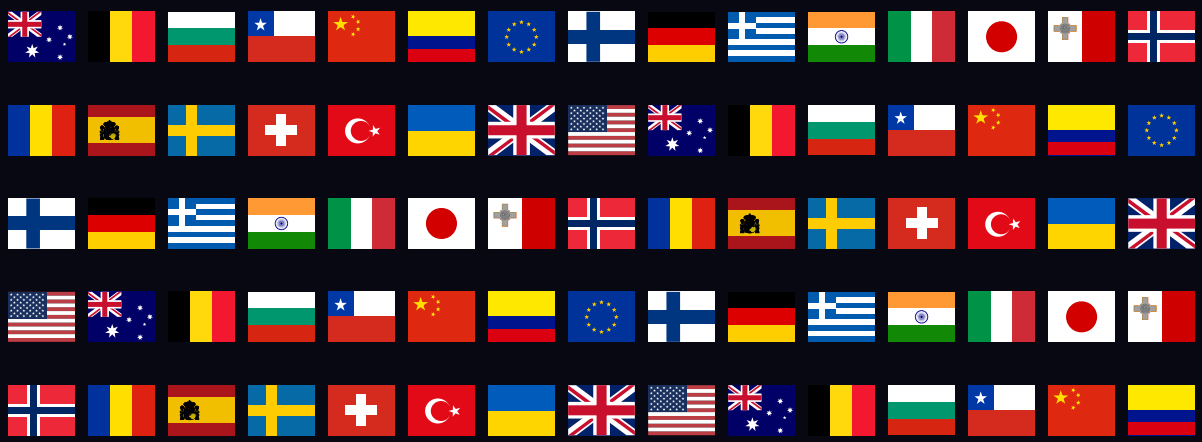
COMPETITION COMPLIANCE

Spain



LEXOLOGY
Getting The Deal Through

Consulting editor
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Competition Compliance

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Quick reference guide containing side-by-side comparison of local insights into Competition Compliance, including key legislation; standards and guidance for compliance programmes; how to demonstrate commitment to competition compliance; risk identification, assessment and mitigation; compliance programme review; managing risk in horizontal and vertical arrangements; market dominance; merger control; joint venture agreements; leniency programmes; investigations; settlement mechanisms; corporate monitorships; and recent trends.

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LEGAL AND REGULATORY FRAMEWORK

Key legislation

What key legislation governs competition in your jurisdiction?

Competition in Spain is governed by Law No. 15/2007 of 3 July for the Defence of Competition (LDC) and its implementing regulation approved by Royal Decree 261/2008 of 22 February . Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) also apply in cases where there is an effect on trade between European Union member states.

Law stated - 25 June 2021

Enforcement

Which authorities are charged with enforcing competition law in your jurisdiction and what is the extent of their powers?

The public enforcers of Competition law in Spain are the National Commission for Markets and Competition (CNMC), which was set up by Law No. 3/2013 of 4 June on the Creation of the National Commission for Markets and Competition and has nationwide jurisdiction for any infringement with effects extending beyond a single region, and the Regional Competition Authorities (RCAs), that have jurisdiction for infringements with effects within their respective autonomous regions.

The CNMC consists of a collective decision-making body, the Council, which has two chambers (one for competition and the other for regulatory matters), including several directorates responsible for investigating different sectors (competition, energy, telecommunications and audiovisual media, and transport and postal). The Competition Chamber of the Council decides on competition infringements while the Directorate for Competition is the unit in charge of investigating infringements at a national or supra-regional level.

The autonomous regions of Andalusia, Aragon, the Basque Country, Castilla y León, Catalonia, the Community of Valencia, Extremadura and Galicia have competition authorities mirroring the structure of the CNMC, with investigative and a decision-making bodies. The RCAs of Canarias, Madrid, Murcia and Navarra also have an investigative body but no decision-making body; instead, the Council of the CNMC makes final decisions. The other Spanish autonomous regions (Castilla La Mancha, Asturias, Baleares, Cantabria and la Rioja) do not have their own competition authorities, so all cartel infringements are dealt with directly by the CNMC.

In recent years, the fight against bid rigging has been high on the competition authorities' agenda. In addition to the investigations opened and the fines imposed in this area, other measures have been adopted. For example, a screening system that helps to identify fraudulent tender offers has been introduced to increase the number of ex officio investigations.

Competition rules in Spain apply to both individuals and undertakings. The concept of 'undertaking' is defined broadly and can extend to any legal or natural person engaged in economic activity, and covers foreign entities, trade associations, individuals operating as sole traders and state-owned corporations.

Law stated - 25 June 2021

Consequences of non-compliance

What are the consequences of non-compliance with competition law?

The risks and consequences of non-compliance with competition law in Spain can be severe. Penalties for non-compliance with competition law in Spain depend on the seriousness of the infringement:

- Very serious infringements, such as cartels, can result in fines of up to 10 per cent of the infringing undertaking's total turnover for the financial year prior to the imposition of the fine.
- Serious infringements, such as anticompetitive vertical agreements, can result in fines of up to 5 per cent of the infringing undertaking's total turnover in the financial year prior to the imposition of the fine.
- Minor infringements, such as obstruction of an investigation, can result in fines of up to 1 per cent of the infringing undertaking's total turnover in the financial year prior to the imposition of the fine.

