the need for rigorous enforcement and consistent application of competition laws across EU Member States, facilitated by coordination within the European Competition Network (most of cases are likely to be dealt with by National Competition Authorities due to the geographic scope of the agreements).

The policy brief suggests that less restrictive means (*e.g.*, non-disclosure agreements, specific non-compete clauses, or gardening leaves) can be used to achieve legitimate business objectives without unduly harming competition.

The best example of the increased interest in anticompetitive agreements in the realm of labor markets comes from the US. Back in 2016, the DOJ and the FTC issued a joint antitrust guidance addressed to employers, alerting that the DOJ could bring a criminal prosecution against individuals, the company, or both in connection with non-poaching and wage-fixing agreements (see here). Now Europe is following suit in an area that is unlikely to go overlooked.

11 Court of Justice of the European Union. Limitations to the administrative powers of the European Commission in connection with information requests (Order of the Vice-President of the Court of 11 April 2024, *Lagardère SA v. European Commission*, case C-89/24).

This matter refers to the potential clash between requests for information (**RFIs**) in administrative investigations and criminal laws related to personal data protection. The rationale of the case likely applies not only to European Commission RFIs in competition matters, but beyond that to regulatory and competition investigations, also by NCAs. The dispute stems from a Commission Decision notifying a RFI under the EU Merger Regulation 139/2004 (**EUMR**) in connection with the merger Decision in the *Vivendi/Lagardère* case. Lagardère filed an action for annulment of the decision and applied for interim measures against the execution of the RFI Decision. The President of the General Court dismissed the application for interim relief on the grounds that Lagardère had not established the condition of urgency: the damage resulting from the risk of a breach of the privacy of Lagardère's employees and company officers and, in particular, the ensuing risk of criminal sanctions against Lagardère had not been proved.

The Court considers that the appealed Order had unduly distorted the application for interim relief, as the risk of criminal penalties against Lagardère was sufficiently clear, given that Lagardère would be compelled to commit a criminal offence by intervening private communications. It was the commission of such criminal offences that rendered Lagardère criminally liable, independently of any subsequent legal process to prosecute such criminal activity.

In particular, amongst other things, *the contested decision requires Lagardère to collect all the interactions conducted by various means of communication over a period of several years between a number of natural persons and certain interactions between other natural persons, then to communicate the information collected to the Commission. […]* [T]*hat obligation extends inter alia to interactions through private or personal email boxes and private or personal mobile devices of the employees and company officers concerned, provided those email boxes and devices have been used at least once for business communications*.

Lagardère would have to access employees' communications even if French law does not confer explicit powers to do so; and Lagardère

claimed, without having been contradicted on point, that it was not able to obtain the consent of the persons concerned.

Furthermore, the Order acknowledges the serious harm around the stigma attached to a criminal conviction and the breach of the bond of trust with company officers and employees.

12 Community Legislation: EU Regulation 2024/1309 of the EP and Council of 29 April 2024 on measures to reduce the cost of deploying gigabit electronic communications networks (OJ L 2024/1309, 8 May 2024).

The purpose of this Regulation is to *facilitate and stimulate the roll-out of very high capacity networks ('VHCNs') by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out faster and at a lower cost.*

All network operators (telecom, gas, electricity, heating, water, railways, ports, airports) and public sector bodies owning or controlling physical infrastructure are bound by this Regulation. The Regulation establishes a common framework of minimum standards that cannot be worsened by Member States. In essence, the Regulation provides for:

- Operators' access to minimum information detailed in the Regulation regarding existing physical infrastructure, accessible in electronic format through a single information point.
- Strict deadlines are regulated for mandated access to information in FRAND terms.
- A general duty to provide access to physical infrastructure under FRAND terms and conditions, including price,
- The economic criteria to take into consideration prior to setting a reasonable access price.
- The key features to acknowledge that a refusal to grant access might not be in breach of the Regulation.
- Exemption from being subject to mandated access in circumstances where access obligations may already be in place regarding telecom network operators under the applicable telecommunications regulations.
- Civil works coordination, includes a procedure for the coordination of works, regulating situations entailing abusive requests; works of minor importance that do not require coordination; civil works cost apportionment.
- Transparency of works required to coordinate civil works including geolocation, infrastructure elements involved, dates of execution etc. all of which shall be made available by relevant network operators and public sector bodies.
- Regarding permits for the deployment of any element of VHCNs and associated facilities, a mandated procedure is established for operator applications and refusal or granting of permits within regulated timeframes which as a general rule cannot exceed four months from application. In case of no decision in the regulated timeframe applications are deemed granted as a general rule.
- A number of mandated infrastructure features are included regarding projected buildings. For instance, all newly constructed buildings and buildings undergoing major renovation works, including elements under joint ownership, for which applications for building permits have been submitted after 12 February 2026, shall be equipped with a fibre-ready in-building physical infrastructure and in-building fibre wiring, including connections up to the physical point where the end user connects to the public network.
- Member States must approve penalties and designate national bodies that will adjudicate in the event of disputes regarding the issues regulated.