Cartels

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Spain

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Overview of the law and enforcement regime relating to cartels

1. In Spain cartel activity is covered and sanctioned by legislation on competition, enacted both at the European Union level – basically Article 101 of the *Treaty on the Functioning of the European Union* ("TFEU") and Article 1, (1) and (2), of the Council Regulation (EC) No. 1/2003, *on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU* ("EU Regulation"), and, at national level – basically, in Article 1 of Law 15/2007, *on competition* ("Spanish Competition Act" or "SCA"), which follows the said EU provisions very closely, and in Regulation on Competition, approved by Royal Decree 261/2008, which developed and implemented the SCA ("Competition Regulation").[1]
   Article 1 (1) SCA prohibits agreements or concerted practices between two or more undertakings which have the object or effect of preventing, restricting or distorting competition and which may affect trade within Spain. Cartels are one of those types of collusive conducts, which the Fourth Additional Provision of the SCA, in its current version, defines as "*an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors*".[2] Agreements qualified as cartels are void, except if covered by a provision of the same Act that provides in different terms (Article 1 (2) SCA).
   As a matter of fact, the general cartel prohibition ("Prohibition") foreseen in the said Article 1 SCA, is subject to several limitations. One of them is foreseen by Article 1 (3), which provides that the Prohibition "*will not apply to agreements, decisions, recommendations and practices that contribute to improving the production or the commercialisation and distribution of goods and services or to promoting technical or economic progress, without the need for any prior decision for this purpose, providing that: a) They allow consumers a fair share of its benefits; b) They do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and c) They do not afford participating undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question*". Article 1 (4) sets forth also that the Prohibition "*is not applicable to agreements, collective decisions or recommendations, or concerted or consciously parallel practices that comply with the provisions set out in the Community Regulations on the application of Article 81 (3) of the EC Treaty*[3] *for certain categories of agreements,*

decisions by associations of undertakings and concerted practices, including when the corresponding conduct may not affect trade between EU Member States". Finally, Article 1 (5), following the regime already foreseen in the EU Regulation and in the mentioned Article 1 (4), provides that "*the Government may also declare through Royal Decree the application of Section 3 of this Article to certain categories of conduct, prior report by the Competition Council and the National Competition Commission*".[4]

In addition, Article 5 of the Spanish Competition Act establishes that the "*Prohibition set forth in the aforesaid Article 1 will not apply to conducts which, due to their scant importance, are not capable of significantly affecting competition. The criteria for demarcating conducts of minor importance shall be determined according to regulations, considering, among others, the market share*". For now, the demarcation has been carried out by Articles 1 and 2 of the Competition Regulation, the first determining the conducts qualifiable of "scant importance" on the ground of their market share and the second excluding certain conducts from that concept even if they meet the requirements foreseen in the first of them to be qualified as "of scant importance".

2. The Prohibition is enforced by the *Comisión Nacional de los Mercados y de la Competencia*, the Spanish Commission on Markets and Competition ("CNMC"), which was created in 2013, by Law 3/2013, and that assumed, since its inception, among others, the powers to enforce competition regulations that once were entrusted to the *Comisión Nacional de la Competencia*, the Competition Commission,[5] now extinguished (Article 5). These powers extend to the enforcement in Spain of EU competition law, where the conduct taking place in the country may affect trade between Member States, under Article 5 of the EU Regulation.[6]

   Public enforcement of the Prohibition at first is vested in the CNMC,[7] which, in this field, has the authority to:

   - investigate any agreements or conducts that may be infringing the Prohibition and, as such, to request the undertakings concerned to supply the information necessary and to carry out any inspections for that purpose;
   - declare that a certain conduct infringes the Prohibition;[8]
   - impose fines of up to 10% of the turnover of the offender in the preceding business year (Article 63 (1) (c) SCA), or in case the turnover cannot be determined and on the ground of the infringement being qualified as very serious, of more than €10 million (Article 63 (3) SCA);
   - impose periodic penalty payments, to an amount of up to €12,000 per day, aimed at compelling the infringer to put an end to the conduct that has been declared as infringing the Prohibition (Article 67 SCA);[9] and
   - the enforcement of its sanction resolutions as well as of those given in review by the courts (Article 5 Law 3/2013).

   On the grounds that the infringements of the Prohibition are qualified as *very serious* by the SCA (Article 62 (4) (a)), this piece of law also sets forth that they lapse after four years, as against shorter lapses for less serious infringements. The term of the lapse period shall be counted as of the day when the infringement was committed or, in the case of continued infringements, as of when they have ceased (Article 68 (1) SCA).

   Law 3/2013 provides for a formal distinction between the organ of the CNMC in charge of investigating agreements and conducts and the one in charge of applying fines and other sanctions for the infringement of the Prohibition (Article 29.2). Whereas investigation activities and the drafting of the resolutions are carried out by the Competition Division, fines and other sanctions are applied by the Competition Committee of the CNMC's

Council,[10] the corresponding decisions being challengeable before the Courts, which are entitled to repeal or modify them, though on legal grounds only (Article 48 SCA).

3. In addition to the public enforcement of competition law – where what is at stake is the application of fines and other sanctions for the infringement, by a certain conduct, of competition rules – in Spain private enforcement of these rules is also foreseen by the law. Third parties (such as customers of cartel participants) may bring private actions, before the Courts of Commerce, for damages arising from an infringement of the Prohibition.

   Since the enactment of the SCA, the initiation of the said private actions does not depend on a previous decision by the CNMC sanctioning the (allegedly) damaging conduct, or even on the opening of investigation proceedings against the defendant, something that clearly leaves room for stand-alone claims. Nonetheless, with a view to avoiding decisions on competition matters based on an interpretation of the competition laws that is not in line with that of the CNMC, the 2000 Civil Procedure Act allows for the CNMC to intervene in any proceedings, as an *amicus curiae*, on its initiative or at the request of the court, for the purpose of informing or making comments regarding the enforcement of competition laws (Article 15 *bis*).[11]

   Whereas public enforcement is vested both in the Authorities and the Courts, private enforcement is in the hands of Courts only, though law also states that competition disputes between offenders and victims can be solved by arbitration or ADR (Article 77 SCA). Regarding arbitration, the CNMC is entitled to act as a court of arbitration for, among others, the hearing of damage claims filed by victims against offenders (Articles 5 (1) b) SCA and 46 of the CNMC's bylaws).

4. In addition to its cartel enforcement activity, the CNMC acts also as a consulting body of the Government, the parliaments, the regional governments and other public entities, in all matters related to competition, something that empowers it to participate in the drafting of any piece of legislation on competition (Article 5 (2) SCA).

Overview of investigative powers in Spain

Investigative powers are vested in the Competition Division of the CNMC, as foreseen in Article 27 of Law 3/2013, which gives tenured civil servants of the CNMC, duly authorised by the relevant director, the status of an agent of the authority enabled to conduct as many inspections as required, at companies and undertakings, for the proper enforcement of such piece of legislation and, notably, of the commitments in competition matters entrusted to it by Article 5.

