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01 Merger decisions by the SCA between December 2016 and February 2017.

Companies	Economic sector	Decision
CCMP / SOVITEC	Glass manufacturing	Phase I (28 February)
GARCIA CARRION / DAFSA	Food industry	Phase I (28 February)
REDEXIS / CEPSA GLP	Pipeline distribution of gaseous fuels	Phase I (2 February)
EQT / ADAMO TELECOM	Telecommunications	Phase I (2 February)
CAT / SINTAX	Road transportation	Phase I (19 January)
INDRA SISTEMAS / TECNOCOM TELECOMUNICACIONES Y ENERGÍA	Programming, consulting and other activities related to computing	Phase I (12 January)
GRUPO ACEK / ESSA PALAU	Manufacture of pieces and accessories for motor vehicles.	Phase I (12 January)
ACCO / ESSELTE	Manufacture of machines and office equipment (not hardware)	Phase I (12 January)
HELIOS / QUIRONSALUD	Manufacture of pharmaceutical products	Phase I (22 December)
WORTHINGTON / AMTROL	Manufacture of tanks and metal containers	Phase I (22 December)
ICU MEDICAL / HIS	Manufacture of medical and dental instruments and supplies	Phase I (22 December)
DATAMARS / FELIXCAN	Agriculture, livestock and hunting	Phase I (15 December)
BRIDGEPOINT / SAPEC AGRO	Manufacture of fertilizers and nitrogen compounds	Phase I (9 December)
GAS NATURAL FENOSA / GLP CEPSA-ACTIVOS	Pipeline distribution of gaseous fuels	Phase I (7 December)
BLACKSTONE / ARCLIGHT / PLANTAS GENERACIÓN EEUU	Production of electrical energy	Phase I (7 December)

02 Vertical integration in the healthcare business – acquisition of QuironSalud by Fresenius (Decision of 22 December 2016).

The acquisition (**Transaction**) of Quironsalud by Fresenius Helios had been initially notified

to the European Commission, who referred the Transaction to the SCA under Article 9 of the EU Merger Regulation. On 22 December 2016, the SCA issued its phase I decision authorizing the Transaction without commitments. Two separate relevant markets were affected by the merger: *(i)* the market for health and private hospital care in Spain; and, *(ii)* the market for the supply of medical and pharmaceutical products to hospitals.

(i) With regard to the market for health and private hospital care in Spain, the Transaction leads to no overlap, other than in the provision by private operators of haemodialysis treatments for public patients in certain regions.

(ii) In relation to the supply of medical and pharmaceutical products, the Transaction has vertical effects since Fresenius Group is active in the upstream market while Quiron is active in the downstream market.

The SCA considered the possibility that Fresenius could benefit from Quiron's position in the downstream market as a purchaser accessing sensitive commercial information from other suppliers; the SCA also considers the possibility that the vertically integrated entity, with considerable market shares in some markets upstream, might have incentives to foreclose other hospital businesses; a third party competitor of Fresenius (B.Braun) also voiced concerns that the vertical integration post-merger could be used to discriminate in favour of Fresenius in the purchasing of hospital supplies even by the public sector hospitals, which may employ doctors who would also be employees of Quiron simultaneously. These concerns were dismissed given that, downstream, Fresenius has a reduced market share in the procurement markets (the SCA did not segment the purchasing market between private hospital and public hospital demand); regarding the allegation that many medical practitioners are employed simultaneously in the private sector (Quiron) and the public sector (participating in the procurement decisions of the latter) this is dismissed on the grounds that public procurement law ensures objectivity in the purchasing decision-making process.

03 The Supreme Court upholds the appeal filed by a parent company fined for anticompetitive behaviour by a subsidiary (Judgment of 18 January 2016, case 2359/2013).

The Supreme Court has upheld the appeal filed by Caprari SpA (**Caprari** or **Parent Company**) against the decision of the SCA declaring the Parent Company guilty of conduct carried out by its Spanish subsidiary Bombas Caprari S.A. (**Bombas Caprari** or **Subsidiary**) (*i.e.* the Subsidiary was party to a cartel with other companies forming the Spanish Association of Fluid Pump Manufacturers (**Association**)).

The SCA had considered the Parent Company joint and severally liable for the fine to the subsidiary and the Association. In this context, Caprari filed an appeal before the High Court arguing a breach of the rights of defence, *i.e.* not having been notified of the proceedings initiated against the Subsidiary. The High Court rejected the appeal, ignoring the allegation regarding harm to the rights of defence.