Where a company is found to have participated in an infringement, its parent company will be jointly and severally liable for the infringement, as both companies are considered a single economic entity. The CNMC can also impose fines of up to €60,000 on legal representatives and directors found to have participated in that conduct.

Companies sanctioned for serious infringements can also be banned from contracting with public bodies for up to three years. In particular, the CNMC has sought to have undertakings involved in bid rigging banned from future public contracts in a number of different cases since 2019. These cases are:

- case S/DC/0598/16, Electrificación y Electromecánica Ferroviarias;
- case S/DC/0612/17, Montaje y Mantenimiento Industrial;
- case SAMUR/02/18, Transporte Escolar Murcia;
- case S/DC/0626/18, Radares Meteorológicos;
- case S/DC/0620/17, Combustibles Sólidos;
- case S/0644/18, Radiofármacos;
- case SANAV/02/19, Transporte escolar de viajeros Navarra;
- case S/DC/0627/18, Consultoras; and
- case S/0011/19, Transporte cántabro de viajeros.

The CNMC has not fixed the scope or duration of the prohibition in any of these cases as the LDC does not grant it the power to do so. Instead, it has referred those cases to the State Advisory Board for Public Contracts. Those cases are currently suspended pending appeal.

However, Catalonia's RCA has imposed a contracting ban on two occasions (case no. 94/2018 Licitacions Servei Meteorològic de Catalunya and case no. 100/2018 Aerobus) although the legal basis for these bans is not clear.

The LDC does not establish any criminal sanction for competition law infringements. However, some provisions of the Spanish Criminal Code (Law 10/1995 of 23 November) could apply to competition law infringements, although they have never been applied. In particular, articles 262 and 281 of the Spanish Criminal Code provide for criminal sanctions for bid rigging or limiting the output of raw materials or essential products, and article 284 of the Spanish Criminal Code provides for criminal sanctions for those who alter prices through violence, intimidation or deceit.

Law stated - 25 June 2021

Guidance

Do the authorities issue guidance on compliance with competition law?

The CNMC often issues non-binding guidelines to clarify the interpretation on specific subjects of compliance with

competition law. For instance, the CNMC recently published Compliance Guidelines on competition law compliance programs and Confidential Information Guidelines on the treatment of confidential information in antitrust proceedings.

At the regional level, the competition authority for the Basque region published for consultation the Competition Compliance Guide .

Law stated - 25 June 2021

Other legislation and relevant practices

Do any other laws outside the main competition legislation regulate competition in your jurisdiction, including any sector-specific regimes? Do they cover any other anticompetitive practices not caught by the main legislation?

There are other laws outside the main competition legislation in Spain that regulate certain aspects that have an impact on competition law:

Spanish Criminal Code (Law 10/1995, of 23 November) applies to certain specific competition law infringements. In particular, articles 262 and 281 of the Spanish Criminal Code provide for criminal sanctions for bid rigging or limiting the output of raw materials or essential products; and article 284 of the Spanish Criminal Code provides for criminal sanctions for those who alter prices through violence, intimidation or deceit.

Spanish Law No. 9/2017 of 8 November 2017 for Public Sector Contracts (LCSP), regulates the ban on public tendering in case of serious competition infringements for a maximum period of up to three years. In particular, article 72 LCSP states that the debarment can be imposed by a decision of the competition authority in which there is an express pronouncement on the scope and duration of said debarment; or through the appropriate ad hoc procedure if the decision of the competition authority does not expressly rule on this issue.

Law stated - 25 June 2021

COMPLIANCE PROGRAMMES

Commitment to competition compliance

How does a company demonstrate its commitment to competition compliance?

Where the competition authorities have considered a company's commitment to competition compliance, they have emphasised that a competition compliance programme must be reinforced with measures aimed at increasing awareness and the effectiveness of that programme.

In line with the Compliance Guidelines recently published by the National Commission for Markets and Competition (CNMC) and the Competition Compliance Guide published by the Basque competition authority, these measures typically include:

- appointing a compliance officer;
- introducing regular training and audits; and
- imposing disciplinary penalties for non-compliance.

Law stated - 25 June 2021

Government compliance standards

Is there a government-approved standard for compliance programmes in your jurisdiction?

Following a public consultation, on June 2020 the CNMC published its Compliance Guidelines in relation to competition infringements, containing the criteria that the authority will take into consideration when analysing the effectiveness of a compliance programme. The Guidelines also consider the possibility of obtaining a reduction in the fines imposed by the CNMC, as well as other benefits, in order to encourage Spanish businesses to adopt compliance programmes.

At the regional level, the competition authority for the Basque region published for consultation its Competition Compliance Guide . Although the Guide does not set out any minimum standards, it makes adequate recommendations, and will no doubt be taken into account by authorities when analysing the sufficiency of measures taken by companies.

Law stated - 25 June 2021

Risk identification

What are the key features of a compliance programme regarding risk identification?

