ICLG

The International Comparative Legal Guide to:

Vertical Agreements and Dominant Firms 2019

3rd Edition

A practical cross-border insight into vertical agreements and dominant firms

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The National Markets and Competition Commission (**CNMC**) is the authority responsible for guaranteeing, preserving and promoting the correct functioning, transparency and existence of effective competition.

According to Law 1/2002 of 21 February 2002 on the coordination of the jurisdictions of the State and the Autonomous Communities in the field of defence of competition, regional competition authorities are responsible for exercising their powers in their territory when business conduct alters or may alter free competition within the scope of the respective region.

1.2 What investigative powers do the responsible competition authorities have?

The responsible competition authorities are entitled to:

- Conduct inspections at the undertaking's premises:
  a. Access any premises, facility or vehicle of the company.
  b. Access company directors' homes (with a court warrant).
  c. Review books, records and documents.
  d. Require the production of, examine, copy or even seize any documents relevant to the investigation (with the exception of confidential, privileged documents).
  e. Retain books, records or documents for a maximum of 10 days.
  f. Seal filing cabinets or rooms.
  g. Require on-site explanations of relevant documents or practices.
- Address information requests.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The process is initiated *ex officio* by the Directorate of Investigation of the CNMC, either on its own initiative or by order of the Council of the CNMC or upon a third-party (natural or legal person) complaint.

First, the Competition Directorate may start a preliminary (confidential) inquiry to assess if there are sufficient reasons to open antitrust proceedings. Once the antitrust proceeding is formally open, the procedure is divided into two phases: *(i)* the investigation phase, led by the Competition Directorate; and *(ii)* the decision phase before the Council of the CNMC. An antitrust administrative decision must be issued no later than 18 months from the formal opening of the antitrust proceedings.

The antitrust proceedings may be closed without fines or declaration of infringement if no evidence of an infringement is found, or if the parties submit a request for a commitments termination, which is allowed by the CNMC. Otherwise, a fining antitrust decision can be expected. The decision of the Council of the CNMC may be appealed before the administrative courts.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The CNMC may impose penalties for any infringement of Law 15/2007 of 3 July 2007 for Defence of Competition (**LDC**) without permission or confirmation by another entity or court.

Regional authorities may fine on the same basis regarding conduct within their jurisdiction.

The CNMC and regional authorities have powers to issue interim measures decisions, including injunctions to stop any given conduct as a matter of urgency.

Note: substantive law applicable to the CNMC is also applicable to regional authorities.

1.5 How are those remedies determined and/or calculated?

According to Article 62.3.a) LDC, vertical restraints are categorised as a serious infringement that can be fined by up to five per cent of the turnover of the infringing party in the business year preceding the imposition of the fine.

If the turnover cannot be determined, the infringing parties may be exposed to a fine ranging from €500,000 to €10 million.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

In the case that the CNMC considers that the agreement would not produce negative effects on competition if it were modified, the CNMC could welcome commitment proposals by the parties. If the commitments are considered appropriate, the CNMC could close the proceedings with a commitments termination decision without a fine and without express admission of guilt.

The CNMC monitors parties' compliance with those commitments and keeps the execution of commitments under review.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No. Decisions of the CNMC are self-executive. Only if CNMC decisions are appealed in court does the CNMC appear in court to defend the legality of its actions.

1.8 What is the appeals process?

Decisions of the Council of the CNMC amount to final agency action and may be appealed only before the High Court (*Audiencia Nacional* in Spanish) within two months from the notification of the Decision.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Commercial courts have authority to declare the existence of infringements of Article 1.1 LDC (which prohibits, for instance, resale price maintenance) as well as to declare an agreement exempt from that prohibition pursuant to Article 1.3 LDC, always within the boundaries of the petition addressed to the competent court. The same applies, *mutatis mutandis*, in connection with Articles 101.1 and 101.3 of the Treaty on the Functioning of the European Union (**TFEU**), which have direct effect and can therefore be invoked before national courts.

Parties to a vertical agreement are entitled to seek declaratory judgments or injunctions and bring damages claims. Theoretically, third parties could seek damages if such parties can prove that they have suffered a loss as a result of the anti-competitive agreement. These forms of order must be sought from the commercial courts, except where the party is simply seeking damages from a previously declared infringement (follow-on actions), in which case it must do so before the ordinary civil courts. Consumer associations have standing to sue on behalf of consumers.

