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A. National Competition and Markets Commission (CNMC), European Commission (EC) and other administrative agency activity

01 Representative CNMC merger decisions, August 2024 – February 2025.

Firms	Notification threshold	Economic sector	Decision
ABERTIS / TRADOS 45	Turnover	Activities ancillary to transportation	Phase I clearance (6 November)
BBVA / BANCO SABADELL	Market share	Financial services, except insurance and pension funding	Phase II initiation decision (12 November)
MASDAR ESPAÑA / GRUPO TER	Turnover	Production, transmission and distribution of electric power	Phase I clearance (21 November)
SERVEO / DOMINION INDUSTRY INFRAESTRUCTURES	Turnover	Support activities for petroleum and natural gas extraction	Phase I clearance (29 November)
COVALCO / AZBZ DELIVERY	Market share	Wholesale trade, non-specialized, of food, beverages and tobacco	Phase I clearance (29 November)
MIURA PARTNERS SGEIC / HEALTHTECH HTBA HOLDING	Market share	Manufacture of pharmaceuticals	Phase I clearance (11 December)
URBASER / STERICYCLE ESPAÑA Y PORTUGAL	Turnover	Hazardous waste collection	Phase I clearance (11 December)
INVEREADY / AVATEL	Market share	Telecommunications	Phase I clearance (18 December)
GLINT / CS M / MONSEGUR	Market share	Retail sale of computers, peripheral equipment and computer programs in specialized establishments	Phase I clearance (18 December)
BONDALTI CHEMICALS / ERCROS	Market share	Manufacture of other basic organic chemical products	Agreement to start Phase II (18 December)
SUDARSHAN / GRUPO HEUBACH	Market share	Manufacture of dyes and pigments	Phase I clearance (9 January)
ITABH /HMY SAS	Market share	Manufacture of office furniture and commercial establishments	Phase I clearance (9 January)
MAVCO / HUBERGROUP	Market share	Manufacture of paints, varnishes and similar coatings; printing inks and mastics	Phase I clearance (9 January)
GRIÑÓ / RATOR	Turnover	Lead, zinc and tin production	Phase I clearance (9 January)
INDRA / TESS	Market share	Manufacture of military combat vehicles	Phase I clearance (9 January)
ATLAS / SRG GLOBAL	Market share	Manufacture of other motor vehicle components, parts and accessories	Phase I clearance (15 January)
ENDESA GENERACION / CORPORACIÓN ACCIONA HIDRÁULICA	Turnover	Electricity production	Phase I clearance (4 January)
ESSECO / ERCROS	Market share	Manufacture of other basic organic chemical products	Phase I clearance (7 February)
MUBADALA CAPITAL / BABEL	Turnover	Programming, consultancy and other computer-related activities	Phase I clearance (7 February)
ESTEVE / NEGOCIO DE MIFAMURTIDA DE TAKEDA	Not disclosed	Manufacture of pharmaceutical products	Phase I clearance (7 February)
KARTESIA MANAGEMENT / RIOCAL / DANOSA	Turnover	Manufacture of other non-metallic mineral products n.e.c.	Phase I clearance (7 February)
MUTARES / NERVIÓN	Turnover	Manufacture of metal construction elements	Phase I clearance (7 February)
GEO TRAVEL / DIT GESTIÓN	Not disclosed	Activities of travel agencies	Phase I clearance (7 February)
GLOBAL ICECREAM INVESTMENTS / GRUPO ALACANT	Turnover	Manufacture of dairy products	Phase I clearance (7 February)
CURIUM / IRAB	Turnover	Manufacture of pharmaceuticals	Decision to initiate Phase II (8 February)
EUROFINS / SYNLAB ESPAÑA	Market share	Other healthcare activities	Phase I clearance (18 February)
GRUPO FUERTES / AGROPOR	Turnover	Pig farming	Phase I clearance (19 February)

02 CNMC / Booking. The CNMC fines Booking.com €413.24 million for abusing its dominant position during the last five years (Decision of 29 July 2024, *BOOKING*, file S/0005/21).

In June 2021 CNMC received two complaints from two hotel industry associations against Booking.com B.V. (**Booking.com**) for a series of anti-competitive practices. Following an antitrust investigation, the Council of the CNMC has decided that Booking.com is responsible for two single and continuous infringements consisting of an exploitative and of an exclusionary abuse of a dominant position from, at least, 1 January 2019 to the present, infringing Articles 2 LDC and 102 TFEU.

Regarding Booking.com's dominant position, its market share in the market for online booking intermediation services to hotels by Online Travel Agencies (**OTAs**) in Spain has remained high, ranging between 70/90% in the 2019-2022 period. The CNMC also concludes, based on the absence of substantial competition, high barriers to entry and lack of countervailing buyer power, that Booking.com has enjoyed a dominant position in the abovementioned market since at least 2019.

On the one hand, the CNMC establishes that Booking.com carried out an exploitative abuse by imposing the following unfair trading conditions on hotels located in Spain: *(i)* a narrow price parity clause (which prevents hotels from lowering the price of their rooms in their own sales channel below the price they set on Booking.com) for its own benefit while reserving the right to unilaterally lower the price offered by the hotel on its website at its own expense; *(ii)* imposing the English language version of the General Terms and Conditions (**T&C**) as the binding version and subjection of any disputes to Dutch law and Amsterdam courts; and *(iii)* lack of transparency regarding the information provided to Spanish hotels on the impact that the subscription to the "Preferente", "Preferente Plus" and "Genius" programs has on their ranking in the results offered by Booking.com on its website, and on the resulting additional number of hotel visits and bookings on Booking.com.

On the other hand, the CNMC considers that Booking.com has carried out an exclusionary abuse by restricting competition from other OTAs in offering their own online hotel intermediary services as follows: *(i)* incentivizing hotels to concentrate their sales/bookings on Booking.com by using the number of bookings a hotel has had on Booking.com as a ranking criterion in the pre-determined ranking results that Booking.com offers on its website (which entails a higher number of bookings); and *(ii)* encouraging hotels to follow a pricing and room availability policy that prioritizes Booking.com's profitability over the rest of the OTAs by using a performance requirement based on the hotel's profitability for Booking.com in order for hotels to access and remain in the "Preferente" and "Preferente Plus" programs.