The powers of inspection granted to the CNMC include, among others, those of making dawn raids, checking books and other documents, obtaining copies of any documentation and enquiring the staff of the companies or undertakings under investigation (Article 5 (2)). The performance of some of these powers (*e.g.* that of making a dawn raid) depend on the express prior consent of the affected party or, failing that, on a court authorisation.[12]

In addition to such powers, in the performance of its function of defending competition, the CNMC benefits from a duty of collaboration with it, imposed by Articles 39 SCA, 10 of the Regulation and 28 of Law 3/2013, on all persons, bodies or entities of all public authorities. This duty extends to the provision, on time, of all types of data and information in their possession which may be necessary for the discharge of the CNMC's functions.

On the ground that the infringement of competition laws is not of a criminal nature, one could see the investigation powers of the CNMC as smaller if compared to those of the police when investigating the commission of crimes. Nonetheless, the court authorisation is also the

rule in criminal investigation whenever the police intends to carry out certain investigation measures that may vulnerate certain constitutionally protected rights. The difference, if any, therefore, have not so much to do with the powers themselves, but with how they are exercised by the police, on one hand, and the CNMC, on the other, whose staff, most of which has civil servant status, does not see itself as a police department.

Sanction procedures are subject to a time limitation foreseen by Article 36 (1) SCA, which sets forth that those procedures shall not extend for more than 18 months following the date of their commencement. In case no resolution is adopted in the first 18 months following this date, the procedure will be deemed as expired (Article 38 (1) SCA).

Overview of cartel enforcement activity during the last years

1. At the time of writing this Chapter (October 2019), the last figures on CNMC's enforcement activity are those disclosed by it in the 2018 Annual Report[13] ("Report"), published in early 2019.

   In 2018 the CNMC initiated nine sanction proceedings for infringements of Article 1 of SCA, of which five were for bid-rigging conducts in private and public tenders. Sectors involved were waste materials, repair of home electrical devices, television broadcasting, construction, car batteries, electricity for rail networks, veterinary pharmaceutical products, etc.

   In that year the CNMC terminated 21 sanction proceedings, of which eight ended with a sanction resolution, two with administrative settlements and 11 were terminated on the ground that the investigation carried out had shown no evidence of infringement.

   In 2018, the CNMC adopted four resolutions on cartels that aimed at setting prices, markets sharing, bid rigging and exchange of relevant market information. Fines amounted to €115,000 million, of which €3.8 million was pardoned under the leniency regime. The said four resolutions referred to the following cases:

   (i) Media agencies (file S/DC/0584/16): In this case, the CNMC found that several companies (Carate España, S.A., Inteligencia y Media, S.A., and Media by Design Spain, S.A., among others) operating in this area of business had entered, in 2014, into cartel agreements to increase prices and share market by engaging in bid rigging practices. Fines amounted in total to more than €7.2 million, the highest single fine being €4 million.

   (ii) Batteries (file S/DC/0569/15) ("batteries"): In this case, the CNMC found that several companies (Azor Ambiental, S.A., Exide Technologies, S.L., Recuperación Ecológica de Baterías, S.L.) dedicated to the sale of used car batteries had established a cartel, under which they had been setting prices and market shares in this market between 2008 and 2012. Fines amounted in total to €5.37 million, the highest single fine being €3.37 million.[14]

   (iii) Public tenders launched by several departments of the Spanish General Administration (Tax, Social Security and Employment) for the acquisition of computing services (file S/DC/0565/15) ("public tenders case"): In this case, the CNMC found that 11 companies operating in this area of business (Software AG Atos Spain, S.A., Connectis ICT Services, S.A., España, S.A., Indra Sistemas, S.A., and seven others) had engaged for more than 15 years in bid rigging activities in relation to public tenders launched for the rendering of computing services, aimed at increasing the prices of those services. Fines amounted in total to around €30 million, the highest amounting to €13.5 million and the minimum to €46,760.

(iv) Business parcel services (file S/DC/0578/16) ("business parcel services"): In this case, the CNMC found that several companies operating in this area of business (General Logistics Systems Spain, S.A., Correos Express Paquetería Urgente, S.A., Redyser Transporte, S.L., Fedex Spain, S.L., among others) had engaged for several years, some of them for more than 10 years, in nine cartel agreements, which included "non-aggression" and market share clauses. Fines amounted in total to €68 million, the highest one being €19.635 million and the minimum €690,400, but, out of a leniency measure, the cartel members companies that denounced the cartel (General Logistics Systems Spain, S.A., and parent companies) were exempted from paying their fines (€3.8 million).

Of the said four cartel procedures, two (batteries and business parcel services) were initiated following a leniency request submitted by companies taking part in the cartels. In the business parcel services case, a leniency exemption, to the amount of €3.8 million, was applied to the participating company that brought information on the cartel to the CNMC (General Logistics Spain, S.L.).

In 2019, the CNMC has initiated several investigation procedures and adopted several sanction resolutions on cartels, the most important of which are the following:

a) Investigations on possible collusion practices in the markets of (i) management of archives, (ii) consulting services, (iii) road maintenance, (iv) solid fuels, and (v) freight loading and unloading.

b) Sanction resolutions:

(i) Railways electrification and electromechanics maintenance (file S/DC/0598/2016, decided on 14 March 2019): In this case, upon denunciation filed by one of the cartelists (Alstom, S.A.), the CNMC found that 15 companies in the businesses of electrification, electric maintenance and electromechanics maintenance for railways (Alstom, S.A., Electrén, S.A., Sociedad Española de Montajes Industriales, S.A., Isolux Ingeniería, S.A., Siemens, S.A., among others) engaged in three different bid-rigging cartels, one per business, with a view to optimise their bids in public tenders launched by ADIF, the Spanish public body in charge of the railway infrastructure. Fines to the companies amounted in total to more than €118 million, the highest single fine amounting to €27.2 million, but out of leniency measures, the cartel member that denounced the cartel was exempted from its fine and another, one that provided relevant information to the CNMC (Siemens, S.A.), saw its fine reduced to 45%. In addition, the CNMC notified the sanctions to the National Public Procurement Advisory Board, so that the sanctioned companies can be excluded from participating in public procurement procedures for a certain period of time, and decided to apply fines to top executives of some of the sanctioned companies, which amounted in total to €666,000.

(ii) Tobacco (file S/DC/0607/17, decided on 10 April 2019): In this case, the CNMC found that three tobacco manufacturers (Philip Morris Spain, Altadis and JT International Iberia) and a distributor of their products (Logista) established a cartel for the exchange of sensible information on the sales of cigarettes between 2008 and 2017. Fines to the companies amounted in total to more than €57.71 million, the highest single fine amounting to €20.98 million.

