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01 Selected merger decisions authorized by the CNMC May 2019 – October 2020.

Firms	Notification threshold	Economic sector	Decision
BARCELO/ DENEB	Not disclosed	Tour operator activities	Phase I clearance (8 May)
EQUIPAFASA/ ACTIVOS SIMPLY	Not disclosed	Retail sale in non-specialized stores with food, beverages or tobacco predominating	Phase I clearance (8 May)
XFERA /LYCA	Not disclosed	Computer programming, consultancy and related activities	Phase I clearance (28 May)
MAGNUM CAPITAL II/ EUROPEAN IO-N INVESTMENT / LCRT	Not disclosed	Telecom	Phase I clearance (28 May)
GRUPO BIMBO/ FABRICA DE PATERNA DE SIRO	Market share	Manufacture of bread; manufacture of fresh pastry goods and cakes	Phase I clearance with commitments (12 June)
AMUNDI/ SABAM	Not disclosed	Fund management activities	Phase I clearance (12 June)
ADVANCE/ WORLD ENDURANCE HOLDINGS	Not disclosed	Fitness facilities	Phase I clearance (30 June)
HENRY SCHEIN/ CASA SCHMIDT – ACTIVOS -	Not disclosed	Retail sale of medical and orthopedic goods in specialized stores	Phase I clearance (30 June)
VT GROUP/ SOCIEDADES DE GRUPO BOLUDA	Market share	Service activities incidental to water transportation	Phase I clearance (28 July)
CRISTIAN LAY/ GRUPO GALLARDO	Not disclosed	Manufacture of basic iron and steel and of ferro-alloys	Phase I clearance (28 July)
ESPRINET - GTI	Not disclosed	Wholesale of information and communication equipment	Phase I clearance (28 July)
QUANTUM CAPITAL PARTNERS/ PAPRESA	Market share	Manufacture of paper and paper products	Phase I clearance (8 September)
BANCO SANTANDER/ URO	Turnover	Buying and selling of own real estate	Phase I clearance (8 September)
MEIF 6 / VIAMED	Not disclosed	Hospital activities	Phase I clearance (8 September)
ABAC SOLUTIONS/ MAIPE/ ELASA/ LLANERA/ NORVENT	Market share	Wholesale of unmanufactured tobacco, cereal, seeds and animal feeds	Phase I clearance (17 September)
RUBIS TERMINAL/ TEPSA	Market share	Warehousing and storage	Phase I clearance (17 September)
NEURAXPHARM/ ACTIVOS DE BUCCOLAM	Market share	Manufacture of basic pharmaceutical products and pharmaceutical equipment	Phase I clearance (22 September)
APG/ VIA LP	Market share	Renting and operating of own or leased real estate	Phase I clearance (29 September)
ÇIMSA/ ACTIVOS CEMEX	Market share	Manufacture of cement	Phase II clearance (29 September)
NOMAR/ ARGENTIA Y CIFRE	Turnover	Manufacture of ceramic tiles and flags	Phase I clearance (12 October)
EQT/ IDEALISTA INTERNACIONAL	Not disclosed	Internet / real estate electronic market place	Phase I clearance (20 October)
CHIESI FARMACEUTICI/ LEADIANT BIOSCIENCES – NEGOCIO REVCOVI -	Market share	Wholesale of pharmaceutical goods	Phase I clearance (20 October)
Q-ENERGY/ TORRESOL	Turnover	Electric power generation, transmission and distribution	Phase I clearance (27 October)
SECURE CAPITAL SOLUTIONS 2000/ HOSPITAL POLUSA	Market share	Hospital activities	Phase I clearance (27 October)

02 CNMC activity. The CNMC publishes a guide on competition law compliance programs.

The National Competition and Markets Commission (**CNMC**) has published a guide on competition law compliance programs (**Guide**).

The Guide draws on two legal developments: *(i)* the prohibition of contracting with public administrations in the case of companies found guilty of infringing the Spanish Competition Act 15/2007, of 3 July (**SCA**), established in Article 71.1.b) (prohibition found in the Spanish Public Procurement Law 9/2017, of 8 November (**LCSP**)) and *(ii)* the recent adoption of Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union Law (**Whistleblowing Directive**).

The LCSP establishes the exclusion from public tenders of companies found guilty of a very serious competition infringement by a final judgment. However, Article 72.5 LCSP admits the possibility of avoiding this prohibition when the responsible company, in addition to paying the relevant fines, puts in place a compliance program.

