Table of contents

01 Selected CNMC merger decisions, May-November 2021.

Firms	Notification threshold	Economic sector	Decision
BEAM SUNTORY/ MAXXIUM ESPAÑA	Not disclosed	Manufacture of beverages	Phase I clearance (1 June)
SCS/ HOSPITAL JUAN CARDONA	Market share	Hospital activities	Phase I clearance (8 June)

HEXPOL AB/ UNICA	Not disclosed	Manufacture of other rubber products	Phase I clearance (16 June)
T-SOLAR/ T-SOLAR OPERATING/ T-SOLAR LUXEMBOURG	Turnover	Production of electricity	Phase I clearance (16 June)
EQUITIX Y GCM/ HTG	Not disclosed	Human health activities	Phase I clearance (16 June)
MASMOVIL/ EUSKALTEL	Turnover	Programming and broadcasting activities	Phase I clearance (16 June)
PROA CAPITAL Y ANEMONIA/ AMARA	Turnover	Electrical installation	Phase I clearance (22 June)
UNICAJA BANCO/ LIBERBANK	Turnover	Financial services activities, except insurance and pension funding	Phase I clearance with commitments (29 June)
ABANCA/ LA SUCURSAL	Market share	Financial services, except insurance and pension funding	Phase I clearance (29 June)
ALD/ BANSABADELL RENTING	Turnover	Not disclosed	Phase I clearance (6 July)
EQT FUND MANAGEMENT S.À.R.L./ SOLARPACK CORPORACIÓN TECNOLÓGICA	Turnover	Electricity, gas, steam and air conditioning supply	Phase I clearance (6 July)
PAPER EXCELLENCE/ DOMTAR	Market share	Manufacture of pulp, paper and paperboard	Phase I clearance (13 July)
LUXIDA/ DISTRIBUIDORA LAS MERCEDES	Market share	Distribution of electricity	Phase I clearance (27 July)
SCG PACKAGING/ DELTALAB	Market share	Manufacture of instruments and appliances for measuring, testing and navigation; watches and clocks	Phase I clearance (27 July)
SANTA LUCIA/ FUNESPAÑA	Market share	Insurance	Phase II clearance with commitments (7 September)
CHARTERHOUSE/ CALYPSO	Market share	Wired telecommunications activities	Phase I clearance (14 September)
PRIM@ER- OLANO/ TMF	Market share	Freight transport by road	Phase I clearance (14 September)
APOLLO/ GRUPO AEROMEXICO	Market share	Passenger air transportation	Phase I clearance (14 September)
MEMORA/ REKALDE/ IRACHE	Market share	Funeral and related activities	Phase II clearance with commitments (14 September)
SKCP/ NEGOCIO DE PIGMENTOS DE CLARIANT/ GRUPO HEUBACH	Market share	Manufacture of dyes and pigments	Phase I clearance (21 September)
PAI PARTNERS/ ALTAN	Market share	Manufacture of basic pharmaceutical products and pharmaceutical preparations	Phase I clearance (21 September)
EL CORTE INGLES/ SANCHEZ ROMERO	Turnover	Retail sale in non-specialized stores	Phase I clearance (29 September)
COLORCON/ IDEAL CURES	Turnover	Manufacture of pharmaceutical preparations	Phase I clearance (29 September)
SEARCHLIGHT CAPITAL PARTNERS/ FLOWBIRD	Market share	Manufacture of instruments and measuring appliances, testing and navigation	Phase I clearance (5 October)
SIEMENS/ FORAN	Market share	Other software publishing	Phase I clearance (13 October)
HELADOS ALACANT / HELADOS SOMOSIERRA	Market share	Manufacture of ice cream	Phase I clearance (13 October)
TURNITIN/ OURIGINAL	Market share	Computer programming, consultancy and related activities	Phase I clearance (19 October)
CEMENTOS MOULINS/ CALUCEM	Market share	Manufacture of cement	Phase I clearance (19 October)
MCH / NEGOCIO B2B URIACH	Market share	Manufacture of basic pharmaceutical products and pharmaceutical preparations	Phase I clearance (19 October)
PHOTOBOX/ ALBELLI	Market share	Other printing, binding and related services	Phase I clearance (19 October)
THALES / NAVIGATE	Market share	Manufacture of computer, electronic and optical products	Phase I clearance (19 October)
GRUPO BDR THERMEA - BAXI- / HITECSA	Market share	Manufacture of fabricated metal products, except machinery and equipment	Phase I clearance (26 October)
ALLIANZ / GT MOTIVE	Market share	Other information technology and computer service activities	Phase I clearance (26 October)

02 Merger-to-monopoly / Mooring and unmooring services. The CNMC approves with commitments the creation of a 50/50 joint venture between Mooring & Port Services and Cemesa Amarres de Barcelona (Decision of 27 July 2021, *MOORING & PORT SERVICES, S.L./ CEMESA AMARRES BARCELONA, S.A.*, file C/1134/20).

