Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2020: Spain

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The Spanish competition law landscape has been busy in 2020. Below we review the main developments and takeaways from the last year in the following areas: (i) institutions and legislation; (ii) merger control; (iii) restrictive agreements and abuse of dominance; (iv) State aid; and (v) COVID-19.

Institutions and Legislation

Cani Fernández: New President of the Spanish Competition Authority

In July 2020, the National Commission for Markets and Competition ("CNMC") appointed Cani Fernández, former partner of the law firm Cuatrecasas, as the new President of the CNMC to replace the outgoing President, J. M. Marín Quemada. Her arrival at the CNMC has been broadly welcomed by the Spanish competition community, as she is expected to bring an expert and practitioner's view to the authority.

The CNMC Is Not a "Court" (*Anesco*, C-462/19)

On September 16, 2020, the ECJ declared inadmissible a question for preliminary ruling from the CNMC in *Anesco* (covered previously here). The ECJ found that the CNMC was not a "court or tribunal" within the meaning of Article 267 TFEU because it did not fulfil the criteria laid down by the case law (*Panicello*, C-503/15, para. 27). In particular, the ECJ found that the CNMC was "not called upon to give judgment in proceedings intended to lead to a decision of a judicial nature" (*Syfait and Others*, C?53/03, para. 29).

The ECJ concluded that the proceedings before the CNMC and its decisions were of an administrative nature instead because:

- "the CNMC acts *ex officio* as a specialised administration exercising the power to impose penalties in matters falling within its competence" (para. 44);
- "the CNMC is required to work in close collaboration with the Commission and may be denied

jurisdiction in favour of the latter" (para. 45);
- the CNMC may withdraw its decision if a party brings an action before the administrative courts and agrees to it (para. 47);
- the CNMC's decisions are not capable of acquiring force of *res judicata* (para. 48); and
- the CNMC's decisions are subject to appeal before an administrative court, where it appears as a defendant (para. 49).

This interpretation was confirmed by the Law establishing the CNMC, which provides that a decision of its Board puts an end to the expressly-called "administrative" proceedings (para. 49). As a result, the proceedings before the CNMC "are on the periphery of the national court system" and the CNMC's decisions are of an administrative nature, not judicial (para. 48).

This finding contrasts with the 1992 ruling (C-67/91), where the ECJ did admit the question for preliminary ruling from the CNMC. The different outcome is explained by the evolution of the institutional framework. Back then, the competition authority encompassed a competition court separate from the investigation body, whereas today the investigation and decision-making functions are separated, but handled under the same administrative roof (*i.e.*, within the CNMC).

The CNMC's Contribution to the EU Commission's Public Consultation on the Digital Services Act and the New Competition Tool (Position Paper)

The CNMC published in November 2020 its contribution to the EU Commission public consultations on the Digital Services Act ("DSA") and the New Competition Tool ("NCT"). Overall, the CNMC cautioned against excessive intervention and insisted on the need to avoid overlaps between legal frameworks.

First, the CNMC advocated for a clear definition of the criteria to intervene in digital markets, prior to the design of a new instrument, such as the NCT and the DSA. According to the CNMC, it would be desirable to have a clear definition of certain notions, such as "gatekeeper" or "digital markets", in order to determine *when* intervention is needed before deciding *how* to intervene.

Second, the CNMC proposed a single intervention tool based on a market-by-market approach and a three-prong test, namely (i) whether there are high barriers to entry; (ii) whether the market's dynamic trends towards effective competition; and (iii) whether the existing tools are sufficient to deal with the identified competition concerns. According to the CNMC, only when the existing competition tools are not adequate to solve specific problems raised in digital markets, should further intervention take place.

Third, the CNMC was concerned that a possible overlap between the proposed *ex-ante* regulatory approach and already-regulated sectors, such as telecommunications and energy, might be a source of legal uncertainty.

The Spanish Competition Act Will Be Subject to Important Amendments (Preliminary Draft Law)

On July 2020, a Preliminary Draft Law to amend the Spanish Competition Act was announced. The aim of the Draft Law is to transpose the ECN+ Directive, but it also goes beyond that and

incorporates relevant amendments to the Spanish Competition Law Act. In particular, the Draft Law provides (i) greater powers of inspection to the CNMC, (ii) a stricter sanctioning regime, (iii) more collaboration mechanisms with investigated companies and (iv) a review of the merger control thresholds (see *infra*). The text of the Draft Law has been subject to public consultation and is expected to be approved in the upcoming months.

Merger Control

The Merger Control Thresholds Will Be Reviewed

One of the most relevant proposals of the Draft Law is the reform of the merger control thresholds. The current turnover thresholds provide that concentrations must be notified (i) where the merging parties have a combined turnover of over EUR 240 million in Spain and (ii) at least two of them individually have a turnover of more than EUR 60 million in the last accounting year. The proposal seeks to insert an exemption from the notification obligation where the merging parties have a combined share below 15 percent in the same market, provided that the acquirer does not hold a share of more than 50 percent in any other market.

