

What's new in Spanish Competition law?

October 2021



CNMC

COMISIÓN NACIONAL DE LOS
MERCADOS Y LA COMPETENCIA

Dear all,

COVID-19 continues to alter what used to be a steady flow of conferences and international events, where we got a chance to meet you all and exchange views on latest developments in Competition law. As you know, Spain has a very dynamic “Federal” competition authority, several equally active regional competition authorities and courts that, to this day, seem to prefer reviewing such authorities’ decisions rather than looking into other competition-related matters, notably direct application of EU law or recovering illegal State aid.

While we eagerly await a return to “full normality” and meeting again face to face, we are pleased to at least send you this short summary of what we think was particularly noteworthy over the past few months.

Needless to say, we shall be delighted to provide more information on the sketches in this issue, which looks back at developments for vertical restraints, cartel fines, merger review and private enforcement.

Enjoy!

Competition law Team, Marimón Abogados

1. What's new on vertical restraints?

E-commerce giant Amazon is facing an antitrust investigation by the Spanish Competition Authority (CNMC) into its agreement with Apple, reached in 2018. Since, third-parties need an authorisation to resell Apple products through Amazon. This practice, apparently included in Amazon's ["brand-gating" programme](#), applies to a total of eight countries including the United States, Japan or Spain, and, in the CNMC's view, may hinder competition in Amazon's marketplace.

Counterfeit products are a major concern for Amazon and brand owners. Amazon presents its brand-gating programme as a solution providing certainty and safety to clients and brands. However, the CNMC stated in a [press release of 1 July 2021](#) that such policies might be affecting third-party retail sales of Apple products as well as ads for products competing with Apple's. This could infringe Article 1 of the Spanish Competition Act and Article 101 TFEU to the extent it limits or reduces competition for the sale of electronic devices on e-commerce platforms. Such reduction shows, as Apple products sold by third parties could previously be found at different prices and conditions. With the brand-gating programme, such differences disappear, as the marketplace and the brand collaborate to promote [direct sales of Apple products](#). The practice might also strengthen Amazon's position in providing marketing services to third-party online retailers.

Amazon and Apple stated that they will fully collaborate with the CNMC's investigation, that will last a maximum of 18 months. This is not the first time Amazon and Apple face scrutiny. As regards Amazon, in 2019 the [European Commission opened an antitrust investigation](#) into the use of commercially sensitive information regarding third-party sellers, products or transactions. Similarly, in 2019 and 2020 the [Bundeskartellamt](#) and the [Autorità garante della concorrenza e del mercato](#), respectively, analysed Amazon's general terms of business for sellers under abuse of dominance provisions. When it comes to Apple, [current ongoing proceedings in Brussels](#) are widely known and, in 2020, the [Autorité de la concurrence](#) fined Apple for retail price maintenance.

Over the past few months, the online world has not been the CNMC's only concern. As we told you in our last newsletter, traditional sales channels keep appearing on the authority's radar, e.g., the investigation of Maquinaria Garrido, an agricultural equipment supplier, for possibly restricting passive sales by its exclusive distributors outside their territory and fixing resale prices. On 14 September 2021 the CNMC closed this investigation with commitments (Case ([S/DC/0006/20](#))). The authority concluded that Maquinaria Garrido's exclusive distribution agreements were likely to restrict competition by limiting passive sales through a clause providing that Maquinaria Garrido be compensated for each passive sale out of a distributor's assigned territory. Another clause set a minimum resale price. The commitments included not renewing the current contracts and introducing new distribution contracts that allowed passive sales without compensation and set no minimum resale price.

2. What's new on cartels?

On the cartel front, we would like to highlight four recent decisions involving bid-rigging.

First, on 16 June 2021, the CNMC decided not to open a formal investigation of vote counting systems suppliers for potential bid-rigging practices ([S/0036/19](#)) linked to elections in Spain between 2015 and 2019. In this instance, the authority found that the companies' decisions not to bid for several contracts in a number of regions responded to economic logic, since the tenders required bidders to provide the same service both for regional elections and national ones held on the same date, as well as to use the same infrastructure and systems without additional cost to the administration, so there was no incentive for providers to participate in the tenders.

Second, also on 16 June 2021, the CNMC fined five passenger transport companies nearly EUR 1,000,000 for operating two cartels in the Spanish northern region of Cantabria ([S/0011/19](#)). The first cartel concerned the market for school transport, a public service provided contracted through tenders. Here, the CNMC found competitors to have (i) shared routes; (ii) agreed not to compete for the same tenders; (iii) offered fake bids to ensure that a given company won specific tenders; and (iv) fraudulently used joint ventures to bid while avoiding to compete with each other. In the second cartel, involving the market for occasional transport (e.g., tourism trips, visits, etc.), two companies colluded in at least 15 contracts to enable transportation services on trips starting in Cantabria. The CNMC's decision was sent to the Procurement Advisory Board which may now start *ad hoc* proceedings to prohibit the cartel members from contracting with public administrations in the future. This course of action is followed where the CNMC's decision does not itself set the duration and scope of the public contracting prohibition.

Third, on 17 August 2021, the CNMC fined 12 companies nearly EUR 60,000,000 for manipulating tenders for motorway maintenance and management services ([S/0013/19](#)). According to the CNMC, the cartel obtained won 71 of the 101 tenders launched by the government for such services between 2014 and 2018. The cartel divided tenders into groups and would collude to offer the same criteria when presenting to an offer. Other practices included limiting the number of contracts where companies would offer significant discounts. As in the previous case above, the decision was sent to the Procurement Advisory Board.