As a result of these infringements, the CNMC has levied two fines on Booking.com of € 206,620,000 for each of the single and continuous infringements as well as a prohibition to contract with Public Administrations. Moreover, the CNMC includes a number of obligations on Booking.com to ensure that the conduct does not continue in the future in relation to hotels located in Spain, such as *(i)* ceasing to simultaneously include in its contracts a narrow parity clause and the clause allowing Booking.com to unilaterally lower the price fixed by hotels; *(ii)* the Spanish language version of the T&Cs and subjection to Spanish law and the forum of Courts located in Spain are to be binding in connection with hotels located in Spain; *(iii)* providing more transparency to hotels in relation to the benefits they shall expect in terms of visits and bookings obtained by participating in the "Preferente", "Preferente Plus" and "Genius" programmes; *(iv)* ceasing to use gross and net bookings as a criterion for the default ranking results; and *(v)* ceasing to use the hotel's profitability to Booking.com as a criterion to access and remain on the "Preferente" and "Preferente Plus" programmes.

03 CNMC activity / General Council of Court Agents. The CNMC fines the General Council of Court Agents €2.46 million (Decision of 4 October 2024, *PLATAFORMA DE SUBASTAS ELECTRÓNICAS*, file S/0001/21).

Court agents manage communications between lawyers and clients on the one hand, and the courts and judges on the other. Court agents are a regulated profession because when the applicable law so states, it is not possible to litigate without their intervention. Court agents, like lawyers, belong to local professional bodies or associations; and all professional bodies in Spain are represented by the General Council of Court Agents (**CGPE**).

In 2016 the CGPE put into operation, by means of a collaboration agreement with a specialized private company, the website www.subastasprocuradores.com so that court agent associations could act as specialized entities for the deposit, direct sale and organization of private and public auctions of movable and real estate assets from judicial enforcement proceedings of all kinds (civil, commercial,

criminal, labor and contentious-administrative); from administrative enforcement proceedings, from voluntary jurisdiction proceedings, or from private orders placed by individuals or legal entities on an *ad hoc* basis, or within the framework of private agreements (including any possible future agreement to be concluded, for example, with financial institutions).

The CGPE fixed the commissions to be charged by the court agent associations using its platform: 4% of the award price for movable property and between 5-15% of the award price for real estate, unless otherwise agreed. Therefore, the CGPE set the price ranges to be paid by the successful bidder of the auction. The rules, terms and conditions of the CGPE platform were posted on its website. According to the CNMC, the CGPE's practices eliminated the uncertainty that arises when brokerage professionals freely set their prices and compete for clients.

On the other hand, the CNMC finds that unfair competition conduct affecting the market has taken place because the CGPE promoted its platform as the only option for judicial auctions and the court agent associations as the only public law corporations designated by the Civil Procedure Act to auction goods. However, the Civil Procedure Act does not establish a reservation or preference in their favor, nor does it expressly state that court agent associations are "*the only designated public law corporation*" as the CGPE conveys to the market. This behavior is qualified by the CNMC as an unfair act of deception contained in Article 5 of Law 31/1991 of 10 January, on Unfair Competition. The CGPE promoted its services to private and public operators as a safer or more reliable intermediation, constituting an act of unfair competition likely to alter the economic behavior of the addressees and harming competitors (which is forbidden under Article 3 Competition Act).

As a result of the above, the CNMC has fined the CGPE € 1.64 million for a single, continuous, very serious infringement of Articles 1 Competition Act and 101 TFEU consisting of the collective recommendation or decision of association of undertakings; and an additional fine of € 821,953 for an infringement of Article 3 Competition Act (unfair trade impacting competition).

04 CNMC activity / Gun-jumping. Decision of 23 October 2024, *MARCIAL CHACÓN E HIJOS*, file SNC/DC/057/24.

The Competition Directorate of the CNMC became aware in June 2023 and January 2024, as a result of the reports issued in two files of the Energy Directorate of the CNMC, of the operations of acquisition of 100% of the share capital of DECAIL ENERGÍA, S.L. and ELECTRA LA HONORINA, S.L., by C. MARCIAL CHACON E HIJOS, S.L. (**Marcial Chacón**).

In view of the above, on 15 March 2024, the Competition Directorate requested information to Marcial. Later in May, Marcial Chacón proceeded to the formal notification of the concentration which was cleared in 5 June 2024. The active cooperation of the company and waiver of any rights of appeal led to a (very) reduced fine of €13,320.

05 CNMC / fines for non-compliance. CNMC has fined the operator AVATEL TELECOM, S.A. 1.81 million euros for not providing information requested by the CNMC (Decision of 16 January 2025, file SNC/DTSA/005/24).

In February 2024, the CNMC's Regulatory Supervision Chamber agreed to initiate sanctioning proceedings against AVATEL TELECOM, S.A. (AVATEL) for a series of infractions consisting of inaccurate or erroneous and late submissions in most cases in response to several requests for information made by the CNMC in the context of files for the preparation of statistical bulletins and reports for 2023.

The CNMC has the function of monitoring the evolution of the sectors it supervises, such as telecommunications and audiovisual, and analyzing their competitive situation. Therefore, the CNMC requires information from operators who operate networks or provide electronic communications services in order to satisfy statistical or analysis needs and for the preparation of sectoral monitoring reports.

According to the CNMC, AVATEL provided inconsistent and inaccurate information and also failed to provide requested information. The Proposed Resolution proposed the imposition of six fines on AVATEL for a total amount of 1,810,000.00 euros. AVATEL acknowledged its responsibility and, under Article 85.1 of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations, a reduction of 40% was applied to AVATEL, reducing it to a total amount of 1,086,000.00 euros.

06 CNMC activity / Telefónica. The CNMC opens antitrust proceedings against Telefónica for purportedly breaching the commitments established during its acquisition of DTS in 2015.

In April 2015, the CNMC granted, subject to conditions, clearance for the acquisition by Telefónica de España S.A.U. (**Telefónica**) of DTS (formerly known as Sogecable), the pay-TV operator.

Some of the commitments seek to limit long-term exclusivities in premium media content. In its monitoring Decision issued in February 2024, the CNMC identified a potential non-compliance with this commitment in the agreement between Telefónica and the National Professional Football League (**LNFP**), dated 19 January 2022.

Specifically, Telefónica entered into a contract with the LNFP that granted exclusive broadcasting and marketing rights for matches of the National First Division League Championship for the 2022/23 season and subsequent seasons.

In light of the aforementioned reasons, the CNMC has opened antitrust/monitoring proceedings against Telefónica. The CNMC now has a maximum period of three months to investigate the matter and reach a Decision.

