Table of contents

01 Selected CNMC merger decisions, December 2022 - February 2023.

Firms	Notification threshold	Economic sector	Decision
WEDDING PLANNER / ZANKYOU VENTURES	Market share	Other telecommunications activities	Phase I clearance with commitments (14 December)
TANATORIOS CORDOBA / FUNERARIA Y TANATORIOS KIKO	Not disclosed	Funeral and related activities	Phase I clearance (14 December)
DOMTAR CORPORATION / RESOLUTE FOREST PRODUCTS INC	Market share	Manufacture on paper and paper products	Phase I clearance (14 December)
COCHLEAR / OTICON MEDICAL	Market share	Manufacutre of computer, electronic and optical products	Phase I clearance (14 December)
KKR / IVI	Not disclosed	Specialist medical practice activities	Phase I clearance with commitments (21 December)
KORIAN / GRUPO 5	Not disclosed	Human health activities	Phase I clearance (21 December)
GLOBAL PAYMENTS / EVO PAYMENTS	Not disclosed	Financial service activities, except insurance and pension funding	Phase I clearance (21 December)
ESPECARITA / KIDS HOLDING	Market share	Cultural education	Phase I clearance (21 December)
TERMA / UNIDAD DE NEGOCIO EGSE DE ATOS	Market share	Manufacture of other transport equipment	Phase I clearance (21 December)
CMA CGM / APB / PUERTO SECO AZUQUECA	Turnover	Freight rail transport	Phase I clearance (18 January)
GRUPO CO / MEMORA	Not disclosed	Funeral and related activities	Phase I clearance (25 January)

02 Merger control – Gun-jumping. The CNMC fines telecommunications operator Xfera Móviles €1.5 million for implementing a transaction before filing for merger control clearance (Decision of 21 December 2022, *XFERA*, file SNC/DC/144/22).

By Decision of 21 December 2022 (**Decision**), the National Competition and Markets Commission (**CNMC**) declared that Masmovil group's Xfera Móviles (**Xfera**), failed to notify the acquisition of Alma Telecom (**Alma**) for merger control. Xfera, which implemented the acquisition on December 2020, has received a €1.5 million fine, which is high compared to other prior matters.

In its Decision, the CNMC concludes that the transaction was subject to merger control because the market share threshold determining reportability was reached in the market for fixed voice termination services. By way of background on relevant market definition, according to existing merger control precedents, an operator has a monopoly over the fixed voice termination services concerning phone numbers assigned to that operator. In practice, this implies that any acquisition of a telecommunications operator with assigned numbering triggers the merger control filing obligation.

The Competition Act establishes that implementing a reportable transaction before having notified or obtained merger control clearance constitutes a serious infringement, which may attract fines of up to 5% of the global turnover of the infringing company.

The Decision provides useful guidance when it comes to the calculation of gun-jumping fines. The section of the Decision dealing with the calculation of the amount of the fine starts off with a general consideration on the importance of merger control as a preventive mechanism; hence the importance of complying with merger filing obligations. On that basis, the CNMC dismisses the arguments put forward by Xfera. In particular:

- The CNMC does not consider the absence of substantive effects resulting from the transaction as a mitigating circumstance (the transaction was cleared in phase 1 unconditionally once notified upon request by the CNMC). It does not matter that the call termination services market is subject to regulated cap pricing.

- The Decision expressly states that the minor importance of the target is only relevant from the standpoint of the substantive merger control assessment, but immaterial when it comes to filing obligations. This is reasonable bearing in mind that the market share threshold has no *de minimis* threshold (it only contemplates an increase from 30% to 50% market share as threshold in those cases where the target does not reach € 10 million in Spain).

- The Decision includes a remarkable discussion on the existence of intent or negligence (or the lack thereof) on the part of Xfera. Xfera argued before the CNMC that it ignored the fact that Alma was active in the reportable market. Xfera claimed in that regard that the due-diligence report elaborated prior to the acquisition included no mention to the assiging of phone numbering to Alma. The CNMC dismissed the argument on the basis that Xfera's diligence obligation could not be extinguished by the mere request of a due diligence report to external advisors.

