Table of contents

01 **Representative CNMC merger decisions, June – July 2024.**

02 **Merger control / Bag-in-box.** The CNMC approves Smurfit Bulgaria's acquisition of Artemis' bag-in-box business with commitments (Decision of 29 May 2024, *SMURFIT /ARTEMIS BIB*, file C/1424/23).

03 **Merger Control / Fines / Misleading information provided in merger notification.** CNMC fines Rheinmetall for misleading information in the merger review of the acquisition of Expal Systems (Decision of 30 April 2024, *RHEINMETALL*, file SNC/DC/081/23).

04 **Merger Control / Analysis.** Can the Government block BBVA's takeover offer for Banco Sabadell?

05 **Abuse of Dominance / Fines / Radio and television rates.** The CNMC fines collective rights management society SGAE for excessive pricing (Decision of 19 June 2024, *DAMA vs. SGAE*, file S/0641/18).

06 **Cartels / Food distribution.** The CNMC dismantles three cartels sharing the supply of food to hospitals, army facilities (Decision of 10 July 2024, *SUMINISTRO DE ALIMENTOS*, file S/0016/21).

07 **Judicial activity / Expiration of administrative proceedings.** The High Court declares a fining decision lapsed because the statutory deadline for antitrust investigations was exceeded (Judgments of the High Court of 14 May 2024).

08 **Judicial activity / Statute of limitations.** The High Court declares lapsed the automotive batteries cartel (Judgements of the High Court of 7 May 2024, appeal number 702/2018 and of 30 April 2024).

09 **Antitrust damages claims / Analysis:** *dies a quo* of limitation periods in antitrust damages claims in Spain - still a controversial issue.

10 **The Spanish Foreign Direct Screening Authority issues its Annual Activity Report.**

11 **Fines / Chocolate, biscuit and coffee products.** The European Commission has fined € 337.5 million on Mondelēz for breaching competition rules (Decision of 23 May 2024, *Mondelez*, case AT.40632).

12 **EU / European Commission activity / Message deletion.** European Commission punishes the deletion of messages exchanged via social networking applications on a mobile phone (Commission Decision of 24 June 2024, Case COMP/AT.40882 - *IFF - deletion of data*).

13 **EU / European Commission activity / Foreign Subsidies.** The European Commission carries out the first raids under the Foreign Subsidies Regulation.

14 **EU / European Commission activity / Very Large Online Platform.** The European Commission designates adult content platform as VLOP.

15 **EU Regulation / Analysis / Artificial Intelligence Regulation published.** Initial takeaways.

---

01 Representative CNMC merger decisions, June – July 2024.

Firms	Notification threshold	Economic sector	Decision
CASP-MCH/DRUNI / ARENAL	Not disclosed	Retail sale of cosmetic and hygiene products in specialized stores.	Phase I clearance (5 June)
VISALIA / SEROSENSE	Market share	Distribution of electric power	Phase I clearance (5 June)
MARCIAL CHACON E HIJOS / ELECTRA LA HONORINA SL – DECAIL ENERGIA SL	Not disclosed	Distribution of electric power	Phase I clearance (5 June)
MERZ / NEGOCIO DE ACORDA	Market share	Manufacture of pharmaceutical products	Phase I clearance (5 June)
PALEX / IZASA	Turnover	Wholesale trade of pharmaceutical products	Phase I clearance (5 June)
CONDIS SUPERMERCATS Y SOCIOS / ROGES SUPERMERCATS	Turnover	Retail trade in non-specialized establishments	Phase I clearance (5 June)
GREENOAKS / KARNOV	Market share	Publishing books, periodicals and other publishing activities	Phase I clearance (10 June)
DECAPITAL / ÑAMING	Market share	Preparation of ready meals and dishes	Phase I clearance (19 June)
GOODLIFE / AUDENS	Not disclosed	Food industry	Phase I clearance (19 June)
ESTEVE / NEGOCIO DE MEDICAMENTOS PERRIGO	Market share	Manufacture of pharmaceutical products	Phase I clearance (19 June)
DAMIRSA / TANATORIOS DE HUELVA	Market share	Funerals and related activities	Phase I clearance (25 June)
AVRIL INDUSTRIE SAS / ACTIVOS METEX-MNG	Market share	Manufacture of other chemical products	Phase I clearance (3 July)
AMERRA / AVRAMAR	Market share	Marine aquaculture	Phase I clearance (3 July)

02 Merger control / Bag-in-box. The CNMC approves Smurfit Bulgaria's acquisition of Artemis' bag-in-box business with commitments (Decision of 29 May 2024, *SMURFIT BULGARIA/ARTEMIS BIB*, file C/1424/23).