As for the Whistleblowing Directive, its future implementation will necessarily involve greater awareness of criminal and administrative offences, including those arising from antitrust rules, and therefore a greater effort to design and implement compliance programs.

The CNMC draws a line between compliance programs implemented prior to the detection of the infringement (*ex ante*) and those implemented or modified subsequent to the company having been indicted (*ex post*).

Regarding *ex ante* compliance programs, these are generally only considered effective when they articulate internal controls that enable self-detection and facilitate the use by the undertaking of the leniency program in the case of cartels. Regarding *ex post* programs, companies under investigation may benefit from having put one in place (both as attenuating factor in the case of fines and in connection with the prohibition to contract with the public sector); but companies have the burden of explaining to the CNMC the program's design or how it has been improved and send, within six months, a statement drafted by their legal representatives certifying that the program has been implemented.

Therefore, the CNMC confirms that self-cleaning measures adopted before a procurement ban is imposed may be submitted to the CNMC during the course of disciplinary proceedings to avoid the CNMC ultimately imposing the ban from participating in public sector tenders. These programs must guarantee:

- Involvement of the company's management bodies and/or its senior executives.
- Training programs: the training strategy must be accessible, adaptable and measurable, in terms of impact of the issues offered during the training. The training strategy is not deemed effective if it is merely a standard strategy that only offers an overview of basic notions.
- Anonymous whistleblowing channels enabling the rapid detection of offending behavior and bringing it to the attention of the person responsible without fear of retaliation.
- Independence of the person responsible for designing and supervising compliance policies.
- Identification of risks and design of supervisory and control protocols. The protocols should indicate the areas of the business most exposed to possible competition infringements, the likelihood that the infringement in question would materialize and its impact.

The CNMC assesses compliance programs on a case-by-case basis taking into account the above criteria when making a decision on the potential fines or the possibility of not applying the ban on sales to the public sector.

03 CNMC activity. The CNMC publishes a guide on treatment of confidential information in antitrust proceedings.

The CNMC has published the "Guide on treatment of confidential information and personal data in antitrust proceedings under Law 15/2007" (**Guide**), aimed at providing guidance to companies and other interested parties when they request confidentiality of information or documents provided by them in antitrust proceedings.

The Guide compiles the case law and administrative practice of prior years. Amongst other aspects, the document sets out how and when to access the file in the various types of proceedings and recalls that it is up to the CNMC to decide which aspects are confidential, after weighing of the interests at stake on a case-

by-case basis (though CNMC decisions are ultimately subject to judicial review).

The Guide also includes indications on how personal data and privileged communications are to be treated.

04 CNMC activity / Gun-jumping. The CNMC investigates the possible execution of unauthorized mergers, as well as potential antitrust practices involving the funeral insurance and funeral services market.

The CNMC is investigating the possible execution of several reportable merger operations without the required prior authorization. Furthermore, the CNMC is investigating possible pre-merger coordination between the companies involved in one such merger, and the reporting of incomplete, incorrect, misleading or false information to the CNMC.

The practices affect the markets for funeral insurance and provision of comprehensive funeral services. According to the CNMC, these practices reportedly took place both before and after the merger was reported to the CNMC.

The CNMC has been active in recent years in monitoring gun-jumping. Fines of up to 5% of the affected companies' turnover might ensue.

05 CNMC activity / Amazon. The CNMC declares that Amazon is a postal operator and must comply with postal sector regulations (Decision of 24 September 2020, file STP/DTSP/006/20).

By Decision of 24 September 2020 (**Decision**) the CNMC has declared that Amazon qualifies as a postal operator. The CNMC has analysed in detail the functioning of Amazon Spain Fulfilment, S.L. (**ASF**) and Amazon Road Transport Spain, S.L. (**ARTS**), the subsidiaries in charge of logistics. As a consequence of the Decision, Amazon *(i)* must be registered as a postal operator; and *(ii)* must comply with the Postal Sector regulations.

According to the analysis of the CNMC, Amazon's commercial activities as a shopping platform fall in three categories: sale of own goods, storage and distribution of goods from third parties and pure online marketplace activity (where the sellers are third party stores). According to the Decision, Amazon carries out "postal delivery" in the first two instances, *i.e.*, Amazon picks up, admits, classifies, transports, distributes and delivers.