- All things considered, although the amount of the fine is high, its importance is minor if compared with the global turnover figure of the acquirer. For that reason, the CNMC considers that the fine complies with proportionality limits. It is worth noting that there are precedents in which the amount has been lowered attending to the limited turnover of the target, but not in this case.

This Decision shows the importance for potential acquirers to be extremely diligent when it comes to assessing if a transaction is reportable in Spain. Although a specialist can generally determine the existence (or not) of filing obligations based on CNMC guidance and precedents, it is useful to be aware that it is possible to formally ask the

CNMC to issue a decision on reportability if total legal certainty is required. The existence of this mechanism is consistently invoked by the CNMC as a mantra to dismiss the arguments of parties in gun-jumping cases.

The prosecution of gun-jumping reinforces the general trend by the CNMC to stiffen merger control enforcement, with an increase in the number of phase 2 investigations or phase 1 investigations subject to thorough (and lengthy) review; and an increase in the number of conditional approvals.

03 Merger control / Wedding planning. The CNMC approves with commitments the purchase of Zankyou by Wedding Planner (*WEDDING PLANNER/ZANKYOU VENTURES*, file C/1318/22)

The CNMC has cleared in phase 1, subject to conditions, the acquisition of Zankyou by Wedding Planner. By way of background, Wedding Planner is the leading online platform for wedding planning services in Spain, Zankyou being its main competitor.

The acquisition affects the market for the provision of online search services related to weddings, and the market of digital platforms for wedding planning services in Spain. This is a typical two-sided market. On one side, the platforms offer information, products, services, and tools for wedding planners (which are the end users). On the other side of the market, the platforms offer companies a tool to make available their products and services to end users, sometimes through paid advertising.

According to the CNMC, the transaction results in horizontal overlaps with significant market share additions, thus reinforcing Wedding Planner's market position. On the other hand, the CNMC concludes that, although surmountable, there are entry barriers, such as economies of scale and network economies. Also pursuant to the CNMC, Wedding Planner would as a result of the transaction strengthen its ability and incentives to impose exclusivity on commercial users in its platforms.

In view of the competitive risks, the CNMC has cleared the transaction subject to the following conditions, which aim to enable the development of alternative platforms: *(i)* not to include exclusivity clauses or incentives in contracts with commercial users of the platforms in Spain; *(ii)* not to punish its commercial users for using third-party services; and *(iii)* communicate the commitments to commercial users.

04 Merger control / Legal databases. The CNMC approves with commitments the acquisition of Thomson Reuters Spain, Wolters Kluwer Spain, and Wolters Kluwer France by Karnov (Decision of 2 November 2022, *KARNOV/TR ESPAÑA/ WA ESPAÑA*, file C/1295/22)

On 30 November 2022 the CNMC cleared in phase 1 the acquisition by Karnov of Thomson Reuters España, Wolters Kluwer España and Wolters Kluwer France, subject to conditions.

Karnov is a Swedish group engaged in the provision of legal, tax, accounting, environmental, health and safety information. Thomson Reuters Spain is an indirect subsidiary of Thomson Reuters Group; in Spain it provides legal information services and consulting solutions, software, and legal training services. Wolters Kluwer Spain and Wolters Kluwer France are indirect subsidiaries of the parent company of the Wolters Kluwer Group, offering legal information and consulting solutions, software and legal training services locally.

The transaction affects the following markets:

(i) Legal databases in Spain. According to the CNMC the parties are close competitors in terms of quality and innovation. Also, the transaction results in significant horizontal overlaps in a market with substantial entry barriers for new competitors. However, the CNMC has discarded the risk of unilateral horizontal effects, in view of mitigating factors, such as the existence of alternatives and the countervailing power of demand.

(ii) Publishing and distribution of professional legal publications in Spain, which includes periodicals, non-periodicals, digital and paper publications. The CNMC has found horizontal overlaps that would increase the capacity and incentive of the merged entity to incorporate exclusivity clauses in its agreements with authors.