The National Markets and Competition Commission (**CNMC**) has approved in second phase with commitments the acquisition by Smurfit Kappa Bulgaria EOOD (a subsidiary of the Irish multinational Smurfit Kappa) (**Smurfit**) of the bag-in-box[1] business unit of the Bulgarian company Artemis OOD (**Artemis**).

Smurfit is one of the world's leading manufacturers of paper and cardboard packaging as well as plastic packaging. It manufactures corrugated packaging, including bag-in-boxes, but does not manufacture or market bags or other plastic products. Artemis, on the other hand, is mainly engaged in the manufacturing of packaging-related products for liquid and semi-liquid products. Artemis focuses its activity on the manufacturing of bags for bag-in-boxes and flexible plastic sheets or films.

The CNMC's first phase analysis concluded that the concentration was likely to have adverse effects in the market for non-aseptic bag-in-box bags for food applications, as it would lead to the acquisition by the main operator and undisputed market leader of one of the four main competitors in the relevant market. In addition, it should be noted that, due to the entry into force of Directive (EU) 2019/904 on single-use plastics, Smurfit is the only manufacturer of caps/taps for bag-in-box bags that has developed a cap that complies with the requirements of the Directive.

To address the CNMC's concerns, Smurfit has committed to maintain the supply of non-aseptic food grade bag-in-box bags of up to 25 liters capacity to Artemis' only customer in Spain, under the same conditions, until the end of 2026.

03 Fines / Misleading information. The CNMC fines Rheinmetall for providing misleading information in the merger proceedings related to the acquisition of Expal Systems, S.A. (Decision of 30 April 2024, *RHEINMETALL*, file SNC/DC/081/23).

In November 2022, RHEINMETALL AG (**Rheinmetall**) pre-notified to the CNMC the acquisition of 100% of the company EXPAL Systems S.A. (**Expal**), a Spanish global defense and security company offering high-end technological solutions for the needs of the Armed Forces. In the absence of horizontal overlaps in the markets declared by the parties as affected, the Competition Directorate of the CNMC indicated to the parties that they could proceed with the formal notification of the transaction. On 2 February, 2023, the formal notification of the transaction took place and the transaction was approved with record speed by Decision of 8 February 2023.

Upon a competitor complaint, the CNMC initiated a confidential investigation later turned into a formal antitrust investigation for incomplete or misleading information against Rheinmetall.

In the merger notification, Rheinmetall omitted to inform the CNMC that the parties were active in the sale of nitrocellulose and wet pulp. Further, Rheinmetall failed to comply with the duty to cooperate with the CNMC when it was prompted to provide information on its activity in the nitrocellulose and wet pulp markets. In sum, the information that Rheinmetall provided was incomplete and misleading and implied that its activity was likely under estimated in the merger file.

In accordance with Article 62.3(c) of Law 15/2007, of 3 July, on the Defense of Competition (**LDC**), Rheinmetall obstructed the work of the CNMC, which covers two counts of conduct by, first, failing to provide mandatory information in the notification form, as well as the misleading nature of some of the information provided in the form; second, by having provided incomplete information in response to a request for information. The CNMC made it clear that, had complete information been provided, the merger review process might have resulted in a different outcome, including possibly an upwards referral to the European Commission under Article 22 EU Merger Regulation 139/2004 (**EUMR**). As a result, the CNMC imposed two penalties on Rheinmetall, amounting to a total of € 13 million.

04 Merger control analysis: can the Government block the takeover offer of BBVA over Banco Sabadell through the merger control process.

Since the moment the takeover offer of Banco Sabadell by BBVA took place, members of the government have taken a position against BBVA's hostile takeover bid for Sabadell. This position has seemed mostly ideological or based on issues of pure party politics (the current Government requires the support from a plurality of parties). It is far less clear that there is a legal basis to block the takeover offer, even if there has been increased

[1] Packaging consisting of a box and a bag.

concentration in the banking sector since the great financial crisis of 2008.