The remedies available are those typical of any other civil claim, ranging from cease-and-desist orders to the award of damages.

Assuming that a private enforcement action goes through all the possible appeals up to the Supreme Court, a final judgment may be rendered after several years. For example, in the *Sugar* case (a follow-on damages claim for damages arising from a sugar cartel), the claim was filed in 2007 and, after several appeals, the Supreme Court decided on the case in 2012 (Judgment of the Supreme Court of 8 June 2012, case 2163/2009).

1.10 Describe any immunities, exemptions, or safe harbours that apply.

Pursuant to Article 1.4 LDC, Commission Regulation (EU) No 330/2010, Article 101.3 of the Treaty of the Functioning of the European Union on categories of vertical agreements and concerted practices (**Vertical Block Exemption**) is applicable in Spain.

Consequently, safe harbour applies when the market share held by the supplier does not exceed 30% of the relevant market in which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market in which it purchases the contract goods or services. As previously indicated, this safe harbour does not apply in case of hard-core restraints, in which case the parties can seek to be covered under the exemption provided for in Article 101.3 TFEU and/or Article 1.3 LDC, as explained above. For these purposes, the case law and guidance both of the Spanish courts and agencies, and the European Commission guidelines and practice, as well as case law of the European courts, are of relevance.

1.11 Does enforcement vary between industries or businesses?

No, although there has been a focus on retail, supermarkets and vehicle distribution in recent years.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

Along with the functions of competition enforcement of the CNMC, this agency also acts as a regulatory authority in certain sectors and regulated markets. These sectors or areas are the following: electronic communications and audiovisual communication; the electricity and natural gas markets; the postal sector; airport tariffs; and certain aspects of the railway sector.

Generally, the CNMC and the courts will look at and bear in mind the entire legal and regulatory landscape. In particular, the LDC provides immunity from antitrust scrutiny conduct carried out in observance of another law (Act of Parliament).

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The Council of Ministers (*i.e.*, the government) may intervene in the merger review process in those circumstances when the Council of the CNMC has decided: *(i)* to ban a concentration; or *(ii)* to subject the merger clearance to conditions. In those circumstances, the Council of Ministers may decide to lift a prohibition or alter the merger conditions on the basis of a number of public interest-related grounds. The existence of this procedure could, by its very nature, alter the review of sensitive mergers in the future, as the grounds on which the Council of Ministers must decide are non-competition-related grounds. However, this is very rarely used and so far has only been used in the television mergers of a few years ago (*vid.* Decision of the Council of Ministers of 24 August 2012, file C/0432/12, *Antena 3/La Sexta*).

Otherwise, members of the Council of the CNMC are ultimately chosen on the basis of parliamentary majorities, but their designation is staggered, so the CNMC is generally perceived as being fairly independent.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

In the past, the CNMC was inclined to fine mostly suppliers. This is because it was considered that, although both suppliers and customers were parties to the vertical agreement, responsibility for the infringement fell on the party with a higher bargaining power, usually the supplier. This trend has changed over time due to a broader knowledge and awareness of buyer power. Thus, in June 2007 the CNMC fined both the supplier and the buyer on the basis that both parties had obtained an unlawful benefit from the agreement and both parties had countervailing bargaining power

(*vid.* Decision of the CNMC of 21 June 2007 in case 612/06, *Aceites 2*). In 2010, the CNMC ruled that exclusive contracts for the acquisition and resale of football broadcasting rights lasting for more than three seasons for Spanish league and cup matches are anticompetitive and fined four buyers (broadcasting operators) but none of the suppliers (football clubs). Two years later, the CNMC fined Suzuki and five of its authorised dealers in Spain for agreeing minimum resale prices for Suzuki motorbikes (*i.e.*, the CNMC again fined both the supplier and the buyer) (*vid.* Decision of the CNMC of 27 March 2012 in case S/0237/10, *Motocicletas*).