The CNMC approved on 27 July 2021 (with confirmation in August from the Government, which has the statutory power to alter conditional or negative merger decisions), in second phase with commitments, the merger between Mooring & Port Services, S.L. (**Mooring**) and Cemesa Amarres Barcelona, S.A. (**Cemesa**) (together the **parties**).[1] Cemesa is part of the international group DP World, based in Dubai, which provides port services in several Spanish ports; in the port of Barcelona, Cemesa held a license for the provision of mooring services and also provides other port services. Mooring held the other license for the provision of mooring and unmooring services in the port of Barcelona.

Nature of the transaction and competition issues.

The transaction involves the creation of a 50/50 joint venture (**JV**) between both parties for the provision of mooring and unmooring services in the port of Barcelona. The CNMC considered the port of Barcelona as the relevant geographic market. The critical aspect is the merger of the two existing operators into a single one.

After an extensive pre-notification, the transaction was notified to the National Markets and Competition Commission (**CNMC**) on 3 November 2020. Although the parties offered commitments in first phase, the CNMC decided to open a second phase. After several information requests issued to the parties and to third parties the Competition Directorate issued on 11 June 2021 the statement of objections (**SO**) where the main problem identified was the likelihood that the JV would reduce -and eventually eliminate- the discounts applied to the services. This was because, although the port service is subject to regulated cap pricing, average prices are in fact lower than the regulated cap prices, and there is effective price competition through discounts applied to the regulated maximum prices.

As is logical, the creation of a monopoly and subsequent price increases was of concern to the CNMC, and could lead it to prohibit the concentration. The potential of the JV *(i)* reducing quality and/or *(ii)* carrying out exclusionary practices by bundling the mooring services provided by the JV in monopoly regime post-merger with the remaining port services provided by Cemesa, was also weighed. However, throughout the procedure, the CNMC ruled out the competition problems derived from possible quality reductions (as there are regulatory obligations to this effect derived from the Ports law and from the operating license itself) and from the bundling of services or exclusive discounts (as there is no market power of the JV in other port services and the JV would be subject to universal service obligations regarding the mooring services). The SO therefore focused on the issue of possible unilateral price increases by the JV.

Commitments and conclusion

The transaction is a merger to monopoly that required an in-depth second phase investigation focusing on the potential detrimental effects, efficiencies, etc., with thorough market testing, etc. In conclusion, the CNMC was concerned about the transaction, which could potentially be prohibited.

To remedy the expressed concerns, the parties offered commitments, which (subsequent to negotiation) resulted in a five-year obligation not to worsen the commercial conditions or prices applied prior to the merger, with the exception of annual price updates reflecting the wage increases included in the national collective bargaining agreement for the mooring sector. The CNMC cleared the concentration on the basis of the said commitments.

03 Other problematic mergers.

In its merger Decision of 11 May 2021, *SOFISPORT/ GRUPO MAXAM*, file C/1770/21, the CNMC has authorized the acquisition of control by Sofisport S.A. of the hunting and sport shooting cartridges business and certain related assets of Maxam Holding, S.L. The CNMC considered the disappearance of the main and, in some cases, only independent supplier of components (gunpowder, primers and cases) used to manufacture non-metallic hunting and sport shooting cartridges in Spain and the EEA. Therefore, the transaction was cleared subject to commitments offered by Sofisport, notably *(i)* divestiture of assets to a competitor, Fiocchi Munizioni, S.P.A. (**Fiocchi**), enabling it to

[1] See press release here: https://www.cnmc.es/prensa/concentracion-mooring-cemesa-20210730. The CNMC reports and merger Decision can be found here: https://www.cnmc.es/expedientes/c113420.

reinforce its production capacity; and *(ii)* Sofisport commits to temporarily supply Fiocchi with gunpowder for a maximum of three years and to guarantee the supply of gunpowder, primers and cases for the next five years to Spanish producers under conditions comparable to those that existed pre-merger.