First, this transaction is not desired by the target, Banco Sabadell. A hostile takeover has its own (market) dynamics which may make the entire process more difficult. Perhaps the closest precedent of a hostile takeover bid is Gas Natural's offer for Endesa, launched in 2005, which, after numerous ups and downs and failed maneuvers by the Government of the day, ended up with the ownership of Endesa passing to the hands of Italy's ENEL. The *Gas Natural/Endesa* merger was authorized by the Council of Ministers (at that time the National Markets and Competition Commission, CNMC, did not yet exist, there were instead the Service and Tribunal for the Defense of Competition; and the decision-making body in second phase merger reviews was the Council of Ministers). The clearance of the Council of Ministers was appealed by Endesa, which gained, in a historic decision, the interim suspension of the merger approval by the Supreme Court. This interim measures Order, together with other anti-takeover measures successfully implemented by Endesa, ended up killing the transaction. Amongst those measures was the opposition to the jurisdiction of the national authorities to review the merger, on the grounds that two thirds of parties' turnover was realized outside of Spain (using the worse access to accounting information about the target company that the buyer necessarily has in a hostile takeover). This defense would perhaps be viable for Sabadell if Brexit had not occurred (since in that case the British business would be counted for the purposes of determining the possible Community dimension of the merger). It should not be ruled out that the Government may now resort to other measures to support Sabadell, such as those it implemented in the past to try to frustrate the successive bids of E.ON and Acciona/Enel for Endesa, even by creating new authorization requirements (which seems less likely now than then, given that in the Endesa precedent the attempt yielded poor final results in the face of the European Commission, which acted under Article 21 of the EUMR, as the bids of E.ON and Acciona/Enel had Community dimension).

In the specific area of merger control, the legal situation has changed with respect to the aforementioned takeover bid for Endesa: now it is no longer the Council of Ministers that has the power to authorize national mergers. Indeed, the LDC, inspired by comparative law models, grants the Council of Ministers the power to intervene (based on reasons of general interest other than free competition) in mergers prohibited by the CNMC or conditionally authorized. Only in these two cases may the Government intervene, with the sole possible purpose of *(i)* confirming the CNMC's Decision; or *(ii)* authorizing the merger with or without conditions; but the LDC in no way contemplates the possibility that the Government may prohibit mergers authorized by the CNMC. In other words, the Government could intervene to change (in this matter, worsen) a conditional authorization (and thus try to frustrate it) rather than block it; although in the few precedents of use of this power, the Government has intervened to *soften* conditions (concentration *Antena3/La Sexta*).

On the other hand, it is unlikely that the CNMC will prohibit the takeover bid for Sabadell on substantive merger control grounds. Because, in spite of the much publicized alleged excessive bank concentration, it does not appear that the current level of concentration is anti-competitive in merger control terms. It is more likely that in markets such as retail banking there may be excessive concentration in certain areas. A close precedent is that of the *Caixabank/Bankia* merger three years ago, where the CNMC identified competition risks in 86 zip codes where a monopoly or duopoly was created. The merger was therefore authorized subject to conditions such as (amongst others) not to exit the cities where one of the parties was located (to avoid financial exclusion); or to maintain for three years the pre-existing retail conditions in the postal codes monopolized as a result of the transaction. The *Unicaja/Liberbank* merger was subject to comparable commitments in the province of Cáceres.

A further area of concern may lie in the simultaneous stakes that various financial entities have in payment systems companies in Spain.

The concentration was formally filed at the end of May. At this stage it may be the merger is approved (likely subject to conditions), or that a second, in-depth analysis, second phase is open.

05 Fines / Radio and television rates. The CNMC fines € 6.4 million on collective rights management society SGAE for abusing its dominant position (Decision of 19 June 2024, *DAMA-UNISON RIGHTS vs. SGAE*, file S/0641/18).

The CNMC has fined the Spanish collective rights management organization SGAE € 6,387,819 for an abuse of dominant position related to pricing practices in the context of the licensing of intellectual property rights over musical and audiovisual works used by radio and television operators in their respective programming.

This is one of many fines for abusive pricing by collective management societies imposed by the CNMC in Spain over the years.

Specifically in this matter, the CNMC considered that the SGAE abused its dominant position by designing and applying, for both musical works rights and some media works rights, very high "fair use tariffs", compared to "average availability tariffs" (flat rates), which did not represent, in general terms, a real alternative to the latter, neither for radio nor for television broadcasters.

This practice had two potentially adverse consequences from a competitive perspective:

- Firstly, the vast majority of users have been forced to pay prices to SGAE which are unrelated to the actual use they make of their repertoire, both in terms of the number of works and the intensity of their use (exploitative abuse).

- Secondly, the prevalent application of flat tariffs makes it difficult for competitors to enter or expand, reinforcing SGAE's dominant position (exclusionary abuse).

  The reason for the latter is that, by paying a flat fee for the use of such an extensive repertoire as SGAE's, users are drastically limited in their incentives to look for alternative repertoires.