An effective compliance programme should include as key elements:

- training sessions to increase awareness among key employees that are tailored to the specific needs of the company;
- a clear mechanism for employees to report competition law infringements safely and anonymously; and
- regular audits to identify the areas where the company is most exposed to competition law infringements.

Law stated - 25 June 2021

Risk assessment

What are the key features of a compliance programme regarding risk assessment?

The competition authorities will take into account the extent to which a compliance programme is properly tailored to identify the most important areas of risks, whether via regular audits or other mechanisms.

The Compliance Guidelines require an effective compliance programme to include protocols and mechanisms designed to identify and minimise the risks faced by the company, as well as tools to evaluate the compliance of personnel with the programme.

Law stated - 25 June 2021

Risk mitigation

What are the key features of a compliance programme regarding risk mitigation?

The key features of a compliance programme from the point of view of risk mitigation are adequate training for staff, supported by clear disciplinary measures to ensure deterrence.

The same types of measures are included in the guidelines, including, among other things, the introduction of regular

training and evaluations, the implementation of an anonymous reporting channel and the adoption of disciplinary measures such as the dismissal of the employees responsible for the infringement.

Law stated - 25 June 2021

Compliance programme review

What are the key features of a compliance programme regarding monitoring and review of business practices?

An effective compliance programme should include periodic evaluations and reviews of its implementation and application, as well as regular updates, to ensure that it is in line with developments in the legal landscape and the sector in which the company operates.

The Compliance Guidelines require the continuous evaluation of the programme to keep up with all legal developments as well as any relevant changes in the market and the company, such as the acquisition of a new business or a change in shareholder structure.

Law stated - 25 June 2021

Effect on penalties

Will an established competition compliance programme have any effect on penalties?

The CNMC has reiterated that the mere implementation of a compliance programme, whether ex-ante or ex-post, does not justify mitigating the company's liability when determining a fine.

According to the Compliance Guidelines , the authority may assess, on a case-by-case basis, whether the pre-existence of a compliance programme, its improvement or its subsequent implementation after the investigation, can be considered as a mitigating circumstance to adjust the amount of the fine. See cases:

- case S/0482/13, Fabricantes de automóviles;
- case S/DC/0544/15, Mudanzas Internacionales;
- case S/DC/0557/15, Nokia;
- case S/DC/0565/15, Licitaciones aplicaciones informáticas; and
- case S/DC/0612/17, Montaje y Mantenimiento Industrial.

In its guidelines, the CNMC indicates that it will normally view an effective ex-ante compliance programme more positively than the promise to implement or improve an ex-post compliance programme, although it should be noted that according to those guidelines to benefit from a compliance programme the party involved, in effect, would need to apply for leniency and collaborate fully in the investigation of the competition authority.

In a recent case, S/DC/0627/18 Consultoras, the CNMC gave credit for compliance efforts by granting a 10 per cent reduction in the fine to one company and excluding it from a proposed ban on public contracting. Crucially, the company had acknowledged its participation in the infringement and cooperated with the authority, which the CNMC highlighted as a key element of an effective compliance policy. By contrast, compliance programs presented by other companies in the same case who did not acknowledge their involvement were not given similar credit.

Law stated - 25 June 2021

HORIZONTAL DEALINGS

Arrangements with competitors

How does competition law govern arrangements with competitors?

Spanish competition law prohibits all types of agreement, whether express or tacit, that aim to prevent, restrict or distort competition. The prohibition has been interpreted broadly to include any kind of concerted practice or information exchange, including unidirectional information exchanges.

Accordingly, businesses should avoid entering into any exchange of information with competitors where the information is relevant to competitive parameters, such as price, production, costs or customers. In particular, a business should avoid any contact with competitors that could be interpreted as an agreement or discussion of practices, including:

- price-fixing;
- limiting or controlling production;
- distribution;
- technical developments or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions; and
- entering agreements subject to the acceptance of supplementary obligations that have no connection with the object of the agreements.

Bid-rigging arrangements are one of the types of arrangements that raise the biggest risk of non-compliance in Spain. The detection and sanction of bid-rigging cases have taken a prominent position for the National Commission for Markets and Competition (CNMC) and will continue to be so due to the impact of the ban on entering into public contracts that can be imposed on infringing companies.

Law stated - 25 June 2021

Exchanging information

Can a company exchange information with its competitors?

The competition authorities have adopted a very strict position in relation to information exchanges between competitors, treating them as serious infringements and even as cartels in a number of cases.

For these purposes, exchanges of information in relation to prices, costs, margins or customers that are disaggregated, current or future and non-public are considered commercially sensitive, even where the data concerned is basic or limited.

Law stated - 25 June 2021

Cartel behaviour

What form must behaviour take to constitute a cartel?

A cartel is defined by Law No. 15/2007 of 3 July for the Defence of Competition (LDC) as including any agreement or concerted practice. Since no form is specified, it is understood that no written agreement of other formality is required,

and one of the notable features of Spanish cartel enforcement has been the extension of the concept of the cartel to exchanges of information. (The leniency programme formally applies only to 'secret' agreements, although this concept is also interpreted broadly.)

In particular, the prohibited behaviour clearly includes attempts. The competition authorities do not need to demonstrate that an agreement or a concerted practice was successful in its aims. In one case the competition authority imposed fines on companies that engaged in an information exchange during a failed attempt to reach an agreement.