(iii) Legal management software solutions in Spain. The transaction does not generate significant overlaps in this market.

(iv) LegalTech software solutions and legal training in Spain (both on-site and distance learning). In the case of distance learning, there are overlaps resulting from the transaction but there are alternative operators with significant market shares that would exert significant competitive pressure upon Karnov. There are no overlaps regarding on-site training.

The CNMC has considered sufficient the following commitments proposed by Karnov: *(i)* refraining from conditioning the purchase (or renewal) of a legal database or publication subscription to the acquisition (or renewal) of any other product offered by Karnov; and *(ii)* no inclusion of exclusivity clauses or incentives in the contracts entered (or renewed) with authors that publish with Karnov. The commitments have a duration of three years.

05 Merger control / Assisted reproduction treatments. The CNMC clears KKR's acquisition of IVI, subject to commitments (Decision of 21 December 2022, *KKR/IVI*, file C/1321/22).

The CNMC has approved in first phase with commitments the acquisition of IVI-RMA GLOBAL, S.L. (**IVI**), the leading assisted reproduction treatment company in Spain, by KKR INCEPTION BIDCO, S.L.U. (**KKR**).

The operation affects the healthcare sector for assisted reproduction treatments and the CNMC has also analyzed IVI's other activities: distribution of biomedical products, genetic testing and gamete management and donation.

The CNMC, during the analysis of the operation, noted the existence of horizontal overlaps with GeneraLife, a KKR portfolio company. The resulting entity would achieve high shares in the provision of fertility services to private patients in Seville, Zaragoza, Murcia and Madrid, with a privileged negotiating position in deciding the type and conditions of services provided.

KKR presented a series of commitments considerd sufficient by the CNMC to address the risks generated by the transaction:

- Divestitures of KKR clinics in Seville, Murcia and Zaragoza to eliminate the overlaps arising from the transaction.
- In the case of Madrid, KKR has commited not to increase prices and not to worsen the commercial conditions of its current services. In addition, KKR has commited not to enter into fertility service agreements with the main competitior in Madrid.
- Lastly, KKR has commited to modify an existing exclusive and excessive duration vitrification solutions distribution agreement with the IVI Group.

06 CNMC antitrust activity – Vertical agreements. The CNMC closes antitrust proceedings against ISDIN, S.A., by means of commitments decision (*ISDIN*, file S/0049/19).

In November 2020 the CNMC opened proceedings against Isdin, a skin care laboratory, for possible resale price maintenance.

Isdin has offered commitments aimed at solving the competition issues detected by the CNMC. The commitments reportedly consist of the implementation of an objective, transparent and non-discriminatory discounts system by Isdin. In addition, the company has committed to improving the ways in which recommended prices are announced to distributors, and to internally promote compliance with competition law. Besides, Isdin will implement actions to prevent

business intelligence tools from being used to monitor resale prices by its sales department.

07 CNMC antitrust activity / Recycling market. The CNMC has adopted interim measures to guarantee publicity and transparency in the upcoming waste auctions organized by Ecoembes (*SUBASTAS ECOEMBES*, file S/0021/21).

On 5 October 2022, the CNMC initiated antitrust proceedings for abuse of dominant position against Ecoembalajes España, S.A. (**Ecoembes**), a non-profit organization acting as manager of the Integrated Management System for plastic packaging in Spain.

The investigation was triggered by a complaint filed by a company recycling PET (type of plastic) bottles. The CNMC's investigation focuses on the auction mechanisms used by Ecoembes. According to the press release published by the CNMC, the auctions are allegedly executed without the due transparency and publicity, making it difficult for recycling companies to enter the market for plastic packaging recycling.

The CNMC has issued an interim relief decision, ordering Ecoembes (pending conclusion of the antitrust investigation) to implement certain measures to ensure that the auctions are transparent. Amongst such measures, a Notary Public needs to be involved in the auctions henceforward. In addition, Ecoembes should publish in its webpage the rules of the auctions, as well as a notarial certification of all the bids submitted and results. Finally, the quantities that can be awarded to a single recycler in the context of an auction are capped (regarding light packaging and PET solid urban waste).

