

Spanish Antitrust - Year in Review

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2019 was an eventful year in Spanish antitrust enforcement. Here is a brief overview of 2019's major legal changes and relevant developments in relation to Competition law in Spain, as well as what to expect in 2020.

I. New Administration

On 8 January 2020, Mr Pedro Sánchez was reappointed as Spanish Prime Minister.

Spain had been without a Government since Mr Sanchez called for a general election in April 2019. That election resulted in a hung Parliament. A second general election, in November 2019, led to another hung Parliament. Late in December 2019, the Spanish Socialist party reached a coalition agreement with Unidas Podemos, a left of left movement which includes Spain's communist party. One of the points of the agreement, which contains a myriad of references to improving the economy's "competitiveness", is the "reinforcement of the prosecution of <<cartels>> in public procurement [...] and the restitution of harm".[1] A new Government was elected on 13 January 2010, including four ministers from Unidas Podemos. The election of the new Government required the abstention, or favourable vote, of a number of smaller parties including Catalan and Basque nationalists.

The emergence of a left wing coalition is likely to have an impact in the long delayed partial renewal of the members of the Council ("Consejo") of the Competition chamber of the National Competition and Markets Commission (the "Comisión Nacional de Mercados y de la Competencia", the "CNMC"), a renewal that will probably result in the end of the mandate of the current President, J. Marín Quemada.[2] A professor of applied economics, Mr Marín Quemada had served in the Board of the Bank of Spain prior to his appointment to the head the CNMC. Mr Marín's tenure at the CNMC has coincided with the merger of Spain's telecom, energy and other regulators. Mr Marín's main legacy as regards Competition law will be his relentless prioritisation of cartel prosecution, more on which below.

However, the exact implications for Spanish Competition law will depend on the identity of the new members and their exact political allegiance. Unidas Podemos is yet to make appointments of this nature and is characterised by an anti-big business stand. This contrasts vigorously with the perceived approach to the economy of the socialist party, which has announced former prominent EU antitrust enforcer Nadia Calviño as Vice President in charge of the economy. The fragility of the support of the coalition in Parliament makes it complicated to anticipate at this stage the identity of those appointments. In any event, overall levels of antitrust enforcement are unlikely to become less vigorous in Spain as a result of the new Administration.[3]

II. Merger Control

The number of transactions reported to the CNMC increased by 3.61 % from last year (from 83 to 86). However, in the past four years, the number of reportable transactions decreased by 17.30 % (from 104 in 2016 to 86 in 2019), probably reflecting the performance of the Spanish economy over the same period.[4]

Spain continues to apply its market share threshold. Up to December 2019, 42.7 % of the transactions were filed in application of country's turnover threshold, 50.56 % under the market share threshold and a 6.74 % in application of both.[5] According to the CNMC's Director for Competition, Ms Beatriz de Guindos:

"[...] in Spain we have always defended our market share threshold in merger control. So far, this has been shown to be a very valuable tool for digital merger operations. Mergers such as Facebook/WhatsApp or Apple/Shazam met the Spanish merger notification threshold based on market shares. The CNMC was therefore able to refer them to the European Commission for an EU wide assessment and not only in the Spanish market. At a national level, the market share threshold has allowed for the review of six platform mergers in the last years, which did not fulfil the turnover notification threshold".[6]

Spain's merger control system continues to be relatively agile. The average duration of an initial ("Phase I") investigation is c. 20 days, e., around ten days prior to the expiry of the one-month legal deadline. The duration of an in-depth ("Phase II") investigation depends on the particularities of the specific case. For example, in case C/0966/18 Quirón / Clínica Santa Cristina (the only Phase II investigation decided by the CNMC in 2019), 6 months elapsed between the decision to initiate the phase II and the approval of the transaction. No transaction was reviewed by the Government under the so-called "Phase III" during 2019.[7]

Overall levels of Spanish merger control intervention remain relatively low. In 2019 the CNMC granted 85 Phase I clearances (96.59 % of the total of decisions adopted during the year). The CNMC obtained remedies in 4.7 % of its Phase I clearances. Conversely, 92.05 % of the transactions were authorized unconditionally during 2019. The CNMC decided to initiate a Phase II as regards C/1052/19 Çimsa/Activos Cemex and approved the transaction C/0966/18 Quirón/Clínica Santa Cristina (also a Phase II) with commitments. As noted in a previous update,[8] in Quirón/Clínica Santa Cristina the CNMC authorized an alleged merger to monopoly with behavioural remedies.