Law stated - 25 June 2021

Suggested precautions

What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

As a general rule, legal advice should always be sought before entering into an arrangement with a competitor. Further, employees should be aware of the risks and precautions necessary when interacting with competitors. In particular, employees who attend trade association meetings on a regular basis should ensure that an agenda is agreed in advance to allow legal advice to be sought if necessary.

Law stated - 25 June 2021

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive agreements with competitors to escape sanction?

There is no prior notification mechanism under which anticompetitive agreements with competitors can be exempted from penalties. However, in line with EU competition law, certain anticompetitive agreements between competitors may be excluded or exempted from the application of competition rules.

Spanish competition law provides that horizontal agreements exempted under the Vertical Agreement Block Exemption Regulation (VBER) are also exempted in Spain, even if the conduct does not affect trade between EU member states.

Even where the VBER does not apply, horizontal cooperation agreements can benefit from an individual exemption under Spanish law when the 'criteria for exemption', under article 1.3 of the LDC, are met. In particular, horizontal agreements can benefit from an individual exemption under Spanish competition law if they generate efficiencies and allow consumers a fair share of the resulting benefit. In addition, the restrictions must be indispensable to achieve the efficiencies generated and competition cannot be eliminated in a substantial part of the market.

Further, arrangements that do not include hardcore restrictions (such as price-fixing or market-sharing) can benefit from the de minimis exemption depending on the market shares of the parties. Specifically, an agreement between competitors can be excepted provided that their market share does not exceed 10 per cent. In addition, the Spanish competition authorities can declare that a practice falls under the de minimis exemption based on the economic and legal context.

Further, the LDC exempts practices that parties are legally required or forced to adopt, although this exception is strictly interpreted.

Law stated - 25 June 2021

VERTICAL DEALINGS

Vertical agreements

How does competition law govern vertical arrangements with commercial partners?

Any agreement (vertical or not) that aims to hinder, restrict or distort competition can fall within the scope of the Spanish competition rules and will be subject to competition enforcement. These rules apply to all types of vertical agreement, including distribution, franchising and supply agreements of all kinds. In line with other jurisdictions, vertical restraints, such as resale price maintenance, restrictions on passive sales, single branding and tying agreements, may attract particular scrutiny.

The approach of Spanish competition law to agency agreements is also in line with that of other jurisdictions, particularly those in the European Union. The Spanish competition authorities tend to follow EU guidance on the definition of 'true agency' (in general, by reference to the assumption of commercial risk) and agreements between principals and agents cannot be considered to constitute resale price maintenance or resale restrictions. Nevertheless, single branding, selection and exclusivity issues relating to the agent itself will still be subject to competition enforcement.

Law stated - 25 June 2021

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive vertical agreements or restrictions to escape sanction?

Spanish competition law provides that conducts exempted under the Vertical Agreement Block Exemption Regulation (VBER) are also exempted in Spain, even if the conduct does not affect trade between EU member states. Further, the Spanish competition authorities typically follow the European Commission's approach to applying competition rules to vertical restraints. Accordingly, most vertical agreements between non-competitors will be exempted, provided that the market share of the parties is below 30 per cent in the relevant markets and the agreement includes no hardcore restrictions.

Even where the VBER does not apply, vertical agreements can benefit from an individual exemption under Spanish law when the so-called 'criteria for exemption' are met. In particular, a vertical agreement can benefit from an individual exemption under Spanish competition law if it generates efficiencies and allows consumers a fair share of the resulting benefit. In addition, the restrictions must be indispensable to achieve the efficiencies generated and competition cannot be eliminated in a substantial part of the market.

Further, arrangements that do not include hardcore restrictions or non-compete agreements of more than five years' duration can benefit from the de minimis exemption, depending on the market shares of the parties. Specifically, an agreement between non-competitors can be excepted provided that their market shares do not exceed 15 per cent. In addition, the Spanish competition authorities can declare that a practice falls under the de minimis exemption based on the economic and legal context.

Further, the Law No. 15/2007 of 3 July for the Defence of Competition (LDC) exempts practices that the parties are legally required or forced to adopt, although this exception is strictly interpreted.

Law stated - 25 June 2021

DOMINANT POSITION

Determining dominant market position

Which factors does your jurisdiction apply to determine whether a company holds a dominant market position?

Spanish competition law defines dominance in a similar way to EU competition law. Specifically, a 'dominant position' is defined as a situation of economic power enabling a firm to determine its conduct independently of its customers and competitors.

When analysing whether a company holds a dominant position in the market, the competition authorities follow an approach similar to that of the European Commission, taking into account:

- market share and its stability and volatility over time;
- barriers to entry;
- the economic capacity of competitors;
- competitive advantages;
- the degree of vertical integration and dominance in related markets; and
- the countervailing power of the demand side.

Law stated - 25 June 2021

Abuse of dominance

If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance?

Spanish competition law provides an open list of conduct that may constitute an abuse of dominant position, including:

- the imposition of unfair prices or commercial terms;
- the limitation of production, distribution or technical development;
- an unjustified refusal to supply;
- the application of unequal conditions to equivalent services placing competitors at a disadvantage to others; and
- tying.

