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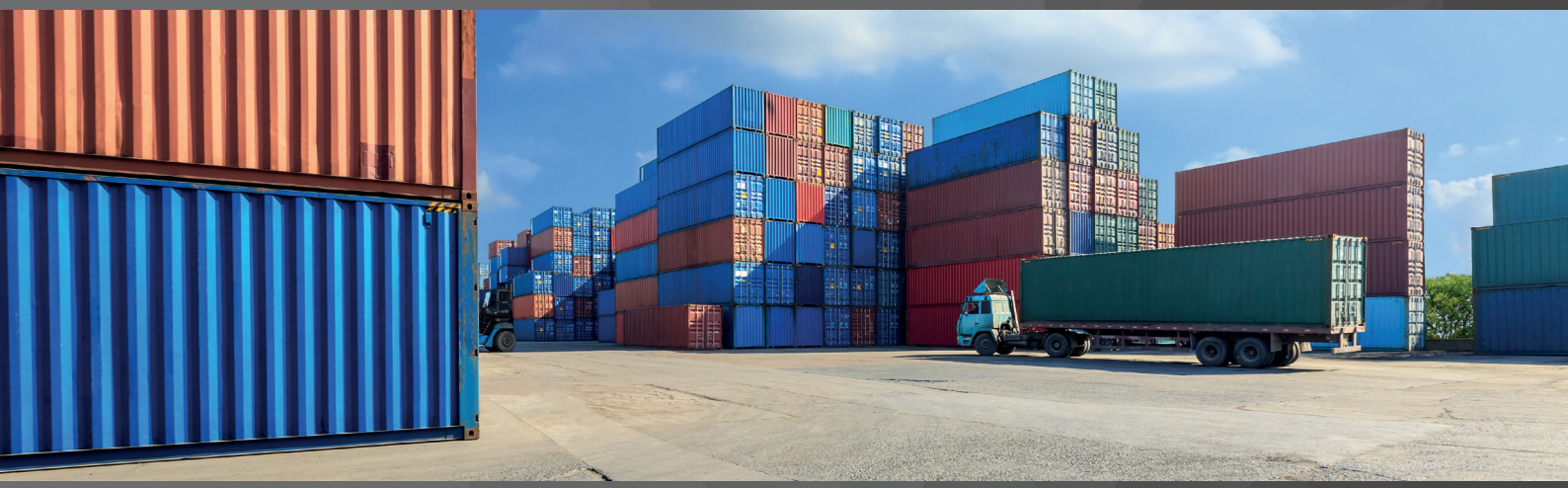

Vertical Agreements and Dominant Firms 2020

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

Fourth Edition

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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 5% of the turnover of the infringing party in the business year preceding the imposition of the fine. Abuse of dominance is also regarded as a serious infringement, but it may also be considered as a very serious infringement which can be fined by up to 10% of turnover (Article 62.4 LDC) if carried out by a company with a market share close to monopoly, or enjoying special or exclusive rights, or in a recently liberalised market.

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

There is no settlement procedure foreseen in the LDC. In Spain, the antitrust proceedings (except in cartel cases and cases where the assessed practice runs itself out) may be closed without fines or declaration of infringement if the parties submit (*ex officio* or proposed by the parties) a request for a commitments termination, which is allowed by the CNMC. In the case that the CNMC considers that the agreement would not produce negative effects

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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 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

The use of voluntary resolution to settle cases depends on the specifics of each case. Cases settled by voluntary resolution in 2018 represented 20% (two out of 10) of all the sanctioning decisions, while in 2019 no cases were settled by voluntary resolution.

1.8 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.

1.9 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.

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

Commercial courts have the 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 anticompetitive 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, and perhaps the seminal case in this area in Spain), 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).

1.11 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, a 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 the 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.

1.12 Does enforcement vary between industries or businesses?

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

1.13 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, including: electronic communications and audiovisual communications; 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).

1.14 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, *Antena 3/La Sexta*, file C/0432/12).

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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.

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

The CNMC is strongly focused on anti-cartel enforcement, the investigation of anticompetitive practices by dominant undertakings being another priority.

Additionally, the CNMC is slowly following up on the larger European trend of fighting anticompetitive conduct in a vertical context in connection with online sales and internet platforms.

1.16 Describe any notable recent case law developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

In 2019, the CNMC fined Vaillant Group EUR 859,763 for imposing anticompetitive restraints on its network of Authorised Technical Services providers (**ATS**), authorised providers of technical services for gas boilers. More specifically, Vaillant *(i)* prohibited the delivery of technical services outside certain territories, *(ii)* fixed the prices to be charged by its ATS network to final consumers, and *(iii)* imposed an obligation on ATS to exclusively use spare parts purchased from Vaillant Group or from authorised operators. When calculating the fine imposed on the Vaillant Group, the CNMC took into account its active cooperation and the fact that the investigated practice was stopped, prior to the notification of the SO, by modifying the contracts containing the restrictive clauses.

This decision points towards the CNMC taking the same stance as the European Commission, by giving a higher value to the active collaboration of investigated undertakings during the investigations of vertical restraints such as RPM, territorial and online sales restrictions.

In this same direction, the CNMC recently terminated with a commitments decision the antitrust proceeding opened in 2018 against Adidas Spain for *(i)* including in its distribution agreements clauses restricting online sales and advertising as well as cross-selling between distributors and between franchisees, and for *(ii)* including a post-contractual non-compete clause in some franchise agreements. Adidas agreed to eliminate the restraints identified by the CNMC and avoided a fine.