III. Cartels

The CNMC continued its strong cartel enforcement during 2019. The CNMC saw total fines nearly double in 2019 to EUR 471 million (from EUR 222 million in 2018).[9]

The largest total fine issued by the CNMC in 2019 in a single case targeted fifteen companies for allegedly constituting a cartel to rig certain bids in relation to railway infrastructures.[10] In the case in question, the CNMC imposed fines on fifteen entities (including large international groups such as Alstom - the immunity applicant - and Siemens - also a leniency applicant -) and fourteen individuals for allegedly having rigged bids in several cartels in the high-speed train and conventional train tenders for fourteen years. Accordingly, fines for a total of EUR 118 million were imposed on these undertakings. The Spanish authority keeps targeting individuals and fines for a total of EUR 666,000 were imposed on a number of individuals responsible for such conduct. The CNMC made a reference to the general Public law provisions, in the books since 2015 but which is yet to be applied, to ban the cartelists from entering into public contracts. The CNMC did not directly apply such prohibition but rather has referred its decision in this regard to the National Consultancy Board for Administrative Contracting. The CNMC has thus refrained from fixing the duration and scope of the prohibition on entering into public contract.[11]

Another highlight of the year is the penalty of EUR 80.6 million, imposed to eight companies in the dairy industry for allegedly having entered a buying cartel as regards farmers.[12]

The agency has continued to have a mixed record in the courts. Certain observers are of the view these reversals may reduce the incentive to apply for leniency. Between 1 January 2019 and 31 December 2019, the Spanish National Court ("Audiencia Nacional") annulled five CNMC's decisions[13] and confirmed three. On the other hand, the Spanish Supreme Court ("Tribunal Supremo") annulled eight CNMC's decisions[14] and confirmed eight.

IV. Unilateral Conduct

Abuse of dominance does not feature as high as cartels in the priorities of the CNMC.[15] Enforcement of Spain's anti-monopolization rules is nonetheless still ongoing. The CNMC initiated the following dominance probes in 2019:

- Against Correos, Spain's former postal monopolist, for allegedly applying below cost exclusionary rebates.[16]
- Against Merck, for a potential abuse of dominance position in the Spanish market for certain combined hormonal contraceptives. According to the CNMC, Merck might have engaged in an abuse "consisting of the use of various judicial mechanisms of industrial property law in order to delay and hinder the entry into the market of third-party competitors in Spain".[17]

In May 2019, the CNMC imposed a fine of slightly below EUR 3 million to the General Society of Authors and Publishers (known in Spain by the acronym "SGAE", a collecting society) for abusing its position of dominance in the management and exploitation of intellectual property rights of authors and publishers of musical and audiovisual works by entering into certain exclusive obligations and other exclusionary practices in relation to other collecting societies.[18]

V. Spain's Decentralized Competition Law Enforcement[19]

Spain's decentralized competition law enforcement continues to reflect the heterogeneous political priorities of Spain's regions.

- Some of the country's regional competition authorities have been very active in 2019 including the Catalan competition authority, which issued 8 decisions imposing fines in 2019 for a total of EUR 3,517,970.52.
- Others, like the Basque competition authority (the "Autoridad Vasca de la Competencia", "AVC") are focusing more on Competition advocacy.[20] According to the website of the AVC, the AVC issued four decisions in 2019, three of which deciding not to initiate proceedings and a fourth recalculating fines after a ruling of the courts. Not a single new fine appears to have been imposed by the AVC in 2019.[21]

VI. Conclusions

2019 has been a year of continuity in Spain's public antitrust enforcement.

- Levels of merger control enforcement remain unchanged. The CNMC continues to be, broadly speaking, agile when reviewing transactions. The CNMC continues reviewing many transactions under the country's market share threshold to afterwards authorise them. A single Phase II investigation was initiated during 2019 and another one was closed with behavioural remedies.
- The Spanish authority continues its strong policy of anti-cartel enforcement with less (but by no means negligible) emphasis in other areas of Competition law. Cartel enforcement continues to be vigorous with the authority having (i) doubled the total of fines imposed on corporations, (ii) enforced fines on individuals, and hinted at the application of a prohibition to contract to cartelists.

A lot in Spanish antitrust in 2020 will probably hinge on the identity of the new Members of the Council, of the CNMC and, of course, of the President of the agency. Parliament arithmetic's suggests the new members will adopt a slightly more populist approach. This would be in line with developments in antitrust authorities elsewhere in the world.