In its merger Decision of 29 June 2021, *UNICAJA BANCO/ LIBERBANK*, file C/1194/21, the CNMC identified a weakening of effective competition in retail banking at provincial level, specifically in the province of Cáceres, where high concentration would ensue post-merger. The merger has been approved subject to a commitment of keeping the offer of products by the merged entity under commercial conditions that are no worse than those offered by the resulting entity in the zip code areas where there is competition post-merger.

04 CNMC activity / Gun-Jumping. The CNMC fines Albia Gestión de Servicios, S.L.U., (Santa Lucía group) (Decision of 13 July 2021, *ALBIA/ TANATORIOS MOSTOLES*, file SNC/DC/045/21).

Albia Gestión de Servicios, S.L.U. (**Albia**) failed to comply with the obligation to notify and get clearance from the CNMC prior to the acquisition of the funeral home Tanatorios Móstoles, S.L. before implementing the merger in 2019.

Like most gun-jumping cases prosecuted in Spain, the transaction was reportable on the basis of the market share threshold. In this case, the threshold was met at least in the retail market for mortuary services in the city of Móstoles, according to the market definition in force in the precedents of the funeral sector where the transaction was executed. A fine of €300,000 has been imposed (which is considerable given the very limited territorial scope involved).

On the other hand, on 13 January 2021, the CNMC required Albia *ex officio* to notify the purchase of Tanatorios Móstoles, S.L. After analyzing the transaction, on 20 April 2021, the CNMC authorized it in Phase I without commitments.

05 Restrictive agreements / Bid-rigging / State Road Network. The CNMC has fined twelve companies for bid-rigging of road maintenance and operation services tenders (Decision of 17 August 2021, *CONSERVACIÓN DE CARRETERAS*, file S/0013/19).

The cartel operated through meetings where the cartel members periodically coordinated the bids to be submitted in the tenders issued by the government for road maintenance services of the State Road Network.

The cartel allocated a "pool" of points to each group of tenders, used as reference by the companies according to the level of discounts offered. This system incentivized each firm in the cartel to concentrate its efforts on a limited number of tenders, while submitting bids with little or no chance of being awarded in the remaining tenders.

The cartel operated between February 2014 and December 2018 and covered 71 tenders. The total amount awarded to companies in the cartel exceeded 530 million euros.

06 Restrictive agreements / Film distribution. The CNMC concludes infringement proceedings against the film distribution majors and an audience measurement company (Decision of 29 September 2021, *DISTRIBUCIÓN CINEMATOGRÁFICA*, file S/0001/19).

This investigation was conducted against the Spanish subsidiaries of 20th Century Fox, Paramount, Rentrak, Sony, Disney, Universal, Warner Brothers and Ymagis, S.A., in connection with uniform conditions applied in the digitization of movie distribution as well as sharing of commercially sensitive information amongst large distributors with the collaboration of audience measurement company RENTRAK B.V.

The investigated companies offered commitments through which they would eliminate the sharing of sensitive non-public information. Specifically, film distributors will not supply audience companies any non-public information about dates of movie releases and the audience measurement company will not supply film distributors information from other distribution companies on: *(i)* disaggregated box office revenues; or *(ii)* the number of screens on which a movie is to be shown.

The investigation echoes some aspects of the FECE investigation against some of the same Hollywood majors, which concluded with a fining Decision in 2006. Unlike in this case, in the FECE case back in 2006, the CNMC equated similarity of conditions which collusion, which (arguably) rightly does not do in this case. The exchange of information regarding dates of movie releases, however, is deemed sensitive; and yet the CNMC does not appear to have considered to what extent sharing information on dates of movie releases might be procompetitive as a means for

output maximization (because viewers do not have to choose between one release or another and can attend a maximum number of releases, with the risk of those coinciding in time being minimized).

07 Restrictive agreements / Railway network. The CNMC has fined for bid-rigging the main security, signaling and communications systems companies in connection with the high-speed (AVE)'s medium-distance and commuter network in Spain (Decision of 29 September 2021, *SEGURIDAD Y COMUNICACIONES FERROVIARIAS*, file S/DC/0614/17).

The CNMC has fined a total of €127.3 million on Alstom, Bombardier, CAF, Cobra, Nokia, Siemens and Thales, and ten of their executives for their participation in a cartel prohibited by Articles 1 LDC and 101 TFEU. Specifically, the companies created a cartel that fraudulently rigged at least 82 tenders from the railway contracting authorities, between 2002 and 2017, for construction, execution of work, supply, installation, commissioning and maintenance relating to the security and communications installations of the AVE and conventional rail network.

