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01 Selected merger decisions authorized by the NMCC April-June 2019.

Firms	Notification threshold	Economic sector	Decision
Nordic Capital/ Solvia	Turnover	Financial services	Phase I clearance (2 April)
Restel/ Hispasat	Not disclosed	Satellite communications	Phase I clearance (11 April)
Quirón/ Clínica Santa Cristina	Market share	Hospitals	Phase II clearance with commitments (16 April)
Broadview/ Formica	Market share	Manufacture of sheets and wood-based panels	Phase I clearance (30 April)
Prensa Ibérica/ Grupo Zeta	Undisclosed	Print media	Phase I clearance (9 May)
Platinum Equity Group/ Grupo Ibérica Congelados S.A.	Turnover	Processing and preserving of fish and molluscs	Phase I clearance (9 May)
PRISA / Vocento / Godó	Turnover	Advertising	Phase I clearance (23 May)
Kuwait Petroleum / SARAS RED	Market share	Fuel retail distribution	Phase I clearance (11 June)
Total / Houghton Activos	Undisclosed	Manufacturing of chemicals	Phase I clearance (11 June)
EQT / IGENOMIX	Market share	Health services	Phase I clearance (11 June)
ACEK / Niu Yugang / Forjas Iraeta – Activos	Market share	Forging, pressing, stamping and roll forming of metal	Phase I clearance (11 June)
SSVP IV / NIDEC -ACTIVOS	Market share	Manufacture of other pumps and compressors	Phase I clearance (11 June)

02 Restrictive agreements – Tobacco: The NMCC fines the main tobacco manufacturers and Logista for an anticompetitive exchange of strategic information (Decision of 10 April 2019, *Tabacos*, S/DC/0607/17).

The National Markets and Competition Commission (**NMCC**) has fined Spain's main tobacco manufacturers, Philip Morris, Altadis, JT International Iberia, as well as wholesaler Logista for an anticompetitive exchange of strategic information. Logista facilitated immediate access to its daily sales to authorized retailer tobacconists reducing competitive uncertainty. The combined amount of the fines is €57.71 million.

Logista is the major and nearly sole tobacco wholesaler in Spain with a market share of 99%. The information provided by Logista included individualized data by brand, product and region, being much more detailed and wider in scope than the information published on a monthly basis by the National Commission for the Tobacco Market.

Interestingly, the NMCC states that the conduct cannot be qualified as a cartel since it did not have the *object* of restricting competition. However, due to the fact that it had the *effect* of hindering competition in the affected market, the NMCC has decided that it constitutes an anticompetitive agreement forbidden under Articles 1 of Law 15/2007, of 3 July, Competition Act (**SCA**) and Article 101 of the Treaty of Functioning of the European Union (**TFEU**).

British American Tobacco was also involved. However, the Decision indicates that the said company stopped exchanging information in 2012, so its antitrust liability was time barred.

03 Restrictive agreements – Textbook publishers: The NMCC fines non-university textbook publishers and the National Association of Book and Teaching Material Publishers (ANELE) for allegedly creating a mechanism to coordinate commercial policies and terms and conditions of trade (Decision of 30 May 2019, *ANELE,* file S/DC/0594/16*).*

The NMCC has declared that the association ANELE and all the publishers under investigation have breached Article 1 SCA and Article 101 TFEU, in relation to *(i)* the adoption and implementation of ANELE'S Code of Conduct (**CoC**), which restricted promotional activities; and *(ii)* digital books, due to alleged coordination of commercial conditions. The fines amount to €180,000 on ANELE and a total of €32.2 million on the publishers.

The first violation revolves around the CoC adopted in April 2012. During the adoption and implementation of the CoC, the publishers and ANELE would have allegedly attempted to restrict competition within the market of non-university textbooks by restricting the offering of gifts by publishers (in particular IT materials, such as digital boards, projectors, etc.) to schools. Prior to the application of the CoC, these gifts were offered to schools in exchange for the adoption of the publishers' textbooks by the said schools.