  This foreclosure effect for musical works' rights is further reinforced by SGAE's conduct of presenting its musical repertoire to users as universal and offering guarantees of indemnity against possible claims by third parties for the use of rights not belonging to its repertoire, further limiting the incentives for those users to contract with SGAE's competitors.

In view of the above, the CNMC considered that the SGAE was liable for:

- a single and continuous infringement of Articles 2 LDC and 102 of the Treaty on the Functioning of the European Union (**TFEU**) in the markets for the grant of authorizations for the reproduction and public broadcasting of musical works for radio and television (linear and on demand), including *(i)* the design and application of tariffs for availability and *(ii)* practices relating to the presentation of the repertoire as universal and shield against third-party claims, from at least 1 January 2016 until the closure of the investigation phase of the case. The fine attached to this conduct amounts to € 3,954,364;

- an infringement of Articles 2 of the LDC and 102 of the TFEU consisting of an abuse of a dominant position in the design and application of the tariffs for availability in the market for the management of remuneration rights for television of authors of audiovisual works referred to in the Intellectual Property Act (linear or on-demand) from at least 1 January 2016 until at least 31 December 2017, imposing a penalty of € 2,433,455.

06 CNMC activity / Food distribution. The CNMC dismantles three cartels that shared the supply of food to hospitals, nursing homes, prisons and Army facilities (Decision of 10 July 2024, *SUMINISTRO DE ALIMENTOS*, file S/0016/21).

The CNMC has sanctioned seven food distributors for participating in three cartels that for years shared public contracts to supply food to hospitals (some of them military), nursing homes, prisons and Army facilities.

The regional authorities of Madrid and Aragon brought to the attention of the CNMC the possible existence of anticompetitive practices in the framework of public contracts.

The first cartel (formed by the companies Plataforma Fermar, S.L. (Femar), Acacio, S.L., Serviline Foods, S.L. and Asesores Llangon, S.L.) divided the tenders to supply food to public and private organizations. In addition, it created a "joint profit pool", which shared profits.

The second (formed by Femar and Leonesa de Patatas, S.L.) and third (formed by Femar, Hermanos Vidal, S.L. and Frutícolas Ateca, S.L.) cartels consisted of two agreements where the fined companies allocated clients geographically.

The CNMC fined the companies involved €3,137,500 for the three cartels and a total of €176,100 to the directors of these companies. In one particular case (Femar manager), the CNMC fined the director €2000 for the first infringement, €21,100 for the second infringement and €21,000 for the third infringement.

07 Judicial activity / Expiration of administrative proceedings. The High Court declares the expiration of a fining decision because the eighteen-month term maximum statutory period was exceeded (Judgments of the High Court of 14 May 2024, appeals number 933/2018 and 929/2018).

On 27 March 2012, the CNMC received a complaint against the companies Anglo Balear de Servicios e Higiene, S.L. (**ABH**) and ISMA 2000, S.L. (**Isma**) for alleged conduct prohibited by the LDC consisting of agreements restricting competition between these companies aimed at dividing the market for the collection, transport and treatment of healthcare waste produced in healthcare centers in the Autonomous Community of the Balearic Islands. The Investigation Directorate of the CNMC opened an antitrust investigatoin against ABH, Isma and SRCL CONSENUR, S.L. (**Consenur**) which ended with the Decision of February 4, 2014, *ABH-ISMA*, file S/0415/12, where the CNMC shelved the file (**Shelving Decision**).

Later, the Supreme Court annulled the Shelving Decision, ordering the CNMC to revert the administrative process to the moment in time prior to the Shelving Decision, to resume the antitrust investigation. Finally, by Decision of 27 September, 2018, the CNMC fined €2,659,180 on Isma €1,025,006 and Consenur (ABH was absorbed by the latter) .

The fined companies filed for judicial review before the High Court denouncing the lapsing of the proceedings because the antitrust decision had been issued after the 18-month term established in the LDC.

The CNMC had a period of 6 months and two days to issue a fining decision since the Shelving Decision. The sanctioned companies consider that the period of six months and two days should be counted from 4 February 2014 (date of the Shelving Decision), while the State Attorney considers that it should be counted from the point the CNMC received the judgment of the Supreme Court ordering it to backtrack the proceedings.

The High Court establishes that the period to be taken into account in the 18-month period, should start to count from the Shelving Decision (*i.e.*, 4 February 2014) until the notification of the antitrust investigation that took place on 27 September 2018. Therefore, it decides that the statutory 18-month period has been exceeded and, therefore, upholds the appeal, quashing the CNMC Decision.

