

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Spain

David Pérez de Lamo, Xavier Quer Zamora (Cleary Gottlieb Steen & Hamilton LLP) · Friday, March 3rd, 2023

Below we cover the main competition law developments in Spain in 2022, concerning (i) institutions, (ii) restrictive agreements, (ii) abuse of dominance, (iii) procedure, (iv) mergers, and (v) the internal market. The selection, as usual with these lists, is inherently subjective. The authors note that they have favoured a broader selection of issues to include certain developments in EU law with a notable Spanish component, as well as institutional developments of transversal significance that also concern Spanish competition law.

Institutions

The Court of Justice Declares that the Spanish State Liability Regime for Breaches of EU Law Is Incompatible with the Principle of Effectiveness (Commission v Spain)

In June 2022, the Grand Chamber of the Court of Justice ruled that the Spanish State liability regime for breaches of EU law is incompatible with the general principle of effectiveness (C-278/20). The ruling is the result of a series of complaints lodged by private individuals in 2016, which led the Commission to launch an infringement procedure against Spain under Article 258 TFEU in 2017. The pre-litigation phase ran until 2019, without Spain remedying the infringement or providing a satisfactory defence. The Commission thus brought the matter before the Court of Justice in 2020.

The Court reviewed the compatibility of the Spanish State liability regime for breaches of EU law, set out in Articles 32 and 34 of [Law 40/2015, on the Regime Governing the Public Sector](#) ('LRJSP') and Article 67 of [Law 39/2015, on the Common Administrative Procedure](#) ('LPAC'), with the general principles of effectiveness and equivalence. In essence, the Court found that four criteria required by the Spanish State liability regime were incompatible with the principle of effectiveness, namely that:

- There be a judgment of the Court of Justice declaring that the applied rule with the status of law is incompatible with EU law (in line with *Brasserie du Pêcheur*, C-46/93 and C-48/93);
- The injured party has obtained, at any instance, a final judgment dismissing an appeal against the administrative act which caused the damage, thus excluding cases in which the damage derives directly from an act or omission of the legislature without there being a challengeable

administrative act;

- A limitation period of one year from the publication in the EU Official Journal of the judgment of the Court of Justice declaring the incompatibility of the said norm, thus excluding cases where there is no such declaratory judgment; and
- Only damages occurring five years prior to the date of the publication in the EU Official Journal can be compensated, for the same reason.

On the other hand, the Court found that the Spanish State liability regime, insofar as it required claimants to demonstrate a ‘sufficiently serious breach’ in damages actions against the State for breaches of EU law, but not in damages actions for breaches of the Spanish Constitution, was not incompatible with the principle of equivalence (for a detailed commentary on this point, Sara Iglesia’s comment [here](#)).

The judgment follows another landmark ruling of the Grand Chamber, which declared that the Spanish State liability regime for breaches of EU law, as developed by the case law of the Spanish Supreme Court, was incompatible with the general principle of equivalence. In *Transportes Urbanos*, the Court took issue with the requirement that the claimant exhaust all domestic remedies in damages actions against the Spanish legislator for breaches of EU law, but not in damages actions for breaches of the Spanish Constitution (*Transportes Urbanos*, C-118/08; for detailed coverage of the background leading to *Commission v Spain*, see the following [outline](#)).

Restrictive Agreements

The CNMC Imposes Record Fine on Six Construction Companies for Decades-Long Bid-Rigging Practices (Obra Civil 2)

