GLI GLOBAL LEGAL INSIGHTS

Cartels

Enforcement, Appeals & Damages Actions

2021

Ninth Edition

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glg global legal group

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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 up to the amount of €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 curia*, 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 intend 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 (March 2021), the last global figures on CNMC's enforcement activity are those disclosed by it in the 2019 Annual Report[13] ("Report"), published in early 2020.

In accordance with the Report, in 2019 the CNMC initiated several sanction proceedings for infringements of Article 1 of SCA, of which five were for bid rigging conducts in private and public tenders.

In that year, the CNMC terminated several sanction proceedings for infringements of Article 1 of SCA, of which two ended with a sanction resolution. Both resolutions sanctioned cartels that aimed at setting prices, markets sharing and bid rigging. Fines amounted in total to €172.55 million, of which €26.25 million was pardoned under the leniency regime. The said resolutions referred to the following cases:

(i) Railways electrification and electromechanics maintenance (file S/DC/0598/2016, decided on 14 March 2019 ("*Railways* case"): 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) 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, S.L., 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.

The said two cartel procedures were initiated following a leniency request submitted by companies taking part in the cartels. In the Railways case, in addition to several reductions, a leniency exemption, to the amount of more than €8.83 million, was applied to the participating companies that brought information on the cartel to the CNMC (Alstom,S.A. and other company of the same group), while in the other case, a similar exemption in excess of €9.33 million was applied to Grupo Navec on the same grounds. Since the beginning of 2020, 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) iron and steel industry, and (ii) real estate agency.

(b) Sanction resolutions:
   (i) Meteorological radar devices (file S/0626/18, decided on 13 February 2020): In this case, the CNMC found that three companies operating in the meteorological radars business (Adasa Sistemas, S.A., Schneider Electric España, S.A., and DTN Services and Systems Spain, S.L.) engaged in a bid rigging cartel that operated between 2014 and 2018, for the sale of meteorological radar devices to the AEMET, the Spanish meteorological office. Fines amounted in total to €610,000, the highest single fine amounting to €450,000.
   (ii) School buses (file SANAV/02/19, decided on 9 September 2020): In this case, the CNMC found that 33 companies operating in the school transportation business (Alberto Elcarte, S.L., Ativar, S.L., Autocares Albizua, S.L., Autocares Felix Gastón, S.L., and others) and a business association from this area established a bid rigging cartel for the award of contracts by the Regional Government of Navarra that operated between 2013 and 2018. Fines to the companies and the business association amounted in total to more than €3.55 million, the highest single fine amounting to €667,297.
   (iii) Solid fuels (file S/DC/0620/17, decided on 22 December 2020). In this case, the CNMC found that several companies operating in the trade of solid fuels (Félix de Inchaurraga, S.L., Grafitos Barco, S.A., Toro y Betolaza, S.A., Candel Energía, S.L., and others) established three cartels at different periods of time, each aiming at sharing markets and relevant information and at setting prices. Fines to the companies amounted in total to more than €3.56 million, the highest single fine amounting to €1,255,455. Executives of those companies who played a role in the cartels where also sanctioned with fines amounting to €51,400, the highest, and €4,800, the lowest.
   (iv) Radiopharmaceuticals (file S/0644/18, decided on 2 February 2021): In this case, the CNMC found that two companies operating in the radiopharmaceuticals production and distribution market (Advanced Accelerator Applications Iberia, S.L., and Curium Pharma Spain, S.A.) engaged in a cartel aimed at sharing clients from both the private and the public sectors. Fines to those companies amounted in total to €5.76 million, the highest one reaching more than €4.24 million.

(2) Since late 2019, at judicial level, the *Tribunal Supremo* ("Supreme Court") and the *Audiencia Nacional* ("National High Court"), the two high courts in charge of hearing cases on sanctions applied by the CNMC ruled on several occasions on cartels, among which it is worth mentioning the following:

(a) From the Supreme Court (Administrative Chamber):

(i) Ruling n. 1449/2019 (cassation procedure 5839/2018), which, on request of Rua Papel Gestión, S.L., a company operating in the business of production and sale of recycled paper, dismissed a ruling given by the National High Court that had partially upheld an appeal filed by that company against a resolution of the CNMC had applied a €354,888 sanction, pursuant to Article 1 SCA, for having engaged with several other companies in certain collusive activities in the said market (file S/0430/12). The National High Court did not revoke in full the appealed resolution, insofar as it understood that the CNMC had correctly applied the doctrine of "accidental discovery" previously devised by the Supreme Court, under which terms documentation accidentally seized in a certain sanction procedure can be used in a new one if its confiscation by the CNMC fully complies with the court order that had authorised the raid. In its cassation ruling, the Supreme Court considers that the *a quo* court had wrongfully applied the said doctrine, as, in this case, the court order that authorised the raid, granted for the purpose of a previous sanction procedure (file S/0415/12), in which the affected market was that of sanitary waste, did not cover the market under investigation in the mentioned file S/0430/12 (paper waste).