The measures adopted will be in force until the end of the sanctioning proceedings, or until Ecoembes puts in place an electronic auction system as provided in Article 22 of Royal Decree 1055/2022, of 27 December, on Packaging. The said legal provision establishes that a system for the electronic allocation of waste for its subsequent management should be implemented. According to the applicable regulations, such system is devised to safeguard compliance with the principles of publicity and competition.

08 CNMC antitrust activity / Insurance. CNMC ends antitrust proceedings against KDV by means of a commitments Decision (Decision of 8 February 2023, *DKV COBERTURAS AUTONOMOS*, file S/0030/20).

Following a complaint, the CNMC initiated an investigation against DKV Seguros y Reaseguros, S.A.E. (**DKV**) for having unilaterally cancelled the *DKV Renta* temporary disability policies of certain self-employed policyholders during the pandemic, while encouraging them to contract other services.

DKV notified insured persons that the declaration of the COVID-19 state of alarm had forced many professionals to temporarily cease their activity and that the applicable law entailed the suppression of the coverage for risks derived from temporary incapacitation to work. DKV offered a refund of the amounts of insurance premiums already paid to insurance takers, although they were required to take out hospitalization indemnity coverage, if they did not have it, as a requirement for obtaining the aforementioned refund.

According to the investigation of the CNMC, the conduct denounced could amount to unfair competition with impact in the market pursuant to Article 3 LDC in connection with Article 4 of Law 3/1991, of 10 January, of Unfair Competition.

DKV requested the negotiated termination of the proceedings with commitments. In particular:

- DKV undertakes to compensate customers with the amount that would correspond to them if, during the pandemic, they suffered a temporary disability.
- DKV will compensate those self-employed people who took out a temporary disability insurance policy with another company when they found out that their sick leave policy was cancelled.

- DKV undertakes to compensate the recipients of the communication who took hospitalization coverage.

In addition, DKV must actively follow up to ensure effectiveness of the commitments, checking implementation and communicating the commitments clearly and expressly so that those affected can understand and assess the proposed measures.

09 Public consultation / CNMC. Implementation of the disqualification of antitrust offenders to participate in public procurement (15 November 2022).

The CNMC has published its draft guidance on the criteria for the application of the antitrust penalty of disqualification from participation in public procurement.

The disqualification can be implemented either by an *ad hoc* administrative procedure before the contracting authorities, or by the antitrust decision itself specifying the scope and duration of the penalty.

The draft CNMC guidance seeks to strike a balance between dissuasion from antitrust infringements on the one hand, and proportionality of penalties, on the other hand.

A first relevant consideration refers to the type of antitrust infringement which can encompass a disqualification. The draft guidance states that this penalty is aimed at infringements catalogued as serious or very serious in the Competition Act, but it is not limited to bid-rigging. If this notion prevails, it can be expected that cartels generally, resale price maintenance, abuse of dominant position or even gun-jumping could potentially encompass disqualifications to contract with the Public Administrations.

The draft guidance touches upon a relatively common issue when applying the disqualification penalty: when all or most of the competitors are found responsible of bid-rigging; or when a monopolist is accused of abusing a dominant position, these are situations where a disqualification order might amount to depriving the public administrations of most or all of its supplies for a given product or service. In such situations the disqualification could be replaced by the inclusion of additional controls in the public tendering conditions, for instance.

When deciding on the scope of the disqualification, the geographic space of the antitrust infringement, the relevant product market affected, the duration of the infringement amongst other circumstances shall be taken into account.

The guidance points out the possibility of not applying the disqualification when, at the moment of being heard in the procedure, the accused party pays or commits to pay the fine and measures are adopted to avoid future antitrust infringements (compliance programs fulfilling the CNMC's requirements). The leniency applicants would also avoid the disqualification.