In July 2022, the Spanish Competition Authority (the “CNMC”) fined six of the main construction companies in Spain (Acciona Construcción S.A., Dragados S.A., FCC Construcción, Ferrovial Construcción, Obrascón Huarte Lain S.A., and Sacyr Construcción S.A) with EUR 203.6 million for bid-rigging practices spanning for more than 25 years (*Obra Civil 2*, S/0021/20). The CNMC qualified the conduct as a very serious infringement of Article 1 of the Spanish Competition Act and Article 101 TFEU because it affected thousands of tenders organized by the Spanish public administration (mainly by the Ministry of Transport) concerning high-value contracts for the construction of key infrastructure, such as hospitals, ports, airports and roads. The construction companies met weekly, starting in 1992, in order to analyse and distribute public tenders among them and exchange commercially sensitive information relating to technical aspects of the tenders and their bidding plans (though the authority found no evidence of exchanges of price information). The construction companies developed a sophisticated *modus operandi* governing the operation of the cartel that evolved over the duration of the infringement. The fine marks are the highest ever imposed by the CNMC.

Abuse of Dominance

The CNMC adopted several noteworthy decisions against undertakings for abusing their dominant position through (i) exclusionary (*Insud Pharma*, *Correos 3*, *Enel Green Power España* and *Real Sociedad Canina de España*) and (ii) exploitative (*Leadiant*) practices.

The CNMC Brings a First in Spain Against Merck for ‘Sham Litigation’ and Misuse of Patent Procedures (Insud Pharma)

In October 2022, the CNMC imposed a hefty EUR 39 million fine, in addition to a prohibition to conclude contracts with the Spanish public administration, to the Spanish subsidiary of multinational pharmaceutical *Merck Sharp & Dohme* for abusing its market position in the market for the sale of vaginal contraceptive rings. The CNMC found that the company had resorted to ‘sham litigation’ and misused patent procedures in order to delay and suppress competition from new entrant *Insud Pharma* ([S/0026/19](#)).

Merck, which had enjoyed a 15-year monopoly over the sale of its contraceptive *Nuvaring*, invoked its patent rights against an alternative contraceptive launched in June 2017 -less than a year from the expiry of its patent-, and requested a Barcelona court to issue an *ex parte* suspension order to stop the manufacture and sale of *Insud Pharma*’s product. This relief was granted in September 2017, after *Merck* had alleged that its rival had failed to provide the necessary evidence to assess whether its patent had been breached. Upon finding that *Merck* had withheld relevant factual and technical information that would have challenged the premises relied on for its legal actions -notably, *Insud Pharma* had indeed offered to provide the evidence to assess the existence of a patent infringement-, the court lifted the interim suspension in December 2017.

As a result of the suspension, however, *Insud Pharma* was forced to halt marketing, sale and production of its contraceptive until December 2017, effectively extending the dominance of *Merck*’s *Nuvaring* in the Spanish market and disrupting normal competitive dynamics. After a 3-year-long investigation, the CNMC concluded that *Merck*’s lack of transparency and legal action was not aimed at enforcing its patent rights, but rather at suppressing competition from new providers.

The authority followed the criteria defined by the EU Courts in *ITT Promedia* ([T-111/96](#)), i.e., (i) the legal action could not be considered as a reasonable attempt to assert the proprietary rights of *Insud Pharma* and therefore only served to harass the opposing party, and (ii) the legal action was part of a plan whose goal was to eliminate competition. The CNMC adopted the infringement decision shortly after the Commission sent *Teva* a Statement of Objections over its alleged misuse of patent procedures and alleged disparagement campaign to prolong the exclusivity of *Copaxone* ([see here](#)). The CNMC’s decision also follows a series of national enforcement proceedings sanctioning disparaging conduct by pharmaceutical companies. For instance, since 2013, the French Competition Authority has sanctioned several companies on anticompetitive disparagement grounds (*see e.g.*, [FCA Decision n°13-D-11 of May 14, 2013, against Sanofi-Aventis](#)), and in 2014 the Italian Competition Authority adopted a decision under Article 101 TFEU on similar grounds against *F. Hoffman-La Roche* (*see ICA Decision in the case I760 of February 27, 2014*).