07 CNMC activity / Postal services. The CNMC reports on internal contracting between Correos group companies.

Correos is the former monopoly and State-owned company dedicated to the postal and parcels market, designated by law to provide the Universal Postal Services in Spain. Correos is subject to the public procurement laws.

Since 2021, the law allows the direct award of contracts between public companies of the same business group, provided that certain requirements are met, such as not distorting competition in the markets. To assess this requirement, the CNMC must issue a report. The CNMC has identified risks that could affect competition in this type of contracts: *(i)* cross-subsidies, particularly if the prices are not market prices; *(ii)* overcompensation in the Universal Postal Services; *(iii)* bundling or tying of services; and *(iv)* advantages in the access to public infrastructure.

The CNMC concludes that the conclusion of the intra-group contract analyzed does not entail distortions of competition.

08 CNMC activity / Apple investigation. Apple investigated for possible anticompetitive practices related to distribution of apps on its devices (*APPLE APP SOTRE*, file S/0005/24).

On 22 July 2024, the CNMC has initiated antitrust proceedings against Apple for alleged abuse of dominant position consisting of imposing unfair commercial conditions to developers who use the Apple App Store to distribute applications to users of Apple products. There is not any additional information on the case.

09 The CNMC approves its own rules for arbitration of disputes in non-regulated areas.

Earlier this year, the CNMC approved the Arbitration Regulation to resolve disputes between operators. This role as arbitrator seeks to adjudicate (private) disputes between opposed parties in areas of competition law that may be arbitrated. It is expressly distinguished from the administrative action of the CNMC in regulated industries *e.g.*, in connection with access to networks or other disputes that require intervention, and which take place in the area of administrative law and are subject to review by the administrative courts. Conversely, the arbitration role of the CNMC is subject to the private law rules of arbitration, and to review by the commercial courts. An important novelty is the introduction of an abbreviated procedure applicable to claims of lesser complexity or which amount does not exceed €100,000, where the deadlines for issuing the award and for the practice of evidence are shortened, allowing greater agility in the resolution of minor disputes.

The main features of the Arbitration Regulation can be summarized as follows:

- The process starts by identifying the parties, the nature of the dispute and the applicable arbitration agreements. The defendant has fifteen days to respond and, if applicable, to file a counterclaim.
- The language of the arbitration is Spanish and will take place at the offices of the CNMC.
- The Regulation allows the modification of the time limits (extension, reduction or suspension) both by decision of the CNMC and by agreement of the parties with the approval of the Board.
- The rules on evidence etc., generally follow established patterns of court process.
- The arbitration award is issued by the CNMC Board within a maximum period of six months, extendable for additional three months in exceptional cases.
- The arbitration award is published only if the parties expressly consent.
- The arbitration is free of charge, although the CNMC may pass on the costs incurred for external services.
- At the request of the parties, the CNMC may administer an independent arbitration panel,

appointing arbitrators and applying fees as determined by the Board.

10 Food chain regulation / AICA sanctions. The AICA imposes the highest fine on a Valencian company for destruction of value of the chain.

The Food Information and Control Agency (**AICA**) has published the sanctions corresponding to the fourth quarter of 2024. A record penalty of €132,000 on Valencian company, Fertotrans, S.L. stands out. It refers to selling below production cost in breach of Article 12 ter of Law 12/2013 of August 2, of measures to improve the functioning of the food chain (**Food Chain Law**). This provision states that, in order to avoid the destruction of value in the food chain, each operator in the food chain must pay the operator immediately preceding a price equal or higher than the cost of production of such product actually incurred or assumed by that operator.

AICA, which reports to the Ministry of Agriculture, Fisheries and Food, is raising the level of enforcement of the Food Chain Law. AICA's main areas of focus nowadays seem to revolve around tackling below-cost pricing; written contracts are used; and that payment deadlines are met. In the first quarter of this year it has imposed penalties of €128,424.6, in the second quarter of €115,478.9 and in the third quarter of €296,674.86. In 2024 the penalties have increased by 112% more than in 2024, *i.e.* slightly more than double.

11 European Commission / Teva. The EC has levied a fine of EUR 462.6 million against Teva for the inappropriate use of the patent system and for employing disparagement strategies intended to postpone the market introduction of a competing multiple sclerosis treatment (Case AT.40588, *Teva Copaxone*).

The European Commission has imposed a fine of EUR 462.6 million on Teva for misusing the patent system and carrying out a disparagement campaign to delay the market entry of competing multiple sclerosis treatments.

The Commission found that Teva abused its dominant position in the market for glatiramer acetate (**GA**) in several EU countries, including Belgium, Czechia, Germany, Italy, the Netherlands, Poland, and Spain. GA is the active ingredient in Copaxone, Teva's key multiple sclerosis treatment.

As the patent for Copaxone neared expiry in 2015, Teva implemented two anticompetitive strategies to maintain its market dominance: *(i)* a misuse of the patent system and *(ii)* a disparagement campaign against a competitor.

Regarding the misuse of the patent system, Teva strategically filed and withdrew divisional patents related to Copaxone's production and dosing, creating a complex legal barrier that discouraged competitors. Moreover, it delayed legal clarity by withdrawing patents when their validity was challenged, preventing rulings that could have invalidated similar patents. Consequently, Teva forced generic competitors into a cycle of repeated litigation, delaying the launch of more affordable alternatives.

Regarding the disparagement campaign against a competitor, Teva spread misleading information about the safety, efficacy, and therapeutic equivalence of a competing GA medicine, targeting healthcare professionals and national regulators, influencing pricing and reimbursement decisions. As a result of this practice, and despite the competing drug being approved by regulators, Teva's actions slowed its market adoption.

The Commission found that Teva's conduct artificially prolonged Copaxone's market exclusivity, delaying competition and maintaining higher prices, amounting to a single and continuous infringement of Article 102 TFEU. The Commission found that after the competitor entered the market, prices dropped by up to 80%, highlighting the financial impact of Teva's practices on healthcare systems.

The EUR 462.6 million fine reflects the seriousness of the infringement, which spanned from 2015 to 2024, varying by country.

This case is significant as it marks the first time the Commission has imposed a fine for both patent misuse and disparagement together. It reinforces the EU's stance against anticompetitive practices in the pharmaceutical sector.

12 European Commission / Temu. The EC initiates two parallel proceedings targeting Temu for breaches of the DSA and of the European consumer protection laws.

The European Commission (**EC**) has initiated two parallel proceedings targeting Temu, focusing on consumer protection and compliance with the Digital Services Act (**DSA**).