1.15 Describe any notable case law developments in the past year.

On 22 November 2018, the CNMC opened an antitrust proceeding for restrictive practices against Adidas Spain (case S/DC/0631/18). The investigation relates to clauses in the contracts applicable to some of its franchisees that could be restrictive for competition, by prohibiting certain types of sales, such as online sales and cross-selling, and imposing non-compete obligations that could be disproportionate. Also, Adidas could have indirectly set the resale price of its franchisees.

Spain seems to have generally been less active in areas such as online sales and distribution than other countries. It is to be expected that more decisions will take place in the coming years in connection with online markets. Another area of focus is that of food and consumer goods distribution, where large purchasers (*e.g.*, supermarket chains) have in recent years been perceived as wielding great economic power from the purchasing side. There is to that extent a study from the CNMC in that particular sector, and some sectoral law in the area of food production and distribution seeking to protect suppliers against large retail organisations.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The CNMC has, in theory at least, a high level of concern over vertical agreements. In practice, there are substantially less enforcement cases than in other European jurisdictions.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The concept of agreement covers anything that enables identifying a meeting of minds of two or more independent companies. Arguably, the concept may be even wider under Spanish law than under EU competition law, as conscious parallelism is also included as conduct enabling characterisation under Article 1 LDC.

The concept of "vertical" implies that the companies which are parties to the agreement are situated at different levels of the production chain.

2.3 What are the laws governing vertical agreements?

The laws applicable to vertical restraints in Spain are: *(i)* the LDC; *(ii)* Royal Decree 261/2008 of 22 February 2008 approving the Defence of Competition Regulation (RDC); and *(iii)* European competition law.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

There are two types of exemptions, which do not appreciably restrict competition (*de minimis*): if the aggregate market share held by (competing) parties to an agreement does not exceed 10% of any of the relevant markets affected by the agreement; or if the market share held by (non-competing) parties to an agreement does not exceed 15% of any of the relevant markets affected by the agreement. This *de minimis* exemption does not apply to hard-core agreements, which include resale price maintenance, absolute territorial protection and generally the other hard-core restrictions blacklisted in the Vertical Block Exemption.

2.5 What is the analytical framework for assessing vertical agreements?

Article 1.1 LDC prohibits vertical agreements between two or more parties, which have the object or the effect of preventing, restricting or distorting competition within the national market.

Pursuant to Article 1.3 LDC, the prohibition contained in Article 1.1 LDC shall not apply to agreements *(i)* generating efficiency gains by contributing to improving production or distribution, or to promoting technical or economic progress, *(ii)* from which consumers must obtain a fair share of these efficiency gains, *(iii)* which do not impose on the undertakings concerned any vertical restraints not essential for reaching the sought efficiency benefits, and *(iv)* which do not allow the participating companies to eliminate competition with regard to a substantial part of the considered products or services. It is worth highlighting that the criteria contained in Article 1.3 LDC are almost identical to those contained in Article 101.3 TFEU.

In addition, as pointed out above, Article 1.4 LDC provides that the prohibition foreseen in Article 1.1 shall not apply to the agreements or collective recommendations meeting the criteria of any EU block exemption regulation, which in the case of vertical restraints is the Vertical Block Exemption.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Market definition criteria on the demand and supply side must generally be followed based on precedent. The European Commission methodology followed in the Notice on market definition is authoritative, but national practice, precedent and local market idiosyncrasies are looked at.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Each practice is looked at on a case-by-case basis, bearing in mind exactly in which companies (other competitors, customers) the practice has effects.

2.8 What is the role of market share in reviewing a vertical agreement?

Article 1.4 LDC refers directly to the Vertical Block Exemption, incorporating its text into national competition law. The Vertical Block Exemption establishes that the exemption foreseen applies

when the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services.

However, outside the scope of the Vertical Block Exemption, vertical agreements should be analysed individually according to the rules set out in Article 1.3 LDC.

2.9 What is the role of economic analysis in assessing vertical agreements?

It is relevant in theory, although less so in practice.