The CNMC Sanctions Correos’ Rebates (Correos 3)

In *Correos 3*, the CNMC imposed a EUR 32 million fine on Correos, the Spanish public postal operator, over its rebate practices ([S/0041/19](#)). Correos, which enjoys a quasi-monopolist position in the Spanish market (*e.g.*, in some of the years examined by the CNMC, Correos’ relevant market shares were over 95%), was found to have abused its dominant position through a system of

conditional and retroactive discounts for large business customers. In February 2022, the CNMC concluded that, given the protracted duration of the contracts, the lack of transparency in the calculation of the discounts, and their non-standardized application, such conduct had the effect of preventing the entry of new competitors into the market for traditional postal services for large corporate customers.

The CNMC Tackles Discriminatory Practices (Enel Green Power España and Real Sociedad Canina de España)

The CNMC's scrutiny in 2022 also extended to the market for access and connection to the power network. In *Enel Green Power España*, the CNMC took issue with Enel Green's conduct as a "Single Node Interlocutor" in two access points to the power network for renewable energy generation facilities ([S/0022/20](#)). In brief, at the time of the abusive conduct, Spanish power regulation required the designation of a company as an intermediary between Red Eléctrica Española (the Spanish Electricity Network operator) and other access seekers to the power network. The function of such intermediaries was to process access requests made to Red Eléctrica Española; a "decisive" step for the allocation of capacity among several requesters. The CNMC found that Enel Green, as a "Single Node Interlocutor", had abused its role in two nodes by prioritizing its own requests while unduly delaying the submission of requests from its competitors. Enel Green was thus able to gather more capacity than it would have normally been able to under normal competitive conditions and prevented rivals from accessing such capacity.

In another notable decision, the CNMC found that the Spanish Royal Canine Society had abused its unique position in the markets for the genealogic certification of purebred dogs and the qualification of judges through a combination of discriminatory practices aimed at rival associations (*Real Sociedad Canina de España*, or "RSCE", [S/0044/19](#)). While pedigree certification was liberalized in 2001 -and since then a number of alternative associations have emerged-, the RSCE is the only body in Spain that can emit internationally recognized export certificates, and more than 7 out of 10 Spanish expert judges participating in competitions and exhibitions for purebred dogs are licensed by the RSCE. In these circumstances, the CNMC found that the RSCE had suppressed the expansion of rival associations and the success of their dog shows, competitions and exhibitions by (i) setting out discriminatory fee regimes and registration requirements for owners of dogs originally registered by rival associations, (ii) prosecuting, prohibiting and sanctioning expert judges licensed by the RSCE participating or seeking to participate in events organized by rival Spanish dog associations, and (iii) creating a network of collaborating members and clubs through exclusivity and non-competition agreements, aimed at furthering the RSCE's position.

The CNMC Ends Lediand's Excessive Pricing Strategy

In November 2022, the CNMC imposed a EUR 10 million fine on pharmaceutical Lediand, the sole manufacturer of the drug for the treatment of cerebrotendinous xanthomatosis ("CTX"), a rare disease affecting around 50 patients in Spain, for abusing its position in the market for the sale of such drugs (*Lediand*, [S/0028/20](#)). Lediand had managed to secure its position as the sole manufacturer of drugs based on chenodeoxycholic acid ("CDCA") by negotiating an exclusivity

agreement with the only supplier of the active ingredient authorized to supply CDCA at scale, and relaunching its medicine as an orphan drug, a status granted by the European Medicines Agency to drugs aimed at the treatment of rare diseases that confers a 10-year exclusive marketing right.

The CNMC found that, since 2010, Ledian had systematically increased the price of its drug, from EUR 50 for a box of 100 capsules in 2010 to over EUR 14,000 in 2017. The authority concluded that such an increase could not be attributed to any additional risks or costs borne by the company, and thus the price charged as of 2017 was abusive in light of its disproportionate and unfair nature. In addition to the fine, the CNMC has imposed an obligation on Ledian (i) to sell its drug in Spain at a non-excessive price negotiated with the Spanish Ministry of Health, and (ii) to waive the exclusivity agreement with the sole supplier of the drug's active ingredient.

