Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Spain

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2021 has been an eventful year for the competition law and policy landscape in Spain. Below we review the main developments and takeaways from the last year in the following areas: (i) institutions, legislation and Covid-19; (ii) merger control; (iii) restrictive agreements and abuse of dominance; and (iv) State aid.

Institutions, Legislation and Covid-19

Spain Transposes the ECN+ Directive in Royal Decree-Law 7/2021

In April 2021, the Spanish Government transposed the ECN+ Directive, which seeks to empower national competition authorities and bring harmonization to the national enforcement regimes of EU member states. The deadline for transposition was in February 2021, and the ECN+ was subsequently introduced in the form of an 'urgent' decree following the European Commission's opening of an infringement procedure in March. As a result, the text was limited to merely implementing the changes from the Directive, thus falling short of the expectations for broad reform created by the Spanish government's draft reform bill of the 2007 Competition Act, published in July 2020.

The Royal Decree-Law 7/2021 nevertheless brought some noteworthy modifications to the Spanish antitrust framework. Apart from enhancing the CNMC's cooperation with other national competition authorities, it overhauls its investigative powers, including the ability to conduct raids upon 'reasonable suspicion' of anticompetitive conduct. The text also strengthens the antitrust sanctions regime and introduces greater incentives for leniency applicants in cartel investigations, among other changes.

Spanish Parliament Discusses Broad Reform of Competition Act

After validation in Parliament in May 2021, the Royal Decree-Law 7/2021 is currently under scrutiny as proposed legislation, which may allow for the introduction of several aspects from the draft reform bill – a much welcomed prospect by practitioners and regulators. One proposal

championed by the Government coalition would implement a settlement procedure similar to that used by the European Commission, through which the parties under investigation could opt for a reduction in fine on the condition that they acknowledge their participation in an antitrust infringement. As observed in other jurisdictions, it is expected that this reform would increase the overall efficiency of the CNMC's enforcement, speeding up the adoption of sanctioning decisions and freeing up valuable resources.

Another amendment with the aim to increase the efficiency of the CNMC's activity would set out a new exception to the duty to notify concentrations where the parties' combined market share falls under 15%. However, to be eligible for this exemption, the parties must not hold a share of over 50% in any other market. This may paradoxically entail greater administrative burdens for the CNMC, especially when dealing with multi-industry companies or investment funds with diversified portfolios.

In addition, an extension of the long-criticized 18-month time limit to adopt a sanctioning decision has also been proposed in Parliament, which would give the CNMC an extra 6 months.

Not all proposals have achieved consensus. In an appearance before the Parliament's Committee on Institutional Reforms in February 2021, Cani Fernández – the President of the CNMC – advocated for a reform of the rules governing the status of the competition authority with the aim of strengthening its management autonomy. Ms. Fernández argued that while the authority enjoys independence at the decisional level, its budget and staffing policies are significantly constrained by the Ministries, preventing the CNMC from efficient organization in respect of ever-changing market realities. The proposal contrasts with a controversial mid-December report co-signed by Prime Minister Sánchez's party, which allegedly envisioned the Executive's ability to dissolve independent authorities and limit their discretion under the premise of democratic accountability.

The CNMC Publishes 2021-2022 and 2021-2026 Strategic Plans, with a Focus on Digital Markets and Sectors Affected by Covid-19

The CNMC published the two strategic plans that will guide its enforcement priorities in the preceding years in a press release in May 2021. The documents – which incorporate observations from a public consultation held between January and February 2021, as well as input from the Spanish Parliament Committee on Economic Affairs – set the course for vigilant monitoring in digital markets and sectors notably affected by the pandemic, such as pharma, insurance, funeral and financial markets. As predicted, in line with the CNMC's growing interest in bid-rigging over the last few years (see below), the plans also mention a focus on detecting fraud in public tenders. The plans can be accessed here and here.

Merger Control

2021 Marks the Highest Number of CNMC Merger Clearances in the Last 5 Years

In a mid-November article, the CNMC reported that in 2021 it had cleared the highest annual amount of notified mergers since 2017, *i.e.*, 94 transactions. The figure rose to 108 in total by the end of December – a significant increase by comparison to 2020's 70 clearances. The full list of

transactions authorized by the CNMC can be accessed here.

Further Consolidation in the Banking Sector

One of the most relevant mergers in 2021 involved Caixabank and Bankia, two major players in the Spanish banking sector. Caixabank's acquisition of Bankia, the third and fourth largest banks in the country respectively, resulted in the single largest entity by assets in Spain, ahead of BBVA and Santander – which remains the first Spanish bank by worldwide assets. The transaction follows a decade-long consolidation process within the sector that has led to the near-complete disappearance of savings banks after successive mergers, acquisitions and restructuring operations that have ultimately reinforced the position of the 4 largest commercial banks. In advance of acquisition by Caixabank, for instance, Bankia had itself originated from the merger of 7 savings banks in 2010, and in 2017 Bankia had acquired a rival which was created after the merger of 4 savings banks also in 2010.