First, the EC informed of the initiation of a formal investigation against Temu for potential non-compliance, which was designated as a very large online platform (**VLOP**) under the DSA in May 2024, placing it under the most stringent DSA

obligations. The EC's investigation focuses on several areas:

(i) sale of non-compliant products: the EC will assess the adequacy of Temu's systems to prevent previously identified rogue traders and non-compliant (particularly, unsafe) products from reappearing on its platform.

(ii) addictive design and gamification risks: the EC will investigate whether Temu's platform design, including game-like reward programs, creates addictive behaviors that may harm users' mental and physical well-being.

(iii) transparency in eecommender systems: the EC will assess whether Temu provides adequate information about how it selects and ranks products for users. Under the DSA, users must be offered at least one option for product recommendations that does not rely on profiling.

(iv) access to data for researchers: the EC will evaluate whether Temu meets its obligation to grant researchers access to publicly available data. This requirement aims at enhancing transparency and accountability.

The DSA proceedings stem from earlier requests for information and a risk assessment provided by Temu in September 2024. The Commission will gather more evidence through additional inquiries and monitoring actions. These proceedings may lead to penalties, mandatory compliance measures, or changes in Temu's operational practices.

Second, the EC informed that the Consumer Protection Cooperation (**CPC**) Network, coordinated by the European Commission and involving national consumer authorities from Belgium, Germany, and Ireland, is addressing several practices on Temu's platform that are allegedly in breach of EU consumer laws. The main issues identified include:

(i) fake discounts: Temu would be creating the impression of discounts when none exist, misleading consumers into making purchases they believe are time-sensitive or advantageous.

(ii) pressure selling: Temu would be using manipulative tactics, such as false claims about limited stock or deadlines, to pressure consumers into hasty decisions.

(iii) gamification practices: Temu would be obliging users to engage in games like "spin the wheel" to access the marketplace but hides critical conditions tied to rewards, creating a lack of transparency.

(iv) misleading information on consumer rights: Temu would be providing incomplete or incorrect information regarding refund policies and returns and failing to inform users about minimum purchase requirements before orders can be finalized.

(v) suspected fake reviews: reviews on Temu's platform are suspected of being unauthentic, and there is insufficient information on how the authenticity of reviews is ensured.

(vi) hidden contact details: consumers struggle to contact Temu for complaints or inquiries due to a lack of accessible contact details.

In addition, the CPC Network has requested information from Temu to assess the company's compliance with other obligations under EU consumer protection legislation such as clearly informing consumers whether or not the seller of a product is a trader, ensuring that product ratings, reviews and assessments are not presented to consumers in a misleading manner, correctly advertising and calculating price reductions, and ensuring that any environmental claims are accurate and substantiated.

The CPC Network has requested Temu to propose corrective measures within one month. If these concerns are not resolved, national authorities may impose enforcement actions, including fines based on Temu's turnover in the EU.

These actions reflect a coordinated EU approach to regulating digital platforms, ensuring consumer trust, and maintaining fair competition. Should Temu fail to meet its obligations, it faces significant fines and enforcement measures, signaling the EU's firm stance on upholding its regulatory framework in the digital marketplace.

Moreover, this regulatory framework will be reinforced with the Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC (**EU General**

Product Safety Regulation), which will come into effect on 13 December 2024. Online marketplaces such as Temu will face additional responsibilities as an online marketplace, including ensuring there is an EU-based economic operator responsible for product safety and complying with product takedown requests if safety issues are identified.

B. Relevant national and international jurisprudence

13 High Court (*Audiencia Nacional*), Criminal law Chamber / Leniency. Judgment of 5 February 2025, case 4/2025 of the on the 'Fire Cartel'.

The High Court decides on the criminal accusations of the 'Fire Cartel', a network of companies and managers in the aerial firefighting sector who for almost two decades manipulated public contracts through a secret market-sharing and price-fixing agreement.

Between 1999 and 2018, several companies in the aerial firefighting sector geographically partitioned and allocated public tenders nationwide, excluding competitors. The bid-rigging included the use of forged documentation. The entire scheme was supplemented by the participation of high-ranking officials of the Valencia and Catalonia regions, who favored the awarding of contracts in exchange for bribes.

The penalties vary depending to the involvement of each defendant, including *(i)* prison sentences for several businessmen and public officials, *(ii)* a nine-month ban on contracting with public administrations for several companies and *(iii)* millionaire fines for some companies and confiscation of the illicit profits obtained through the fraud.

The novelty of this judgment lies in the application to one of the accused businessmen of Article 262.3 of the Criminal Code, which establishes an exemption from criminal liability for altering prices in public tenders for natural persons who, acting in the name and on behalf of a company or corporation, have participated in practices contrary to competition law, if certain conditions are met.

In this regard, the judgment analyses the immunity system contained in article 262.3 CP, introduced by LO 14/2022, which exempts directors, administrators and employees who participate in collusive agreements in public tenders from criminal liability if they meet certain conditions. This exemption from criminal liability transposes into Spanish law Directive ECN+ (EU) 2019/1, the aim of which is to encourage the cooperation of cartel members in detecting and punishing cartels, and recognizes the purpose of the leniency policy pursued by both national and EU legislators and included in the Criminal Code to protect, also in the criminal sphere, those who disclose the existence of secret cartels that carry out anti-competitive practices.

As stated in Article 262.3 PC, for a defendant to benefit from this immunity, the following requirements must be met:

1. Cessation of participation in the offence prior to the relevant individual having had noticed that he or she is under investigation.

2. Application to the CNMC for immunity from fines before the defendant is formally investigated.

3. Active cooperation with the CNMC providing valuable information for the detection of the cartel.

4. Collaboration with the judicial authority or the Public Prosecutor's Office, providing useful evidence for the identification of other perpetrators.

The Court highlights the inconsistency between these requirements, as the law requires first going to the CNMC and then collaborating with the Public Prosecutor's Office, which is not always feasible in cases where criminal proceedings have preeminence. The question arises as to whether filing the complaint with the Public Prosecutor's Office is equivalent to fulfilling the exemption requirement with the CNMC, given that both have the same purpose (to identify and punish cartels). In this case, the Anti-Corruption Prosecutor's Office was the first to receive the complaint, in 2014, before the CNMC began its investigation in 2016.

The businessman Mr. Nicolás, who invoked the exemption in his favor, participated in the anti-competitive practice, denounced the existence of the cartel and the persons and companies involved, including himself as manager of one of the companies, and provided evidence of the criminal rigging of the tenders for fire-fighting aircraft. He claimed to have handed over documentation, to have maintained active collaboration with both the prosecution and the police, as well as with the magistrate's court. In addition, he claimed that in the oral trial he had acknowledged his preeminent position regarding the company Avialsa, his control of the facts and his participation in the cartel.