According to ANELE and some of the accused companies, the purpose of the CoC was no other than to eliminate bribery in schools, thus preventing unethical conduct (such as offering gifts to teachers) that may influence the book prescription process, *i.e.* the aim of the CoC was to safeguard that schools select books solely on the basis of pedagogical criteria, not being subject to external influences. However, according to the NMCC, the restrictions were not guided by ethical considerations but by pure economic motivations (*i.e.*, agreement to restrict competition). This type of restriction follows the same rationale as regulation in sectors such as pharmaceuticals where public bodies wish to avoid any tampering with the objective selection process by doctors.

Regarding the digital books, the Decision considers that publishers fixed prices and other commercial terms between 2014 and 2017.

ANELE and several publishers have already publicly stated their intention to apply for judicial review of the Decision.

04 Unfair conduct affecting competition – gas and electricity supply: The NMCC fines Endesa Energía XXI for misleading conduct contrary to the principles of good faith and professional diligence affecting the market (Decision of the NMCC of 20 June 2019, *AGIC*, file S/DC/0552/15).

The NMCC has fined Endesa Energía XXI €5.5 million, for using the electricity bills as a tool to promote services of other group companies.

In the past, the electricity market in Spain was fully regulated, and all prices were set by the Government. However, in the late 90s the sector was partially liberalized and, since 2009, any domestic consumer is free to choose between the regulated or the free market.

Endesa XXI is one of the few companies authorized by law to provide services in the regulated market. Domestic consumers (particularly those in the

regulated market), are considered particularly vulnerable because of their limited knowledge of the characteristics of the electricity market. Domestic consumers are also scarcely inclined to actively seek a change of supplier unless influenced to do so.

Endesa XXI's took advantage of the vulnerability and misinformation of this group of consumers by including in the electricity bill messages and promotions from Endesa Energía, another subsidiary of Endesa which only provides services in the open market. In other words, Endesa Energía XXI benefitted from the confusion created by the use of the group logo and the low awareness of regulated market consumers, with the goal of redirecting them to the open market. The company relied on a privileged communication channel such as the electricity bills issued in the regulated market to promote services in the open market; furthermore, the described communication channel was not available to competitors.

The conduct breaches Article 3 of the Spanish Competition Act which entitles the NMCC to investigate unfair competition conduct affecting the public interest.

The NMCC decided to open an investigation subsequent to a complaint by the Association of Installers of Catalonia. Gas Natural, another major electric utility company investigated on the same charges, reached an agreed commitments decision with the NMCC. However, Endesa refused this possibility.

05 Abuse of dominance – Management of intellectual property rights: The NMCC fines the Spanish Society of Authors, Composers and Publishers (SGAE) for an abuse of its dominant position in the management and exploitation of intellectual property rights (Decision of the NMCC of 30 May 2019, *DAMA VS SGAE*, file S/DC/0590/16).

The NMCC has fined the Spanish Society of Authors, Composers and Publishers (**SGAE**) €2.95 million for abusing its dominant position in the management and exploitation of intellectual property rights of authors and publishers of musical and audiovisual works (Articles 2 SCA and 102 TFEU).

The investigation was initiated in 2017 after a complaint lodged by DAMA (Intellectual Property rights of Audiovisual Media) and Unison Rights, both intellectual property rights management organizations competing with SGAE.

The abused referred to the inclusion by SGAE of contractual conditions which unreasonably restricted the freedom of its members to decide whether to partially transfer or withdraw the management of their rights: the ability of authors to transfer the management of part of their rights was impaired by the packaging of rights by the SGAE, which did not allow to unbundle those rights for their separate management.

Second, the SGAE would have abused its dominant position regarding the granting of authorizations and compensation for the rights of reproduction and public communication of authors and publishers' musical and audiovisual works. In particular, the abuse was perpetrated through the joint selling (bundling) of authorizations of reproduction and public communication of the intellectual property rights under management and the absence of breakdown of fees between the musical and audiovisual rights.

The joint selling took place in the accommodation and catering sectors. Due to the fact that fees were not broken down to reflect the individual value of audiovisual and musical repertories, the user (restaurant or hotel) could not know the real costs incurred in using the said rights and could not compare them with competitive offers. Equally, the joint selling forced the hotel or restaurant wanting to offer musical content to acquire in the same transaction the audiovisual rights. Given that SGAE is the only operator marketing rights of reproduction and public communication of phonograms or musical content, SGAE's clauses acted as a market leveraging device effectively foreclosing competitors.