According to the CNMC, this is a very detrimental cartel that has had the actual effect of eliminating or significantly restricting competition in 82 tenders. During its 15-year existence, the companies were awarded tenders for a total amount of € 4,142 million.

Back in 2019, the CNMC had already fined € 118 million on fifteen companies for rigging the award processes for the electrification of the high-speed AVE and conventional networks and its electromechanical equipment.

The information collected during the investigation of the latter case, alerted the CNMC to the possible existence of anti-competitive practices that would affect tenders issued for security, signaling and communications installations of the AVE and conventional network. Consequently, the CNMC initiated this investigation, which resulted in a fine for the companies under investigation.

08 Restrictive agreements / EURO 6000. The CNMC closes with commitments an investigation against EURO 6000 related to access to ATM networks (Decision of 2 November 2021, *EURO 6000*, file S/0034/19).

The CNMC has ended proceedings for breach of Article 101 TFEU and 1 LDC against EURO 6000 on 2 November. The proceedings were opened on February 2020 because of the concern that EURO 6000 (comprising several banks) may have denied ING access to its ATM network, in contrast to the access granted to other entities.

The commitments, proposed by EURO 6000 establish FRAND terms *vis-à-vis* ING or other third parties. These commitments include:

i. a new system to determine fees;

ii. the obligation to make public the fee system as well as any further agreement with third entities;

iii. the follow-up of a procedure which provides certainty to each applicant requesting access to the ATM network; and

iv. regarding ING, the claimant originating the proceedings, EURO 6000 undertakes to offer a new fee system.

The commitments seek to guarantee that the CNMC's concerns are cleared without expressly declaring a competition law breach.

09 Judicial activity / Football. The European Super League matter before Spanish Courts.

Twelve European football clubs[2] signed on 17 April 2021 a framework agreement to form the European Super League (**ESL**). The ESL was announced as a major European football tournament in competition with the current UEFA Champions League. According to the Real Madrid president and one of the main sponsors of ESL, the ESL was essential for the continuity of football, since it would allow a significant increase in revenues for the whole business.[3]

UEFA took aggressive action against the ESL members threatening, amongst other things, their exclusion from FIFA, UEFA and national competitions. One of the first steps of the ESL was therefore to file a lawsuit against UEFA and FIFA (for breach of Articles 101 and 102 TFEU), and a request for interim measures, which were

[2] AC Milan, Atlético de Madrid, Arsenal, Chelsea, FC Barcelona, Internazionale Milano, Juventus FC, Liverpool FC, Manchester City FC, Manchester United FC, Real Madrid CF and Tottenham Hotspur.

[3] https://english.elpais.com/usa/2021-04-21/real-madrid-president-we-are-creating-a-european-super-league-to-save-soccer-the-situation-is-dire.html

granted few days after, on 20 April 2021 by the Commercial Court nº17 of Madrid (**Court**). The interim measures, in essence, ordered UEFA and FIFA to refrain from preventing the development of the ESL, and from punishing clubs and players part of ESL during the main proceedings until a judgment on the merits is reached.

Afterwards, the Court decided in its Order of 11 May 2021 to stay proceedings and refer to the Court of Justice of the European Union (**CJEU**) several questions for a preliminary ruling in an expedited procedure (case C-333/21).

The questions posed refer to whether the course of conduct adopted by UEFA and FIFA is contrary to Articles 101 and 102 TFEU, and whether those same activities would unlawfully restrict Articles 45, 49, 56 and/or 53 TFEU. The counts of conduct connected with the request for a preliminary ruling include:

i. the need for prior authorisation by UEFA and FIFA to clubs wishing to organize alternative competitions, given the lack of an objective, transparent and non-discriminatory procedure for approval;
ii. the possibility of opening disciplinary proceedings against ESL clubs and players;
iii. the assumption by UEFA and FIFA of the original rights of the competitions, depriving the clubs of such ownership and the derived marketing rights.