However, this is not a complete list and, in keeping with EU law and jurisprudence, any conduct by a dominant undertaking that hinders, restricts or distorts competition may potentially be considered abuse.

Most recent abuse cases decided in Spain have involved conduct designed to stifle competition in network industries, such as passenger rail transport, pricing power in the electricity sector and unjustified commercial terms and restrictions imposed on customers by collecting societies. Most recently, the National Commission of Markets and Competition has carried out dawn raids in the natural gas sector in relation to possible abuses of dominance.

Law stated - 25 June 2021

Exemptions and defences

What exemptions, defences or other circumstances will allow a dominant company's otherwise abusive conduct to escape sanction?

There are no exemptions for abuse of dominance and the leniency programme is not available. Theoretically, abuse of dominance could be declared de minimis, although this is extremely unlikely. As such, the only basis for an exception would be that the allegedly abusive conduct was required in order to comply with the law.

Law stated - 25 June 2021

MERGER CONTROL

Competition authority approval

Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Mergers, acquisitions of sole or joint control and the creation of 'full function' joint ventures that meet certain thresholds must be notified to and authorised by the competition authorities before completion. The competition authorities may lift the suspension of the implementation before approval in the event of takeover bids on the Spanish stock exchange and other situations of urgency, but will only do so in exceptional cases and generally only at the end of the first phase.

Transactions must be notified if either one of two alternative thresholds is met:

- if the transaction leads to at least a 30 per cent share acquisition or increase of a relevant market in Spain or in a geographic market within Spain (unless the target's turnover in Spain in the last financial year is less than €10 million and the participants do not have a combined or individual market share equal to or greater than 50 per cent in any affected market in Spain or in a geographic market within Spain); or
- if the combined aggregate turnover in Spain of all the participants in the last financial year was more than €240 million and the turnover in Spain in the last financial year of each of at least two of the participants was more than €60 million.

A binding agreement is generally needed in order to notify, but there is no triggering event or deadline for filing; it is sufficient that the transaction is notified and authorised prior to closing.

The responsibility for the filing is on the merging parties or the party or parties that will control the resulting entity. In an acquisition of sole control, the acquirer is responsible for filing. In an acquisition of joint control or the creation of a joint venture, all parties that will have joint control must sign the notification.

Law stated - 25 June 2021

Timing

How long does it normally take to obtain approval?

In cases where no competition issues arise (ie, most cases) clearance is obtained within one month of notification. However, such notification is often preceded by prenotification contacts with the competition authorities. The investigation may be extended on a number of grounds, including if additional information is required. Accordingly, it is prudent to allow two to three months for clearance if possible.

Spanish merger control rules allow for a simplified procedure, under which a short-form notification is used and a short-form decision will be issued. The timetable for that procedure is formally the same (ie, one month from notification) and prenotification contacts are still required; however, once notified, clearance is typically obtained more quickly than in standard cases.

On the other hand, where competition issues arise, an investigation can be significantly longer. There are formal deadlines of one month in the first phase and two months in the second phase, but these can be and often are extended significantly; later government intervention is also possible. Accordingly, the most difficult cases can, and do, last six months or more.

Law stated - 25 June 2021

Impact of merger clearance

Does merger clearance by the authority constitute confirmation that the terms in the documents comply with competition law?

Where a transaction is authorised, the terms of the documents notified to the competition authorities and considered directly related to and necessary for the transaction are included in the authorisation. However, the authorities require the parties to identify any competition restrictions included in the agreement in the notification form and will review them carefully and exclude from authorisation any restrictions that they consider to go beyond what may be ancillary for these purposes. Such excluded restrictions must then be assessed under the general competition rules.

Law stated - 25 June 2021

Exchanging information before completion

Are there limits on the information that can be exchanged with the other party before completion of a merger?

An exchange of information before the completion of a merger may fall under the scope of article 1 of the Law No. 15/2007 of 3 July for the Defence of Competition (LDC). Consequently, there is a fine balance between not providing information that would be in breach of competition laws and providing information necessary for a reasonable due diligence exercise.

However, precautions can be adopted to allow for a meaningful disclosure during negotiations of the transaction and between signing and clearance of the transaction.

Due diligence and negotiation phase until signing

During the due diligence and negotiation process, the seller should consider and develop particular rules and arrangements aimed at the protection of confidential information concerning the target. In particular, the parties should consider the use of formal measures such as non-disclosure agreements, confidentiality declarations and data rooms.

Between signing and clearance of the transaction

Signing does not provide for a carte blanche; instead antitrust restrictions remain in force until closing. Before clearance is granted, the parties shall continue to operate as separate businesses. Therefore, access to information must be limited to what is needed to ensure future operations once the merger has been authorised and access must

be limited to a specific group of people within each organisation (usually known as the 'clean team').

Law stated - 25 June 2021

Failure to file

What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any notable recent cases?

There is no statutory deadline for filing or fines for failure to file within a given period. However, if a notifiable transaction is carried out without authorisation, the competition authorities may require the parties to provide notification of the transaction within 20 days. After reviewing the transaction, the authorities may prohibit the transaction or impose remedies and fines of up to 5 per cent of the total turnover of the infringing party in the previous year for the failure to respect the standstill obligation.