The transaction was notified in November 2020 and was cleared in Phase I in late March 2021, following the CNMC's approval of the commitments offered by the parties, which focused strongly on addressing local-level post-acquisition concerns (see CNMC decision). In particular, the parties committed to (i) restricting the closure of branches in underserviced municipalities; (ii) maintaining their terms and conditions in areas where they held high market shares; and (iii) granting customers access to the acquirer's closest ATMs where Bankia's ATMs were shut down. Other commitments included (iv) transparency in Caixabank's communications with Bankia's clients; (v) maintaining terms and conditions for vulnerable clients; and (vi) undertaking statutorily-mandated divestitures in stocks.

Though less noteworthy, in late June 2021, the CNMC cleared another merger in the banking sector between Unicaja and Liberbank, which resulted in the fifth largest domestic bank in Spain (see CNMC decision). As with Caixabank/Bankia, the Spanish competition authority cleared the transaction in Phase I also with commitments addressing potential local-level post-transactional concerns along the lines of (ii) and (iv) above.

Restrictive Agreements and Abuse of Dominance

The CNMC Toughens Probe into Bid-Rigging Practices

2021 was a milestone in the CNMC's probe into collusion in public tenders. The CNMC has previously scrutinized bid-rigging practices due to their substantial impact on public finances, but in 2021 the emphasis notably increased to 70% of all cartel sanctions: *i.e.*, out of its 7 cartel sanctions, 5 were bid-rigging cases.

To summarise, in early February, the CNMC imposed a EUR 5.76 million fine on the participants of a bid-rigging cartel in the market for the supply of radiopharmaceutical fluorodeoxyglucose to hospitals (*Radiofármacos*, S/0644/18). In May, the CNMC imposed a EUR 6 million fine on several consulting companies for colluding in local public tenders (*Consultoras*, S/DC/0627/18). During the summer, the CNMC handed down two fines of EUR 1 million for cartels in the passenger transport sector (*Transporte Cántabro de Viajeros*, S/0011/19), as well as an additional

EUR 61 million fine in the road maintenance sector (*Conservación de carreteras*, S/0013/19). In October, the most significant case was decided when the CNMC imposed a EUR 128 million fine to the main companies involved in the security, signalling and communications systems for the Spanish high-speed trains (*Seguridad Ferroviaria*, S/DC/0614/17).

In most cases, the CNMC imposed the prohibition to contract with the Spanish public administration and fined executives. These measures, as well as the detective role of the economic intelligence unit, have gained importance in the fight against collusion in public tenders since 2019. Furthermore, the CNMC released an updated Guide on public tenders and competition, which contains recommendations to improve the design of public tenders and detect anticompetitive practices.

The CNMC Acquires New Inspection Powers

The Royal Decree-Law 7/2021 expanded the inspection powers of the CNMC, allowing for inspections to be carried out in any 'other' office or business premise where there may be relevant evidence for an investigation. It is, however, unclear whether the CNMC has used its newly-acquired powers. In 2021, the CNMC conducted inspections at the offices of companies in the waste treatment and recycling market in Spain (see CNMC press release), in the military equipment market (see CNMC press release), and in the offices of Spanish and Portuguese companies in the business information database subscription market, in a joint effort with the Autoridad da Concorrência (AdC) (see CNMC press release).

The Super League Arrives at the Court of Justice

In April 2021, 12 of the largest European football clubs (AC Milan, Arsenal, Atlético de Madrid, Barcelona, Chelsea, Internazionale Milano, Juventus, Liverpool, Manchester City, Manchester United, Real Madrid and Tottenham Hotspur), led by Florentino Pérez (the President of Real Madrid), announced the creation of the so-called 'Super League' (see press release): a partial-breakaway league from FIFA-UEFA's competitions.

Despite the Super League's promise to transform the European football landscape and enhance the value proposition of the sport, the project immediately faced popular backlash from fans and clubs. Moreover, FIFA-UEFA publicly opposed the Super League and announced severe sanctions to block it (see UEFA press release). As a result of all of the above, 9 of the 12 clubs abandoned the project and re-joined UEFA's competitions in exchange for a series of commitments (see UEFA press release). However, Barcelona, Juventus, and Real Madrid held out. Meanwhile, the Spanish company incorporated for the purposes of implementing the Super League launched legal actions against FIFA-UEFA, alleging that they infringed EU competition rules.