Procedure

The National High Court Annuls Multiple CNMC Decisions Due to Insufficient Evidence (Prosegur/Loomis, Hormigones de Asturias, Istobal)

In 2022, the Spanish National High Court annulled a number of antitrust decisions of the CNMC due to insufficient evidence. Notably, the National High Court annulled:

- A decision of the CNMC fining two security companies and their managers with a total of EUR 46.5 million for sharing the cash-in-transit and cash-handling market, fixing prices and exchanging commercially sensitive information during at least 7 years (*Prosegur/Loomis*, [S/DC/0555/15](#)), insofar as the CNMC had (i) failed to prove the existence of a common plan and a concerted practice, (ii) improperly stretched the content of internal emails to establish the infringement and (iii) unduly discarded the reasonable explanations provided by the security companies to justify their behaviour (Judgments of June 20, 21 and 23, 2022, [SSAN 3135/2022](#), [3137/2022](#), [3134/2022](#) and [3109/2022](#)).
- A decision of the CNMC fining 13 concrete companies and one of their managers with EUR 6.12 million for bid rigging practices in the market for the supply of concrete and related products for at least 15 years (*Hormigones de Asturias*, [S/DC/0545/15](#)), insofar as the CNMC had (i) largely relied on circumstantial evidence, like Excel sheets, to establish the existence of market sharing between the companies, which did not show the individual participation and liability of the companies, (ii) relied on an insufficient sample of tenders, (iii) improperly stretched the content of internal emails to establish the infringement, and (iv) unduly discarded the reasonable explanations provided by the concrete companies to justify their behaviour (Judgments of June 24 and 27, 2022, [SSAN 3163/2022](#), [3085/2022](#), [3165/2022](#), [3120/2022](#), [3094/2022](#), [3192/2022](#), [3189/2022](#), [3124/2022](#), [3110/2022](#), [3131/2022](#), [3108/2022](#) and [3128/2022](#)); and
- A decision of the CNMC fining a car wash equipment maker with EUR 638,770 for refusing to supply spare parts and technical information to independent repairers of its machines (technical assistance services) that were not part of its authorized network (*Istobal*, [S/DC/0540/14](#)), insofar as the CNMC (i) had relied on implicit agreements between Istobal and the authorized repairers

to exclude independent repairers, which were not sufficiently backed by evidence and in principle were justified under the rationale of Istobal's selective distribution system, and (ii) failed to prove Istobal's alleged refusal to supply technical information to independent repairers, as this was contradicted by information in the file (Judgment of July 29, 2022, SAN [4209/2022](#)).

Mergers

The CNMC Fines Several Undertakings for Gun-Jumping (Albia Gestión de Servicios, Funespaña, Xfera, Electra Alto Miño)

In March and April 2022, the CNMC initiated two infringement proceedings against Albia Gestión de Servicios S.L.U. (a subsidiary of the Santa Lucía group) for failing to notify the acquisition of exclusive control over the funeral homes Funeraria Tanatorio La Paz S.L. and Tanatorio de Marín S.L. (*Albia/Tanatorio La Paz*, [SNC/DC/086/22](#); and *Albia/Tanatorio de Marín*, [SNC/DC/092/22](#)). In March 2022, the CNMC also initiated an infringement proceeding against Funespaña S.A. (a subsidiary of MAPFRE group) for failing to notify the acquisition of joint control over Funeraria San Vicente S.L. (*Funespaña/San Vicente*, [SNC/DC/088/22](#)). The CNMC required Albia and Funespaña to notify the concentrations and approved them all in the first phase without commitments (*Albia/Tanatorio La Paz*, [C/1270/22](#); *Albia/Tanatorio de Marín*, [C/1271/22](#); and *Funespaña/Funeraria San Vicente*, [C/1267/22](#)). In July 2022, however, the CNMC concluded the gun-jumping proceedings imposing two fines of EUR 250,000 and 25,000 on Albia and one fine of EUR 110,000 on Funespaña.