This rule of maximum duration of antitrust investigations is often disputed in court. In practice, the CNMC can re-open proceedings anew recycling the existing evidence and formally opening a new file, provided the antitrust infringement has not yet lapsed.

08 Judicial activity / Statute of limitations. The High Court declares lapsed the automotive batteries cartel (Judgements of the High Court of 7 May 2024, appeal number 702/2018 and of 30 April 2024, appeal number 694/2018).

In the automotive batteries cartel, the CNMC fined EXIDE TECHNOLIGIES, S.L.U. (**Exide**) and RECUPERACIÓN ECOLÓGICA DE BATERÍAS, S.L. (**REB**) and its parents, for an infringement of Articles 1 LDC and 101 TFEU by Decision of 12 July 2018, *BATERIAS AUTOMOCIÓN*, file S/DC/0569/25.

In December 2012 ECO-BAT TECHNOLOGIES LTD (**Eco-Bat**) filed a leniency application with the CNMC regarding a purchasing cartel of used batteries. The CNMC informed this company that the European Commission had considered itself the Competition Authority competent to investigate this matter (AT. 40018 *CAR BATTERY RECYCLING*), with the exception of the Spanish market, which was not the subject of the case before the European Commission, so the CNMC pursued its investigation in Spain.

Exide was accused of a single and continuous infringement covering the period from April 2008 to January 2012 and the initiation of the infringement proceedings did not take place until 23 January 2017 (five years after January 2012). The limitation period established in the LDC for serious infringements is four years (article 68.1 LDC). The Court assesses the point of whether or not more than four years have passed between the last relevant fact or incriminating information detected by the CNMC and the date of formal initiation of antitrust proceedings.

Article 68.3 of the LDC, under the wording in force at the time of the facts, established that the statute of limitations was interrupted by any act of the Administration with formal knowledge of the interested party. However, this provision was amended by Royal Decree-Law 7/2021, of 27 April, on the transposition of European Union directives on competition matters, adding point 4 to Article 68, which establishes that:

> "*The statute of limitations for the CNMC is interrupted during the processing of sanctioning proceedings before the National Competition Authorities of other Member States or before the European Commission with respect to the same facts that constitute an infringement prohibited by this law or by Articles 101 or 102 of the Treaty on the Functioning of* the European Union.

The interruption of the statute of limitations shall begin at the time of notification of the first formal investigative measure by the Competition Authority of another Member State to the European Commission [...]".

The CNMC justifies that the infringement would not have been time-barred because of the investigation by the European Commission. However, the High Court considered that the infringement was time-barred because, as mentioned above, the European Commission's investigation was not aimed at any of the companies that the CNMC subsequently investigated. Consequently, the High Court annulled REB's fine.

09 Comment: *dies a quo* of limitation periods in antitrust damages claims in Spain: a still not uncontroversial issue.

The issue of whether the limitation period starts to run either on the date of publication of the administrative decision or when the administrative decision has become final is currently subject to judicial controversy; and it is a key point in antitrust damages litigation matters following CNMC antitrust decisions.

On the one hand, there are first instance courts that have in the past considered the dies a quo to be the date when the CNMC's Decision was published (Article 1902 Civil Code).[2]

On the other hand, there are courts that have declared that the limitation period starts to run when the CNMC Decision became final (*i.e.*, when the Supreme Court or ultimate court on review issued its final judgment of a CNMC Decision), therefore applying the five-year limitation period. For instance, a First Instance Court in Barcelona reached that conclusion, finding that the defendants challenged the underlying CNMC antitrust Decision before the High Court, and that such an appeal could have resulted in the nullity of the said Decision, which amongst other factors played in favor of considering the final judgement as *dies a quo*.[3] Another example is a Judgment from a First Instance Court in Madrid in a case related to the insurance cartel,[4] in which the Court found that the injured party could not have final and complete knowledge of the harm suffered until the Supreme Court issued its judgment on the validity of the administrative decision (*i.e.*, until the administrative antitrust decision became final). On appeal, the Provincial Court of Zaragoza has also declared in at least three judgments that the *dies a quo* is the date when the CNMC Decision became final.[5] This finding is without prejudice of the possibility (not the obligation) to claim damages when the CNMC Decision is known by the injured party. In essence, the Provincial Court of Zaragoza states that it would be illogical to stay the civil damages claim until a final judgment by the administrative courts is issued. On those grounds, considering that the claim was characterized as a follow-on claim, the limitation period should start to run once the Supreme Court (or ultimate court on review) has confirmed the CNMC Decision. The Provincial Court of Madrid has also found in at least one case that the *dies a quo* starts to run when the administrative decision is final.[6]

Indeed, once judicial review is at work, a risk will always linger that one court or the other will end up quashing the administrative antitrust decision. Considering the state of affairs, a First Instance Court of Zaragoza has very recently issued a request for a preliminary ruling to the CJEU[7] on, amongst other questions, the point of whether or not the limitation period starts to run once an administrative decision is final.