On the basis that Amazon provides services to third parties when it delivers goods that are not their property, the CNMC has dismissed Amazon's argument that it qualifies as a self-provider of postal services exempt from the postal regulations. Consequently, Amazon must going forward comply with all obligations of a postal operator, such as data protection requirements, quality standards, enabling channels to claim and report customer incidences, etc.

06 Mergers: Travel agency business. The CNMC authorizes Barceló to purchase Globalia's travel agency business.

On 8 May 2020, the CNMC has authorized in phase 1 the acquisition by Barceló Corporación Empresarial (**Barceló**) of exclusive control of assets belonging to Globalia Corporación Empresarial (**Globalia**), essentially, its wholesale and retail travel agency and occasional road passenger transportation business.

In the wholesale travel agency market, the operation involves the merger of the top two competitors, albeit with a combined market share of less than 25%.

A potentially problematic area was the wholesale segment of marketing trips to Disneyland Paris, as the merger involved the integration of two of the three wholesalers currently licensed to market this product in Spain. Licenses are granted by Disney on an annual and discretionary basis. However, post-merger, the retail agencies may resort to the licenses of the resulting entity, as well as to Viajes El Corte Inglés or, failing this, to Disneyland Paris, which also sells this product directly.

From the demand side, the Imserso Social Tourism Program is an important source of demand. 2015 was the first year that a lot was awarded to an entity other than Mundosenior (existing joint venture between Globalia and Barceló). At the wholesale level, the combined share of the two companies through the Mundosenior joint venture has dropped from 100% to significantly below 50% for the 2019-2021 period. The competitive dynamics of this market have evolved considerably in recent years. As a result, the ability of Mundosenior to monopolize the market has vanished. In short, the potential anti-competitive effects that an association between the two companies could have are limited because other companies and

joint ventures exert significant competitive pressure, which has already materialized through lower bidding prices.

Regarding passenger air transport, Air Europa (Globalia) is in the process of being sold to the IAG Group. Hence, Air Europa is excluded from the scope of the Globalia/Barceló transaction. The parties now incorporate non-exclusivity/non-discrimination obligations to ensure that the business added to the new company will not be strengthened to the detriment of third-party tour operators while Air Europa remains under Globalia's control.

In light of the aforementioned reasons, the CNMC considered that the notified operation would not have an adverse impact on effective competition.

07 Mergers / Phase II. Green light to Çimsa's acquisition of Cemex's white cement division.

According to the recently published press release, after a fourteen-month investigation, the CNMC has cleared in phase II the acquisition of Cemex' white cement divisions by Çimsa subject to conditions.

The CNMC initiated a phase II in-depth review due to potential competition problems in the markets for in-bulk white cement and bagged white cement. As a result of the acquisition, Çimsa becomes the largest competitor in both packaged and unpackaged white cement markets with more than 50% market share in the latter.

The clearance of the operation has been subject to two main conditions. First, the divestiture of Çimsa's silo in Alicante, which is to be transferred before closing to competitor Cementos Molins. The second condition guarantees supply to customers in Southern Spain from the Motril silo.

08 Restrictive agreements / Real estate intermediation market. The CNMC opens antitrust proceeding against seven firms for suspected price coordination in the real estate intermediation market.

Following dawn raids in November 2019, the CNMC has opened proceedings against seven firms (CDC Franquiciadora Inmobiliaria, S.A.; Look & Find primera red inmobliaria, S.A.; Aplicaciones Inmovilla, S.L.; Idealista, S.A.; Witei Solutions, S.L.; Anaconda Services and Real Estate Technologies, S.L.; and Servicio Multiple de Exclusivas Inmobiliarias, S.L.) for suspected restrictive agreements prohibited by Articles 1 SCA and 101 of the Treaty on the Functioning of the European Union (**TFEU**).

The CNMC has concerns that the means by which this alleged coordination was implemented include the use of software and digital platforms. The CNMC is also investigating whether the conduct has been facilitated by firms specialized in IT solutions through the design of real estate brokerage software and the algorithms embedded in them.

The initiation of these proceedings does not prejudge the result of the investigation. A maximum period of 18 months is now open for the CNMC to investigate and resolve the case.

09 Restrictive agreements / Selective distribution. The CNMC accepts commitments by Adidas Spain in connection with contractual provisions applied within its selective distribution network (Decision of 6 February 2020, *Adidas*, file S/DC/0631/18).