(iii) Dairy industry II (file S/0425/12, decided on 11 July 2019): In this case, the CNMC found that 10 dairy companies participating in the raw milk market (Calidad Pascual, S.A., Celga, S.L., Corporación Alimentaria Peñasanta, S.A.,

Danone, S.A., Nestlé España, S.A., and five others) engaged in a cartel, between 2000 and 2013, for the exchange of information that allowed them to coordinate commercial strategies before their providers, the milk producers. Fines to the offender companies amounted in total to €80.6 million, the highest single one reaching €21.86 million. Nonetheless, the CNMC decided not to apply six of those fines on the ground that it considered that the infringements could no longer be sanctioned out of the applicable time limitation.

(iv) Industrial assembly and maintenance (file S/DC/0612/17, decided on 1 October 2019): In this case, the CNMC found that 19 companies (ACSA, Duro Felguera, Grupo Navec, Envesa Operaciones, S.A., HGL, IMASA, etc.) dedicated to industrial assembly and maintenance had established a cartel, under which they had been setting prices and market shares in this market between 2001 and 2017. Fines to the companies amounted in total to €54.26 million, the highest single fine being €14.65 million, but out of leniency measures, the cartel member that denounced the collusion (Grupo Navec) was exempted from its fine and another, one that provided relevant information to the CNMC (Envesa Operaciones, S.A.), saw its fine reduced to 50%. In addition, the CNMC notified the sanctions to the National Public Procurement Advisory Board, so that the sanctioned companies can be excluded from participating in public procurement procedures for a certain period of time, and applied also fines to top executives of some of the sanctioned companies, which amounted in total to €280,500.

2. In 2019, at judicial level, the *Tribunal Supremo* ("Supreme Court") and the *Audiencia Nacional* ("National High Court") ruled on several occasions on cartels, among which it is worth mentioning the following:

   a) From the Supreme Court (Administrative Chamber):

      (i) Ruling n. 188/2019 (cassation procedure 5624/2017), which, in a cassation appeal filed by the CNMC, confirmed a ruling given by the National High Court, that upheld a lawsuit filed by Telefónica Móviles España, S.A., a telecom operator, against a €25.78 million sanction imposed to it by the CNMC for having engaged in vertical agreements with some of its entrepreneurial clients, that, though not illegal as such, included certain permanence clauses (which restricted termination by the clients) that were deemed anticompetitive (case S/0422/12). In this case, the Supreme Court upheld the *a quo* ruling because, out of its limited powers to analyse facts in cassation procedures, it saw no exceptional reasons that would allow it to replace the facts considered proven by the National High Court by those deemed by itself proven.

      (ii) Ruling n. 244/2019 (cassation procedure 2593/2018), which repealed a ruling given by the National High Court, that had partially confirmed a resolution applied by the CNMC in 2014 (case S/0430/12) to Unión de Empresas de Recuperación, S.L., and several other companies operating in the markets of recycled paper (acquisition of used paper for recycling and sale of recycled paper), that had applied fines of more than 3.6 million in total, on the ground of those companies having engaged in an horizontal cartel used to share the market, set prices and exchange relevant commercial information. In its cassation ruling, the Supreme Court considers that the evidence against the appellant (Unión de Empresas de Recuperación, S.L.) was illegally obtained and as such could not validly ground a sanction resolution.

      (iii) Ruling n. 430/2019 (procedure 6360/2017), which confirmed a ruling given by the National High Court, that dismissed an appeal filed by the Secretary

of the board of Amurrio Ferrocaril y Equipos, S.A., a manufacturer of rail infrastructure, against a resolution of the CNMC that had applied a €6,000 sanction, pursuant to Article 63.2 SCA, that, in case of infringements committed by juridical persons, allows for sanctions to be applied not only to the infringer undertaking but also to members of its board of directors. This ruling is relevant insofar as it extends the application of the regime foreseen in Article 63.2 SCA – which foresees the sanctioning of physical persons that participated in the decisions that led to the legal person infringing the competition legislation – to a person who, though being a secretary of the board of directors of a sanctioned legal person, is not himself a director of this and as such could not participate in the decision that lead the company to be sanctioned by the CNMC.

(iv) Ruling n. 674/2019 of the Administrative Chamber (Cassation procedure 2117/2018), which repealed a ruling given by the National High Court, that had upheld an appeal filed by Repsol, S.A., the mother company of an oil & gas group of companies, against a 2015 resolution of the CNMC that had applied a €20,000,000 fine to such company for a collusion conduct carried out by one of its fully controlled subsidiaries. In this ruling the Supreme Court sustained that, pursuant to Article 61.2 SCA, Repsol, S.A., was liable for the conduct of one of its subsidiaries insofar as it could not provide evidence that it had not determined the economic conduct of the offender subsidiary.

b) From the National High Court (Administrative Chamber):

(i) A ruling given on 28 January 2019 (appeal against an administrative decision 646/2015) (case Microlan), which declared void and of null effect a sanction resolution of the CNMC, in relation to a €580,794 fine applied to Microlan, S.A., the appellant) in a sanction procedure where it was found that such company and several other manufacturers of paper and corrugated carton had engaged in collusion conducts in those markets (case S/0469/13). In this ruling, the National High Court understood that, when the appealed resolution was given, the infringement had already lapsed by operation of the time limitation foreseen in Article 36 SCA.[15]

(ii) A ruling given on 27 May 2019 by the Sixth Section (appeal against an administrative decision 188/2015 (case Cobendai), which declared void and of null effect a resolution of the CNMC (case S/0488/13) that had applied a €406,755 sanction to Cobendai, S.L., a Hyundai concessionaire in the region of Madrid, for having engaged in collusion practices (setting of prices and commercial terms and conditions and exchange of relevant commercial information regarding the sales of Hyundai cars in the Spanish market) with other concessionaires in the said region. In its ruling the National High Court understood that, although there was some evidence that Cobendai took part in the setting up of the cartel agreement, there is no evidence that it actually complied with rules of the same and, as such, there came to exist no infringement by it of Article 1 SCA that could validly be sanctioned by the CNMC.

(iii) A ruling given on 8 July 2019 (appeal 304/2015 (case Auto Pla de Vic 4per4)), which declared void and of null effect, in relation to the fine applied to Auto Pla de Vic 4per4, S.L., the appellant (€114,852), a 2015 sanction resolution of the CNMC (case S/0487/13) that applied fines, amounting, in total, to €3.25 million, to 12 car dealer companies, for having participated in a cartel aimed at, among others, the setting of prices and the exchange of relevant commercial information, in the regions of Madrid and Barcelona. In this case, the National

High Court considered that the participation of the appellant in the cartel was not beyond a reasonable doubt – and this on the ground that the only evidence of the infringement was an internal email sent by one of those companies where the appellant was mentioned as a cartel member – and, as such, that there came to exist no infringement by it of Article 1 SCA that could validly be sanctioned by the CNMC.

Key issues in relation to enforcement policy

The CNMC has the authority to decide not to initiate proceedings following a complaint, but only when the Competition Directorate considers that, in the case brought to its attention, there seem to be no infringement of competition rules (Article 49 (3) SCA). Notwithstanding the fact that this provision does not leave much room for an enforcement policy that sets priorities in the use of the scarce resources available to enforce competition rules, the fact is that room exists, although only in relation to the investigation activities carried out at the CNMC's own discretion.