On appeal, the Supreme Court has considered that, since the Parent Company owns 73.3% of the share capital of the Subsidiary and the independence between both companies was not demonstrated (rebuttable presumption), it was not possible to accept the breach of the rights of defence claimed. Thus, the Court considered that a parent company that may exert decisive influence over its subsidiary should be aware of the proceedings to which its subsidiaries are a party.

The appeal was ultimately upheld on procedural grounds. The general rule on presumption of liability of mother companies has not been revised under this Judgment.

04 A First Instance Commercial Court dismisses the lawsuit filed against Blablacar for unfair competition stating that Blablacar is a platform that focuses exclusively on private transport and is therefore not subject to transportation regulations (Judgement of the Commercial Court of 2 February 2017).

In its judgement of 2 February 2017, a Madrid Commercial Court dismissed the appeal lodged by the Spanish Confederation of Bus Transportation (**CONFEBUS**) on May 2015 against Comuto Iberia S.L. and Comuto S.A. (parent companies of Blablacar) (**Blablacar**) for unfair competition.

CONFEBUS argued that Blablacar infringed the unfair competition rules by carrying out, without the necessary permit, an activity regulated by the Spanish Land Transportation Act (**SLTA**). The Court ruled that Blablacar's activity focuses exclusively on private car-sharing activities between individuals, outside the scope of the SLTA.

CONFEBUS argued that Blablacar performs an activity seeking profit because Blablacar charges a 10% commission to platform users. Blablacar objected that the commission is only an insignificant monetary compensation to cover the necessary expenses for the correct functioning of the platform. The Court agreed with the defendant's argument, stating that Blablacar has not created a platform in order to provide a transportation service, but to put in contact individuals who want to make the same trip and share certain expenses. The drivers are not hired by Blablacar; nor do the drivers belong to a transportation company. They are individuals who at their own risk offer to participate in the platform.

In this context, the Judgement established that the price recommended by Blablacar, which is based on the distance and number of travellers using each car, remains lower than regulated prices for functionally comparable transportation services. Drivers do not seek profit other than exceptionally.

Direct payment to Blablacar by the travellers is not regarded by the Court as a significant element to conclude that the activity of Blablacar must be caught by the sector regulation, because Blablacar wires the money to the driver immediately after the trip.

Overall, the Court held that the activity developed by Blablacar constitutes an activity regulated by the Spanish Information Society Services and Electronic Commerce Act (**SISSEC**). In its Judgement, the Court assimilated Blablacar to a social network such as Facebook or WhatsApp, justifying that the prior control of its users data by Blablacar is an essential requirement to be part of the network.

The SISSEC establishes that in Spain a service from an EU Member State can be restricted only when it poses a serious threat to the public order. When this threat does not occur, free provision of services should prevail. The Judge recognized that the activity carried out by Blablacar is in a grey area in regulatory terms, but such lack of definition does not enable prohibition.

The commented Judgement has been published a year and a half after another Spanish dismissed a petition to close down Cabify (an individual transportation service competing with the taxi service). Interestingly, the court that now endorses Blablacar's activity was the same court that in December 2014 ordered the interim suspension of Uber's activity in Spain.

CONFEBUS has already announced that it will appeal the Judgement.

05 The SCA has initiated an investigation against Aspen Pharma for excessive pricing.

On 3 February 2017, the SCA has initiated proceedings against Aspen Pharma Ireland Ltd, Aspen Pharmacare Holdings Limited and Aspen Pharma Trading Limited (**Aspen**) for possible abusive practices consisting on a refusal to supply certain pharmaceuticals and for excessive prices. The SCA also investigates Deco Pharma S.L., Aspen's distributor in Spain, for a possible agreement to limit distribution, causing a shortage of the affected drugs.

This investigation has been initiated *ex officio* by the SCA after being informed by the Italian Competition Authority of these possible restrictive practices.

This may be part of a wider trend in Europe. In February 2016, the Competition and Markets Authority of the United Kingdom (**CMA**) fined GlaxoSmithKline and other generics manufacturers more than €48 million over the sale of paroxetine, an antidepressant. On 7 December 2016, the CMA fined Pfizer a record €99 million for excessive pricing of an epilepsy drug. The CMA also fined the distributor of the drug Flynn Pharma € 6.1 million. During the same month, the CMA sent to Actavis a statement of objections setting out its concerns regarding excessive pricing of hydrocortisone tablets.