The CJEU has refused the expedited procedure under Article 105 of the Rules of Procedure of the Court of Justice given the fact that UEFA and FIFA have complied with the interim measures and stopped disciplinary proceedings. In the main proceedings, over half of EU Member States have submitted written statements formally opposing the creation of the ESL, which gives a good idea of the political and public opinion relevance of this matter.[4]

The Court requested UEFA in late September to confirm compliance with the interim measures. The Court stated that the initiation of disciplinary proceedings after the adoption of the interim measures constituted a "*blatant disregard*" of the measures and Court[5].

[4] https://www.skysports.com/football/news/11095/12439918/european-super-league-over-half-of-eu-countries-formally-oppose-botched-project

[5] https://www.elconfidencial.com/espana/2021-09-20/el-juez-de-la-superliga-da-un-ultimatum-a-ceferin-y-avisa-a-tebas-por-sus-declaraciones_3292724/

10 Judicial activity / milk cartel. Court issues damages decision in connection with price fixing in milk cartel (Judgement of the Commercial Court nº 1 of Granada of 30 June 2021, appeal number 1722/2015).

By Decision of 26 February 2015, *INDUSTRIAS LACTEAS*, file S/0425/12, the CNMC declared the existence of a cartel in the dairy industry, sanctioning several dairy companies for having reached agreements on purchase prices and distribution of supply sources, allowing the companies total control of the market.

In a Judgment dated 30 June 2021, the Commercial Court No. 1 of Granada granted the first damages award to a group of 17 farmers from the Ribera area in Navarra, for an amount of nearly two million euro against Corporación Alimentaria Peñasanta, S.A., Puleva Food, S.L. Central Lechera de Galicia, S.L.

The Commercial Court stated that the defendant companies, except for Schreiber Foods España, S.L., which has been acquitted, would have to pay a total of € 1,852,646 (14% of the total claimed by the farmers, apparently on account of a poor economic valuation of the harm).

This Judgment is not final and can be appealed before the Provincial Court of Granada.

11 Judicial activity / Prohibition to participate in public procurement tenders. The Supreme Court confirms an injunction granted by the High Court to stay a prohibition to participate in public procurement tendering included in a bid-rigging antitrust decision (Judgement of the Supreme Court of 14 September 2021, appeal number 6372/2020).

The Judgment of the Supreme Court (**the Judgment)** addressed an appeal brought by the CNMC against an Order of the High Court provisionally staying the sanctions in Decision of 20 June 2019, *Transporte Escolar Murcia*, file SAMUR/02/2018.

The importance of the Judgment lies on the nature of the prohibition to participate in public tenders, a punishment against bid-rigging foreseen by Spanish law. Indeed, Spanish law allows that the prohibition imposed by the CNMC may be delimited, as to the scope and duration thereof, either by *(i)* the CNMC itself, or *(ii)* a specific administrative body, the contracting board (**JCCA**), dealing with public procurement issues dependant on the Ministry of Finance. In this case, (as is usually the rule), the concrete scope and duration was left to the JCCA.

The Supreme Court decides on two main questions, *i.e.*, *(i)* when is the prohibition to bid enforceable, and *(ii)* whether the mere referral to the JCCA to decide on the details of the suspension is a matter that can be the object of an injunction.

Regarding *(i)*, the Supreme Court decides that the enforceability of the prohibition is effective only when its concrete scope and duration is determined -by either the CNMC or the JCCA-. Regarding *(ii)*, the Supreme Court argues that it is not reasonable to be able to stay the antitrust fine and not the referral to the JCCA (as both are closely linked). The practical importance of this is that it is possible (and likely) that the penalty of disqualification from participation in public tenders can be the object of an injunction.

12 The CNMC joins the larger trend of investigating conduct by 'big tech', in this case against Apple and Amazon.

On 1 July 2021, the CNMC announced an investigation against Apple and Amazon for possible restrictive practices in the Internet sales of electronic products and the provision of marketing services to third-party retailers through online platforms in Spain.

The conduct under investigation involves an agreement between both groups that would include restrictions on the Amazon website in Spain regarding: *(i)* the retail sale of Apple products by third parties; *(ii)* advertising of competing Apple products and certain campaigns directed at Apple customers by Amazon; and *(iii)* other commercial restrictions.

13. Reform of the Competition Act.

Royal Decree-Law 7/2021, of 27 April, has implemented into Spanish law EU Directive 2019/1 of 11 December 2018 empowering the competition authorities of Member States (OJ L11/3, 14.1.2019) (ECN+ Directive).