In relation to those investigation activities, there are key issues in enforcement policy that tend to change from time to time, as the circumstances of the economy and the authorities' views on *what to do* in order to better enforce competition rules, also change. In the case of the CNMC, on the ground of its recent creation, seen in the fact that its first managing board, the Council, is still pending renovation by the Government, it seems that the time to see significant changes in its enforcement policy has not yet come.

Nonetheless, since 2015, the CNMC has been approving annual programmes where it defines the general strategic measures to be taken in the year and the measures specifically foreseen for each of the sectors over which it has regulatory powers and in terms of enforcement of competition rules. In 2018, it created the Department of Economic Analysis, in charge of analysing public procurement data and surveying sectors where sensible competition issues have already been identified.

For 2019, the CNMC's annual programme has set, among others, the following priorities: (i) advise the Government in the transposition of the Directive (EU) 2019/1, 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, known as the "ECN+ Directive"; (ii) strengthen the capacity to initiate, on its own, sanction procedures for the infringement of the competition legislation; (iii) strengthen the surveillance of the sanctioned companies with a view to detect unfulfilments of the CNMC's resolutions and adopt the corresponding measures; (iv) develop a framework of procedures to be used by public bodies in relation to public procurement, with a view improve efficiency of the tenders; and (v) analysis of the functioning of the markets that depend on digital economy, with a view to improve the surveillance of the same.

Besides, in 2019, as announced in the year before, the CNMC has taken, among others, the following measures: (i) disclose guidelines on the drafting of economic reports to be submitted within certain complex procedures; (ii) allow oral pleadings in certain complex procedures; (iii) reinforce the economic background of its resolutions; (iv) develop a technical framework for the analysis of public procurement tenders and auctions, with a view to improve its standards and efficiency; and (v) improve the defence of its resolutions before the courts.

In addition, following the importance given to the digital economy by its chairman, Mr. José María Marín Quemada (2013–), an economist, the CNMC has identified as priority areas of its competition enforcement activity in 2019 certain areas of business where the use of the internet, as a platform from which business is conducted, has been expanding (financial

sector, transportation and public procurement). Other areas also identified as priorities for the CNMC in this year are television advertisement, pharmaceutics, hospitals, ports' services and agriculture.

Key issues in relation to investigation and decision-making procedures

As commented before, investigation of cartel activity is carried out by the Competition Division through its Cartels and Leniency Subdivision, which has powers neither to initiate sanction procedures nor to apply sanctions, these powers being vested in the Council. This has been understood as enough to observe the usual rule in sanction procedures that requests that the power to investigate and the power to punish are vested in different persons or organs. Nonetheless, since the creation of the CNMC, there has always been a discussion of whether this would be sufficient to make the CNMC strong enough to impose fines for competition law infringements to companies with which it has close and frequent relations, not on the ground of being a competition authority, but on that of being also the authority in charge of most of the regulated sectors (energy, telecommunications, etc.). That is to say, the weakness of the CNMC as a competition authority would lie not so much on the fact that the distinction between who investigates and who punishes is not much more than formal,[16] but on the fact that who is in charge of regulating a sector may not seem very well positioned to punish competition infringements by companies operating in the same sector.

Though the said argument ignores the fact that competition laws apply not only to companies operating in regulated sectors but also to companies in the other sectors of the economy, the truth is that companies operating in regulated sectors – on the ground of being only a few and having, as such, high turnover and big market shares – are prone to being applied high fines in case of infringement of competition rules, precisely those for which strength and independence on the part of the competition authority are mostly required.

Anyway, notwithstanding the above arguments used against the CNMC, after more than six years of activity, there is no doubt that this agency has been independent and strong enough to impose heavy fines for competition infringements to a high number of companies from different sectors of the economy, including many operating in sectors regulated by it. Therefore, it seems that, at least in this point, the concerns raised by the creation of the CNMC have proved to be somewhat ungrounded.

Nonetheless, if independence and strength have proved not to be an issue, some argue, not always with reason, that the same cannot be said of the CNMC's skills to deal with complex cases, for lack of, either of economic vision, which leads cases not be handled in an efficient manner, at least from an economic point of view, or of legal assertiveness, which has lead many sanction resolutions, most of them adopted before 2016, to be declared void and of no effect when reviewed by courts. Regarding these CNMC's resolutions, many of them were repealed on mere formal grounds (*e.g.*, lack of notification of certain interim decisions to the investigated parties or of hearing of these, etc.), something that generated criticism and frustration, notably from members of its own Council.

Leniency/amnesty regime

Articles 65 and 66 SCA, as developed and implemented by Articles 46 to 53 of the Competition Regulation, allow the CNMC to grant exemptions from payment of fines, or reductions in the amount of them, to undertakings or individuals that inform the CNMC of the existence of a cartel and of their participation or responsibility in the same, accompanied by the substantive evidence at their disposal or which may be obtained through an internal

investigation, provided the requirements and conditions thereto laid down in the SCA and in the Competition Regulation are duly met.

The SCA establishes an exemption of sanction for the members of a cartel that bring evidence to the CNMC of the existence of (i) sufficient clues to ground an investigation of the cartel, or (ii) of the infringement of the Prohibition – when, in this second scenario, no exemption has been given to any person on behalf of the former (Article 65.1) – provided that she cooperates with the CNMC and, among others, ceases to participate in the cartel (Article 65.2).

In addition, Article 66 SCA provides for a reduction in the sanctions to those individuals or companies participating in a cartel, that, without meeting all the requirements foreseen for the exemption granted by Article 65, at least meet some of them, and notably that of cooperating with the CNMC in the investigation, by providing evidence deemed relevant in comparison to that already gathered by such Commission.

In June 2013 the extinguished competition authority, the *Comisión Nacional de la Competencia*, approved a clemency programme under the SCA, which follows the leniency programme of the European Commission and which the CNMC has been applying since its creation. The notice of the programme, published in the Official Gazette in August 2013, includes detailed rules on the requests for exemption and reduction of the fines, the collaboration to be provided by the offenders and confidentiality, as well as an exhibit with the model form to be used by companies and undertakings that request leniency measures.

In 2019, the CNMC used this programme to exempt several offenders from fines, or to reduce the amount thereof of several offenders. An example of this is the mentioned business parcel services case, where, as mentioned, the CNMC exempted the members of the cartel that informed of the conduct from paying a fine to the amount of €3.8 million out of a leniency measure applied to such offenders.

Administrative settlement of cases

Following the solution devised by the EU Regulation, Articles 52 of SCA and 39 (5) of the Competition Regulation set a route for the termination of sanction proceedings without the application of a sanction to the offender. Under this provision, the Council of the CNMC, following a proposal by the Competition Division, has the authority to terminate sanction proceedings on cartel activities, when the alleged offenders have offered to bind themselves to eliminate the damages arising out of the investigated conducts, in terms deemed to sufficiently protect the general interest.