In view of the specific facts of this case, the Court ends up recognizing the requested exemption, taking into account Mr. Nicolás enabled the dismantling of the cartel, concluding that a literal interpretation of art. 262.3 CP would lead to an unfair result contrary to the intention of the EU and national legislatures and considers that all the parameters for its application to this specific case are present, regardless of the fact that the accused filed the complaint in 2014, when the criminal liability exemption system was not yet in force, as it was introduced in LO 14/2022, since the transitional provision of the law provided for its retroactive application in the event of it being more favorable to the accused. Therefore, the immunity is recognized for Mr. Nicolás, exempting him from criminal liability.

14 Spain / Supreme Court / Damages. Judgment of 6 November 2024 (Judgment No. 1469/2024).

Husco S.L. (**Husco**), an enterprise involved in the wholesale and retail trade of fuels, initiated legal proceedings against oil operator Repsol Comercial de Productos Petrolíferos S.A. (**Repsol**). Husco sought compensation for damages incurred from March 6, 2017, to the present, citing violations of Article 101 TFEU. Additionally, Husco requested the annulment of its legal relationship with Repsol concerning the installation of vehicle supplies, asserting that this relationship contravenes Articles 101 and 102 TFEU.

Initially, Husco's claims were dismissed; however, they were subsequently upheld upon appeal. In response to this appellate decision, Repsol lodged an appeal in cassation, resulting in the case being presented to the Supreme Court (**TS**), which delivered its ruling on November 6, 2024.

The TS's judgment offers significant clarifications regarding the interpretation of the CJEU judgment dated April 20, 2023, concerning case C-25/21 (**2023 CJEU judgment**). This judgment invalidated a contract while acknowledging that none of its provisions violated Article 101 TFEU. Furthermore, the TS addresses the methodology for determining the compensation for damages in cases of price fixing.

Upon reviewing the legal reasoning of the 2023 CJEU judgment, the TS recognizes that the existence of an infringement of EU competition law, as determined by a decision from a competition authority (which must have been subsequently upheld by the courts), has to be considered as established by the plaintiff in the absence of contrary evidence. Consequently, this shifts the burden of proof to the defendant, provided that the nature, as well as the material, personal, temporal, and territorial scope of the alleged infringements in the actions initiated by the plaintiff align with those of the infringement identified in the decision issued by the competition authority.

The TS interprets that the judgment under appeal recognizes this premise as established, which consequently leads to a reversal of the burden of proof, obligating Repsol to provide evidence that, in the circumstances of this case, there was no instance of indirect price fixing.

The application of this premise in the present case is grounded in the resolution issued by the CNMC (formerly known as **CNC**), dated July 30, 2009. The CNC's 2009 resolution established that Repsol, in collaboration with other oil operators, had violated Article 1 LDC and Article 81(1) of the Treaty establishing the European Community (now Article 101(1) TFEU) by indirectly establishing a fixed retail price through service stations operating under its brand. This action effectively restricted competition both within its own network of service stations and in relation to other service stations.

Furthermore, the TS has clarified that for a contract to be considered null and void, it is not necessary for any specific provision to explicitly contravene competition law. Instead, it suffices that the execution of the contract entails practices aimed at preventing, restricting, or distorting competition within the internal market. This encompasses practices that directly or indirectly involve the establishment of fixed purchase or sale prices or other transaction conditions, as delineated in Article 101(1)(*a*) TFEU.

Furthermore, the TS addresses the assessment of compensable damages resulting from price-fixing violations.

The TS stipulates that such damages must stem from the unlawful actions in question. In this instance, the distributor's inability to independently establish the final retail price hindered its capacity to benefit from the so-called "volume effect"—namely, the influence of variations in the quantity of products or services sold on the resulting final sales figures. This indicates that the distributor may have been able to achieve higher sales volumes at a more competitive price, potentially leading to increased profits.
The claim for damages in this particular case should have been substantiated by these factors, along with the necessary evidence, which the plaintiff failed to provide, ultimately resulting in the dismissal of its claims concerning damages.

Considering the conclusions above, the TS has partially overturned the judgment on appeal, thereby affirming the declaration of contractual nullity between Husco and Repsol, while nullifying the order for Repsol to pay compensation for damages.

15 CJEU / sensitive information. The exchange of information over a period of more than ten years between fourteen credit institutions in Portugal can amount to a restriction of competition by object (Judgment of 29 July 2024, case C-298/22).

In 2019, the Portuguese Competition Authority fined fourteen credit institutions a total amount of €225 million, for an exchange of sensitive information between 2002 and 2013. The Portuguese Competition Court referred a request for a preliminary ruling to the CJEU on the possibility of qualifying an exchange of information as a restriction by object, as well as the conditions therefor.

The CJEU concluded that an autonomous exchange of information between competitors may constitute a restriction by object. It is sufficient that in the factual context such exchange constitutes a form of coordination which, by its very nature, is necessarily detrimental to competition.

16 CJEU / Booking.com. The CJEU rules on the contractual relationship between hotels and the Booking.com platform (Judgment of 19 September 2024, case C-264/2023).

The Amsterdam Court of First Instance referred a question to the CJEU for a preliminary ruling on the application of the principle of prohibition of collusive practices referred to in Article 101(1) TFEU to the rate parity clauses used by hotel booking platforms in contracts concluded with accommodation providers and, in particular, with the clauses used by Booking.com.

Until 2015, Booking.com included in the general terms and conditions a so-called "broad parity" clause, under which accommodation providers could not offer rooms at a lower price than that offered by Booking.com on its own sales channels or on other channels operated by third parties, including Booking.com's competitor platforms. In the same year, Booking.com made a commitment to the French, Italian and Swedish antitrust authorities to remove this clause and replace it with a so-called "restricted parity" clause limiting the prohibition imposed on accommodation providers to offer their rooms at better prices than those offered on Booking.com.

However, the Bundeskartellant, after consulting the European Commission, found that the restricted parity clause was also contrary to the prohibition of collusive practices under EU and German law and ordered Booking.com to put an end to its use. In this context, Booking.com asked the Amsterdam Court of First Instance to declare that the clause did not infringe Article 101 TFEU and 63 German hotel establishments asked the same court to declare that Booking.com had infringed Article 101 TFEU.