(ii) Ruling n. 95/2020 (cassation procedure 7458/2018), which, on request of the CNMC, dismissed a ruling given by the National High Court, that had partially upheld an appeal filed by an employee of FENIM, a business association, against a resolution of the CNMC that had applied to such physical person 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 "governing bodies" who had played a role in the sanctioned infringement. This ruling is relevant insofar as it clarifies that, in order for one such member to be validly sanctioned by the CNMC two requirements must be met: first, that the person was a member of a governing body of the infringer, no matter whether this body is singular or collective; and, second, that she played a role in the sanctioned infringement, even if such role was merely ancillary. Therefore, if one these requirements is not met, as it happened in the case of the mentioned physical person, there is no ground for sanctioning her.

(iii) Ruling n. 1403/2020 (cassation procedure 4227/2019), which, in a cassation appeal filed by the CNMC, revoked a ruling given by the National High Court, that had declared void a sanction applied by the CNMC to Alluitz Motor, S.L., for having engaged in cartel activities with several other companies, all concessionaires of Audi, Seat and Volkswagen vehicles (file S/0471/13). The National High Court had declared the appealed resolution void, based on the understanding that, although the appellant had participated with the other sanctioned companies in the cartel activities, it did not operate in the market affected by these activities. In this case, the Supreme Court revoked the *a quo* ruling and confirmed the CNMC resolution, as it understood that what is forbidden by Article 1 of the SCA is the participation in cartel activities, for these purposes being irrelevant that the company that engages in these activities operates in a market other than the one affected.

(iv) Ruling n.1822/2020 (cassation procedure 4038/2019), which, on request of the CNMC, repealed a ruling given by the National High Court, that had upheld an appeal filed by Innovaciones del Mediterráneo, S.A. ("IMSA"), a former concessionaire of Audi and VW cars in the region of Andalucía, against a

resolution given by the CNMC in 2015 (file S/0471/13). This resolution had applied to IMSA a fine of more than €101,510, for having engaged with other concessionaires in the same region in an horizontal cartel used to set prices and other market terms. The fine applied was not based on IMSA's turnover in the year before the one where the sanction is applied, as ruled in Article 63 of the SCA, as IMSA had had no turnover in that year, but on an indirect estimation based on the turnover acquired by the company to which IMSA had sold its business. In its cassation ruling, the Supreme Court considers that the appealed ruling, that had exempted IMSA from any fine, breaches the rule set out in Article 63 of the SCA and orders the CNMC to replace the said fine with a new one, not exceeding the original amount to avoid breaching the principle that forbids that an appeal ends with a *reformatio in pejus*, but calculated in accordance with the company's turnover in the year previous to the sale of its business.

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

(i) A ruling given on 18 February 2020 by the Sixth Section (appeal n. 676/2015 (case *Transportes Carlos*), which declared void and of null effect a resolution of the CNMC (file S/0454/12) that had applied a €47,657 sanction to Transportes Carlos, S.L., a company operating in the of refrigerated by road transportation market, for having engaged, between 1993 and 2012, with 11 other companies and a business association all in the same business, in collusion practices aimed at setting prices. In its ruling the National High Court understood that, although there was evidence that the appellant had participated in the cartel until 2008, there was no such evidence thereafter, which means that, when the CNMC initiated the sanction procedure (July 2013), the four-year time limit foreseen in Article 68.1 SCA for sanctioning the breaches of such piece of legislation had already elapsed, and, as such, there existed no cartel infringement that could still be validly sanctioned by the CNMC.