The offer is converted to a commitment once the Council adopts the decision to terminate the proceedings. Such decision cannot be taken after the termination of the investigation phase and the notification to the alleged offenders of the draft of the Resolution of the proceedings.

Though the administrative settlement of cases is different from a leniency programme – notably on the ground that, in such case, the sanction proceedings are not opened on the basis of information provided to the CNMC by a company or undertaking participating in a cartel – it can lead to the non-application of sanctions to the offender, which is, by all means, a form of leniency.

Though the CNMC has administratively settled several cases (*e.g.* abuse of dominant position), so far there is no notice of a cartel case having been settled in these terms.

Third party complaints

Third parties (*e.g.*, customers of cartel participants) can denounce cartels as well as other anti-competitive conducts that they see as infringing the SCA and actually a substantial part

of the CNMC's sanctioning procedures are opened following a complaint filed by a third party. For example, the 2015 investigation of the mentioned public tenders' case, which, as mentioned, led to fines of almost €30 million, was opened on the ground of a complaint filed by one of the acquirers of those services.

The complaint needs to be submitted through the CNMC's webpage and include the data foreseen in Article 25 of the Competition Regulation. Data foreseen in Exhibit I of this Regulation can also be included in the complaint, although this is not mandatory.

Participants have the right to be notified of the CNMC's decision to open sanctioning proceedings or to set the case aside following the submission of a complaint. This decision, which is taken by the Council of the CNMC, following a proposal by the Competition Division, can be challenged before the courts.

In case the CNMC decides to initiate sanction proceedings, informers, as interested parties, have the right to (i) access those proceedings, with the exception of documents therein with commercial secrets belonging to other parties, (ii) request evidence, (iii) file pleadings, and (iv) receive notifications of certain developments produced in the same and, notably, receive the list of conducts that the Competition Division deems as foreseeably breaching the competition rules, and the draft of the resolution that ends the sanction proceedings (Articles 31–33 of the Competition Regulation).

Nonetheless, with a view to increase the number of infringements brought to the attention of the CNMC, it has announced, in early 2018, that it will authorise complaints to be filed without the need to disclose the name of the person/company that fills them.

Penalties and sanctions

As mentioned before, the CNMC has the authority to apply sanctions to offenders of competition rules, either in the form of fines or in that of periodic penalty payments.

Pursuant to Article 63 SCA, fines can be up to 10% of the turnover of the offender in the preceding business year. Apart from establishing an upper limit, as this provision does not include any guidelines on exactly how the fine should be set, in 2009 the predecessor of the CNMC, the National Competition Commission, approved some guidelines on the subject.

Nonetheless, in 2015 in its ruling 112/2015 (appellation 2872/2013), the Administrative Chamber of the Supreme Court ruled that the 2009 Guidelines did not comply with the provision of Article 63 SCA and set some criteria that the CNMC has been following since then ("Criteria").

In accordance with the Criteria, the said 10% upper limit is not a cap to be applied to a previously determined sanction, as it had been understood before, but the true upper limit of the fine range, whose amount needs to be set in accordance with the seriousness of the infringement to be sanctioned, the 10% amount being restricted to the most serious infringements only. In addition, the relevant turnover for the purpose of determining the said upper limit is the global turnover of the offender, which comprises not only the one corresponding to the market where the infringement was committed but also those corresponding to the remaining business activities of the offender.

In order to set the amount of the fine, the Criteria distinguish between the *general* amount – which is based on the nature of the infringement in itself, corresponding to around 60% of the upper limit – and the *specific* one – which takes into consideration the circumstances of the infringement (duration and positive/negative aspects of the conduct of each of the companies to be sanctioned and the dimension of the market affected by the infringement),[17] corresponding to the remaining 40% of the upper limit.

Nonetheless, in accordance with the Criteria, the sum of the said *general* and *specific* amounts

corresponds to the final amount of the fine if such sum is deemed to be proportionate to the "relevance of the conduct of the infringer", bearing in mind the importance of the business activities for which the infringer is to be sanctioned in her global turnover and the profits generated by the conduct to be sanctioned. Based on this, the fine should neither be smaller than the amount of those profits nor substantially higher than the same. Therefore, in case the sum of the general and the specific amount lies out of those limits, the amount of the fine needs to be adjusted accordingly.

In October 2018, with a view to detail the Criteria established by the mentioned 2015 ruling of the Supreme Court, the CNMC published new Guidelines on the setting of fines. In these new Guidelines, the CNMC discloses how it has been interpreting the Criteria since 2015 and sets out some additional rules aimed at assuring that the mentioned *general* and *specific* fine amounts are adjusted to the effective economic impact of the infringement. For that, it devises a so-called (upper) limit of proportionality to which every fine needs to be lowered in case the sum of the *general* and the *specific* amounts is higher than that limit.

Right of appeal against civil liability and penalties

1. Rulings on civil liability given by the Courts of Commerce, which are provincial and based on the capital of each province, can be appealed before the corresponding Provincial High Court (*Audiencia Provincial*), also based on the province capital. The Provincial High Courts hear the cases in second instance, which means that their rulings can be based on facts different from those accepted by the rulings given by the *a quo* courts. Nonetheless, the appellate powers of these courts are limited by the grounds foreseen by the appellant in her pleadings.

   The appellate rulings are appealable in cassation before the Civil Chamber of the Supreme Court, based in Madrid. The grounds for cassation of the rulings given by the Provincial High Courts are those foreseen in general terms in the 2000 Civil Procedure Act, according to which a ruling given by a Provincial High Court is appealable in cassation on any of the following types of grounds: (i) where the *a quo* ruling deals with fundamental rights, except the right to the due process of law foreseen in Article 24 of the Spanish Constitution; (ii) when the amount of the proceedings exceeds €600,000; or (iii) if that amount is lower or the proceedings have been conducted due to their subject matter, when the hearing of the appellation has "cassation interest" (Article 477 (2)).[18]
2. With regards to public enforcement, the trying of the decisions by the CNMC is vested in the Administrative Chamber of the National High Court, based in Madrid, which hears the cases in unique instance. The rulings given by this Court are appealable in cassation before the Administrative Chamber of the Supreme Court, also based in Madrid.[19]

   The grounds for cassation of the rulings given by the said Chamber of the National High Court are those foreseen in general terms in the 1998 Contentious Administrative Proceedings Act, according to which a ruling given by the Administrative Chamber of the National High Court is appealable in cassation on one or both of the following types of grounds: (i) infringement of procedural rules in the proceedings followed in the said *a quo* court; and (ii) infringement of any rules and or case law applicable to the case being heard (Article 88).

Criminal sanctions

The Spanish legislation does not qualify as a crime any of the conducts forbidden by the competition legislation. The criminalisation of certain anticompetitive conducts has been discussed on several occasions, but the legislator has always opted to keep things as they have been since anticompetitive conducts began to be punishable under the 1963 Competition

Act. In the case of cartel behaviour, when forbidden, it is also deemed as an administrative infringement, sanctioned with penalties, applied by the CNMC, and which, in no case, are deemed to have criminal sanction nature.