10 Supreme Court activity / Legal Costs. The Supreme Court rejects the appeals filed by the Bar Associations of Madrid, Guadalajara and Las Palmas and confirms the CNMC's antitrust fines in connection with collective price recommendations by professional Bar Associations (Judgements of the Supreme Court of 19 December 2022, appeal number 7573/2022, of 23 December 2022, appeal number 7583/2022, and of 23 December 2022, appeal number 8404/2022).

The Supreme Court has rejected the cassation appeals lodged by the Bar Associations of Madrid, Las Palmas and Guadalajara against the judgments of the High Court confirming the CNMC fines on the mentioned Bar Associations for an infringement of Article 1 of Law 15/2007 on Competition (**LDC**) consisting on a collective recommendation on prices.

As a result of a reform of the law on professional associations, Bar Associations were banned from establishing detailed professional fees, with the possible exception of general criteria regarding the calculation of litigation costs (for the case when the losing party has to pay the legal costs of the winning party) and the action to recover unpaid fees.

The Bar Associations of Las Palmas, Guadalajara and Madrid published a compilation of indicative criteria for the calculation of litigation costs. However, according to the CNMC, the publication of said criteria constituted a collective recommendation on prices, as they contained a detailed list of professional fees to be applied by the lawyers in each type of judicial proceeding (rather than general criteria).

The Supreme Court has now confirmed that the above criteria are price lists prohibited by Article 14 of the Professional Associations Act, not merely indicative criteria for the sole purpose of the calculation of litigation costs and the action to recover unpaid fees and must be interpreted restrictively. Therefore, the Supreme Court upholds the CNMC's fines as it considers that the published criteria amount to collective price recommendations contrary to competition law.

These judgements open a new discussion in relation to the manner in which the Bar Associations can publicize the criteria. The risk for clients is one of not being properly informed of the risks they face prior to engaging in legal actions in case they lose and are ordered to pay the litigation costs. The matter is not yet settled in practice and there is a considerable degree of expectation on how it will be solved.

11 High Court activity / Anticompetitive agreements – Abuse of dominance. The High Court quashes a decision issued by the CNMC against Istobal (High Court judgment of 29 July 2022, appeal number 355/2016 (only recently published)).

Back in 2016 the CNMC found that car-wash equipment manufacturer Istobal had infringed both the anticompetitive agreements and the abuse of dominance prohibitions enshrined in the LDC. First, the CNMC found that Istobal had implicit agreements with the technical services providers (**TSPs**) forming part of its network that prevented the latter from supplying spare parts to independent TSPs. Such implicit agreements were evidenced by certain requirements established by Istobal to any company placing an order (for instance identification of the machine to be serviced). The CNMC also found the existence of implicit agreements to the same effect between Istobal and the manufacturers of spare parts for its machines. On the other hand, the CNMC found that Istobal refused to provide the independent workshops with the technical information necessary to repair the machines. The company was fined € 638,770.

In a recently published judgment, the High Court has quashed the CNMC Decision. In its judgment the High Court carries out a detailed factual analysis of the evidence included in the administrative file, concluding that the CNMC did not met the required standard of proof.

When it comes to the access to spare parts, the High Court has concluded that independent TSPs were able to obtain such parts from alternative supply channels. Also, Istobal parts can be repaired with no limitation from the technical standpoint. The High Court also found that the requirements established by Istobal for a TSP to obtain spare parts were in line with those justified when it comes to selective distribution systems on safety grounds.

Regarding Istobal's refusal to provide independent workshops with the technical information indispensable to repair the machines, the High Court concludes that Istobal provided evidence to the CNMC proving that such information was in fact accessible via an online platform. Such evidence was ignored by the CNMC. In any event, according to the High Court the CNMC failed to establish that Istobal was dominant, since the decision defines the relevant product market but does not quantify Istobal's market share.

The High Court annulled the decision issued by the CNMC on the grounds above. As discussed, the High Court mainly focuses on the facts of the case and the evidence in the administrative file. There are no revolutionary legal findings or theories; however, the judgment is noteworthy because it forms part of a growing body of case law

where the High Court demands a more thorough analysis of the evidence by the CNMC for an infringement to be found (another example is the High Court's annulment of the € 46 million fine imposed by the CNMC to two security services companies, reported in a previous issue of this newsletter).