Last but not least, the CNMC also fined consulting firms and some executives EUR 6,300,000 in total for exchanging commercially sensitive information in so-called "collaborative networks" at national or regional level to avoid competing for public tenders ([S/DC/0627/18](#)). The case was referred to the CNMC by the Basque Authority. The participants' managers were close, so all it took was as little e-mail asking for mutual assistance and collaboration to manipulate the tenders. The CNMC estimates that the conduct affected as many as 173 tenders. Like the two previous decisions above, the CNMC also sent this one to the Procurement Advisory Board as it refrained from setting the duration and scope of the public contracting prohibition.

3. What's new on merger review?

In our previous newsletter we commented on the fact that the CNMC's merger control activity had been affected by COVID-19, as was any activity, everywhere, during the pandemic. However, we are beginning to see a return to form, where it seems the CNMC is reaching pre pandemic levels, authorising a whopping 44 mergers in just 5 months since March.

In this instalment of our newsletter, we have decided to focus on the **gun jumping** and **breach of commitments** proceedings frenzy that has seemingly engulfed the Spanish authority. As we stated previously, the CNMC prides itself on having more dynamic notification thresholds (i.e., market share) than other authorities, which allows it to capture and review many transactions that would otherwise be left unchecked. This vigorous approach is complemented by the frequent implementation of behavioural commitments and structural remedies.

This being the case, the authority places a lot of its emphasis on monitoring such commitments imposed on a given transaction. In these past 5 months, it would seem players in the oil business have not been honouring the commitments reached with the authority when it authorised their concentrations. Hence, Repsol ([SNC/DC/044/19](#)) has been fined EUR 850,000 for breaching its obligation of acquiring given minimum supplies from third-party operators, while DISA ([SNC/DC/011/21](#)) was fined for violating its obligation related to the sea transport of kerosene for aviation in the Canary Islands, resulting in a sanction of EUR 1,000,000.

Moreover, the CNMC has in these past months imposed fines on three separate occasions for gun jumping on account of these transactions meeting the market share threshold. Consequently, Funespaña, a subsidiary of insurer Mapfre, was fined EUR 100,000 because the notification threshold was met at least in the retail market for chapel of rest services in a town of the island of Gran Canaria, where the target held almost a 60% market share. Furthermore, another funeral operator, this time a subsidiary of insurer Santa Lucía, was fined EUR 300,000 as the target had more than a 50% market share in the retail market for mortuary services in a specific municipality of the Madrid region. Last but not least, not even governments can escape the market share threshold. In a third case, the CNMC fined the Portuguese Directorate-General of Treasury and Finance EUR 30,000 for failing to notify Portugal's acquisition of Transportes Aéreos Portugueses SGPS (TAP SGPS) in October 2020. The TAP Group provides passenger air transport services on 11 routes to or from Spanish airports and exceeds the 30% market share notification threshold on 9 of these. Since the Directorate-General cooperated fully, the CNMC imposed a reduced fine.

4. What's new in private enforcement?

Since our last newsletter, successful damages litigation has continued to make headlines. For instance, the Socialist Party's follow-on lawsuit against their envelope suppliers, fined in 2013 for participating in a cartel that had lasted for a record 30+ years (ES:JMB:2021:604) or Danone's request for discovery in a stand-alone action against members of a cardboard cartel (ES:JMB:2020:334A), both brought before the Barcelona commercial courts.

More importantly, actions relating to the European Commission's cartel settlement [decision in Trucks](#) have continued their slow ascent towards the Supreme Court. On their way, they trigger learned discussions, among which we would highlight two.

On the one hand, the Barcelona commercial courts, that in the past autonomously decided to designate certain ones among them to deal with competition cases, have continued to improve the legal protection of plaintiffs by agreeing the so-called "Barcelona Protocol" to flexibly bundle similar actions brought by the same law firm. That is true of no less than 450 out of a total 650 follow-on lawsuits brought in Barcelona against truck manufacturers. As one judge put it, hearings reminded him of *Groundhog Day*, while "tedium and boredom can greatly influence the development of proceedings and also affect judicial analysis." Unfortunately, Spanish civil procedural law offers little prospect for a less creative avenue, namely collective actions.

On the other hand, a Counsellor of the Spanish NCA's (CNMC, its Council being the authority's decision-making body) complained that Spanish courts seldom ask the CNMC for support in competition damages claims. The CNMC suffers the same drastic reduction in leniency applications as other NCAs (it fined one leniency-triggered cartel in 2019 as opposed to seven in 2015), because would-be applicants fear follow-on damages, and is eager to compensate this with a more active role in court. The 8 court requests received to date relate to the theory of harm in the CNMC decisions and general considerations on methods for quantifying damages.

Given such requests, the CNMC has taken a proactive role and just before the summer launched a [public consultation](#) on its draft "Guidance for the quantification of damages due to competition law infringements" designed to build upon the 2013 European Commission guide. The CNMC is open to comments until 30 September next.

Needless to say, a more active role by the CNMC could potentially greatly further damages actions and, in the longer run, encourage cartel victims to bring more such actions.

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Marimón Abogados is a law firm founded in 1931 that offers legal services in all fields of law and has offices in Barcelona, Madrid and Seville. Our firm has adapted to the changes that have taken place in the legal market, creating specialised departments with extensive experience that accompanying our clients in their daily activities.

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Our Desks



For any queries or comments on the above please contact:

- Diego Crespo
dcrespo@marimon-abogados.com
- Yolanda Martínez
ymartinez@marimon-abogados.com
- Jorge Ramos
jramos@marimon-abogados.com
- Stefan Rating
srating@marimon-abogados.com
- Andrea Gutiérrez
agutierrez@marimon-abogados.com

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