Notwithstanding the above, certain anticompetitive conducts may be deemed a crime, if they are qualified as such under a broader rule not specifically devised to punish those types of conducts. That is notably the case of several fraudulent schemes seen in public procurement tenders (bid rigging) – where several bidders collude to increase prices, if acting as sellers, or to lower them, if acting as buyers, thus generating a direct loss to the launcher of the tender or auction and an indirect one to taxpayers and the whole economy – which are punishable, under Article 262 of the Criminal Code, with imprisonment from one to three years and several ancillary and several ancillary sanctions, which are more severe when the tender or auction has been called by a public body.

Cooperation with other anti-trust agencies

The CNMC cooperates with several competition authorities, both at EU level and with national authorities from other Member States, and is a member of the European Competition Network ("ECN"), a network integrated by those authorities and the European Commission, that, in the words of the CNMC, "*facilitates compliance with the obligations on cooperation imposed by legislation in the European Community, and which ensures consistent and effective application of the regulations on defence of competition, while also allowing sharing of experiences and identification of best practices*".

The CNMC also participates in the European Competitions Authorities Forum ("ECA"), a forum which the CNMC describes as focused on discussion of experiences and exchange of information on good practices among competition national authorities from Member States of the European Economic Area; and takes part in the Committee on Competition from the OECD, on behalf of Spain, which concentrates on the distribution and exchange of knowledge and experiences in the defence of competition.

In addition, the CNMC is a member of the Latin-American and Caribbean Competition Forum, a project of the OECD and the Inter-American Development Bank that supports the application of competition policies in Latin America and the Caribe. In the 2018 edition of the said Forum, the sixteenth, which took place in Buenos Aires, Argentina, the CNMC, among others, submitted a paper on the estimation of damages caused by cartels.

It also sponsors, together with the competition authorities from Portugal, an Ibero-American Forum on Competition, which meets once a year with competition authorities from the Caribe and the Ibero-American countries, with the purpose of establishing ties with them.

The CNMC also organises bilateral summit meetings with competition authorities from other countries, the most recent of which took place in 2018, with the French competition authority.

Finally, in January 2019, the CNMS signed a Memorandum of understanding with the Moroccan competition Authority, with a view to (i) reinforce cooperation on the competition legal framework and policy, and (ii) exchange information and technical assistance.

Cross-border issues

In accordance with the EU Regulation and the SCA, the CNMC has the authority to enforce not only the national competition rules, but also such regulation, when an infringement of Article 101 TFEU, *i.e.* one that affects competition in the EU market, occurs at least partially in Spain (Article 5 Law 3/2013).

The performance of this power may lead the CNMC to exert extra-territorial jurisdiction,

in the sense that it can investigate the effects, in other EU Member States, of cartels whose practice occurs at least partially in Spain, or impose fines which take into account the effect of the forbidden conduct on territories outside of Spain.

In cases where the applicable legislation is the SCA, there could exist also grounds for the CNMC to exert extra-territorial jurisdictions, whenever part of the investigated or sanctioned conducts had taken place outside of Spain. Nonetheless, none of the proceedings initiated or terminated in 2018 which we had knowledge of, led the CNMC to exert such jurisdiction.

The Spanish authorities and courts regularly cooperate with authorities and courts in other jurisdictions when they are requested to do it, particularly in what concerns the notification of the initiation of proceedings. In 2018, the CNMC notified the ECN of the initiation of five proceedings for the enforcement of Articles 101 and 102 TFEU.

Developments in private enforcement of competition laws

1. In Spain private enforcement of competition law and, as such, that of the Prohibition, has been in place for some time, and notably before the enactment of the SCA in 2007. As a matter of fact, although, in the first few decades of the Spanish competition legislation private enforcement was not specifically foreseen, and the mainstream understanding was that competition rules were aimed at protecting general interests – not private rights – and, as such, that the infringement of those rules could not be a ground for claiming damages – courts began to accept the existence of the right to claim those damages long before the legislation opted to specifically rule this matter. Whilst before 2007 no provision expressly foresaw such enforcement,[20] courts began to accept that the right to claim damages caused by infringement of competition rules was covered by general rules and principles that allow for the claim, by an individual or a juridical person, of any damages suffered as a consequence of the infringement of any laws, as was upheld by a ruling given by the Civil Chamber of the Supreme Court in 2000.[21]

   Nonetheless, the enactment of the SCA significantly upheld such enforcement by (i) entrusting the Courts of Commerce with the power to decide any controversies arising out of the infringement of Articles 1 and 2 of the same, and (ii) by repealing the need, foreseen in the long repealed 1989 Competition Act, to have a decision of the competition authority that sanctions a conduct, as a condition for any claim for damages to be admitted by the courts.

   In 2017, with the transposition of the Directive 2014/104/EU, by Royal Decree Law 9/2017, which added several provisions to the SCA – and, notably, a title (VI) on compensation of damages – private enforcement of competition law in Spain received a new impulse.

   The provisions of Title VI of the SCA (Articles 71–81) cover relevant issues on the damages claims caused by the infringement of competition laws, and, notably, the principle of full indemnity of damages, the determination of the amount to be indemnified and the burden of proof, some of them already covered, though in very general terms only, by the civil torts' legislation (Article 1902 of the Civil Code).

   Following Article 3 of the Directive 2014/104/EU, Article 72 SCA provides for the existence of a right to full compensation of damages, adding that such compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed, which means the right to compensation for actual loss and for loss of profit, plus the payment of interest accrued since the date when the damages were caused. Nonetheless, pursuant to this provision, full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

In order to avoid overcompensation, Article 78 SCA provides that compensation amounts to the damages effectively suffered by the claimant, which excludes any amounts passed on, i.e., "*compensation for actual loss at any level of the supply chain cannot exceed the overcharge harm suffered at that level*". The courts have the power to estimate the share of any overcharge that was passed on.

As to the burden of proof, we need to distinguish between the burden of proof of the infringement and the burden of proof of the damages. Regarding the burden of proof of the infringement, Article 75 SCA sets forth that "an infringement of competition law found by a final decision of the CNMC or by a Spanish court is irrefutably established for the purposes of an action for damages for the infringement of competition rules". As to the burden of proof of damages, Article 76 SCA establishes that it shall be presumed that cartel infringements cause harm, although the infringer shall have the right to rebut that presumption. In any case, the burden of determining the amount of damages suffered is upon the plaintiff. If this fails to comply with that burden, it will be up to the court to estimate such amount (Article 76 (2) SCA).

In case of more than one offender, liability for the damages is joint and several (Article 73 (1) SCA). Therefore, if an offender pays the victims more than its *share* of the damages, she will have the right to recover from the other offenders the amounts paid in excess (Article 73 (5) SCA).