The CNMC has reached a commitments decision with Adidas regarding restrictive practices in the Spanish retail market for clothing and footwear contrary to Article 1 SCA. Adidas submitted commitments addressing the CNMC's concerns regarding certain clauses in the retail sports clothing company's franchise and resale contracts.

The investigation was initiated as a result of a complaint lodged by BCINCOPE, S.L., one of Adidas Spain's franchisees. These clauses restricted some of Adidas's authorized retailers and franchisees from:

(i) Using the Adidas Brand names and trademarks for the purposes of online search advertising;
(ii) Selling online without a prior specific authorization by Adidas (by requiring retailers to seek authorization of their web address or URL prior to engaging in online sales). In some contracts, retailers were only allowed to sell exclusively at the point of sale and to final consumers at the point of sale, which was interpreted by the Authority as a *de facto* absolute ban on online sales.
(iii) cross-selling among authorized retailers and franchisees.

Additionally, some contracts included a non-compete clause overly broad in scope and, therefore, not complying with the requirements

provided for in the Vertical Block Exemption Regulation (**VBER**).

Equally, the CNMC has observed the existence of resale price maintenance (**RPM**) practices on behalf of Adidas, provided to its clients through product brochures and through the platform "Retail and Pro" (a software tool developed by Adidas that submits centralized information about the products and, in particular, recommended resale prices). However, it also confirmed that franchisees could freely modify resale prices choosing to ignore recommendations. As a result, the CNMC concluded that resale price fixing had not been substantiated.

Adidas submitted remedies intended to eliminate the competition restrictions identified that addressed the CNMC's concerns. In particular, a new contractual framework was set up by Adidas, with the following amendments:

(i) elimination of post-contractual non-compete clauses;
(ii) substitution of the authorization requirement of clients by a verification of compliance with the conditions contained in the conditions for Internet Sale; and
(iii) the elimination of restrictions on cross-selling between authorized dealers and franchisees.

10 Restrictive agreements / National Meteorological Agency. The CNMC dismantles a bid-rigging arrangement in tenders by the National Meteorological Agency (Decision of 13 February 2020, *RADARES METEOROLOGICOS*, file S/DC/0626/18).

The CNMC has dismantled a market-sharing cartel for the supply of weather radar units used by the National Meteorological Agency (**AEMET**).

The AEMET has an extensive tracking network with conventional observatories and remote sensing systems. It monitors adverse weather phenomena that can take place anywhere in Spain and prepares real time forecasts on very different time scales.

In 2014, AEMET issued a tender for the maintenance of the Radar Observation System. The only bid was submitted by a consortium between Adasa Sistemas and Telvent Energia (Schneider is the economic successor of Telvent). According to the CNMC, the consortium was not economically justified and the only explanation for such a consortium was a bid-rigging agreement; the parties submitted apparently independent bids to simulate competitive conduct, which in fact were the cover up for bid-rigging.

The CNMC found a single and continuing cartel, consisting of market-sharing and price-fixing.

The CNMC has declared the prohibition on the accused companies to participate in public biddings. The exact scope and duration of the prohibition shall be decided under the rules on public procurement by a separate body, following the procedure under Article 72 of the Law 9/2017, of 8 of November, regulating Public Sector Contracts.

11 Judicial activity / company officer's penalties. The Supreme Court sheds light on the issue of penalties to directors (Supreme Court Judgments of 1 October 2019, appeal numbers 5280/2018 and 5244/2018).

The Supreme Court's judgments quash the decisions against two employees of FENIN (the Spanish Federation of Health Technology Companies) in the CNMC' Decision of 26 May 2016, *AIO*, S/DC/0504/14), which fined €128.8 million on eight manufactures, their association FENIN and four individuals, for price-fixing of adult diapers marketed through the pharmacy channel.

The Supreme Court recalls that two cumulative requirements must be met under Article 63.2 SCA to fine an individual: *(i)* that the individual is a legal representative or member of the management body of the offending company, understood as one who could adopt decisions that "*set, condition or direct*" the actions of the company; and *(ii)* that the individual has intervened in the anticompetitive agreements or decisions.

In the appeal number 5244/2019, the employee was a "Technical Director" and, in view of the lack of justification by the CNMC that such position implied management activities, the Supreme Court decided that this was not a managerial position. The reasoning in the parallel case follows the same rationale.