The reform approved is less ambitious than anticipated by the preparatory works. No settlement procedure is introduced in line with that under EU law; neither is an also expected extension of the legal duration of antitrust proceedings (limited to 18 months, which is perceived as sometimes too short); fines on individual directors are left untouched at a maximum of €60,000, widely perceived as low. However, it may well be that these and other legislative reforms are passed in the parliamentary process of approval of the Royal Decree-Law as a standard Act of Parliament.

In summary of the areas now affected by this key legislative reform:

(A) Antitrust fines and liability.

a. *The reform reinforces the fining powers of the national Competition and Markets Commission (**CNMC**)*. The CNMC has in the past typically (though not always, the uncertainty stemming from the fact that prior to this reform there was silence regarding the geographic scope of turnover) calculated antitrust fines on the basis of national turnover. Subsequent to the reform, maximum fines can run up to 10% of worldwide turnover. This reform is likely to lead to increased fines.

b. *Increase of the upper limits of fines for RPM and general horizontal and abuse of dominance cases.* All breaches of Articles 101 and 102 TFEU and national law equivalents are subject to fines of up to 10% of turnover (hitherto the 10% upper limit was reserved to cartels and abuse of dominance in monopoly or liberalized markets).

c. The notions of *group liability* and *economic continuity* are reinforced in connection with *(i) dawn raids*, where it is now made clear that an inspection order addressed to a single company is deemed to have been addressed to the entire group of companies, provided the latter are connected with the investigated facts; and *(ii) antitrust liability* which is now expressly extended to company successors.

(B) Interim measures. The CNMC has very rarely made use of interim measures in antitrust matters. The reform inserts a paragraph in the relevant provision which does not seem to add much of substance (it requires international coordination in Article 101, 102 TFEU matters; and requires that interim measures are limited in time and should not lead to irreparable harm). Hopefully this will be a signal to the CNMC to use its powers to issue interim measures when required.

(C) Leniency. The reform clarifies that *(i)* leniency applicants also benefit from an *exemption to the ban of cartel members from public procurement tenders*; *(ii) leniency applications and corporate statements are confidential* and may only be accessed by the accused parties without right to a copy and solely for defense in antitrust administrative proceedings (damages claims not included); and *(iii)* a *marker system* is now put in place in Spain.

(D) Investigation toolbox and key procedural principles.

a. *Investigation powers of the CNMC are clarified regarding areas such as executive or company staff interviews.* The CNMC is now given express power to summon individuals to interviews under threat of penalty. Lawyers may assist interviewees and interviews can be recorded.

b. *The CNMC is empowered to reject complaints based on priority criteria*. This has been a much debated issue since under the pre-existing law the CNMC was obliged to (at least) give weight to any complaint submitted to it, even if to reject it, which of course has been a source of busyness sometimes viewed as unnecessary or detrimental to the efficient work of the CNMC. Difficulty to prove the facts in a complaint, likely limited impact or the possibility to remedy the issue through other legal means are cited as criteria to determine priority.

c. Fundamental rights: antitrust proceedings must abide by the general principles of EU law and the EU Charter of Fundamental Rights.

14 European Commission activity / Vertical Agreements. The European Commission publishes a draft revised Vertical block exemption Regulation (VBER) and Guidelines.

The EC has published on 9 July 2021 the awaited draft proposal for a revised VBER and its Guidelines. The current rules expire on 31 May 2022. The draft rules highlight the importance of the digital economy, where e-platforms and e-commerce play a central role. In particular:

i. Online sales restrictions. The proposed VBER contains a definition of online sale restrictions, labeling them as restrictions which object is to prevent buyers or customers from selling goods or services online or from using one or more online advertisement channels. This kind of restrictions will qualify as hardcore restrictions and will not be covered by the VBER. However, certain online-related vertical agreements might be included in the VBER if their object is not the restriction of competition. This could be the case in connection with dual-pricing "*in so far as it has as its object to incentivize or reward the appropriate level of investments respectively made online and offline*", as described in paragraph 195 of the proposed Guidelines.

ii. Dual Distribution. The impact that e-commerce has had on dual distribution (a supplier sells directly to its clients, and also through independent distributors) has made it necessary for the EC to address the issue directly in the VBER. Measures have been adopted to address the concerns regarding potential horizontal restraints, indicating situations which will not be covered by VBER specifically when addressing online intermediation services. For instance, the exemption does not apply to non-reciprocal agreements between competitors where the parties' combined market share exceeds 10% (if exceeding 10% but not surpassing 30% VBER would still apply, unless an anticompetitive information exchange took place).