2.10 What is the role of efficiencies in analysing vertical agreements?

It is relevant in theory, although less so in practice.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There are no special rules for intellectual property. The block exemption is only applicable to the licence directly related to the use, sale or resale of goods and services when those intellectual property rights provisions do not constitute the primary object of the agreement.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The CNMC has to demonstrate anticompetitive effects in principle, but it must be borne in mind that some vertical restraints are considered unlawful *per se* when they contain hard-core restrictions such as: *(i)* price-fixing; *(ii)* non-competition clauses for a duration longer than five years; and *(iii)* restrictions on passive sales.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

As mentioned in question 2.5, the prohibition of Article 1.1 LDC shall not apply to agreements, decisions of practices that contribute to the production or marketing and distribution of goods and services or to promoting technical or economic progress, without any prior decision being necessary due to compliance with the requirements of Article 1.3 LDC.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Legal exemption defences may be available; see question 1.10 above.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The CNMC and the LDC incorporate the Vertical Block Exemption.

2.16 How is resale price maintenance treated under the law?

According to the CNMC, resale price maintenance is *per se* restriction of competition (*vid*. Decision of 29 February 2008 in case 647/08, *Distribuciones Damm*).

Resale price maintenance can be executed by any means or devices which have as their object or effect the restriction of the distributor's freedom to set end-prices. This can take place, for instance, by establishing the margin that dealers must offer to their respective agents (*vid*. Decision of 11 January 2012 in case S/0154/09, *Montesa Honda*); fixing maximum discount levels (*vid*. Decision of 5 October 2006 in case 599/06, *Maquinaria agropecuaria*); or by means of a finalist strategy aimed at monitoring discounts applied by a distributor (*vid.* Decision of 19 October 2004 in case 619/04, *Técnicas Ganaderas*).

The CNMC also considers minimum resale prices an infringement of Article 1 LDC (*vid*. Decision of 2 November 2004 in case 578/04, *EKO-AMA Mondáriz*).

The CNMC does not regard recommended resale prices as contrary to Article 1 LDC (*vid*. Decision of 3 November 2008 in case 2765/07, *Animales de compañía*). However, and depending on the specific context and means employed, price recommendations have been considered by the CNMC as fixed resale prices. For instance, in the *Repsol/Cepsa/BP* case (*vid*. Decision of 30 July 2009 in case 652/07, *Repsol/Cepsa/BP*), the CNMC fined three petrol companies for notifying recommended and maximum resale prices to petrol stations which were, in practice, applied as fixed retail prices. The CNMC relied on, *inter alia*, the following indicia:

- high compliance (in more than 80 per cent of the cases) with the suggested or maximum retail prices;
- reduction of incentives to apply discounts by reducing the retailers' margins; and
- the IT system communicating the suggested resale prices hampered in practice the ability of petrol stations to deviate from the suggested resale prices.

Regarding maximum resale prices, the CNMC considers this practice to be compliant with the LDC (*vid*. Decision of 30 November 1998 in case 389/96, *Cervezas Mahou*).

2.17 How do enforcers and courts examine exclusive dealing claims?

This type of restraint can be acceptable except in circumstances that lead to market foreclosure. See, for instance, the reference to the *football rights* investigation, above at question 1.14, which concerned a network of exclusive agreements which foreclosed competition.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

See question 2.17.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination may be contrary to applicable national rules on retail trade or unfair trade. Discrimination can also be contrary to Article 1 LDC and may also amount to an abuse of dominant position under some circumstances.

2.20 How do enforcers and courts examine loyalty discount claims?

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

In addition to resale price maintenance, exclusive dealing, tying arrangements, price discrimination, loyalty discount and multi-product discount, we may find other types of vertical restraints:

- Exclusive supply, where the supplier is required to exclusively or mainly distribute the products to only one purchaser.
- Exclusive customer allocation, where the supplier agrees to sell its products only to one distributor for resale to a particular group of customers.
- Selective distribution, where distribution systems are based on quality criteria.
- Single branding, concerning agreements which have as their main element that the buyer is obliged or induced to exclusively or mainly sell products from a single brand.
- Category management agreements, whereby a distributor entrusts the supplier with the marketing of a category of products including, in general, not only the supplier's products, but also the products of its competitors.
- Franchising agreements, generally containing licences to intellectual property rights related, in particular, to trademarks or signs and know-how for the use and distribution of goods or services.