The limitation period for claiming an indemnity for damages caused by an infringement of the Prohibition is now five years (Article 74.1 SCA), which is substantially higher than the one foreseen in the general torts' legislation (one year)[22], though this is not applicable with retroactive effect in relation to the 2017 reform (first additional provision of the Royal Decree Law 9/2017). The said limitation period is suspended, among others, for the duration of any consensual dispute resolution process between the parties.

2. The reform carried out by Royal Decree Law 9/2017 did not only affect substantive law matters but it also extended to procedural ones, by amending the 2000 Civil Procedure Act. The said piece of legislation added a section (1st Section *bis* of Fifth Chapter of the Second Title of the Second Book) to the said Civil Procedure Act, with Articles 283 *bis* a) to 283 *bis* k), on evidence in damages proceedings for the infringement of competition rules. The most significant innovation in this matter has to do with the disclosure of evidence by the defendant, or would-be defendant, at the request of the plaintiff, which may now be ordered by the court, if certain requirements thereto are duly met. The failure of the requested party to comply with a court order on this may generate several negative consequences for such party, including the application by the court of daily fines of up €60,000, let alone be a ground for the initiation of a criminal procedure on charges of a commission of a crime of disobedience (Article 283 *bis* h)).

   In 2019 so far there have been very few court rulings on damage claims filed by victims of cartels, and some of them were not in relation to cartel infringements forbidden by the SCA but by the EU Regulation. Among them it is worth mentioning the following:

   (i) Order of the Supreme Court (Civil Chamber) of 26 February 2019 (procedure 262/2018), in which it rules on a jurisdiction conflict between two Courts of Commerce, one of Valladolid and the other of Valencia, concerning the territorial jurisdiction with authority to hear a cartel damages lawsuit filed by the acquirer of a truck against the seller of the same, the Spanish subsidiary of the conglomerate Volvo Renault SAS which had been sanctioned by the European Commission for certain collusive conducts. In the absence of a provision that specifically covers this issue, the Supreme Court ruled that the court with territorial jurisdiction to hear

damages cases arising out of collusive conducts is (i) the one corresponding to the area where the defendant has its place of business, (ii) in the absence of this, the one where it has its headquarters, or (iii) if the headquarters are outside of Spain, the one corresponding to the area where the collusive conduct took place or where its effects were felt, at the discretion of the plaintiff.

(ii) Ruling n. 161/2019 of the First Court of Commerce of Bilbao on 3 April 2019 (case 720/2018), that partially upheld a cartel damages lawsuit filed by Eulen, S.A., an acquirer of seven IVECO trucks, against the two sellers of the same, which were included in a Decision of the European Commission that had sanctioned the IVECO manufacturer for cartel practices. In this ruling, the said court decided that the damages claimed amount (around €225,000) could not be proved, because the experts report submitted by the plaintiff did not follow the rules applicable to the quantification of the damages, and, as such, in accordance with the provision set forth in Article 76 (2) SCA opted to set the damages in the amount of 15% of the price of each of the trucks, which lies within the lower and higher average cartel damage levels disclosed by the European Commission in its 2009 study *Quantifying antitrust damages; Towards non-binding guidance for courts*.

(iii) Ruling n. 470/2019 of the Court of Appeals of Murcia on 20 June 2019 (appeal procedure 180/2019), whereby it fully confirmed a ruling by the First Court of Commerce of Murcia that had dismissed a cartel damages lawsuit filed by a person who had acquired two MAN tractor heads in 2008, against the company (Man Financial Services España, S.L., a company included in the Man group at that time) that had leased those vehicles to it. The lawsuit was based on a cartel of several car manufacturers, including several companies belonging to the Man group, whose existence had been declared by the European Commission in a Decision dated 19 July 2016. In its ruling the *ad quem* court understood that the defendant was not included in the said Decision and, as such, the defendant's liability for any damages caused to the plaintiff by the sanctioned collusion conducts would have to have been proved by the plaintiff, who failed to comply with the burden of providing evidence of the defendant's engagement in those conducts.

Reform proposals

For the time being there are no substantial outstanding proposals for reform of the Spanish national competition regime,[23] although the debate about the institutional framework of the Spanish competition laws enforcement has been on the table since the creation of the CNMC in 2013.

The ideas behind the merger of the competition authority and some of the regulatory ones in the CNMC in 2013, which had to do with reducing costs, generating synergies and avoiding contradictions between regulatory and competition policies, have not been confirmed by the CNMC's practice in its first six years of existence. This and the mentioned weaknesses seen by many in the CNMC's institutional framework, had led the former Government, supported by the People's Party, in 2017, to consider revising the solution that itself had devised in 2013, with a view to get back to a regime similar to the one in place before the creation of the CNMC, *i.e.*, a regime that entailed a competition authority, with powers to investigate and sanction the infringements of the competition legislation, and several independent regulatory agencies, with powers to rule and sanction conducts except those foreseen by the said legislation.

For now, the current government, supported by the Socialist and several small non-mainstream

parties which has taken office in June 2018, is no longer in a position to move forward any reforms, insofar as, at the time of writing this chapter (October 2019), a parliamentary election has been called, something that, under the Spanish Constitution, reduces its powers to those of an acting government. Nonetheless, bearing in mind that several of the main parties have questioned the existing institutional framework of the competition laws, it would not be surprising if, in the end, the government that will come out of the election decided to dismantle the CNMC and move back to the independent agencies' regime with a stand-alone competition authority, by all means the most common regime in the EU. Another option that could be foreseeably considered is that of keeping the CNMC as a global regulator but with no authority on competition matters and entrust the enforcement of competition legislation to a new competition authority.

Anyway, what is being discussed for the time being is not the reform of the competition rules or that of the competition authorities but the reform of sectors where compliance with competition rules has long been a highly discussed issue, and the CNMC is playing a role in these discussions in its condition of consulting body in competition matters. An example of this is that of the regulated professions sector (architects, economists, engineers, legal professions, etc.), where not only the CNMC but also the competition authorities that preceded it, have found room for much improvement. Regarding this sector, in 2018, the CNMC published a report with its comments on the draft of an act to reform the conditions to access the professions of *abogado* (Spanish lawyer) and *procurador de los tribunales* (Spanish legal professional entrusted with powers to represent a party in court proceedings), where it basically supports the view that it is in the general interest that the acts reserved by the current legislation to the second of the said professions be also opened to lawyers.[24] In addition, in 2019, the CNMC has already had the opportunity to give its opinion on the draft of several pieces of laws and regulations with impact on competition (*e.g.* bylaws of several professional bodies, rent a car with driver services in Madrid, maritime transportation in the Balearic Islands, complementary legislation on trademarks).