In summary, according to the Supreme Court's judgments, the CNMC may impose penalties on the directors or legal representatives irrespective of their level of involvement in the anticompetitive conduct, but the essential

condition of having managerial responsibilities should be met.

12 Judicial activity / Refrigerated transport. The High Court has annulled a CNMC Decision fining €8.8 million on 12 refrigerated transport companies and one business association for price-fixing (Judgment of the High Court of 18 February 2020, appeal number 658/2015 among others).

The appealed Decision stated that the Spanish Association for Refrigerated Transportation (**ATFRIE**, in its Spanish acronyms), a business association of the main national companies involved in refrigerated transportation, had met to fix prices in the sector of refrigerated transport. The meetings had the purpose of: *(i)* disseminating among its associates the tariffs applicable to international road refrigerated transport freight services while *(ii)* participating in an agreement to constitute a franchise company seeking to fix the prices of road refrigerated freight transport and unifying terms of sale.

The claimants reasoned, among other issues, that the appealed Decision breached the right to their presumption of innocence since the CNMC lacked evidence of price-fixing agreements from 2008 to 2012. As a result, the infringement was time-barred. The High Court upheld the claimants' arguments concluding that the CNMC had not submitted evidence of the realization of the anticompetitive conduct by ATFRIE or its associates beyond 2008. Statute of limitations for cartel conduct is of four years since the cartel became known.

13 Judicial activity / Dawn raids. The Supreme Court has dismissed an appeal in connection with dawn raids carried out by the CNMC (Supreme Court Order of 6 March 2020, appeal number 8085/2019).

The Supreme Court Order focuses on the guarantees that must govern the CNMC's inspection activities in the exercise of its powers and, in particular, in relation to legal assistance for companies subject to inspection.

In particular, the appeal is brought by Prysmian Spain, S.A (**Prysmian**) against the judgment of the High Court, which dismissed its previous appeal (Judgment of 23 July 2019, appeal number 776/2015) in the context of the inspection carried out by the CNMC in its headquarters. According to the High Court's judgment, the entry into Prysmian's headquarters was authorized by the court and, moreover, the CNMC requested the consent of the company's representative to carry out the dawn raid. It should be noted that, before granting his consent, the company's representative was advised by external lawyers via telephone.

Prysmian appealed the decision of the High Court on the grounds that it did not receive timely and effective legal assistance. The Supreme Court dismissed the appeal on the basis that the representative signed the acknowledgement of receipt to prove his consent to the dawn raid and that there was no legal provision requiring the suspension of the CNMC's entry until the external lawyers arrived.

In addition, the Supreme Court refers to consolidated doctrine in the criminal field, applicable to antitrust proceedings by analogy, stating that judicially authorized dawn raids do not require the presence of a lawyer.

14 Judicial activity / Adult diapers cartel. Supreme Court sheds light on the liability of cartel members not directly active in the relevant market (Judgment of the Supreme Court of 21 May 2020, appeal number 7880/2018).

In 2016, the CNMC fined €128.8 million on seven manufacturers, a business association (the Spanish Federation of Healthcare Technology Companies (**FENIN**)) and four individuals for setting up a price-fixing cartel of adult diapers sold in pharmacies (Decision of 26 May 2016, *AIO*, file S/DC/0504/14 (**Decision**)).

One of the fined companies, Textil Planas Oliveras, S.A. (**Texpol**), appealed the Decision on the grounds that it was not active in the relevant market and, therefore, it could not be considered as part of the cartel. The High Court sided with Texpol annulling the fine imposed based on the fact that the activity of the company was limited to the sale of adult diapers to hospitals, and not through the pharmaceutical channel, which was the channel under investigation.

The State Attorney appealed the High Court's ruling requesting the Supreme Court to establish case law in order to determine whether the intervention of an undertaking in a cartel, even if it is not active in the main relevant market - but is active in a market which is linked or connected to it- can be considered contrary to Article 101 SCA and Article 1 TFEU. The

Supreme Court agreed and concluded that Texpol's participation in the investigated conduct facilitated collusion and benefitted the cartel.

Unlike most cartels, where companies conspire to increase their sales prices, the four companies colluded to lower the price of ethylene, to the detriment of ethylene sellers. In particular, the companies coordinated their price negotiation strategies before and during the bilateral MCP settlement negotiations with ethylene sellers to push the MCP down to their advantage. They also exchanged price-related information.