In relation to the above, the very recent Judgment from the CJEU of 18 April 2024, case C-605/21[8] (**Heureka Judgment**) discusses the binding nature of an antitrust Commission Decision which is not yet final. In the Heureka Judgment, the CJEU draws a distinction between administrative decisions issued by national competition authorities (**NCAs**) and those of the Commission. The CJEU recalls that acts of EU institutions enjoy a presumption of legality, having full legal effects, so long they have not been declared invalid.[9] In that regard the CJEU refers to Article 16(1) Regulation 1/2003, which provides that national courts are bound by decisions issued by the

[2] For instance, Judgment of First Instance Court of Zaragoza num.1 of 9 November 2022, appeal num. 204/2022.
[3] Judgment of the First Instance Court of Barcelona num. 3, of 1 December 2022, num. 583/2022.
[4] Judgment of the First Instance Court of Madrid num. 2, of 9 June 2020, num. 210/2020.
[5] See Judgments of 5 July of 2023, num. 302/2023; of 1 September 2023, num. 345/2023; and of 22 November 2023, num. 530/2023.
[6] Judgment of the Provincial Court of Madrid of 19 May 2022, num. 377/2022.
[7] Order of the Mercantile Court of Zaragoza num. 1, of 10 January 2024, num. 472/2023.
[8] Judgment of the Court of Justice of the European Union (Grand Chamber) of 18 April 2024, *Heureka Group a.s. v. Google LLC*, case C-605/21.
[9] Paragraph 73.

Commission, regardless of whether or not they are final. By contrast, Article 9 Damages Directive assigns value as evidence for national damages claims purposes to decisions of national competition authorities only where those decisions are final. In that context, the CJEU states that "*Article 102 TFEU and the principle of effectiveness do not require the limitation period to continue to be suspended until the moment the Commission's decision becomes final.*" The position concerning administrative decisions issued by the NCAs could arguably be the opposite, given that Article 9 of the Damages Directive requires such decisions to be final in order to be binding for national courts (*i.e.*, administrative decisions from NCAs would seemingly not enjoy the same presumption of legality as Commission Decisions under the Damages Directive, so that it is reasonable to stay limitation periods until the decision is final).

The abovementioned request for a preliminary ruling from the First Instance Court of Zaragoza will (hopefully) clarify the question, but the Heureka Judgment seems to establish a distinction between European Commission and NCA decisions for the purposes of the *dies a quo*; acts of NCAs would be subject to a later *dies a quo* (at the moment the act becomes final). If this interpretation is confirmed, this would play in an effective extension of deadlines to claim damages in follow-on cases.

10 The Spanish Foreign Direct Screening Authority issues its Annual Activity Report.

The Ministry of Economy (where the office managing the Foreign Direct (**FDI**) Screening files is inserted), has issued its 2023 Activity Report.

The Report provides an overview of the regulatory evolution of FDI screening in Spain with mention to the 2023 FDI Regulation and the latest developments at EU level.

According to the report, total FDI in Spain has amounted to €28.21 billion in 2023. Most FDI screening applications (43%) stem from the US, with an increase of foreign investment in 2023 having its origin in Canada, UAE and the UK. Conversely, the number of FDI screening applications stemming from Chinese investors has been reduced from 9% of the total in 2021 to 5% in 2023.

The evolution of FDI screening files in Spain since the inception of the current FDI screening regime is summarized in the table below. As it can be viewed there, the number of consultations has waned substantially since the first full year of application (2021); conversely, the number of FDI screening filings for approval has increased. This suggests that the initial lack of regulatory clarity (which led to uncertainty regarding whether or not transactions were subject to FDI screening approval) has been reduced as experienced has been gained; and that the implementing Regulation approved in the summer of 2023 has provided some much needed guidance in crucial aspects of the regime.