(ii) A ruling given on 16 October 2020 (appeal against an administrative decision n. 405/2014) (case *Aplicaciones y Transformaciones de la Madera*), which declared void and of null effect a sanction resolution of the CNMC, in relation to a €286,834.71 fine applied to *Aplicaciones y Transformaciones de la Madera*, S.L., the appellant) in a sanction procedure where it was found that such company and several other manufacturers of EUR palettes had engaged in collusion conducts (file S/0428/12). In this ruling, the Court understood that the sanction applied by the CNMC was not adjusted to the criteria set out in the ruling given in cassation by the Supreme Court on 29 January 2015 (cassation n. 2872/2013) and, as such, ordered the CNMC to recalculate it in accordance with such criteria.[14]

(iii) A ruling given on 21 December 2020 (appeal 477/2016 (case *Surgyps*), which declared void and of null effect, in relation to the fine applied to Surgyps, S.A., the appellant (€114,852), a 2016 sanction resolution of the CNMC (case S/DC/0525/14) that applied fines, amounting, in total, to €29.17 million, to 23 cement and concrete manufacturers, for having participated, between 1999 and 2014, in a cartel aimed at exchanging relevant commercial information, market sharing and setting of prices. In this case, the National High Court considered that there was no evidence of the participation of the appellant in the cartel, as the documentation in the proceedings related to the appellant did not constitute sufficient evidence that such company had taken part in an integrated plan

to continuously engage in the mentioned collusive conducts with the other sanctioned companies – 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 unfulfillments 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 former chairman, Mr. José María Marín Quemada (2013–2020), an economist, the CNMC has identified as priority areas of its competition enforcement activity in 2020 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 2020 were television advertisement, pharmaceuticals, hospitals, port 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,[15] but on the fact that who oversees 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 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 led 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 only one cartel case, the recently decided case n. S/DC/0573/16 (odontology services) has been settled in these terms. In this case, decided on 9 February 2021, the CNMC accepted to terminate sanction proceedings against two dental professional associations (*Colegio de Odontólogos de la 1ª Región* and *Consejo General de Colegios Oficiales de Odontólogos y Estomatólogos de España*) by accepting the offers made by each of these associations under which both assumed the obligation to eliminate damages arising out of the investigated collusive conducts (media campaigns against companies employing doctors to render dental services under a trademark).

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),[16] 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 outside 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)).[17]

(2) With regard 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.[18]

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 antitrust 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"), 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 2019 edition of the said Forum, the 17th, which took place in San Pedro Sula, Honduras, 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 2019, 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 may exist grounds for the CNMC to exert extra-territorial jurisdictions, when part of the investigated or sanctioned conducts had taken place outside of Spain. Nonetheless, none of the proceedings initiated or terminated in recent years 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 2019, the CNMC notified the ECN of the initiation of eight 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,[19] 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 because of the infringement of any laws, as was upheld by a ruling given by the Civil Chamber of the Supreme Court in 2000.[20]

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 damage 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.

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),[21] 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 2020 there were few court rulings on damage claims filed by victims of cartels that can be deemed innovative in terms of how they interpret competition laws and regulations, 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) Ruling n. 926/2020 of the Court of Appeals of Cáceres on 19 November 2020 (appeal procedure 499/2020), whereby it revoked a ruling by the First Court of First

Instance of Cáceres that had dismissed a cartel damages lawsuit filed by a person who had acquired four MAN trucks in 2008, against Man SE, the manufacturer of which the sellers of the trucks were concessionaires, on the ground that when the lawsuit was filed time foreseen thereto by the law had already lapsed. The lawsuit was based on damages caused by 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 began by understanding that the time to file the lawsuit had not lapsed, as, among others, such time could not be counted from the date when such decision was announced by the European Commission in a press release but from the date when it was published in the Official Journal of the European Union. Based on this, the court decided to hear the case, uphold the lawsuit and, as such, to condemn the defendant to pay a certain amount of damages to the plaintiff. In doing so, the Court dismissed a *passing on* argument used by the defendant, by saying that this failed to comply with the burden, imposed by the general procedural rules, to provide evidence that the overprice had been passed on, *i.e.*, that the plaintiff had actually sold those trucks in the same market, that of new trucks, for a price similar or higher than that for which it had acquired them.

(ii) Order n. 369/2020 of the Tenth Court of Commerce of Barcelona of 23 November 2020 (case 2182/2019), which, under the rule set out in the mentioned Article 283 *bis* l of the Civil Procedure Act, authorises a request filed by Grupo Danone against several companies operating in the corrugated cardboard business (Cartonajes M Petit, S.A., Hispano Embalaje, S.A., Cartonajes Europa, S.A., and Cartonajes La Plana, S.L.) to disclose certain documents that such applicant deems necessary with a view to the filing of a lawsuit against those companies for damages arising out of the breach of competition rules, This order is interesting in so far as it is possibly the first order of this type given in advance of the foreseeable filing of a damages *stand-alone* lawsuit. Although the case is based on sanction applied to the now sued companies by the CNMC in a procedure where they and several other companies were sanctioned in 2015 for having engaged in a cartel (case S/0469/13), the sanction was declared void by the National High Court in 2019 not because the court did not appreciate the existence of an infringement, which it did appreciate, but only on the ground that it had been applied five days after the lapsing of the 18-month deadline set out in Article 36 (1) of the SCA.