Spain seems to have generally been less active in areas such as online sales and distribution than other countries. However, it is to be expected that more decisions will take place in the coming years in connection with online markets. In this regard, the CNMC recently opened proceedings against seven undertakings in the real estate intermediation market for suspected anticompetitive agreements carried out by using software and digital platforms.

Another very interesting and far reaching investigation in recent times has concerned open television operators Mediaset and Atresmedia, who received fines of €38.9 million and €38.2 million respectively for vertical conduct in the television advertising markets (Decision of 12 November 2018, Atresmedia/Mediaset, case S/DC/0617/17). These are are remarkably high fines in a verticals context. This case was interesting as it concerned a network of vertical agreements covering more than 50% of the relevant market, between each of the two largest open TV operators and the media buying agencies, which was considered to foreclose competition by alternative television operators willing to compete in the television advertising market.

The Atresmedia/Mediaset matter coupled with the ongoing investigations in the electronic markets area may signal some new trend of verticals enforcement in Spain.

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 in connection with vertical agreements. In practice, there are substantially fewer 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? Are there any types of vertical agreements or restraints that are *per se* unlawful?

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 hardcore agreements, which include resale price maintenance, absolute territorial protection and generally the other hardcore restrictions blacklisted in the Vertical Block Exemption which are in principle considered as *per se* unlawful.

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

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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 precedents. The European Commission methodology followed in the Notice on market definition is authoritative, but national practice, precedents 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 on 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. It is hoped that with a renewed CNMC Council in June 2020 this will change.

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

It is relevant in theory, although less so in practice. It is hoped that with a renewed CNMC Council in June 2020 this will change.

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 a 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 hardcore 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 or 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; please see question 1.11 above.

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

No, they have not.

2.16 How is resale price maintenance treated under the law?

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

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, *Montesa Honda*, case S/0154/09); fixing maximum discount levels (*vid.* Decision of 5 October 2006, *Maquinaria agropecuaria*, case 599/06); or by means of a finalist strategy aimed at monitoring discounts applied by a distributor (*vid.* Decision of 19 October 2004, *Técnicas Ganaderas*, case 619/04).

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

The CNMC does not regard recommended resale prices as contrary to Article 1 LDC (*vid.* Decision of 3 November 2008, *Animales de compañía*, case 2765/07). 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, *Repsol/Cepsa/BP*, case 652/07), the CNMC fined three

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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% 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, *Cervezas Mahou*, case 389/96).

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. An extensive review of football events rights licensing in Spain a few years ago, which concerned a network of exclusive agreements which foreclosed competition, is a good example of this. Exclusive distribution agreements are, at least in principle, possible as long as they do not lead to foreclosure.

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

Please 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 discounts and multi-product discounts (depending on the circumstances), we may find other types of vertical restraints that may lead to an infringement of the applicable laws:

- 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. An example of MFNs in Spain relates to pharmaceutical marketing data in the *HmR v. IMS Health* investigation a few years ago.

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 generally and this is likely to be an increasing trend.

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 of:

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.

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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, a dominant position requires a stable market share of around 40% 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, a market share close to 40% 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 fined 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.

The 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 generally a good reference of what is to be expected.

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

Yes. 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 the conduct as being exclusionary (such as predatory pricing, margin-squeeze practices or refusal to supply) or exploitative (such as imposing excessively high prices or discriminatory conditions).

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

In Spain, there is a very substantial body of precedents related to intellectual property collective management societies. Some cases have led to damages 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.

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3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

The CNMC has not taken any special measure to try to regulate big tech platforms. However, there are some recent investigations in this area, which is certainly an area of concern.

3.17 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 responses above have covered the relevant information.

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Pedro Callol is a senior partner praised for his extensive experience in antitrust law and litigation, as well as in the antitrust and regulatory angles of complex mergers and acquisitions. Prior to co-founding Callol, Coca & Asociados SLP, Pedro Callol was an equity partner leading the EU and competition practice of one of Spain's largest corporate law firms; before this, he created and led the EU competition law practice of a London 'magic circle' law firm in Spain; and prior to that, he was an associate with Arnold & Porter in Washington, D.C. and London. He is dual-qualified in Spain and England, holds an LL.M. from the College of Europe, Bruges (grantee of the Ministry of Foreign Affairs of Spain) and is a law graduate of the University of Chicago Law School (Fulbright).
Pedro is currently the President of the Fulbright Alumni Association of Spain and of the Ryder Club of Spain. He is a member of the Advisory Board of the American Antitrust Institute in Washington, D.C. and a member of the Board of Directors of the Spanish Competition Law Association.

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Manuel Cañadas is an attorney admitted to the Madrid Bar. He has wide experience as a competition law, distribution and litigation specialist, also covering other related areas such as unfair competition, IP, data protection and trade regulation. Prior to joining Callol, Coca & Asociados SLP, Manuel was an associate at the EU & competition department of one of the largest law firms in Spain. Before that, he trained with a Spanish competition law boutique firm. He holds a law degree from Universidad Autónoma (Madrid), an LL.M. in European and International Law from Université Catholique de Louvain (Belgium), and a postgraduate degree in Business law from Universitat Oberta de Catalunya (Spain).

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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, as well as to media, technology, consumer goods, pharmaceutical, distribution and industrial corporations, mostly from the EU, America and Asia.
In the area of merger control, Callol, Coca & Asociados SLP has intervened successfully in the most complex merger reviews in the last few years in Spain (*e.g.*, *Telefonica/Digital+*, *Fresenius/Quiron*, *Cerberus/Renovalia*, *Glintt/Pharmaplus*, *IBAM/Mallinckrodt*, and *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 investigations, 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 and unfair competition through breach of regulations, amongst others.

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