06 Judicial activity – Damages claims: The Supreme Court sheds light on the territorial jurisdiction criteria to be applied in connection with follow-on antitrust damages claims (Supreme Court Decision of 26 February 2019, appeal number 262/2018).

The Supreme Court has clarified which courts can have jurisdiction in damages claims concerning competition law infringements within Spanish territory. The said issue has been controversial in the past, so the Supreme Court guidance has provided legal certainty in relation to lawsuits currently being lodged (or which are expected to be) dealing with follow-on damages claims concerning (in particular) the trucks cartel.

The case at hand dealt with a jurisdictional conflict in a damages claim concerning the purchase of a truck. Two courts declared that they lacked

jurisdiction to hear the claim in accordance with the Spanish procedural rules (one of the courts granting jurisdiction to the court of the place where the truck was purchased). The Supreme Court first refers to the Damages Directive, in particular to the provision stating that national procedures for claiming damages in competition law cases must comply with the principles of equivalence and effectiveness. This means that national procedural laws "*should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation*".

In this vein, the Supreme Court has declared that Article 51 of the Law 1/2000, of 7 January, on Civil Procedure (**LCP**) applies the said principles when dealing with a legal person that has its registered office located outside Spain. The said provision foresees that the court having jurisdiction to hear the claim shall be *(i)* the one in which the registered office of the defendant is located or, failing this, *(ii)* the place where the legal relationship having led to litigation was originated (but only if the legal person has a commercial establishment open to the public or an authorized representative therein). Thus, in damages claims concerning the trucks cartel, in which typically only the parent companies are sued, there is no way that a court within Spanish territory can have jurisdiction since *(i)* the registered office of the parent companies is located outside Spain and *(ii)* the trucks are usually bought from car dealers, which are considered businesses independent from the truck manufacturers (thus, the second criterion is not met).

The Supreme Court finds the solution for this jurisdictional puzzle in Article 52.1.12º LCP, which deals with jurisdiction in unfair competition claims. According to the said provision, the courts having jurisdiction to hear unfair competition claims in Spanish territory are the ones located in either *(i)* the place where the defendant has its domicile; *(ii)* if it has no domicile in Spain, its place of residence; or *(iii)* the place of occurrence of the tort or where its effects are deployed.

07 Spain – Judicial activity – Dawn raids: The Supreme Court sheds light on the interpretation of random discovery of evidence in the framework of dawn raids and annuls a fine imposed on UdER (Supreme Court Judgement of 26 February 2019, appeal number 2539/2018).

The Supreme Court has upheld the appeal lodged by UdER (Unión de Recuperación) against the Judgment of the High Court of 15 December 2017 (appeal number 15/2015), declaring the NMCC's Decision of 6 November 2014, *Recogida de Papel*, file S/0430/12 (Decision) null and void. In the said Decision, the NMCC had imposed fines amounting to €3.83 million for a cartel in the paper collecting sector infringing Articles 1 SCA and 101 TFEU.

The issue of the ruling boils down to diverging interpretations of the concept of random discovery (discovery by mere chance of evidence related to markets or conduct outside the scope of the investigation order). The NMCC had initiated enforcement proceedings after obtaining evidence of the alleged infringements during a dawn raid carried out in the framework of a separate investigation concerning collusive agreements in the collection, transport and treatment of sanitary waste market. In particular, the scope of the inspection order was the "*collection and treatment of waste, whether sanitary or of other types*". Hence, the discovery made during the said inspection was used to initiate a separate investigation, covering markets and alleged conduct for which the NMCC had presented no evidence prior to the said random discovery.

The High Court had argued in the *ad quem* judgment that, even though the scope of the inspection order was extremely vague, it contemplated the seized documents which led to the initiation of enforcement proceedings in the paper collecting sector as random discovery and, therefore, concluded that the NMCC had acted legitimately.

Conversely, the Supreme Court asserted that the High Court had incorrectly regarded the unrelated documents as a random discovery. The findings were not by accident, since through the clause "*of other types*" used in the inspection order, the officials searched and seized documents related to any type of waste, including paper. Thus, the evidence enabling opening of the investigation had been found in the course of a dawn raid authorized by an inspection order with a scope too broad going beyond the mandatory legal requirements that the scope of the order must be determined. Consequently, the Supreme Court declared the Decision null and void without entering into the merits of the case (which referred to the treatment of consortia under Article 101 TFEU and equivalent national provision).