In this context, a Madrid Court requested a preliminary ruling from the EU Court of Justice (see request and English translation) on whether FIFA-UEFA's practices breach Articles 101 and 102 TFEU (*European Superleague Company,* C-333/21). In parallel, the Madrid Court ordered FIFA-UEFA to suspend all sanctions against the clubs and to refrain from adopting any further measures that could hinder the organization of the Super League (see interim measures). The request for a preliminary ruling is timely because it coincides with the General Court's ruling in the

International Skating Union case (T-93/18; appealed in C-124/21), which poses similar legal questions. So far, the Court of Justice has rejected the Super League's request for an expedited procedure.

State Aid

The Court of Justice Defines the Concept of 'Selectivity' in the Spanish Goodwill Saga

In October 2021, the Court of Justice handed down the last judgment of the so-called 'Spanish Goodwill saga', clarifying the concept of 'selectivity' in State aid. The ruling put an end to decade-long litigation, including eight cases on appeal (*World Duty Free v Commission,* C-51/19 and C-64/19; *Sigma Alimentos Exterior v Commission,* C-50/19; *Banco Santander v Commission,* C-52/19; *Banco Santander and Santusa v Commission,* C-53/19 and C-65/19; *Axa Mediterranean v Commission,* C-54/19; and *Prosegur Compañía de Seguridad v Commission,* C-55/19).

In late 2001, Spain introduced a provision in its Corporate Tax Law providing that in the event an undertaking taxable in Spain acquires a shareholding greater than 5% in a 'foreign company' and retains it for at least one year, the resulting goodwill may be deducted via amortization from the taxable base. However, that deduction did not apply to acquisitions of shares in Spanish companies. The Commission found that this difference amounted to illegal and incompatible State aid because it conferred an unjustified advantage to Spanish companies in the context of competitive takeover bids (SA.22309). The Commission thus ordered the recovery of the aid in its decisions of 2009 and 2011.

In 2014, the General Court annulled the decisions, finding that the Commission had failed to establish the selective nature of the tax measure. In particular, the General Court highlighted the general nature of the measure, which did not target a particular "category of undertakings" and was potentially available to all (*Autogrill v Commission,* T-219/10, paras. 41–45). In 2016, the Court of Justice quashed the General Court's ruling, relying on a broader interpretation of the concept of selectivity (*Commission v World Duty Free,* C-20/15 and C-21/15, paras. 66, 78 and 79), and referred the case back to the General Court, which, this time upheld the Commission's decisions (*Commission v World Duty Free,* T-219/10 RENV). On appeal, the Court of Justice confirmed the latter, putting an end to the protracted dispute, and thus 'crystallized' the broad interpretation of selectivity set out in its previous ruling (*World Duty Free and Spain v Commission*, C-51/19 and C-64/19).

Through these rulings, the Court of Justice clarifies that in order to determine whether an aid measure is selective, it is irrelevant that the measure grants an advantage to a limited group of undertakings with specific features (*Commission v World Duty Free,* C-20/15 and C-21/15, para. 78). "All that matters […] is [whether] the measure [has] the effect of placing the recipient undertakings in a position that is more favourable than that of other undertakings […] in a comparable factual and legal situation" (*Commission v World Duty Free,* C-20/15 and C-21/15, para. 79; confirmed in *World Duty Free and Spain v Commission*, C-51/19 and C-64/19, paras. 31–35). Therefore, a 'general' derogation from the reference framework may still be selective if it favours some undertakings *vis-à-vis* others. In other words, selectivity is not an 'absolute' concept based on the general or limited scope of an aid measure but a 'relative' one based on the differential effect created.

In addition, The Court of Justice establishes that the definition of an aid measure by reference to specific 'behavioural' characteristics, such as acquisitions of shareholdings, may also make it selective (see D. Kyriazis, EULL, October 2021; and Cleary Gottlieb, Newsletter, October 2021).

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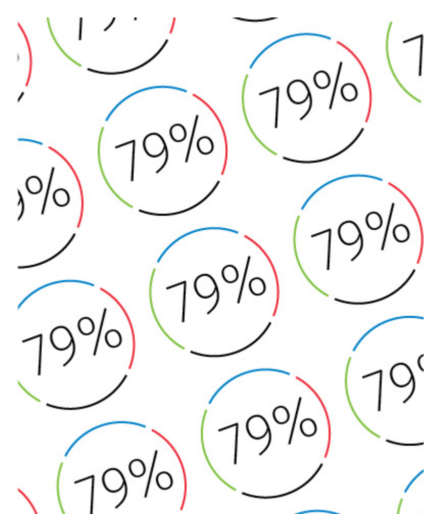

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