The amendment aims to reduce the number of notifications of mergers which, *a priori*, do not raise competition concerns. The caveat to the exemption, on the other hand, intends to prevent the creation or reinforcement of conglomerate dominant positions, which are typical in digital markets. The main criticism voiced against the amendment is that it will entail a significant burden for merging parties as they will have to analyze each and every market in which they (and their controlled companies) are present (Position Paper of the Spanish Competition Law Association).

The CNMC Backs Market Share Thresholds to Capture Digital Mergers

In a recent speech at *Georgetown Law*, Cani Fernández defended the use of market share thresholds to capture problematic acquisitions in digital markets. The use of market share thresholds is a particular feature of the Spanish merger control system, which is shared with a few other Member States, including Portugal, Greece, Slovenia and Latvia. In this connection, Cani Fernández stated that the CNMC reviewed a total of eight digital mergers 2019, six of which were captured through the market share thresholds.

Restrictive Agreements and Abuse of Dominance

A Cartel Participant Not Active in the Affected Market Is Nevertheless Liable (*Textil Planas Oliveras*, Supreme Court Judgment 1087/2020).

In 2016, the CNMC fined Textil Planas Oliveras with *c*. EUR 800,000 for participating in a cartel in the market for adult diapers for severe incontinency, financed by the National Health System and dispensed in pharmacies to outpatients. The Spanish High Court quashed the decision in 2018 on the ground that Textil Planas Oliveras was not active on the market affected by the cartel, as it only sold adult diapers to hospitals and not in pharmacies.

On appeal, the Spanish Supreme Court overturned the ruling of the High Court and upheld the decision of the CNMC by judgment of May 21, 2020. According to the Supreme Court, the participation of an undertaking in a cartel constitutes a violation of Article 101 TFEU and Article 1 of the Competition Act, even if the undertaking is not active in the affected market, but is nevertheless present in a market linked or connected thereto. In this regard, the Supreme Court pointed out that the High Court missed the fact that the CNMC had actually assessed the effects of the cartel on connected markets. Furthermore, in line with the ECJ case law, the Supreme Court noted that there is nothing in the wording of Article 101(1) TFEU which indicates that the prohibition refers only to undertakings operating in the affected markets (*AC-Treuhand*, C-194/14 P, para. 27; *Icap,* T-180/15, para. 97).

The relevant question then is not whether the cartel participant has drawn any explicit or direct benefit, but whether it facilitated collusion in any way, even if indirectly. The opposite interpretation would endorse "a criterion of impunity". In sum, when it comes to sanctioning anti-competitive behaviour, "the starting point is the irrelevance of the market in which the parties operate", followed by the fulfilment of the relevant criteria of Articles 101 TFEU and 1 of the Competition Act, which must be given full effect.

The CNMC Assessed for the First Time Vertical Restrictions on Online Sales (*Adidas*, S/DC/0631/17)

In 2018, the CNMC initiated formal proceedings against Adidas to review its agreements with selective distributors and franchisees. Prior to this case, the CNMC had conducted limited investigations on vertical restrictions, but the rise of online sales has attracted closer scrutiny from competition authorities across the EU.

The CNMC identified competition concerns in the conditions governing online sales of the initial agreements concluded by Adidas with its selective distributors and franchisees. However, it also found that the older contracts had been gradually superseded by softer terms and conditions. Therefore, on February 6, 2020, the CNMC terminated the proceedings with a commitments decision focused on Adidas' older contracts. The decision is relevant because it provides guidance on the CNMC's approach to vertical restrictions on online sales. The key takeaways are the following:

- A contractual clause indicating that the distributor may only sell the provider's products at the authorized "point of sale" may amount to a prohibition of online sales, even if the latter are not expressly regulated or prohibited.
- A restriction on online advertising through search engines is equivalent to a prohibition of online sales, which constitutes a hard-core restriction.
- Pre-authorization requirements to sell online or to use the provider's brand in the distributor's domain name will amount to a hard-core restriction when they are defined in abstract terms. The CNMC does not completely preclude the provider from restricting the use of its brand by distributors in their domain names, as that may be justified to protect the brand. However, this will raise concerns when the terms do not include a reasonable maximum time period to reply to the authorisation request. If the authorization is delayed, distributors may be effectively precluded from selling the products online.

State Aid

The GCEU Annulled the Commission Decision Ordering the Recovery of State Aid Granted to the Valencia and Elche Football Clubs (GCEU T-732/16 and T-901/16).