06 The SCA issues guidance to identify potential fraud in public procurement.

On 18 January 2017, the SCA has published guidance providing information regarding the prosecution of competition law irregularities in the area of public procurement (**Guidance**).

In recent years, the SCA has fined several companies for bid-rigging (*e.g.*, adult-diapers, modular building or the international removals cartel).

According to the SCA, public procurement accounts for 15% of Spain's GDP and the reduction of of competition in public tenders causes harm in excess of €40,000 million.

The Guidance lists ten signs of bid-rigging:

- Reduced number of tenderers;
- inconsistent offers from the same tenderer;
- identical offers or suspicious similarities between the offers;

- suspicions of the existence of a boycott;
- non-competitive tenders;
- suspicious behaviour patterns between the tendering companies;
- unjustified sub-contracting between the tendering companies;
- offers submitted by the same natural persons;
- the creation of consortia between tenderers without any apparent justification.

07 The Spanish Supreme Court has issued a judgement regarding the interpretation of the principle of legitimate expectations in the area of antitrust.

On 29 November 2012, the SCA fined the Regional Association of Winemakers of Valdepeñas (**ASEVIVALDEPEÑAS**) for infringement of Articles 1 SCA and 101 TFEU (**Decision**).

On review by the Supreme Court, ASEVIVALDEPEÑAS invoked the principle of legitimate expectations, since the Public Administration intervened in the agreement between the farmers and the winemakers.

The Supreme Court upheld the High Court ruling, concluding that the importance of the Public Administration's intervention in the agreement is only relative, compared to the seriousness of the illegal agreement. The intervention of the Public Administration in certain practices contrary to competition law does not exempt the participants from liability. Consequently, the Supreme Court considers the possibility of a reduction of liability, depending on the level of participation of the Public Administration; but an exemption of liability may not be granted.

08 The SCA has fined Renfe and Deutsche Bahn for blocking the liberalization of the rail-cargo market (Decision of 28 February 2017, file S/DC/0511/14 *RENFE OPERADORA*).

The SCA has imposed fines totalling €75.6 million on several companies operating the rail-cargo market, for practices contrary to Articles 1 and 2 of the Competition Act and Articles 101 and 102 TFEU (according to a recent press release by the NCA).

Renfe and Deutsche Bahn are the first and second largest players in the freight market in Spain, with combined market shares in excess of 80% (and of nearly 100% in the car and steel segments).

According to the press release, the parties have cooperated to maintain the *status quo* existing prior to liberalization of the market. Regarding the abuse of dominant position by Renfe, this refers to commercial discrimination of competitors.

Renfe has been fined €49,962,000 for a single and continuous infringement of Articles 1 Competition Act and 101 TFEU, and €15,129,000 for a single and continuous infringement of Articles 2 and 102; Deutsche Bahn receives a fine of €10,513,000 for a single and continuous infringement of Articles 1 and 101.

09 The European Court of Justice (ECJ) rules that the creation of the current SCA breached EU law (ECJ Judgment of 19 October 2016 (Case C-424/15)).

The ECJ has issued its ruling on a request by the Supreme Court regarding the compatibility of the SCA creation back in 2013, when Spain integrated its sector regulators (**NRAs**) and the Competition Authority under a single agency roof, with Directive 2002/21/CE, of the European Parliament and the European Council, of 7 March 2002, on a common regulatory framework for electronic communications networks and services (**Framework Directive**).

The proceedings were initiated following a claim filed by the former Chairman and one member of the board of the former Telecommunications NRA, for unjustified and early dismissal caused by the creation of the SCA in 2013 (their employment contracts only expired in 2017).

The request for a preliminary ruling questioned the ECJ on: *(i)* whether or not the creation of the SCA was in conformity with the Framework Directive and, *(ii)* the lawfulness of the early unjustified dismissal caused by the institutional reorganization.

Regarding *(i)*, according to the ECJ, the Framework Directive does not preclude the creation of a multi-sector NRA, provided that, in the performance of its tasks, the new NRA guarantees the requirements of competence, independence, impartiality and transparency laid down in the Framework Directive; and provided that an effective right of appeal is available against its decisions to a body independent of the parties involved. According to the ECJ, the SCA seems to meet those requirements; however, this should be determined by the referring court.

Regarding *(ii)*, the ECJ has considered, pursuant to Article 3 (3a) of the Framework Directive, that the dismissal of the chairman and one member of the board before the

expiry of their terms of office -on the sole ground that an institutional reform has taken place- should be precluded, in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of such members.

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