Westlake received full immunity for revealing the cartel, thereby avoiding an aggregate fine of *ca.* €190 million.

15 Judicial activity / EU Law / Gun jumping. The CJEU upholds Marine Harvest gun-jumping fine (Judgment of the Court of Justice of 4 March 2020, case C-10/18 P).

On 14 December 2012, Marine Harvest entered into a share purchase agreement under which it acquired a 48.5% stake in one of its competitors, Morpol. The transaction, which was not notified to the Commission, was completed on 18 December 2012. In 2013, Marine Harvest made a mandatory public offer to the remaining 51.5% shares in Morpol, through which it increased its shareholding to 87.1%. A formal notification was submitted in August 2013 and this second transaction was conditionally cleared in October 2013. In its decision, the Commission raised its view that prior to the public offer Marine Harvest had already acquired sole control over Morpol, as a result of the initial 2012 transaction. In July 2014 the Commission issued an infringement decision finding that Marine Harvest had breached the notification and standstill obligations, imposing two separate fines of €10 million each for (a) failure to notify a transaction under Article 4.1 of the Council Regulation (EC) No 139/2004 of 20 January 2014 on the control of concentrations between undertakings (**EUMR**); and, (b) implementing that transaction prior to clearance, in breach of the standstill obligation under Article 7.1 EUMR.

Marine Harvest's judicial appeals against the Commission fining decision before the EU's General Court and the CJEU were rejected. Marine Harvest argued that the Commission's decision breached the principle of *non bis in idem* as it had been fined twice for the same conduct, and the general principle governing "concurrent offences" which should prevent the Commission from punishing a company for two offences which have the same objective.

In its ruling of 4 March 2020 the CJUE concluded that failure to notify and breach of the suspension obligation are separated infringements for which the Commission can impose separate fines and consequently dismissed Marine Harvest's appeal.

16 Judicial activity / EU Law / By object infringement. The CJEU confirms a strict interpretation of the notion of infringement by object (Judgment of the Court of Justice of 2 April 2020, case C-228/18).

On April 2020, the CJEU rendered its ruling in *Budapest Bank* on a request for a preliminary ruling from Hungary's highest court. The CJEU provides clear guidance on the concept of restriction of competition by object and its practical application by courts and national competition authorities.

The background of the case concerns a decision of the Hungarian Competition Authority fining 22 banks, as well as Visa and Mastercard, which had entered into an anticompetitive agreement to establish a uniform multilateral interchange fee (**MIF**) for card payments. The Hungarian Competition Authority established that the agreement had both the object and effect of restricting competition.

On appeal, the Hungarian Supreme Court made a reference to the CJEU seeking clarification on whether such conduct could constitute an infringement by object of competition law bearing in mind the special characteristics of card payment activities.

The CJEU first established that a competition authority can classify a certain conduct as a restriction of competition both by object and by effect. However, competition authorities must do so based on the necessary evidence for each type of restriction.

With regard to the content of the agreement, the CJEU established that an agreement can only constitute an infringement by object if it can be concluded that it is harmful to the proper functioning of competition. If an agreement gives rise to pro-competitive effects, the conduct cannot be characterized as an infringement of competition "*by object*". Similarly, an agreement cannot be considered as harmful to the proper functioning of competition without "*sufficiently reliable and robust experience*". The CJEU expressed its

doubts that said experience existed in the case at hand due to the fact that the previous decision practice of the competition authority as well as previous judgments of the EU courts pointed in the opposite direction, *i.e.* need to analyse the effects of the conduct. Finally, the CJEU emphasized the need to analyse the economic and legal context in which the agreement is adopted together with an analysis of the counterfactual situation.

17 Judicial activity / EU Law / Cartels. The General Court reduces the fine imposed on Infineon for its participation in the smart card chip market by almost €6 million (Judgment of the General Court of 8 July 2020, case T-758/14).

By decision of 3 September 2014, the Commission established the existence of a cartel in the smart card chip sector in the EEA from 2003 to 2005. Within said cartel, several undertakings, namely Infineon, Philips, Samsung and Renesas, had coordinated their pricing policy through a network of bilateral contacts in order to determine their respective responses to customers' requests to lower prices. Infineon obtained a reduction of the fine of 20% based on the fact that it had only participated in collusive agreements with Renesas and Samsung and that there was no evidence that it had been aware of anticompetitive contacts between the other cartel members. Despite this, the German chipmaker received the largest penalty.