The CJEU, in its judgment, has concluded that although the provision of online hotel reservation services by platforms such as Booking.com has had a neutral or even positive effect on competition, it has not been demonstrated that the rate parity clauses, both broad and narrow, are objectively necessary for the performance of this main transaction. It considers that broad parity clauses entail risks of foreclosure of small platforms and new platforms entering the market. It also considers that the restricted parity clauses have a minor restrictive effect on competition, but are not necessary to ensure the economic viability of the hotel booking platform.

17 CJEU / *FIFA* v *Lassana Diarra*. The CJEU rules on the FIFA Regulations on the Status and Transfer of Players (Judgment of 4 October 2024, case C-650/22).

Lassana Diarra, a former professional football player, presented several provisions of the FIFA Regulations on the Status and Transfer of Players (**RSTP**) to the Belgian courts. The RSTP are concurrently enforced by national football federations, including that of Belgium.

According to the RSTP, if a player terminates their employment contract without "just cause" prior to the expiration of the standard or agreed-upon duration of the contract, both the player and the new club that employs them are jointly and severally liable for the compensation owed to the previous club. Furthermore, the RSTP mandates that the national association to which the player's former club belongs must withhold the issuance of an international transfer certificate to the national association of the new club until the resolution of any termination dispute between the former club and the player.

In 2014, the Russian football club Lokomotiv Moscow terminated its contract with Lassana Diarra, citing an alleged breach of contract by the player. The club sought compensation in the amount of EUR 20 million. In 2015, Diarra received an offer from Sporting du Pays de

Charleroi. However, the Royal Belgian Football Federation (**URBSFA**) declined to register the transfer until his former club issued an international transfer certificate in accordance with the RSTP. By the end of the year, Lassana Diarra commenced legal action against FIFA and URBSFA, requesting compensation amounting to EUR 6 million for lost earnings resulting from his inability to secure a contract with the Belgian club during the 2014/15 season, attributable to the RSTP. His claims were initially accepted by a first instance court in early 2017; however, FIFA subsequently appealed this decision to the Court of Appeal in Mons, Belgium.

In September 2022, the Court of Appeal in Mons submitted several inquiries for a preliminary ruling to the CJEU, which concerned the legality of specific provisions of the RSTP in relation to the free movement of workers (Article 45 TFEU) and the safeguarding of fair competition (Article 101 TFEU).

The RSTP regarding Article 101 TFEU. The CJEU construes the provisions of the RSTP regarding player transfers as effectively establishing no-poach agreements, despite the lack of explicit language to that effect. These anticompetitive agreements are enforced by FIFA upon clubs and their players. They are restrictions by object, unjustified under Article 101.3 and there is no need to prove parties' intent.

The RSTP regarding Article 45 TFEU. The CJEU determines that the RSTP provisions regarding player transfers are likely to impede the free movement of professional football players across Member States.

According to the CJEU, players who reside or are employed in their home Member State and wish to enter a contract with a new club located in another Member State may face significant disadvantages due to the RSTP imposing stringent restrictions on the cross-border movement of professional football players. Additionally, it is asserted that the RSTP imposes unpredictable legal and financial risks on new clubs, which may ultimately discourage them from signing new players and restrict the employment opportunities available to those players.

The CJEU, however, determines that it is the responsibility of the national referring court to evaluate whether there are valid justifications for restricting freedom of movement by determining if such provisions serve a legitimate objective in the public interest and adhere to the principles of proportionality and necessity. The preservation of the regularity and development of competitions is acknowledged as a legitimate objective by the CJEU.

In relation to the proportionality of the RSTP, the CJEU observes that certain provisions thereof extend beyond the initially asserted objective of ensuring a degree of regularity in competitions by maintaining stability within the football teams. According to the Court, FIFA seems to disregard that certain provisions adhere to prolonged timeframes, which seems inconsistent with the relatively brief career span of professional football players.

In addition, the CJEU expresses opposition to the RSTP provisions concerning the compensation payment and the international transfer certificate. The CJEU determines that the criteria established for calculating the compensation owed by the player and the new club appear to prioritize the financial interests of the clubs rather than the legitimate objectives related to the sustainability of competitions as asserted by FIFA. Moreover, the CJEU contends that the provisions governing the international transfer certificate fail to adhere to the principle of proportionality, failing to adequately consider the specific circumstances of each case. Instead, these provisions are applied in a rigid and automated fashion.

18 CJEU / *Commission* v *Intel Corporation*. The CJEU has confirmed the illegality of the European Commission 2009 decision against Intel (Judgment of 24 October 2024, case C-240/22 P).

On 13 May 2009, the EC fined €1.06 billion on Intel for abusing its dominant position in the global market for x86 architecture microprocessors, commonly known as central processing units (**x86 CPUs**), between October 2002 and December 2007, through a strategy aimed at excluding its primary competitor from the market.

The investigation conducted by the EC uncovered that Intel relied naked restrictions and conditional rebates. Intel was found to have implemented a series of rebates and payments (**loyalty rebates**) designed to cultivate loyalty among four original equipment manufacturers (**OEMs**) and a European retailer of microelectronic devices (Media-Saturn-Holding GmbH, **MSH**). This conduct substantially impeded the ability of Intel's rivals to compete effectively based on the merits of their x86 CPUs.

Specifically, Intel provided Dell, HP, NEC, and Lenovo with rebates that were contingent upon their commitment to purchase all or nearly all of their x86 CPUs from Intel. Additionally, Intel

made payments to MSH that were conditional upon MSH exclusively selling computers equipped with x86 CPUs produced by Intel.

The decision made by the EC in 2009 was appealed to the General Court of the EU, which rendered its judgment on the matter on 12 June 2014. The General Court dismissed Intel's action; ultimately however, the CJEU annulled the GC's initial ruling from 2014 and subsequently referred the case back to the General Court for further proceedings.

In its judgment, the CJEU observed that both the General Court and the EC had operated under a flawed assumption: that loyalty rebates offered by a dominant undertaking inherently have the capacity to restrict competition. This erroneous assumption resulted in the conclusion that it was unnecessary to investigate all pertinent circumstances or to perform an as-efficient competitor (**AEC**) test.

Nevertheless, since the EC had conducted such an assessment, which had a substantial impact on the determination of whether these rebates could potentially foreclose an AEC as Intel, the CJEU concluded that the General Court was required to consider all of Intel's arguments concerning the EC's assessment. The CJEU also determined that, to apply the AEC test, the EC "*is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market*" (**AEC criterium**).