* * *

Endnotes

1. In addition, Spain has enacted Law 3/1991, *on unfair competition*. This piece of legislation does not aim to protect competition in the markets, but each of the players in the markets (companies and consumers) from *unfair* acts and conducts, *i.e.*, committed in bad faith, of companies against other companies or consumers. Amongst others, this piece of legislation rules on the effects of unfair acts and conducts, by establishing a right of the companies or persons damaged by the same to be indemnified by the agents. Although Law 3/1991 does not specifically cover cartel activities, the pursuance of these might lead to the commission of unfair acts and conducts covered by the same.
2. This definition was given by Royal Decree Law 9/2017, which transposed several EU directives and notably Directive 2014/104/EU, of the European Parliament and the Council, *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, whose Article 2 (14) reads in the very same terms. Before that the Fourth Additional Provision of the SCA read the following: "*cartel is taken to be any secret agreement between two or more competitors which has as its object prices fixing, production or sales quotas, market sharing, including bid rigging, or import or export restrictions*". The most significant differences between the two versions have to do with the fact that, in the current version, neither secrecy of the agreement nor even the

existence of an agreement are requirements for the existence of a cartel. Instead of an agreement, a mere "concertation of practices" is now sufficient.

3. Now, Article 101 (3) of the TFEU.
4. Now, the below mentioned Commission on Markets and Competition.
5. Pursuant to Articles 13 and 15 SCA and 1 of Law 1/2002, the enforcement of SCA is shared by the CNMC with the regional competition commissions in each of the Spanish regional communities ("Regional Commissions"), which have established a department of such type, for the time being only 12 of those communities having done so.
   Basically, in accordance with such piece of legislation, the regional commissions engage in the enforcement of the Prohibition in case of agreements or conducts taking place within each of their territories, the CNMC keeping to itself the enforcement of the Prohibition in all other cases. Nonetheless, some Regional Commissions have not been given full powers in this matter but only some of them. Where there is no Regional Commission in place or where its powers do not cover the enforcement of the Prohibition in full but only a part thereof, the CNMC performs the corresponding powers (Transitory Provision of Law 1/2002).
6. In addition to such powers, Law 3/2013 has also vested the CNMC with powers to regulate several sectors (telecommunications, electricity, mail, railways, ports, etc.) that, before its creation, were entrusted to different regulatory boards and commissions.
7. In this chapter any reference to the Prohibition enforcement powers entrusted to the CNMC comprises those entrusted to the Regional Commissions by their corresponding bylaws, in accordance with the rules on assignment of enforcement powers to national and regional competition authorities foreseen by Law 1/2002. On this issue, see endnote 5.
8. Article 62 (4) SCA deems a cartel infringement as a *very serious infringement*.
9. In the case of juridical persons, in addition to the fines applied to such persons themselves, the SCA also foresees the applications of fines of up to €60,000 to the individuals that manage or are members of the board of the same or integrate the managing departments that played a role in the prohibited agreement or conduct (Article 63.2).
10. The composition and powers of the organs of CNMC are ruled by its bylaws, which were approved by Royal Decree 657/2013.
11. This provision entrusts the same powers to the European Commission in any procedures where what is a stake is the enforcement of Article 101 TFEU.
12. The use by the CNMC of the power to engage in dawn raids without the consent of the affected party or a court authorisation, on several occasions, has generated legal disputes, where the affected party, as plaintiff, requested the setting aside of the proceedings, out of the illegality generated by undue access to her premises. A recent example of this is the case heard by the Supreme Court, where this ruled, in cassation, in favour of the plaintiff (Repsol, S.A.) and against the CNMC, by annulling the information gathered in a dawn raid carried out on the premises of the said plaintiff (ruling given by the Administrative Chamber on 17 September 2018 – proceedings 2922/2016).
13. The figures for 2019 will be disclosed in the Annual Report for this year, due in early 2020.
14. In the end, Azor Ambiental, S.A. was not sanctioned, as the CNMC understood that the conducts of this offender had been investigated after the four-year lapse period foreseen in Article 68 (1) SCA, something that, *ipso facto*, makes their punishment void.
15. Anyway, this situation exists since the enactment of the SCA, which merged the *Servicio de la Competencia*, integrated in the Ministry of the Economy and with powers to investigate infringements, and the *Tribunal de Defensa de la Competencia*, in charge of applying sanctions, and replaced them by the mentioned *Comisión Nacional de la*

Competencia. At that time, the mainstream view was that this change strengthened independence at the time of investigating conducts, and this on the ground that the said *Servicio* integrated the Government and the new *Comisión* was independent from this.

16. These circumstances are those set in Article 64 SCA. Among the positive circumstances established therein, it is worth mentioning the one, added in 2017, consisting of the intent, by the infringer, to eliminate the effects of the infringement. This circumstance has a reinforced positive effect when the offender succeeds in fully eliminating those effects before the CNMC passes the corresponding sanction resolution.
17. Pursuant to Article 477 (3) of the 2000 Civil Procedure Act, there exists "cassation interest" when the *a quo* ruling is not in line with case law from the Supreme Court or there exist rulings from two or more Provincial Courts that rule on similar matters in contradictory terms, or where it applies rules that have been in force for less than five years, as long as, in the latter case, no case law from the Supreme Court exists concerning previous rules of identical or similar content.
18. The 2000 Civil Procedure Act also foresees an appeal of appellate rulings, called "extraordinary" for the infringement of procedure by an *a quo* ruling. This appeal, which, since its creation, has been subject to a transitory regime set forth in the Sixteenth Final Provision of the said 2000 Act, is based on any of the following grounds: (i) a breach of the rules on objective or functional jurisdiction and competence; (ii) an infringement of the procedural rules governing the judgment; (iii) a violation of the rules governing the procedures and safeguards of the proceedings, where such breach gives rise to the nullity of the ruling in accordance with the law or could have brought about a lack of proper defence; and (iv) a breach of the right to a due process, foreseen in Article 24 of the Spanish Constitution.
19. Apart from the mentioned Law 3/1991, *on unfair competition*, in its original version, which, though not foreseeing the indemnification of damages, was seen by some court rulings, as a ground thereto. A reform of this Act passed in 2009 amended Article 18 (now Article 32) of Law 3/1991 to expressly foresee the indemnification of damages caused by the unfair competition acts or conducts.
20. We refer to ruling 540/2000, whereby a sort of distribution agreement was deemed void, on the ground of infringing Article 81 (now 101) of the TFEU, and which included, as *obiter dicta*, statements on indemnification of damages caused by the infringement of competition rules.
21. Article 1968 of the Civil Code.
22. This ruling is one of several given in similar lawsuits filed by other companies sanctioned in the mentioned S/0469/13 procedure, where the National High Court found that no sanction could validly have been applied to the infringers by the CNMC on the ground of the lapsing of time foreseen in Article 36 SCA.
23. With the exception of those required for the transposition of the mentioned Directive (EU) 2019/1, of 11 December 2018, which will require, among others, the amendment of the SCA. Although the Government has not yet disclosed the draft of the piece of legislation that needs to be passed for the transposition of the said Directive, this will foreseeable happen in 2020, as all EU Member States are required to have it transposed by 4 February 2021 (Article 34).
24. Report with reference "IPN/CNMC/004/18", published in March 2018.

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