The competition authorities have been highly active in enforcing the obligation to notify, particularly in cases based on the market share threshold. They actively monitor transactions carried out in Spain, regularly send information requests to parties involved in transactions and have taken action in a number of cases of non-notification, imposing fines between €5,000 and €286,000 in more than 10 cases over the last eight years (although several of those fines were later annulled or reduced).

Law stated - 25 June 2021

JOINT VENTURES

Competition authority approval

Are joint ventures required to seek clearance from the competition authority?

Any acquisition of joint control over a full-function joint venture must be notified to and authorised by the competition authorities before completion if either one of the thresholds is met.

Joint control exists where two or more undertakings have the possibility of exercising decisive influence over another undertaking. A joint venture is classed as 'full-function' when it performs on a long-lasting basis all the functions of an autonomous economic entity. The full functionality test carried out in Spain is aligned with the test applied by the European Commission under the EU Merger Regulation in the same type of situations.

Law stated - 25 June 2021

Joint venture arrangements

When will joint venture arrangements fall within the scope of competition law?

Non-full-function joint ventures, such as strategic alliances and cooperative joint ventures (eg, production joint ventures), fall within the scope of article 1 of the Law No. 15/2007 of 3 July for the Defence of Competition (LDC) and article 101 of the Treaty on the Functioning of the European Union (TFEU).

Joint venture agreements that do not imply a coordination of competitive behaviour are unlikely to be prohibited under article 1 LDC and article 101 TFEU because of their cooperative nature. This is the case of collaborative joint ventures between non-competitors or between competing companies that cannot independently carry out the relevant project or activity the cooperation will be doing.

In particular, the Spanish competition authorities typically follow the European Commission's approach with regard to

horizontal cooperation agreements. Accordingly, arrangements between competitors on joint production, purchasing or sales/marketing or cooperation in respect of research and development or intellectual property rights licensing may be considered not to restrict competition or exempted on an individual basis provided that they confer effective means to secure business objectives through collaboration and are designed in a manner where any relevant competition law risk is minimised from the outset.

However, agreements could appreciably restrict competition when the undertakings have significant market power and foreclosure effects are likely to occur. Therefore, it is necessary to assess the joint venture in its economic (market) and legal context, before conclusions can be made as to whether the joint venture agreement contains restrictions on competition.

Law stated - 25 June 2021

LENIENCY

Leniency programmes

Is a leniency programme available to companies or individuals who participate in a cartel or other anticompetitive conduct in your jurisdiction?

A leniency programme is available to any company or person that participates or has participated in a cartel in Spain.

The programme extends only to conduct that qualifies as a cartel and not to any other type of prohibited behaviour. However, cartel conduct can be broadly defined as including any agreement regarding concerted practice and even exchanges of information.

Full immunity is available for applicants that are the first to provide the competition authorities with evidence that may enable these authorities to prove the existence of a cartel or provide sufficient legal grounds for an inspection. Applicants that are not the first to provide evidence of a cartel may benefit from a reduction of their fine where the evidence provides significant added value to the evidence already in the possession of the authorities.

To qualify for leniency an applicant must:

- cooperate fully, continuously and diligently with the authorities throughout the administrative investigation procedure;
- end its involvement in the infringement (unless the authority considers otherwise);
- not destroy evidence or disclose its intention to present a leniency application; and
- not have been the instigator of the cartel.

Law stated - 25 June 2021

Beneficiaries of leniency

Can the company apply for leniency for itself and its individual officers and employees?

Companies can apply for leniency themselves or for individual officers and employees.

Employees must be identified in the formal leniency application and cooperate fully with the authorities during the proceedings.

Law stated - 25 June 2021

INVESTIGATION

Commencement of investigation

How is an investigation into a suspected breach of competition law started?

The competition authorities may start an investigation ex officio when the authority is aware of indications of infringement, or after the receipt of a complaint or leniency application, although in practice the vast majority of cartel cases are started as a result of a leniency application.

Prior to opening a formal investigation, the competition authority will typically carry out a 'reserved investigation'. The reserved investigation is fully confidential and parties are not made aware of it or allowed to access the files. There is no maximum duration for the reserved investigation, which can vary in length between a few months and even a few years.

If the National Commission for Markets and Competition (CNMC) decides to open a formal investigation it notifies the parties under investigation by publishing the decision. From the formal opening of the investigation, the CNMC has 18 months to adopt a final decision. However, the CNMC is entitled to suspend this deadline at any time on the grounds detailed in article 37 of Law No. 15/2007 of 3 July for the Defence of Competition (LDC).

Law stated - 25 June 2021

Limitation period

What are the limitation periods for investigation of competition infringements?

Limitation periods for competition infringements vary according to the gravity of the offence:

- For serious infringements (including the most serious abuses of dominant positions and cartels and other agreements between competitors), the period is four years.
- For less serious infringements (including other abuses, agreements between non-competitors and failing to respect the standstill obligation), the period is two years.
- For minor infringements (such as failure to comply with authority requests and obstruction of inspections), the period is one year.