In 2022, the General Court identified inaccuracies in the EC's application of the AEC test with respect to the four OEMs and MSH. Additionally, errors were recognized in the EC's assessment of the market share impacted by the loyalty rebates and the duration of their implementation. These findings resulted in a partial annulment of the contested decision, particularly regarding characterization of such rebates as practices infringing Article 102 TFEU, as well as the annulment of the substantial fine levied against Intel.

The EC lodged an appeal against the GC's 2022 judgment, contending, first, that there were errors in the EGC's assessment of the AEC test, and second, that the General Court failed to adequately consider the scope of the judicial review conducted in relation to the analysis of whether loyalty rebates had the potential to restrict competition.

On 24 October 2024, the CJEU delivered its final ruling on the case, rejecting the EC's appeal.

Regarding the scope of judicial review, the CJEU clarified that it is not within the purview of the General Court to determine whether the operative part of the EC's decision could be justified based on reasoning that does not contain the identified errors, particularly when such reasoning is not presented coherently within the decision itself.

Consequently, the CJUE determined that the General Court could not be reproached for not examining whether other sections of the EC's decision included information that could facilitate the development of a rationale demonstrating the potential for the contested rebates to exert an anticompetitive foreclosure effect. This is because such an examination would necessitate the General Court to "*substitut[e] its own reasoning*" for that of the EC.

Concerning the AEC test, the CJUE performed a comprehensive evaluation of both the EC's AEC test and the General Court's assessment of that test, ultimately affirming the latter's conclusions that the EC's analysis was flawed due to errors.

The CJEU reiterated a principle it established in its 2017 ruling regarding the implementation of the AEC test. According to this principle, when a dominant entity presents evidence indicating that its actions could not have resulted in the purported foreclosure effects, the EC is obligated to evaluate the consequences of those actions. This evaluation must include an analysis of the AEC criterium outlined above.

The CJEU further observed that the potential for loyalty rebates to result in the foreclosure of an AEC, as a general principle, must be evaluated utilizing the AEC test. However, it also emphasized that this test represents "*merely one of the ways of assessing whether an undertaking in a dominant position has used means other than those that come within the scope of 'normal' competition*."

Additionally, the CJEU examined the application of the AEC test in relation to Advanced Micro Devices (**AMD**), original complainant against Intel to the EC in October 2000. The CJEU rejected the EC's assertion that the General Court had overlooked the fact that AMD itself constituted an AEC that had been foreclosed, due to the high-performance, innovative, and attractive nature of its products.

The CJEU determined that this consideration was irrelevant, as "*the AEC test is a hypothetical exercise that makes it possible to determine whether a competitor which is as efficient as Intel*." Consequently, this analysis should be conducted

independently of AMD's actual ability or competitiveness.

As concluded by the CJEU, the analysis in question "*may therefore demonstrate that the contested rebates were […] capable of foreclosing a[n] AEC, even if AMD had not itself been foreclosed, just as it may reveal the lack of such capability, despite the fact that one or other of the dominant undertaking's competitors left the market or was marginalized.*"

19 US courts / Google. Federal Court declares that Google maintained an illegal monopoly in internet search and advertising markets.

At a time when the European Commission is moving on with the (burdensome) task of issuing its own Article 102 TFEU Guidelines, it is good to take a look at this very interesting matter across the Atlantic. Last summer, the District of Columbia Court judge Amit Mehta issued its opinion in the US case accusing Google of resorting to exclusive distribution agreements with various operators to monopolize online search and online advertising.

The opinion, which provides detailed information and arguments in its 277 pages, makes for interesting reading for competition and technology lawyers, on a matter that affects billions of users worldwide – and where much has been said about potential for more or less intrusive remedies, ranging from merely behavioral changes in business practices to outright breaking out of Google.

The facts refer, in essence, to the exclusive agreements with companies such as Apple or Samsung to have Google search engine pre-installed in their mobile devices, in exchange for many billions of US Dollars. Relevant aspects of the opinion include the following:

- A relevant behavioral finding is the inertia of users (particularly of mobile devices, more than desktops) and general reluctance to move to alternative search engines.
- Another finding is that the creation and operation of a successful search engine requires access to massive amounts of data.
- 50% of all queries in the US are run through the default search access points covered by the challenged distribution agreements.
- Exclusive agreements with Google have deprived competitors of the possibility to acquire sufficient scale and the ensuing network effects.
- Barriers to entry and switching costs for consumers are high.

50% foreclosure is considered by the Court sufficient to warrant a Sec. 2 SA infringement. Furthermore, the amount of money received by Apple in consideration for the exclusivity (US$20 billion in 2022) amounted to 17.5% of Apple's operating profit, such financial amount is perceived as a reduced incentive for Apple to innovate and enter the search engine market.

The role of Microsoft's Bing as a competitive option to Google's was dismissed, even for a company of the size and clout of Microsoft.

Regarding the search engine advertising market, 45% market foreclosure was considered significant. Exclusivity has also allowed Google to increase prices and reduce quality.

A decision is still pending regarding remedies required to restore the competitive situation, with great speculation on whether behavioral remedies (*e.g.*, banning exclusivity payments or otherwise curtailing exclusivity) will suffice or some kind of divestiture will be required.

C. Foreign Direct Investment (FDI) screening.

20 Analysis of recent developments in FDI screening in the EU and Spain

Recent reports from the European Commission (**EC**) and Spain's Ministry of Economy, Trade, and Business reflect a heightened activity in the field of Foreign Direct Investment (FDI) screening.

On 17 October 2024 the EC published its 4th Annual Report on FDI screening, noting an 18% increase in notifications since the EU framework was implemented in 2020. This increase reflects heightened attention to investments from third countries that may threaten the EU's security or public order. Of the 488 cases notified in 2023, 92% were solved within 15 days, while 8% required more detailed assessments. Currently, 24 Member States have implemented screening mechanisms, with the remaining three are in the process of doing so. These efforts align with the EU's Economic Security Strategy, which seeks to balance openness to global investments with the protection of collective security interests.

On this regard, the EC has proposed a revision of the FDI Screening Regulation, currently under discussion in the Council of the EU and the European Parliament. This revision aims to make it mandatory for all Member States to have an FDI screening mechanism and to establish a minimum level of harmonization of national screening laws across the EU. Additionally, procedural improvements in the cooperation mechanism

between Member States and the EC are proposed, seeking to strengthen the EU's capacity to identify and address investments that may pose risks to security or public order, ensuring more uniform and effective protection throughout the Union. Other regulatory reforms are already looming in the horizon, of particular importance perhaps is the upcoming screening of outbound investments as preconized by [Commission Recommendation on Outbound Investments] in January this year.