	2023	**2022**	**2021**
FDI Applications	97	83	55
Unconditional Clearance	80 (82%)	63 (76%)	42 (76%)
Conditional Clearance	8 (8%)	9 (11%)	6 (11%)
Unauthorised	0	1	0
Shelved	9 (9%)	10 (12%)	7 (13%)
Consultations	87	174	231

The Report provides some high-level information on mitigation measures (remedies), stating generally that remedies are designed on an *ad hoc* basis depending on the features of the particular transaction. Common threads of the 2023 remedies include measures aimed at guaranteeing supply of essential goods or services; measures which goal is to limit the access by foreign investors to sensitive information; measures aimed at preventing the loss of sovereignty in specific areas, particularly in the technology sector.

The Report also indicates that most FDI screening activity has taken place in manufacturing, information and communications businesses, and the most frequent ground for FDI screening has been that the relevant transaction affects essential inputs.

Roughly 10-15% of FDI screening approvals are conditional. Furthermore, there is only one prohibition on record in the years of functioning of the FDI screening regime, which took place in 2022 (see table). Interestingly, this has been an investment by an EU company (Vivendi) under the rule that requires FDI screening approval for EU investors if the target is a company listed in the

Spanish stock market. In that case, Vivendi sought to acquire a stake in Prisa, who in turn owns newspaper El Pais. This may seem quite in line with the political nature of FDI screening.

11 Fines / Chocolate, biscuit and coffee products. The European Commission has fined € 337.5 million on Mondelēz for hindering competition by signing anti-competitive agreements and by abusing its dominant position (Decision of 23 May 2024, *Mondelez*, case AT.40632).

The European Commission has fined Mondelēz International, Inc (Mondelēz), one of the world's leading chocolate and biscuit producers, € 337.5 million for obstructing cross-border trade in chocolate, biscuit and coffee products between Member States.

The Commission has found that Mondelēz has:

(i) infringed Article 101 TFEU, between 2012 and 2019, by taking part in 22 anti-competitive agreements or concerted practices, covering all EU markets, by:

(a) restricting the territories or customers targeted by seven wholesale customers (traders/"brokers") to resell Mondelēz products. One agreement also included a provision requiring Mondelēz's customer to mark up the price of exported products in relation to domestic sales. These agreements and concerted practices took place between 2012 and 2019 and covered all EU markets;

(b) preventing ten exclusive distributors active in certain Member States from responding to sales solicitations from customers located in other Member States without Mondelēz's prior authorisation. These agreements and concerted practices took place between 2006 and 2020 and covered all EU markets.

(ii) Mondelēz infringed Article 102 TFEU, abusing its dominant position, between 2015 and 2019, by:

(a) refusing to supply a broker in Germany to prevent it from reselling chocolate bars in the territories of Austria, Belgium, Bulgaria and Romania, where prices are higher;

(b) interrupting the supply of chocolate bars to the Netherlands in order to prevent them from being imported into Belgium, where Mondelēz sold its products at a higher price.

The Commission concluded that, as a result of these practices, Mondelēz prevented retailers from sourcing freely from Member States with lower prices and artificially partitioned the internal market with the objective of preventing cross-border trade from leading to lower prices in countries where prices were higher. Consequently, Mondelēz could continue to sell its own products at higher prices, ultimately to the detriment of EU consumers.

12 European Commission fines for the first time for deletion of messages exchanged via social networking applications on a mobile phone (Commission Decision of 24 June 2024, Case COMP/AT.40882 - *IFF - deletion of data*).

The European Commission has fined International Flavors & Fragrances Inc and International Flavors & Fragrances IFF France SAS (together **IFF**) €15.9 million for obstructing an inspection.

In March 2023, the Commission carried out inspections at the offices of companies active in the consumer fragrances industry. Once the Commission's inspection team arrived at the offices, it noticed that an IFF employee had deleted WhatsApp messages he had with a competitor.

Once the infringement was detected, IFF immediately acknowledged the facts and actively cooperated with the Commission during and after the dawn raid. In fact, IFF cooperated by assisting the Commission in recovering the data deleted by the employee.

The Commission considers that the infringement committed by IFF is very serious because: *(i)* the employee deleted the messages after being informed of the Commission's inspection; and *(ii)* because the Commission was not informed of the deletion of the data. Therefore, the Commission concluded that a lump sum fine of 0.3% of IFF's total turnover would be proportionate and dissuasive. However, thanks to IFF's proactive cooperation during and after the inspection, it decided to reduce the amount of the fine by 50% and to impose a fine of €15.9 million, representing 0.15% of IFF's total turnover.

13 European Commission activity / Foreign Subsidies. The European Commission carries out the first raids and investigations under the Foreign Investment Regulation.

In April, the European Commission initiated two investigations under Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (**FSR**).