After conducting three formal investigations beginning in 2013, the Commission found in 2016 that Spain had granted illegal State aid to seven football clubs, namely Barcelona, Real Madrid, Valencia, Athletic Bilbao, Atlético Osasuna, Elche and Hércules. These investigations concluded with three State aid decisions, namely (i) Decision of August 11, 2016 (SA.33754) concerning a settlement on a land transfer from the city of Madrid to Real Madrid; (ii) Decision of September 28, 2016 (SA.29769) concerning corporate tax privileges to FC Barcelona, Real Madrid, Athletic Bilbao and Atlético Osasuna; and (iii) Decision of November 3, 2016 (SA.36387) concerning loan guarantees from the State-owned Valencia Institute of Finance ("VIF") to Valencia, Hércules and Elche.

The decisions were appealed by most of the football clubs concerned, leading to a first batch of judgments of the GCEU in 2019: on February 26, (i) *FC Barcelona* (T-865/16) and (ii) *Athletic Club* (T-679/16); on March 20, (iii) *Hércules* (T-766/16); and on May 22, (iv) *Real Madrid* (T-791/16). While the General Court dismissed the action brought by *Athletic Club*, it upheld the rest and annulled the respective decisions, in essence, because the Commission did not prove or motivate its State aid findings to the requisite legal standard.

In 2020, the General Court wrote two more chapters in the 'State aid for Spanish football clubs' book. By judgments of March 12, the GCEU annulled the Commission decision ordering the recovery of the loan guarantees granted by the State-owned VIF to the *Valencia* (T-732/16) and *Elche* (T-901/16) football clubs. In line with the previous judgments, the GCEU found that the Commission had committed a series of manifest errors of assessment by not proving its State aid findings to the requisite legal standard. In arriving at such conclusions, the GCEU relied heavily on the *Frucona Košice II* (C?300/16 P) ruling, where the ECJ essentially found that the Commission must request and assess "all of the relevant information" during the administrative procedure (paras. 70-71 and 80-81).

In this way, the GCEU found in *Valencia* (T-732/16) that the Commission made a manifest error of assessment (i) for assuming that no financial institution would provide a guarantee to a company in difficulty (para. 134) and (ii) for failing to exercise its investigative powers to request and assess all of the necessary information in relation thereto (para. 136). Similarly, the GCEU concluded in *Elche* (T-901/16) that the Commission made a series of manifest errors of assessment (i) by not considering the economic and financial situation of a non-profit organisation linked to the football club (Fundaci?n Elche) in order to assess the existence of an advantage (paras. 92-95); (ii) by not taking into account Elche's capital increase when determining the value of the shares at the time of granting the loan guarantee (paras. 113-115); (iii) by not examining the existence of a mortgage on a land plot given to the IVF as a counter-guarantee by the Fundación Elche (paras. 116-120); and, as in the *Valencia* case, (iv) by presuming that no financial institution would provide a guarantee to a company in difficulty (para. 132).

All in all, the abovementioned cases impose a higher standard on the Commission to prove and substantiate its findings, which is part of a larger trend of closer judicial review of the

Commission's discretion.

In 2021, two more chapters will be written, with rulings expected by the ECJ in the *FC Barcelona* (C-362/19 P) and *Valencia* (C-211/20 P) appeals. So far, AG Pitruzzella has advised the ECJ to set aside the GCEU's ruling *FC Barcelona* (T-865/16), outlining a range of criteria that the Commission must consider when assessing the existence of an advantage in State aid cases of this sort.

COVID-19

The unprecedented situation caused by the COVID-19 crisis has tested the ability of the Spanish Government and the CNMC to react promptly and effectively. In this connection, the Spanish Government approved a range of socio-economic measures to mitigate the effects of the crisis and protect the health of the citizens (*Spain's Economic Measures to Mitigate the Effects of COVID-19*).

Procedural and Administrative Time Limits Were Suspended

All procedural terms and time limits were suspended for all jurisdictional orders. In addition, the General Council of the Judiciary suspended all judicial proceedings throughout the national territory, guaranteeing only essential services. Moreover, administrative terms and time limits were equally suspended in all proceedings with public authorities, including the CNMC, but for a few exceptions. The CNMC remained fully operational during the state of emergency, conditioned by certain adjustments. Although the CNMC closed its on-site registry, the e-services platform remained open.

A Stricter Screening FDI Regime Was Approved

The Spanish Government updated its FDI screening regime (Royal-Decree Law 34/2020), severely limiting the acquisition by foreign investors of companies active in sensitive sectors related to public order, security and health. The sectors covered by the amendment include critical infrastructure (*e.g.*, health services), critical technologies, dual-use items and food safety, among others. In particular, the Spanish government required an *ex-ante* authorization for FDI (i) where the foreign investor holds more than a 10 percent capital stake in a Spanish company or (ii) when, as a result of the investment, it will participate in the management or control of a Spanish company. Even if the amendments were adopted in the context of the pandemic, they are expected to remain in the long-term.

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