12 Judge of first instance activity / Antitrust damages. Antitrust damages resulting from an abuse of dominant position in the collective management of intellectual property rights (Madrid Court of First instance judgment of 22 March 2022, *NH Hoteles v. EGEDA*, appeal number 2250/2019).

This is an interesting antitrust damages judgment where various questions are decided upon. The case is one of *(i)* on the one hand, follow-on based on a finding by the CNMC that EGEDA had incurred in an abuse of dominant position; *(ii)* on the other hand, stand-alone for part of the conduct.

The first question to be decided is that of the legal regime applicable, given that the Spanish law prior to the EU Damages Directive has some important differences, notably the statute of limitations which is of one year. In this regard, the Directive did not apply *ratione temporis* to the facts because of the time of the infringement.

The one-year limitation period applies, therefore, to the case at hand. *Dies a quo* in this regime has been declared by the case law to be the moment the harm ceases in the case of continuous infringements. On the other hand, in follow-on actions in situations where the administrative antitrust decision has been appealed, the commented judgement states that the *dies a quo* can be said to take place at the moment there is a final decision against which no further appeal is possible.

A second question concerns EGEDA's move to reconvene and request interim measures to cease use of the intellectual property rights for lack of payment of the agreed rates. This was dismissed by the judge.

Dwelling into the substance of the case, the conduct at stake is one of abusive pricing (excessive pricing) by EGEDA which is the collective society for managing of media intellectual property rights. The abuse was declared by the CNMC and confirmed by the Supreme Court in last instance. The judgment later goes on to discuss the criteria used to find out whether or not excessive pricing has occurred. The Court cites various precedents such as the ECJ Judgment of 13 July 1989, *Tournier*, case C-395/87, in order to find that excessive pricing can be inferred from comparing pricing in other cases in similar circumstances.

13 Madrid Provincial Court activity / Interim measures. Madrid Provincial Court order on interim measures on appeal against the prior Order from the judge of first instance deciding to revoke prior interim measures (Madrid Provincial Court Order of 30 January 2023, appeal number 1578/2022).

In its lawsuit before the judge of first instance of Madrid, the Super League company requested an interim measure aimed at ensuring, in essence, that no action by UEFA and FIFA could take place which would undermine the creation and execution of the Super League project. The judge initially accepted the petition on an extreme urgency basis and without hearing the defendants; however, the interim measures were later revoked by the judge. The Madrid Provincial Court now decides on the appeal by the Super League company which seeks to reinstate the interim measures against UEFA and FIFA.

In essence, the Provincial Court Order decides that there is *periculum in mora* because competition can be affected (a new competition prevented) during the time it takes for the first instance judge to reach a decision on the merits of the dispute. In practice, this implies that if the interim measure is not granted, UEFA and FIFA could frustrate the creation of the Super League.

Regarding the second requirement for the interim relief to be granted, the *fumus boni iuris* or appearance of good law, the Provincial Court clearly does not seem concerned by Advocate General Rantos'

opinion. The Court defers to the judgment on the merits as the right place to consider the impact of the reasoning by Advocate General Rantos. The Provincial Court considers that the conduct at stake is carried out by entities (UEFA, FIFA) enjoying a monopoly position and sees *prima facie* evidence of a violation of Article 102 TFEU. The Court also finds that the requirement of the *periculum in mora* is met, as the Court sees urgency, in order to preserve competition, which justifies the interim measures being adopted.

The Provincial Court dismisses the possible legitimate justifications related to the European football model or that UEFA and FIFA may obviously seek to attain any legitimate objectives so as to justify the (illegal) means used.

The interim measures desired by the Super League company are therefore reinstated, subject to Super League posting a bond of € 1 million.