Moreover, the EC has also included wholesalers and importers in the scope of dual distribution.

iii. MFN clauses. The EC considers that most favored nation clauses can qualify for the benefit of the VBER, provided that all the requirements are met (*i.e.*, 30% market share), now with the exception of the "*wide retail MFNs*", referred to a prohibition of offering better conditions through competing online intermediation services. These wide retail MFNs are not covered by the draft VBER and, consequently, they will have to be assessed individually.

The next EU rules on distribution and vertical restraints are expected to be in force from 1 June 2022 until 31 May 2034.

15 EU Law / Car manufacturers. The European Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars.

The EC has found that Daimler, BMW and Volkswagen group (Volkswagen, Audi and Porsche) breached EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning.

Car manufacturers had technical meetings to discuss the development of the selective catalytic reduction (SCR)-technology, which eliminates harmful nitrogen oxide emissions form diesel cars through the injection of urea (also called "AdBlue) into the exhaust gas streams. For five years, those car manufacturers colluded to limit

competition on cleaning technology to what was required by law.

Daimler, BMW and Volkswagen group reached an agreement on AdBlue tank sizes and ranges and a common understanding on the average estimated AdBlue consumption. Also, they exchanged commercially sensitive information of these elements.

Regarding fines, *(i)* Daimler received full immunity, avoiding a fine of €727 million; *(ii)* Volkswagen group benefited from a reduction of the fine under the 2006 Leniency Notice and was fined €505 million; and *(iii)* BMW was fined €372 million.

16 EU Law / Yen Interest Rate Derivates trading market. The European Commission re-adopts its decision and fines ICAP €6.45 million for facilitating several cartels in the Yen Interest Rate Derivatives trading market.

The European Commission has re-adopted a cartel decision against ICAP for having breached EU antitrust rules by facilitating several cartels in the area of the Yen Interest Rate Derivatives (**YIRD**) trading market.

YIRDs are financial products, used by banks to manage the risk of interest rate fluctuations. In February 2015, the EC adopted a decision imposing fines on the same ICAP entities for facilitating six bilateral infringements in the YIRDs sector. In November 2017, the General Court annulled one out of the six infringements and shortened the duration of four infringements. The General Court also annulled the fines imposed on ICAP for inadequate reasoning. In July 2019, the Court of Justice dismissed the EC's appeal, as ICAP did not appeal, the General Court's findings on ICAP's liability for the five infringements became final, albeit without fines.

Now, the EC corrected the procedural error and included a detailed reasoning on the fine calculating, imposes fines on the three entities of ICAP having participated in the five infringements at the time.

17 Judicial activity / EU Law / SUMAL Judgement. The Court of Justice endorses downward liability by deciding that parties harmed by anticompetitive conduct may claim damages directly against subsidiary companies (Judgement of the Court of Justice of 6 October 2021, case C-822/19).

The Judgment of the European Union Court of Justice (**CJEU**) of 6 October 2021, *Sumal*, case C-882/19, addresses a request for a preliminary ruling from the provincial court of Barcelona in late 2019. The court is addressing the appeal brought by Sumal after the first instance court had dismissed the claim based on the fact that liability is imputable to Daimler, not its subsidiaries. Indeed, Sumal had sued Mercedes Benz Trucks España, Daimler's Spanish subsidiary, seeking compensation for two trucks acquired during the cartel term.

The Judgment addresses three main issues:

(i) The CJEU reminds that the notion of *undertaking* is an autonomous EU law concept, which may comprise several companies, and that it enables the automatic application of upward liability when an affiliated company is found responsible (points 38-50).

(ii) A subsidiary is not deprived of its rights of defence, given it is not directly named in the Decision, because it must "*dispose of all the means necessary for the effective exercise of its rights of defence, in particular in order to be able to dispute that it belongs to the same undertaking as its parent company*" (p. 51-67).

(iii) Finally, the Court defends that national courts should construe national rules in light of EU law, including the downward liability. Having said so, however, the CJEU argues against any *contra legem* interpretation and, therefore, any national law that does not permit to claim damages against a subsidiary company is contrary to Article 101 TFEU (points 68-75).

The Judgment is not surprising when viewed on the light of the *Skanska* and concordant case law on the concept of economic continuity of undertakings etc.