In September 2022, the CNMC initiated an infringement proceeding against Xfera Móviles S.A.U. (subsidiary of Masmovil Ibercom S.A.U.) for failing to notify the acquisition of Grupo Ahí+ (*Xfera*, [SNC/DC/144/22](#)). The CNMC required Xfera to notify the concentration and approved it in the first phase without commitments (*Masmovil/Ahí+*, [C/1292/22](#)). In December 2022, however, the CNMC concluded the gun-jumping proceeding by imposing a fine of EUR 1.5 million on Xfera.

Finally, in September 2022, the CNMC initiated an infringement proceeding against Electra Alto Miño Distribuidora de Energía S.L.U. for failing to notify the acquisition of exclusive control over the assets of the electricity distribution network in Arnoia (a town of the province of Ourense in Galicia) (*Electra Alto Miño/Activos Arnoia*, [SNC/DC/157/21](#)). In December 2022, the CNMC concluded the gun-jumping proceeding by imposing a fine of EUR 30,000 on Electra Alto Miño.

Internal Market

AG Szpunar Hints Possible End to the Spanish Taxi Saga

In December 2022, Advocate General Szpunar delivered an Opinion on the preliminary ruling request from the High Court of Catalonia concerning the adoption of restrictions on the operation of for-hire vehicles in Barcelona ([C-50/21](#)). The highly anticipated Opinion comes at the end of yet another eventful year in the debate between taxis and black car services, as the CNMC continues to challenge local regulations imposing restrictions on for-hire vehicles (*see here*) and competition authorities request regional governments to refrain from imposing “unnecessary and

disproportionate regulatory requirements” (see [here](#)).

Following a challenge to a local regulation adopted by the Barcelona Metropolitan Area, the High Court of Catalonia asked the Court of Justice to clarify whether Articles 49 and 107(1) TFEU preclude national provisions imposing (a) quantitative restrictions on the number of licenses for for-hire vehicles, as well as (b) the requirement of a second license and the fulfilment of additional conditions for for-hire vehicles wishing to provide urban transportation services. In his Opinion, AG Szpunar proposes that the quantitative restrictions imposed by the Barcelona Metropolitan Area constitute a restriction on the freedom of establishment under Article 49 TFEU, notably deeming that the economic viability of taxi services cannot, in itself, constitute a legitimate justification and that it is questionable that taxis constitute services of general economic interest.

While the Court is not bound by the Opinion, the recommendation provides a clear indication that the restrictions on for-hire vehicles might not be compatible with the internal market, which could put an end to the years-long dispute between the sector, regulators and competition authorities (for a more detailed analysis, see Isaque Leite’s comment [here](#)).

Any opinions or conclusions provided in this blog entry shall not be ascribed to Cleary Gottlieb Steen & Hamilton LLP or any clients of the firm involved in the case.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

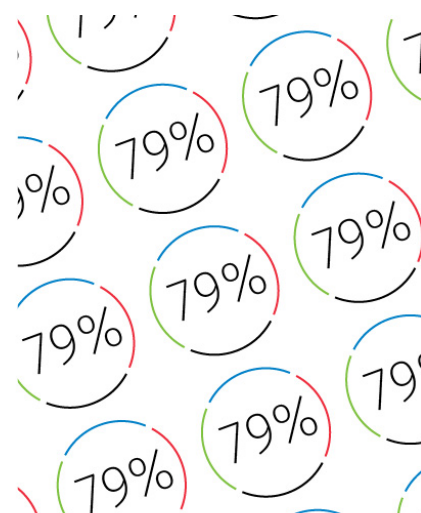
Kluwer Competition Law

The **2022 Future Ready Lawyer** survey showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Friday, March 3rd, 2023 at 9:00 am and is filed under [Competition Law 2022](#), [Competition policy](#), [Competition proceedings](#), [Spain](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.