2.23 How are MFNs treated under the law?

The CNMC analyses most-favoured-nation (**MFN**) clauses in accordance with the Vertical Block Exemption and the Vertical Guidelines, as well as under Article 102 TFEU and its national equivalent, Article 2 LDC, when applicable. The case on pharmaceutical studies cited under question 1.15, above, concerned in part an MFN clause, which IMS Health (currently Iqvia) agreed to drop from its pharmaceutical marketing data purchasing agreements as a result of the investigation.

2.24 Describe any notable case developments concerning vertical merger analysis.

Interesting vertical mergers dealt with by the CNMC in the last few years include: the acquisition by Fresenius of Grupo Quiron, at the time the largest private hospital group in Spain, where potential issues of foreclosure to alternative hospital suppliers were raised (Decision of 22 December 2016 in case C/0813/16, *Helios/Quironsalud*); and the acquisition of Telefonica of the pay-TV business of Canal+ in Spain (Decision of 23 April 2015, file C/0612/14, *Telefonica/Digital+*), dealing with interesting media content matters in the context of the vertical integration between the largest communications platform owner and the largest owner of media content in the country.

More recently, an operation consisting of the acquisition of control by Catalana Occidente Group through the acquisition of 100% of the capital stock of four funeral homes sparked some concern that the vertical integration between the life insurance and funerary services could pose problems in the insurance market. Finally, the CNMC considered that the vertical overlap derived from the operation did not pose a problem for the maintenance of effective competition (Decision of 12 April 2018, file C/0928/18, *GRUPO CATALANA OCCIDENTE/SOCIEDADES ADQUIRIDAS*).

The acquisition by ORPHAN EUROPE S.a.r.l. of exclusive control over a series of assets necessary for the manufacture and commercialisation of an "orphan drug" called Cystagon in all countries of the world with the exception of the United States, Australia and Japan (Decision of 22 March 2018 in case C/0925/18, *RECORDATI/MYLAN*) raised some concerns regarding the distribution of orphan drugs in Spain. However, the CNMC considered that, given that ORPHAN was already the exclusive distributor of the medicine Cystagon in Spain pre-merger, there would be no substantial modification to the structure of the existing distribution of the product.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The CNMC has a high level of concern and is active in the enforcement of the prohibition of abuse of dominant position.

3.2 What are the laws governing dominant firms?

The LDC regulates the abuse of dominant position in line with EU law.

3.3 What is the analytical framework for defining a market in dominant firm cases?

Article 2 LDC prohibits any abuse by one or more undertakings of their dominant position in all or part of the national market. The abuse may consist in:

a. The direct or indirect imposition of prices or other unfair trading or services conditions.

b. The limitation of production, distribution or technical development to the unjustified prejudice of undertakings or consumers.

c. The unjustified refusal to satisfy the demand for purchase of products or provision of services.

d. The application, in trading or service relationships, of dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others.

e. The subordination of the conclusion of contracts to acceptance of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of these contracts.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

Much as under EU law, showing a dominant position depends on the particular circumstances of the allegedly dominant company and the relevant market. As a rule of thumb, dominant position requires a stable market share of around 40 per cent or higher, with no competitors with similar market shares, in markets with significant barriers to entry and expansion, preferably mature and with a low elasticity of demand. However, this is no mathematical rule and a number of factors must be looked at to determine the existence of a dominant position: the entry barriers; the degree of market concentration; the elasticity; the degree of vertical integration, etc.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Generally, dominant companies are subject to a stricter test when behaving in the market, as some courses of conduct that would not be objectionable for the majority of companies may be considered abusive when carried out by a dominant company.

3.6 What is the role of economic analysis in assessing market dominance?

The importance of economic analysis when studying a possible abuse of dominant position is key, both in establishing that a dominant position exists and in evidencing the abuse, more so perhaps after the landmark *Intel* case at the European Court of Justice.

3.7 What is the role of market share in assessing market dominance?

As mentioned in question 3.4, the market share close to 40 per cent or higher may indicate that there is a dominant position, although this figure may change depending on the market, plus there are other factors to be taken into account in assessing market dominance.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Economic defences of various types, such as absence of foreclosure in exclusionary abuses, for instance, are available. One example of this is the recent Supreme Court Judgment of 5 February 2018 (*vid*. case 2808/2015) where Correos (which owns the public postal network and provides the universal postal service in Spain) was sanctioned by the CNMC for a margin-squeeze that prevented competitors from competing effectively in the segment of large postal service customers, constituting an abuse of dominant position.