These periods may be interrupted by any act of the authorities that is formally known to the party concerned, and by acts carried out by the parties concerned to ensure, comply or execute the corresponding decisions.

Similarly, once the competition authorities impose a fine, they have one, two or four years in which to execute it, depending on the seriousness of the infringement.

Law stated - 25 June 2021

Information-gathering powers

What powers does the competition authority have to gather information?

The CNMC and regional competition authorities (RCAs) may carry out dawn raid inspections to gather information or send formal requests for information at any stage of the investigation.

The provision of information can be compelled and failing to provide information is considered a minor infringement

subject to penalties of up to 1 per cent of a company's total turnover. In addition, the competition authorities may impose penalties of up to €12,000 per day during which a company fails to comply with a request.

Law stated - 25 June 2021

Dawn raids

For what types of infringement will the competition authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The competition authorities can and do carry out dawn raid inspections for antitrust infringements (a power they use frequently). Between 2013 and 2019, the CNMC carried out dawn raids on 244 companies in 74 different investigations, while the regional authorities assist the national authority and carry out their own inspections.

When carrying out inspections, the authorities have broad powers of investigation that include the right to:

- access premises, land and the means of transport of companies and associations, as well as private homes (in the latter case, with a court order);
- seize and make copies of documents to support an investigation (hard copies or electronic copies);
- retain original documents that have been seized;
- affix seals to premises under inspection; and
- request oral explanations on the spot.

By contrast, there are few specific rules as to how the authorities may carry out their investigation of physical or electronic copies of relevant documents. However, the competition authorities have sought to remedy this by releasing notices setting out an applicable framework.

Law stated - 25 June 2021

Dawn raids – rights and obligations

What are the company's rights and obligations during a dawn raid?

During an inspection, a company has the right to receive a copy of the competition authority's investigation order, which should identify:

- the date, scope, object and purpose of the inspection;
- the inspectors taking part;
- the subjects under investigation; and
- the data, documents, operations, information and other elements to be inspected.

If the investigation order is insufficient, the company can refuse to comply. During an inspection, the company has the right to be advised by external and internal counsel, and receive a copy of the official record and a list of documents taken or copied by the authority.

The competition authorities can carry out inspections either with a company's consent or with judicial authorisation. Further, in determining whether to allow the inspection, a company has the right to be informed whether a judicial authorisation has been applied for and refused.

Companies have a general obligation to cooperate with inspectors, and in particular to not destroy or tamper with evidence, provide access to documents within the scope of the inspection and respect any seals affixed by the authority. If they fail to do so, they can be fined significant penalties of up to 1 per cent of their turnover. Since 2008, the competition authorities have imposed fines of between €2,000 and €418,600 on six companies.

Law stated - 25 June 2021

Refusal to cooperate

What are the penalties and other consequences for refusing to cooperate with the authorities during an investigation?

Refusal to cooperate in an investigation, obstructing a dawn raid inspection or providing incomplete, false, misleading or incorrect information are considered minor infringements subject to penalties of up to 1 per cent of a company's total turnover. In addition, the competition authorities may impose penalties of up to €12,000 per day during which a company fails to comply with a request.

Law stated - 25 June 2021

SETTLEMENT

Settlement mechanisms

Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

The competition authorities may accept the early termination of an investigation when the companies under investigation submit commitments to address competition concerns.

As a rule, the competition authorities will not accept commitments:

- in cases involving cartels;
- for conduct that had irreversible effects on competition;
- where the infringing companies have already been penalised for similar conduct; or
- when the early termination jeopardises the effectiveness and deterrent effect of competition rules.

In other cases, the parties may submit commitments at almost any time during the investigation procedure (although, in practice, they are unlikely to be accepted after the statement of objections).

The authority has broad discretion as to whether to open negotiations and whether to accept any commitments offered. If the authority accepts the commitments submitted by the parties, the decision adopted will not include a formal declaration of an infringement or an imposition of a penalty. The procedure is more fully described in a notice published by the authority.

Law stated - 25 June 2021

Impact of compliance programme

What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

In general, although the inclusion of compliance measures would likely be looked at positively, the competition

authorities tend to prefer commitments that are clear and easily verifiable.

Law stated - 25 June 2021

Corporate monitorships

Are corporate monitorships used in your jurisdiction?

Corporate monitorships are not generally used in Spain; however, as part of their discretion, the competition authorities could require parties to submit to monitoring as part of a commitments package in a settlement case.

Law stated - 25 June 2021

Statements of facts

Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Competition authority settlement decisions do not generally set out an agreed statement of facts. Nevertheless, the findings in those decisions are admissible in legal proceedings.

Law stated - 25 June 2021

UPDATE AND TRENDS

Recent developments and future reforms

What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for competition law reform in your jurisdiction?

On 6 February 2020, the National Commission for Markets and Competition (CNMC) decided to formally terminate proceedings against Adidas after the implementation of specific commitments put forward by the company. The commitments include amendments to the existing contracts to ensure that the contractual conditions are uniform among its distribution network's members and that updated versions of the distribution agreements are applied to (and known by) all distributors. This is the first case in which the CNMC assessed vertical restrictions on online sales.