(iii) Ruling n. 709/2020 of the Court of Appeals of Pontevedra on 23 December 2020 (appeal procedure 463/2020), whereby it confirmed a ruling by the Second Court of Commerce of Pontevedra that had uphold a cartel damages lawsuit filed by Kartin, S.L., a company that had acquired 14 MAN trucks between 1997 and 2011, against Man SE, the leaser from which the buyer acquired those vehicles in the end of the lease agreement. The lawsuit was based on damages caused by a cartel of several car manufacturers, including companies belonging to the MAN group, whose existence had been declared by the European Commission in the mentioned Decision dated 19 July 2016. In the appealed ruling, although the *a quo* had dismissed the criteria for the quantification of indemnity sought by the plaintiff (€176,727.23), partially uphold the lawsuit by condemning the defendant to pay a lower indemnity, set by it in accordance with the rule set out in Article 76 (2) of the SCA, enacted by the by Royal Decree Law 9/2017. Based on that rule, such court condemned the defendant to an indemnity to the amount of 5% of the price for which the trucks had been acquired.

In its appeal, the defendant sustains, among others, that the said rule could not have been applied to facts occurred before the mentioned Directive 2014/104/EU, and that the rejection of the said criteria used by the plaintiff should have led to the dismissal in full of the lawsuit. The *ad quem* Court dismissed the appeal by saying, among others, that the right of the court to set the indemnity when the plaintiff fails to do it in due terms, though not enshrined in the Spanish internal legislation before the addition of the mentioned Article 76 (2), was part of the EU case law that was to be taken into consideration, in internal cartel damages cases, at the time of interpreting the main internal provision on non-contractual damages (Article 1902 of the Civil Code).

Reform proposals

For the time being, except for the amendments required for the transposition of the mentioned Directive (EU) 2019/1,[22] which will require, among others, the amendment of the SCA, there are no substantial outstanding proposals for reform of the Spanish national competition regime, 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 years of existence. This, and the mentioned weaknesses seen by many in the CNMC's institutional framework, had in recent years led the main parties to question the existing institutional framework of the competition laws and to consider revising the solution 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.

This matter, at least for now, is seen as something of the past, and the existing institutional framework seems to be gradually taking hold. Now what is being discussed is not a reform of the CNMC model but of the CNMC's internal structure and, notably, of how the competition department and the regulatory ones operate in a manner that avoids undesirable interaction between them. The recently appointed president of the CNMC, Ms. Cani Fernández, an experienced competition lawyer (2020–), has promised to pursue an amendment of the bylaws of the entity, with a view to strengthen its independence and develop a more efficient financial and human resources regime. She has also pleaded for an increase in the budget of the entity, as this, in her words, is too low when compared to the savings it generates to the economy.

* * *

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: "*[C]artel 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 but not yet published.
14. 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.
15. 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.
16. 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.
17. 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.
18. 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.
19. 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.
20. Article 1968 of the Civil Code.
21. 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.
22. Although the piece of legislation that must be passed for the transposition of the said Directive has not yet been enacted, this should have happened already, as all EU Member States are required to have such Directive transposed by 4 February 2021 (Article 34).

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A founding partner of SCA LEGAL, S.L.P., Pedro Moreira has almost 20 years of experience as a litigation lawyer, specialising in commercial, competition and corporate law disputes. Thanks to his expertise in those areas of law and his background in economics and business administration, he regularly advises clients, from different jurisdictions and sectors, in competition matters proceedings and complex litigation cases (in relation to the breach of commercial contracts, damage claims, shareholders conflicts and other corporate law issues, bankruptcy and insolvency matters, etc.), some of them multijurisdictional and/or heard by a court of arbitration. Pedro also advises on a regular basis on non-contentious matters, mostly in commercial, corporate and competition law.

Pedro graduated in Law from the Complutense University of Madrid and has a B.A. in Law from the Catholic University of Lisbon, an M.A. in Economics (Diploma de Estudios Avanzados en Economía) from the Complutense University of Madrid and an M.B.A. from the EAE (Madrid)/Camilo José Cela University (Madrid). He is a member of the Madrid Bar Association, speaks fluent Spanish, Portuguese and English and has also a good command of French and German.

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