Spanish courts upheld the appeal filed by Correos, considering that, even acknowledging the existence of a margin-squeeze, the CNMC had not demonstrated that such practice had exclusionary effects for companies. The Supreme Court concluded that alternative operators can and must make optimal use of their own capacity to compete.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

The rules of the European Union on this matter are to be followed.

3.10 Do the governing laws apply to "collective" dominance?

Article 2 LDC prohibits abuse of dominant position both by a single undertaking and several undertakings.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Buyer power can be a source of dominance, much in the same way as supplier power.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Spanish law does not make any express distinction between abuse of dominance and exclusionary abuses. However, in the framework of the investigation of potential breaches of the relevant provision prohibiting unilateral anticompetitive conduct, when identifying the specific abuse committed by the undertaking enjoying a dominant position in the market, both the decisional practice of the CNMC and the case law assess the conduct and identify conduct as being exclusionary (such as predatory pricing, margin-squeeze practices or refusal to supply) or exploitative (such as imposing excessively high prices or imposing discriminatory conditions), largely in line with EU competition law.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

There is in Spain a very substantial body of precedents related to intellectual property collective management societies. Some cases have led to damage actions before the Spanish commercial courts. In most of the cases, the claims challenged exploitative excessive pricing (*vid*. Decision of the CNMC of 6 November 2014 in case S/460/13, *SGAE Conciertos*) and the imposition of statutory and contractual conditions that unjustifiably restrict the freedom of the collective management societies' members to withdraw their rights management (*vid.* Decision of the CNMC of 30 May 2019 in case S/DC/0590/16, *DAMA/SGAE*). There are other important IP rights-related cases such as various matters related to IP licensing of premium content (football rights and movie rights; output deals).

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The courts tend not to consider these as much as the enforcer.

3.15 How is "platform dominance" assessed in your jurisdiction?

Foreseeably, it would be assessed largely in line with EU law.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Generally, only refusals to supply regular customers or refusals to supply a product or service essential to operate in the market are considered to restrict competition, unless the refusal is objectively justified. However, in the case that a potential or actual, economically viable, supply alternative exists, it will be difficult to conclude that an abuse has taken place (*vid*. Decision of the CNMC of 15 June 2009 in case S/0034/08, *Olympus Medical Systems Europa*).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The *HmR/Iqvia* case is of particular note.

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We are a specialist team devoted to antitrust law and providing our professional services in a zealously independent and professionally demanding environment. We provide services to private equity and investment funds, media, technology, consumer goods, pharmaceutical, distribution and industrial corporations mostly from the EU, America and Asia.

In the area of merger control, we have intervened successfully in the main transactions of the last few years where approval has been required in Spain (*e.g.*, *Telefonica/Digital+*, *Fresenius/Quiron*, *Cerberus/Renovalia*, *Glintt/Pharmaplus* or *HIG/Dominion*, to name but a few).

In the area of investigations, we have in the past succeeded in persuading the authorities to close investigations without fines (Barcelona harbour, dyestuffs, insecticide equipment investigations) or with symbolic fines (ice cream manufacturers, football broadcasting rights). We have top credentials in administrative investigation, having succeeded in recent years in annulling or reducing fines, such as in the case of the Supreme Court litigation on behalf of Mediterranean Shipping Company in the Valencia harbour case. We have recently successfully taken a cartel case in the paper recycling sector to the Supreme Court, which ultimately reversed the CNMC's fining Decision. We have a flourishing distribution law practice and also advise and represent our clients in connection with antitrust damages claims, both in non-contentious (settled) matters (*e.g.*, an EU food packaging cartel), as well as in court litigation (where we have assisted in litigation ending with a declaratory judgment exonerating our client, a member of the sodium chlorate cartel, of civil liability). Our unfair trade litigation experience spans matters dealing with poaching of workers, sales at a loss, economic dependence or unfair competition through breach of regulations, amongst others.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Foreign Direct Investment Regimes
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Sanctions
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

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