Infineon appealed the Decision before the General Court, contesting the existence of the cartel and, alternatively, the amount of Infineon's fine by the Commission, but said action was dismissed.

Subsequently, Infineon lodged an appeal before the Court of Justice. The appeal was upheld by the CJEU which concluded that the General Court had failed to examine all the anticompetitive contacts disputed by Infineon and also had failed to address the argument raised by Infineon that the Commission had infringed the principle of proportionality by setting the amount of the fine without taking into account the limited number of contacts in which Infineon participated. For that reason, the case was referred back to the General Court.

On 8 of July 2020, the General Court reduced Infineon Technologies' fine by approximately €6 million (from €82,784,000 to €76,871,600). The Court concluded that the Commission took insufficient account of the limited number of anticompetitive contacts between Infineon and its competitors while also not succeeding in proving the existence of one of the alleged anticompetitive contacts.

18 Judicial activity / EU Law / Dawn raids. The CJEU rules on dawn raids, in particular on storing of data without prior selection, which is then examined in the offices of the Commission (Judgment of the Court of Justice of 16 July 2020, case C-606/18 P).

The CJEU ruled on the European Commission's powers of inspections in cartel proceedings, in particular, regarding the power to copy data without a prior examination.

On 2009, the Commission's inspectors, accompanied by representatives of the French competition authority, visited the premises of Nexans France in order to carry out an inspection. On the third day of that inspection, the inspectors were able to examine the laptop of Mr. J, who had returned to the office. The use of the computer investigation software enabled the inspectors to recover a number of files, documents and emails which had been deleted from the hard drive of that computer and to determine that those documents were relevant to the investigation. The inspectors decided to make a copy-image of that hard drive. However, noting that they no longer had sufficient time to make such a copy, they decided to carry out a copy of selected data and to place it on data recording devices (**DRDs**) which were put in sealed envelops and taken back to the Commission's offices in Brussels.

The sealed envelopes containing the DRDs were opened in the Commission's offices in Brussels in the presence of the appellants' lawyers. The documents recorded on those DRDs were examined and the inspectors printed out those documents which they considered relevant for the purposes of the investigation.

The appellants brought an action before the General Court seeking, *inter alia*, the annulment of the inspection decision and a declaration that the Commission's decision to seize copies of certain computer files and of the hard drive of Mr. J.'s computer to examine them subsequently at its offices in Brussels was unlawful. The General Court dismissed the action in its entirety.

On appeal, the CJEU held that the Commission may decide to examine data contained on the digital carrier of the undertaking under inspection not by reference to the original, but

by reference to a copy. Indeed, the Commission reviews the same data whether it examines the original or the copied data. Regarding the rights of the undertakings concerned, those rights are safeguarded where the Commission copies the data, admittedly without prior examination, but then assesses whether the data is relevant to the subject-matter of the inspection in strict compliance with the rights of defence of the undertaking concerned, before those documents found to be relevant are placed in the file and the remaining data is deleted.

Consequently, according to the CJEU, the Commission's right to make such copies affects neither the procedural safeguards nor the other rights of the undertaking under inspection, provided that the Commission, after completing its examination, places on the file only documents which are relevant to the subject-matter of the inspection.

19 European Commission activity. The European Commission adopts guidance for national courts when handling disclosure of confidential information.

The European Commission has adopted a communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (**Communication**). The adoption follows a public consultation launched by the Commission last year inviting comments on stakeholders on the draft communication.

The purpose of the Communication is to provide guidance to national courts with regard to access and protection of confidential information in antitrust damages cases. The Antitrust Damages Directive obliges Member States to ensure that national courts have the power to order the disclosure of evidence provided that the damages claim is plausible, the evidence requested is relevant and the disclosure request is proportionate. The Communication provides a number of different measures that can be used by national courts in order to protect confidential information in the context of disclosure requests (*i.e.* redactions, confidentiality rings, use of experts, closed hearings) while also describing how and when such measures could be effective.

20 The Ministry of Economy and Digital Transformation publishes the Draft Regulation modifying the Spanish Competition Act.

Last 31 July 2020, the Ministry of Economic Affairs and Digital Transformation made public the draft regulation modifying Law 15/2007, of 3 July, on the Defense of Competition (**Draft Regulation**). The Draft Regulation, other than implementing the main features of the ECN+ Directive into Spanish law, also introduces important amendments to the Spanish antitrust legal regime, based on the expertise gathered since the entry into force of the current law. The Draft Regulation is currently under public consultation until 15 September.