The investigations follow notifications submitted, on the one hand, by the ENEVO Group (including LONG Solar Techonologie GmbH) and, on the other hand, by Shanghai Electric UK Co. Td. Td. and Shanghai Electronic Hong Long International Engineering Co. Td, for the design, construction and operation of a photovoltaic park in Romania, with an installed capacity of 454.97 MW (project partially financed by the EU Modernization Fund). The Commission, based on the preliminary examination carried out, considered it justified to open an in-depth investigation for possible indications that both companies have received market-distorting foreign subsidies.

Furthermore, in the framework of another investigation, the Commission has carried out unannounced inspections at the premises of a Chinese company based in the Netherlands and Poland active in the manufacture and sale of inspection equipment for airports.

Finally, the Commission also opened an investigation, under the FSR into the acquisition by Emirates Telecommunications Group Company PJSC (a state-controlled telecommunications operator based in the United Arab Emirates) of sole control of PPF Telecom Group B.V (a telecommunications operator) because there are indications that one of the companies has received foreign subsidies that distort the EU internal market.

14 European Commission activity / Very Large Online Platform. The European Commission designates adult content platform as VLOP

The European Commission has officially designated Xnxx as a Very Large Online platform (**VLOP**) under the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (**DSA**). Xnxx is an adult content platform with an average of more than 45 million monthly users in the European Union according to the Commission, hence falling under the DSA threshold for designation as a VLOP.

This designation entails a series of obligations, among which are the adoption of specific measures to protect users, prevent minors from accessing adult content or the implementation of age verification tools. These obligations must be fulfilled by Xnxx within four months and a risk assessment report must be submitted by mid-November 2024.

15 EU Artificial Intelligence Regulation published. Initial takeaways.

Object.

The long-awaited EU Regulation 2024/1689 (**Regulation**) of 13 June 2024 on Artificial Intelligence (**AI**) has been published in the OJEU last Friday, 12 July 2024.

An AI system is defined as a *machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to* generate *outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments*.

Regulatory framework.

From 2 August 2024 onwards, a regulatory regime will apply depending on the purpose of each AI model and with regard to its potential risk to health, safety and fundamental rights. In essence:

(i) a catalogue of eight AI models banned as of 2 February 2025 is specified;

(ii) the Regulation defines an open list of at least 25 AI models (segmented in nine different categories) which are deemed 'high risk'. These systems encompass, in turn, a set of eight types of obligations derived from the proactive responsibility required by the Regulation to avoid or mitigate the inherent risks derived from their deployment in the EU market. Companies active in the HR, biometrics, emotion recognition, education, life insurance, health insurance or creditworthiness sectors will be particularly impacted to the extent that they develop and/or use AI;

(iii) a premium on transparency is imposed on the providers and deployers of generative AI so that it is known at all times that they are interacting with an AI system or output;

(iv) the Regulation defines the characteristics of a generative AI so that, as of 2 August 2025, it becomes mandatory to explain the training process of the AI models, as well as the content used therefor; and to ensure

compliance with copyright law by allowing -technologically- reservation by rightholders.

Enforcement framework.

The Regulation contemplates the creation of a European AI Office at Community level, as well as of national authorities to be designated by each Member State.

Maximum fines overall may reach up to 7% of worldwide turnover of infringing companies. Also public administrations and offices subject to the Regulation may be subject to fines.

Member States will not be able to start fining infringements until 2 August 2025, whereas the European Commission will be able to do so from 2 August 2024 for non-compliance by generative AI providers.

Initial takeaways.

The Regulation is riddled with indeterminate legal concepts, in addition to the 68 definitions it incorporates (some of them open-ended and which will require additional clarification).

The Regulation significantly increases the compliance burden for companies and individuals caught. The Regulation also establishes new mechanisms for filings, entries in the AI Register, certifications, EU Declarations of Conformity and CE marking, which will force companies to exhaustively manage the life cycle of the AI solutions they develop and/or implement.

The Regulation is designed to have extraterritorial effects, which is particularly relevant bearing in mind the worldwide nature of the products involved and that many operators will be based in Asia or the Americas.

Like with the GDPR, the Regulation is a pioneer legislative tool likely to model other regulatory efforts worldwide. The application of the Regulation by the administrative and judicial bodies - both national and Community - that will be in charge of its interpretation and enforcement will, at least to an extent, determine the pace of development and innovation of European industry in the coming years; but above all, how we want to face the challenge of the paradigm shift that the irruption of AI in the global economy represents.

The information contained in this bulletin does not constitute legal advice. For more information on our firm go to www.callolcoca.com