The Provincial Court Order commented here is somewhat surprising. In view of Advocate General Rantos' opinion discussed above it is more than doubtful that there is a *fumus boni iuris* or *prima facie* appearance that the Super League should be allowed to benefit from interim relief which as a matter of practice leaves UEFA and FIFA unprotected from the creation of the Super League and the negative consequences this can have for the financial stability and fulfilment of the European football values (which Advocate General Rantos clearly considered worthy of protection).

It remains only to be seen what the parties reaction will be, how long and in which form the European Court of Justice will take to issue its judgment on the point, and what the final national reaction is. Whereas the Court of Justice in preliminary rulings sets the law, it remains the task of the national referring court to adjudicate on the underlying dispute. Depending on the final form of the European Court's judgement, the referring court and/or other national courts or authorities may (or may not) have room to allow alternative competitions (be it the Super League or another competition) subject to those competitions being governed by rules that can ensure respect of the European football values deemed worthy of protection.

14 European Court of Justice activity / Super League. Opinion of the Advocate General Rantos of 15 December 2022 European Super League Company, case C-333/21.

Advocate General Rantos has published his long-awaited Opinion prior to the judgment of the Court of Justice of the EU in the Super League dispute. The case arises from a request by the Madrid court hearing the dispute to the Court of Justice to rule on a number of preliminary questions necessary to decide on the merits of the case.

The root of the dispute lies in the refusal of FIFA and UEFA to allow the Super League's sponsoring clubs to participate in FIFA and UEFA competitions. For the Super League, the dispute is about an attempt by UEFA and FIFA to preserve their monopoly in the organization and management of football competitions by trying to exclude competition from a new product such as the Super League. For UEFA and FIFA, on the contrary, this is a matter of protecting the European football model and its values, in the face of an entity such as the Super League, which is focused on profit and is capable of threatening the aforementioned sporting model.

The starting point of the debate, therefore, concerns the existence of certain sporting values which could provide a legitimate justification for the alleged restrictions on free competition by UEFA and FIFA. According to the Advocate General, Article 165 TFEU would recognize the existence of such a European sports model endowed with a number of values such as solidarity of the bigger clubs towards smaller ones, of professional football with amateur, women's and disabled football, etc., openness (one of the accusations against the Super League was that the founding clubs reserved a special status for themselves) and equality. The Advocate General confirms that these objectives are legitimate justifications from a competition law point of view.

UEFA's alleged conflict of interest situation is also discussed, an accusation against which the Advocate General recalls that the fact that an entity such as UEFA simultaneously regulates professional football and organizes competitions is not illegal *per se*. In this line, UEFA's refusal to allow the clubs promoting the Super League to participate in UEFA competitions (such as La Liga) is justified precisely by the need to safeguard the legitimate objectives deriving from the safeguarding of the values of the football competition referred to above. At this point it must be stressed that UEFA and FIFA have at no time sought to prohibit the Super League from creating the new competition, but have only applied their disciplinary regime against the UEFA member clubs promoting the Super League. The nuance is important, because as the Advocate General states, Super League clubs are free to create their own competition but they are also obliged to comply with UEFA and FIFA rules. What the Super League members cannot pretend is to create their own championships, in competition with UEFA and FIFA, and continue participating in UEFA and FIFA events as if nothing had happened. In this respect, the Advocate General Opinion describes the Super League project as "opportunistic", as it wants to focus on the most profitable segment of the business, to the detriment of the competitions and the European football model.

Another argument used by the Super League is that UEFA and FIFA violate the essential facilities or infrastructure doctrine (*Bronner* case law). However, the Advocate General is of the opinion that the essential facilities doctrine is not applicable to the case, simply because the Super League, as mentioned above, is freely created. Furthermore, the financial capacity of the Super League members is well known, so it is illogical to think that the Super League would have an absolute need, let alone a right, to access any infrastructure or 'essential facilities' in order to set up its own competition. As the Advocate General concludes, the substantive issue can be traced back to the fact that Super League clubs cannot expect UEFA and FIFA to stand idly by in the face of Super League's attempts and cannot pretend to participate in both competitions simultaneously (Super League and UEFA competitions) as if nothing had happened.

We will wait for the final judgement in a few months.