The most relevant new developments of the Draft Regulation are summarized below:

- **The Draft regulation strengthens the antitrust penalty framework:** The maximum amount of the fine to be imposed by the CNMC shall be at least 10% of the undertaking's total worldwide turnover.[1] Most of the infringements will be considered as very serious, resulting in fines of up to 10% of turnover. Likewise, fines to managers shall be increased from a maximum of €60.000 to €400.000.
- **Revision of the time limits in antitrust proceedings:** The time limit of antitrust sanctioning proceedings increases from 18 to 24 months. Also, the time limit for filing submissions in response to statements of objections is raised to 1 month.
- **A settlement procedure is introduced:** this mechanism, currently not available in Spain, implies that the CNMC may offer a reduction of up to 10-15% of the fine to undertakings or managers who recognize the infringement.
- **Revision of notification thresholds in the simplified merger control procedure:** Concentrations meeting the turnover thresholds but whose resulting market share is less than 15% in the affected market shall be exempt from notification. However, said exception shall not apply when the purchasers (or any of its Group companies) have an individual share of more than 50% in any given market.
- **Greater incentives for leniency** applicants: A marker system is introduced under which the Authority will hold the place in line to the first leniency applicant that approaches it with information while it gathers

[1] According to the CNMC's current decisional practice, in general only the turnover accrued in Spain is considered.

documentation. Also, the information submitted by applicants to a reduction of a fine will not be taken into account to determine the fine of those who provide it.

- **Enhanced powers of investigation:** In addition to inspecting the headquarters of investigated companies and the homes of their employees, the Draft Regulation provides for access to any other location, including the headquarters or offices of third parties, where relevant information of the investigated company may exist. The ability of the CNMC to conduct interviews with any representative of a company or association of companies, or natural persons, when they may be in possession of relevant data and information, is introduced.
- **At an organizational level**, the Draft Regulation eliminates internal procedures, allows the CNMC to prioritize investigations in view of their importance for the public interest and strengthens collaboration and mutual assistance mechanisms between regional competition authorities, other national competition authorities or the European Commission.

21 Emergency amendment to the Law on measures to improve the functioning of the food chain.

On 26 February 2020 the Royal Decree Law 5/2020, of 25 February, was published, adopting urgent measures in the area of agriculture and food (**RDL 5/2020**), amending Law 12/2013, of 2 August, on measures to improve the functioning of the food chain (**Law 12/2013**).

Firstly, RDL 5/2020 modifies the content of Article 9.1(c) of Law 12/2013, in relation to the criteria to be used when calculating the contract price when it is set according to a variable amount. In particular, it includes a list of criteria that may be used when determining the variable amount of the contract prices: *(i)* evolution of the market situation, *(ii)* the volume and quality of the delivered product; and *(iii)* the composition of the product.

Furthermore, RDL 5/2020 introduces two new provisions on abusive commercial practices that refer to the way promotional activities are carried out and the need to avoid the so-called "destruction of value in the chain". Regarding the implementation of promotional activities, RDL 5/2020 established that these should be carried out in accordance with the principles of *(i)* mutual consent and freedom; *(ii)* mutual interest; and *(iii)* flexibility to adapt to the particular circumstances of the different operators. Article 12bis(3) prohibits promotional activities misleading as to the price and image of products or harming the perception as to quality or value of the products. Although RDL 5/2020 does not define what is understood by "misleading consumers", the wording of the rule is similar to that contained in Law 3/1991, of 10 January, on Unfair Competition (**LCD**), and should therefore be interpreted as referring to the LCD. As regards the "destruction of the value in the chain" it attempts to introduce through RDL 5/2020 the setting of a minimum purchase price that can only be fully determined by the producer. This provision could raise legal issues, as it seems to grant one of the parties to the food supply contract the power to unilaterally determine an essential element of the contract (which seems to contradict the Civil Code).

Third, RDL 5/2020 also amends Article 23 of Law 12/2013, including new types of conduct in the list of serious infringements: *(i)* failure to incorporate the price in the food contract; *(ii)* making changes to the price included in the contract that are not expressly agreed by the parties; *(iii)* the destruction of value in the food chain; and *(iv)* carrying out promotional activities misleading about the price and image o the products.