A series of changes to the Spanish Competition Act 2007 are being prepared to adapt Spanish legislation to the ECN+ Directive.[22] Among the anticipated changes, it is expected the CNMC will have the power to set priorities in applying competition regulations and even shelve, without further consideration, complaints that are not a priority to investigate (something which, to date, is not possible under General Spanish Public law). Other expected changes include raising the maximum fines for individuals (currently set at EUR 60,000) and the introduction of a settlement procedure for cartel cases similar to that of the European Commission.

The main change in Spanish antitrust in 2020 might not be brought by the enforcers or the legislature, though. The National Consultancy Board for Administrative Contracting, is to decide the first cases on the ban the alleged cartelists from entering into public contracts. Depending on the scope of the ban, Spain might become of the jurisdictions most feared by cartelists.

[1] See, "Coalición Progresista. Un nuevo acuerdo para España. PSOE, Unidas Podemos", Section 2(11)(8), available (in Spanish only) at <https://drive.google.com/file/d/1A7yR8NktBUkrBYSGWYMPHpyUUYeTZr/view>.

[2] The CNMC is the entity resulting from the merger of the Spanish competition, energy, telecoms, railways, audiovisual, airports and postal regulators. The CNMC is led by a board of 10 members entrusted with decision-making powers (the Council), which is divided into a competition chamber and a regulatory chamber.

[3] According to the Electoral manifesto of Unidas Podemos the party undertakes to "develop laws that will provide the Administration with effective instruments and increase fines in cases of cartels and oligopolies. In addition, we will strengthen the National Commission of Markets and Competition [...] providing it with the necessary resources to prevent its power from being well below that of the oligopolies it must control" (full text available, in Spanish only, at: <https://podemos.info/bloque/horizonte-digital-nueva-economia/>).

[4] All the statistics in this section have been compiled from publicly available information by Garrido Abogados. For more detailed information see our update on Spanish merger control in 2019: <https://www.garridoantitrust.com/post/spanish-merger-control-during-2019-key-facts>.

[5] There is no information as regards two transactions.

Pursuant to the Spanish Competition Act, a merger or acquisition shall be notified to the CNMC when: (i) the combined Spanish turnover of the parties exceeds EUR 240 million and the individual turnover achieved in Spain by at least two of the parties exceeds EUR 60 million; or (ii) as a result of the transaction, a share equal to or higher than 30% of a relevant product market in Spain (or in a geographic market within Spain) is acquired or increased. There is a 'de minimis' exception pursuant to which no market share notification is triggered where the following two cumulative conditions are also met: (i) the turnover achieved in Spain by the target company or assets to be acquired is below EUR 10 million; and (ii) the individual or combined market share of the parties does not reach 50% in any affected market in Spain (or a narrower geographic market defined within it).

[6] De Guindos, B., "The Spanish Competition Act: Evaluation and Future Perspectives". CPI Antitrust Chronicle October 2019.

[7] In those cases where the CNMC decides either to prohibit the transaction or to clear it subject to commitments or conditions, the Ministry for the Economy may ask the Government to decide whether to confirm the CNMC's decision or authorise it, subject or not to commitments or conditions. In the second case, the Government's decision must be based on certain specified public interest criteria other than competition. In such cases, the Ministry of the Economy has 15 days to decide whether to ask the Government to intervene. If it does, the government has one month to decide on the transaction. The intervention of the government in merger control proceedings is informally known as "Phase III".

[8] See, for more information: <https://www.garridoantitrust.com/post/the-spanish-authority-obtains-behavioral-remedies-in-a-rare-phase-ii-merger-control-investigation>

[9] See, Cinco Días, "La CNMC dispara un 112% el volumen de las multas impuestas en 2019" (December, 20, 2019), available at: https://cincodias.elpais.com/cincodias/2019/12/19/companias/1576785095_592891.html. The statistics of this section have been compiled by Cinco Días on the basis of publicly available information.

[10] See, CNMC Decision of 14 March 2019 in case S/DC/0598/2016 *Electrificación y Electromecánicas Ferroviarias*, available at: https://www.cnmc.es/sites/default/files/2380080_31.pdf

[11] For a detailed analysis, see: <https://garrido.es/old/wp-content/uploads/2019/04/Spanish-authority-hints-at-prohibiting-cartel-member-from-entering-public-contracts.pdf>

[12] See, CNMC Decision of 11 July 2019 in case S/0425/12 *Industrias Lácteas 2*, available (in Spanish only) at: https://www.cnmc.es/sites/default/files/2568492_41.pdf

[13] The Spanish National Court annulled the following CNMC's decisions: Decision of 5 March 2015 in case S/0487/13 *Concesionarios Land Rover*, Decision of 5 March 2015 in case S/0488/13 *Concesionarios Hyundai*, Decision of 5 March 2015 in case S/0489/13 *Concesionarios Opel*, Decision of 18 June 2015 in case S/0469/13 *Fabricantes de Papel y de Cartón Ondulado* and Decision 28 June 2015 in case S/0471/13 *Concesionarios AUDI/SEAT/VW*.