Second, pursuant to information published by the Spanish Ministry of Economy, Trade, and Business earlier in 2024, foreign investment in Spain reached €28.215 billion in 2023, in line with the average of the past five years. Investments aimed at enhancing productive capacity and employment increased by 12% compared to 2022, totaling €5.68 billion. The sectors attracting the most investment were wholesale trade, telecommunications, and energy. As for the origin of such investments, the press release reflects that there was an enhanced diversification of investment sources, United States was the leading investor source, contributing 28.9% of the total, followed by the United Kingdom (13.1%), Germany (10.6%), and France (9.2%),

These developments highlight the commitment of the EU and Spain to creating an open and secure investment environment. The strengthening of FDI screening mechanisms and the revision of the EU Regulation reflect a proactive strategy to balance the attraction of foreign investments with the protection of national and regional security interests. For legal professionals specializing in competition law and FDI regulation, these changes emphasize the importance of adapting to an evolving regulatory landscape to ensure compliance and facilitate secure investment activities within the EU.

D. Commentary.

21 Comment on the CJEU Google Android Auto judgment. The CJEU rules that Google's restrictions on Android Auto may constitute market abuse (Judgment of 25 February 2025, case C-233/23).

In 2015 Google launched Android Auto, developed for mobile devices that run on the Android OS to allow its users to directly access applications on those devices on the infotainment system screen of a motor vehicle. To ensure the interoperability of each application with Android Auto, Google offered templates for each interoperability solution that allowed third parties to create versions of their own applications. In May 2018, Enel X Italia Srl (**Enel X**) launched an application called JuicePass for electric car charging functions. Enel X asked Google to take the necessary steps to ensure JuicePass's interoperability with Android Auto, but Google refused.

Enel X filed a complaint with the Autorità Garante della Concorreza e del Mercato (**AGCM)** for an infringement of Article 102 TFEU. The AGCM, by decision of April 27, 2021, concluded that Google's conduct constituted an abuse of a dominant position. The parties filed an appeal with the courts, which raised a preliminary question.

This ruling implies a partial overturn of existing EU case law on refusal to supply and a potentially far-reaching interpretation of the duty to share by dominant undertakings owning 'essential') facilities. Are ownership rights and the incentive to innovate being thwarted? Are incentives to create and develop open architecture platforms available to third parties being reduced?

- The CJEU judgment of 26 November 1998 (Case C-7/91, *Bronner*), is partially rewritten to include in the catalogue of abusive conduct not only platform sharing indispensable for a downstream app business, but also when platform sharing is such as to make the secondary market app more attractive to consumers. This may play as a disincentive or diminished incentive to innovate upstream;

- The conduct is abusive provided the platform has not been developed by the dominant company solely for its own business needs. Again, this may be an incentive to get away from open architecture and towards closed and non-interoperable software architectures, overlooking the immense benefits for consumers of indirect network externalities created by open architectures/platforms;

- The facts of the case suggest that there had been no prior business dealings regarding the particular Android Auto platform, so in a way the judgment of the General Court of the European Union of 17 September 2007 (case T-201/04, *Microsoft*) (where Microsoft enable full interoperability between PC operating systems and servers until it was no longer convenient to do so) is also being rewritten: the prior business dealing factor is downplayed. This is again significant, as it flows therefrom that dominant companies must actually enable

interoperability even in the absence of prior dealings, further curtailing dominant company's freedom to choose trading partners.

22 Comment – Illumina Grail. The CJEU corrects the expansive interpretation of the European Commission aimed at monitoring anticompetitive acquisitions of "star-tups" (Translation of the press article of Pedro Callol in Cinco Dias, 10 September 2024).

English language version available here.

23 Comment – FDI screening. The *Gaanz MaVag/Talgo* transaction: the Spanish government blocks a transaction on national security/interest grounds for the second time since the FDI screening regime entered into force - and in both occasions the investor is an EU investor.

On 27 August, the Spanish government used its FDI screening powers to **block the takeover offer (Takeover) by Hungarian fund *Ganz MaVag*** for ***Talgo*** (listed train manufacturer). Ganz MaVag is ultimately 45% State-owned by Hungary; and according to press sources, the rationale behind the prohibition would have been a desire to avoid any technology or know-how spilling over to Putin's Russia, as links of Ganz MaVag with Russia have been identified by the CNI (national secret service). Particularly, the rationale behind prohibition would be to avoid technology that could be used against the Ukraine being acquired by Russia.

The Takeover is a transaction regulated and supervised by the National Securities and Exchange Commission (**CNMV**), so the FDI screening Decision is publicly available, which is not otherwise the case. In summary of our initial takeaways:

- This is only the second time the government exerts its veto power. The first time had been the acquisition by **French company Vivendi of a stake in Prisa** (the company owning the daily newspaper **El Pais**) back in 2022. Interestingly, therefore, **the only two occasions on record where the Spanish government has vetoed an investment under its FDI screening powers are in connection with EU investors**.

- The reasons provided for the veto in the FDI screening Decision are meagre: that the investment affects the public order, full stop. No mention to the State ownership of the investor or any other substantiated issue or concern. The lack of reasons is warranted by the government's power to declare the actual grounds for the Decision confidential. **A potential dispute in these cases may arise around the allowed extent of the confidentiality and reach of the censorship of the reasons for interested parties, a point that is already being litigated in court in other cases**.

- Whereas there is no information on any legal challenge by Vivendi back in 2022, the information now disclosed to the CNMV regarding the Takeover indicates that the investor plans to challenge the FDI screening Decision before the national courts (the Supreme Court is competent), without prejudice to any legal action deemed necessary at EU level.

- Leaving aside any grounds for challenge based on administrative procedure that may have arisen, **under EU law the arguments for a potential legal challenge would revolve around the proportionality/sufficiency test and procedure under Article 21 EUMR for mergers with EU dimension; and around the freedom of circulation of capital/investment and freedom of establishment under the TFEU (*e.g.*, VIG, Xella Magyar cases respectively)**. Even though the nature of the values protected (national interest, security) provides margin of discretion to the government, a veto would probably require some substantiated grounds to withstand EU law scrutiny.

The above issues have not yet been decided yet by the courts in Spain (though there is some pending litigation). This matter may be the best opportunity yet for courts to clarify the scope and leeway of the government to act in this area.

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