18 Judicial Activity / Damages Directive. AG Rantos' opinion on the temporal scope of the Damages Directive.

On June 2020, the provincial court of León (**Court**) requested a preliminary ruling to the CJEU on the interpretation of certain provisions regarding the temporal scope of Directive 2014/104/EU of 26 November 2014 (**Damages Directive**). The request arose in the framework of a dispute in which a company claimed damages from Volvo and DAF arising from their

participation in the Trucks Cartel. In summary of AG Rantos' opinion issued on 28 October 2021:

(*i*) *On the substantive and procedural provisions*: in order to ensure the uniform application and to prevent the fragmentation of EU law, AG Rantos opines that the qualification of a provision as substantive or procedural is a matter of EU law. More precisely, the five-year limitation period in the Damages Directive is a substantive provision not applicable to the case at hand where the damages claim was brought after the transposition of the Directive but the facts had happened before.

(*ii*) *On the presumption that cartel infringements cause harm*: this provision is substantive and, therefore, is not applicable to infringements that occurred prior to the transposition of the Directive.

(*iii*) *On the judges' power to assess harm*: national measures implementing the Damages Directive are procedural, so this faculty shall apply to every action brought after the national transposition even if originating in an infringement that had already ceased before the national measure entered into force.

(*iv*) *On the "dies a quo" or moment from which the limitation period starts to count*: AG Rantos starts by considering the one-year period foreseen by Spanish law as "*considerably shorter*" than the one in the Directive, though its compatibility with the EU principle of effectiveness is to be considered in view of all the circumstances (*Cogeco* case law). He further continues by arguing that the relevant starting date for accounting of the one-year period of the Spanish Civil Code is that of the publication of the summary of the Decision in the Official Journal of the EU. Since the Decision is not published on the day that it is adopted, AG Rantos considers the publication of the summary Decision as the day in which damaged parties are considered to be informed about the facts of the Decision and, therefore, enabled to bring actions.

An implied conclusion of the opinion (if it were followed by the CJEU as is generally the case) is that the one-year limitation period under the Spanish law prior to the Damages Directive is compliant with the principle of effectiveness since, (arguably) according to the *Cogeco* case law, all circumstances must be taken into account and the one-year period can be extended indefinitely. The extension (or interruption) of the one-year period is a matter expressly excluded by the opinion from its scope; yet, the mention to the *Cogeco* case along with the fact that the opinion continues its reasoning on the basis of the one-year limitation period, arguably imply that the one-year period as structured under the Civil Code is compliant with the principle of effectiveness.

19 Judicial activity / US law / Epic Games Inc. v. Apple Inc. The Judge concludes that Apple cannot be labeled as a monopolist (Judgment of the US Court of the Northern District of California of 10 September 2021, *Epic v. Apple*).

The Judgment of the US Court of the Northern District of California (**Court**) of 10 September 2021[6], *Epic v. Apple* (**Judgment**), has concluded that Apple Inc. (**Apple**) is not a monopolist in light of current US and California antitrust laws. However, what could be seen as a neat victory for Apple is tempered with a US-wide injunction that enables developers to bypass Apple's in-app purchasing system.

Background

Back in August 2020 Epic Games Inc. (**Epic**) updated Fortnite with a tool that enabled users to acquire in-app currency directly through Epic instead of using the mainstream App Store payment service. The whole objective of this move was to avoid the 30% fee that Apple charges every app developer for every payment made through its payment mechanism, and that is why a discount was offered along with the Epic payment in relation with App Store's price.

Apple decided to remove Fortnite from the App Store for having breached its rules and Epic filed a complaint alleging anticompetitive conducts.

Judgment

As in all unilateral conduct cases a central issueis that of relevant market definition. Whilst both Epic and Apple put forward their relevant market definitions, the Judge decided to go with its own market: mobile game transactions - where the market share estimated for Apple was 50-55% in the years analysed. Accordingly, while finding that in light of those numbers Apple is not a monopolist, the Judge further declared that "*the evidence suggests that Apple is near the precipice*

[6] See the full extent of the Judgment here: https://regmedia.co.uk/2021/09/10/epic-v-apple.pdf

of substantial market power, or monopoly power, with its considerable market share"[7].

Regarding the injunction, the judge decided to permanently restraint Apple "*from prohibiting developers from (i) including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing and (ii) communicating with customers through points of contact obtained voluntarily from customers through account registration within the app*".

Apple is appealing the decision, but on 9 November 2021, Apple has been denied an injunction against the anti-steering measures, which means that it will have to implement the decision immediately.

[7] See page 139.