[14] The following CNMC's decisions were annulled by the Spanish Supreme Court: Decision of 26 May 2016 in case S/DC/0504/14 *AIO*, Decision of 6 November 2014 in case S/0430/12 *Recogida de Papel*, Decision of 1 September 2015 in case S/0491/13 *Colegio Abogados Guadalajara*, Decision of 22 September 2014 in case S/0428/12 *Palés*, Decision of 19 December 2013 in case S/0378/11 *Desmotadoras de Algodón*, Decision of 17 December 2015 in case S/DC/0516/14 *ICOGAM*, Decision of 29 October 2014 in case S/0422/12 *Contratos de Permanencia* and Decision of 19 December 2012 in case S/0248/10 *Mensajes Cortos*.

[15] The strategic plan of the CNMC does not contain a single reference to dominance / abuse / unilateral conduct (the CNMC's strategic plan is available here: <https://www.cnmc.es/file/8563/download>).

[16] See, Press Release, CNMC, "The CNMC initiates disciplinary proceedings against Sociedad Estatal Correos y Telégrafos, S.A. for abusing its dominant position" (November 25, 2019), available at: [https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20191125%20NOTA%20PRENSA_Incoación_Correos%20ENG%20\(002\).pdf](https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20191125%20NOTA%20PRENSA_Incoación_Correos%20ENG%20(002).pdf).

[17] See, Press Release, CNMC, "The CNMC initiates disciplinary proceedings for alleged anti-competitive practices in the Spanish market for combined hormonal contraceptives", (November 21, 2019), available at: [https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20191121%20NP%20Incoación%20Anticonceptivos%20_def%20\(06004\).ENG.pdf](https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20191121%20NP%20Incoación%20Anticonceptivos%20_def%20(06004).ENG.pdf)

[18] See, Press Release, CNMC, "The CNMC fines the General Society of Authors and Editors (SGAE) for anticompetitive practices in the management and exploitation of intellectual property rights" (May 31, 2019), available at: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20190531_Sanción_SGAE_DEF_eng.pdf.

[19] Spain features de-centralized competition law enforcement as regards the *ex post* (i.e., prohibition) rules in the Spanish Competition Act of 2007. 12 out of the country's 17 regions feature regional competition authorities. These entities have powers mainly as regards the prohibitions of anticompetitive agreements and abuse of dominance, i.e., Spain's equivalents to Articles 101 and 102 TFEU or Sections 1 and 2 of the Sherman Act. Spain's regional competition authorities have no powers in relation to merger control and cannot apply the TFEU.

[20] See, Interview at *Expansión* to Urresola, A., "We can tackle anti-competitive practices with dialogue and rigour" (May 7, 2018), available, in Spanish only, at: http://www.unionprofesional.com/clipping/110518/expansion_070518.pdf

[21] Information available (in Spanish) at: http://www.competencia.euskadi.eus/contenidos/informacion/resoluciones/es_resoluci/122%20-%20RESOLUCIÓN%20CVC%20ARQUITECTOS%20RIOJA%20ALAVESA.pdf and (in Basque) at: https://www.competencia.euskadi.eus/contenidos/informacion/resoluciones/eu_resoluci/122%20-%20RESOLUCIÓN%20CVC%20ARQUITECTOS%20RIOJA%20ALAVESA-EU-ZUZ.pdf. The latest (2019) Strategic Action Plan of the AVC contains no reference to fines (see http://www.competencia.euskadi.eus/contenidos/informacion/memoria_actividades/es_memoact/Presentación%20anual%202019%20LEA-AVC.pdf). The pattern is broadly consistent with previous years. Pursuant to information from the AVC, the Basque authority issued two decisions imposing fines in 2019: (i) a decision imposing a total of less than EUR 10,000 to the members of a price fixing cartels of driving schools; and (ii) a decision imposing two fines for a total of EUR 600 to a professional association of real estate agents for unduly foreclosing a real estate agent from another association. The fine to the professional association was annulled on appeal, already during 2018 (for the annual report of the AVC in 2018 see http://www.competencia.euskadi.eus/contenidos/informacion/memoria_actividades/es_memoact/LEA%20AVC%20Memoria%202018.pdf).

[22] See, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3-33.