08 Judicial activity / Principle of individual nature of fines: The Supreme Court clarifies the principle of the individual nature of fines in competition law infringements by confirming a €42 million fine to Repsol (Judgments of the Supreme Court of 23 May 2019, appeal number 2117/2018, and 27 May 2019, appeal number 5326/2017).

In 2015, the NMCC imposed two fines on Repsol S.A. (**Repsol**), the parent company of the energy group, amounting to €20 and €22.5 million for coordinating prices through exchanges of information with competitors and for fixing of fuel prices at service stations, respectively.

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

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

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

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

09 Portugal: mergers and dawn raids.

Our Portuguese colleagues inform that the National Competition Authority has carried out dawn raids in the health sector in connection with suspected practices restricting patients' choice.

In the area of mergers, the Portuguese Authority has open a phase II merger investigation in connection with a hospital acquisition by HPA group (Algarve Hospital Group) of Saint Gonçalo de Lagos Hospital.

10 European Commission investigates Broadcom for exclusionary conduct. The European Commission makes use of its interim measure powers after two decades of inactivity.

The European Commission has announced that it has opened an investigation against Broadcom in connection with various practices such as *(i)* setting exclusive purchasing obligations, *(ii)* granting rebates or other advantages conditioned on exclusivity or minimum purchase requirements, *(iii)* product bundling, *(iv)* abusive IP-related strategies and *(v)* deliberately degrading interoperability between Broadcom products and other products.

The case follows precedents in the microchips market, particularly echoing the investigation against *Intel* which ended up being litigated in court and led to the European Court of Justice judgment of 6 September 2014 (case C-413/14).

The Commission's press release can be found here.

This investigation against Broadcom is perhaps more important because the Commission has also issued a statement of objections on interim measures, where the Commission asserts that Broadcom is likely to hold a dominant position in the relevant markets; and that the exclusivity provisions in the supply agreements may affect competition and stifle innovation in the affected markets, so that an interim measures decision may be indispensable. The Commission's press release does not contain any indication of what the interim measure would be. Broadcom can be heard now in connection with the measure and thereafter an interim measures decision will be adopted. If so, this will presumably be an interim cease and desist order or similar regarding the allegedly abusive commercial clauses.

The last time the European Commission used its interim measure powers was in connection with an abuse of dominance by IMS Health in the

pharmaceutical marketing data market almost two decades ago (*NDC/IMS Health*, Case COMP D3/38.044). That was a rather exceptional case of required compulsory licensing of IMS Health's brick structure for marketing information purposes. Though relatively rarely, the Commission did use its interim measure powers on some occasions prior to the *IMS Health* case.

The Commission must believe either that the potential infringement by Broadcom is extremely serious, or that it needs to make a policy point that it is ready to use its interim measure powers again.

11 The European Commission issues guidelines for national courts on how to calculate the *pass-on* of price overcharges related to infringements of EU antitrust rules.

The European Commission has issued guidelines for national courts on how to estimate the passing-on of overcharges to indirect purchasers of goods and services affected by infringements of Articles 101 and 102 TFEU. The guidelines have been issued pursuant to Article 16 of the Antitrust Damages Directive (which expressly foresees that the Commission shall issue guidelines for national courts on this particular topic). The guidelines complement the Practical Guide on quantifying harm in action actions for antitrust damages, issued by the Commission in 2013. It should be noted that the guidelines are non-binding upon national courts and are without prejudice of existing EU and national laws of the Member States.

Both direct and indirect purchasers have the right to compensation if they have been harmed by infringements of Articles 101 and 102 TFEU. Indirect purchasers are harmed to the extent that a direct purchaser of products or services affected by an infringement fully or partially passes on price overcharges to its customers. The experience dictates that calculating the overcharges passed on to indirect customers of the infringer can be challenging. The guidelines shed light upon the issue, setting out the economic principles and methods to estimate the overcharges, also aiming to help the courts to identify relevant sources of related relevant evidence.

The document is now available here pending publication in the OJ of the EU.