In its series of judgments of 20 February 2020, the Spanish High Court annulled a decision of the CNMC imposing a fine of €8.8 million on 12 refrigerated road transport companies and their industry association for participating in price-fixing agreements between 1993 and 2012. The absence of proof of the appellants' participation in the described conduct led the Spanish High Court to annul the fine imposed, since the four-year limitation period established in article 68.1 of the Law No. 15/2007 of 3 July for the Defence of Competition (LDC) for very serious infringements had already elapsed, as the sanctioning proceedings in question were initiated on 1 July 2013. This ruling sets a precedent in the assessment of the evidence in sanctioning proceedings concerning infringements of the competition rules, and it seems to raise the standard of proof required for the CNMC when finding and fining a single and continuous infringement.

On 16 September 2020, the Court of Justice of the European Union (CJEU) ruled that the CNMC is not a 'court or tribunal' for the purposes of article 267 of the Treaty on the Functioning of the European Union (TFEU), thus denying a request for a preliminary ruling from the competition authority as part of its investigation into the Spanish port sector. The CJEU's judgment settles the debate on the CNMC's lack of standing to refer questions for a preliminary ruling and is the second time that the CJEU has rejected a request for a preliminary ruling from a Spanish body.

As to the policy and legislative developments, on 28 April 2021, the Spanish Council of Ministers enacted Royal Decree-Law 7/2021 transposing the ECN+ Directive aimed at strengthening the enforcement powers of national competition authorities and coordination with the European Commission within the framework of the European Competition Network (ECN).

The changes introduced were less-wide reaching than expected and mainly technical:

- all anticompetitive agreements (article 1 of the LDC) and abuses (article 2 of the LDC) will be classified as very serious infringements and can be sanctioned with a fine of up to 10 per cent of the total worldwide turnover of the infringing company (previously vertical agreements and some abuses were only subject to a fine of up to 5 per cent); and
- a specific procedure is introduced for interrupting investigation deadlines when other national competition authorities or the European Commission opens a parallel investigation, or during a court review.

Other, more significant changes that had been considered in a draft bill were left out and it is not yet clear whether these proposals will be taken forward in separate legislation. These changes included, among others:

- a proposal to raise fines for legal representatives and directors from a maximum of €60,000, as stipulated in the current law, to €400,000;
- the introduction of a 'settlement procedure' allowing a 15 per cent reduction in the fine in return for accepting responsibility for an infringement; and
- the extension of the maximum duration of infringement procedures from 18 months to 24 months.

On 10 November 2020, the CNMC published its contribution to the EU Commission public consultations on the Digital Services Act and the New Competition Tool. Overall, the CNMC cautioned against excessive intervention and insisted on the need to avoid overlaps between legal frameworks.

Law stated - 25 June 2021

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your jurisdiction implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No formal decisions to exempt filings or conduct from investigations were taken during the pandemic.

The CNMC published the joint statement by the European Competition Network (ECN) on the application of competition law during the emergency on its website, in which the ECN declared that it would not actively intervene against necessary and temporary measures put in place in order to avoid shortages of supply.

On 31 March 2020, the CNMC set up a dedicated mailbox encouraging consumers to report anticompetitive practices and submit enquiries related to the pandemic. The CNMC subsequently declared that this mailbox had been successful, with over 500 complaints received in its first two months. In addition, the CNMC also confirmed that it had been contacted by companies with doubts as to the enforcement of competition rules and that it had given guidance where necessary, reminding operators of the limits imposed by competition rules on cooperation agreements, and that any temporary measures intended to deal with this exceptional situation must be abolished as soon as normality is restored in the sector.

The CNMC announced that most consultations on cooperation agreements it had received during the first months of the pandemic were related to the financial sector, the insurance sector, the health sector and the provision of

assistance services. The CNMC is providing informal advice, analysing the proposals submitted by the companies, the possible efficiencies and eventual risks, in accordance with article 101(3) TFEU as well as the Temporary Framework for assessing antitrust issues stemming from the current covid-19 outbreak approved by the European Commission.

In May 2020, the CNMC adopted an updated version of its Plan of Action for 2020 in the context of the covid-19 pandemic, in order to include additional considerations regarding potential breaches of competition law as a result of the crisis.

Law stated - 25 June 2021

Jurisdictions

Australia	Piper Alderman
Belgium	Fieldfisher
Bulgaria	EY Law Partnership
Chile	Bofill Mir & Alvarez Jana Abogados
China	King & Wood Mallesons
Colombia	Holland & Knight LLP
European Union	O'Melveny & Myers LLP
Finland	Eversheds Sutherland (Finland)
Germany	SCHULTE RECHTSANWÄLTE. Rechtsanwaltsgesellschaft mbH
Greece	Law Offices Papaconstantinou
India	Anant Law
Italy	Ashurst LLP
Japan	Mori Hamada & Matsumoto
Malta	GVZH Advocates
Norway	CMS Kluge
Romania	MPR Partners
Spain	Cuatrecasas
Sweden	Advokatfirman Cederquist KB
Switzerland	Niederer Kraft Frey
Turkey	ACTECON
Ukraine	Vasil Kisil & Partners
United Kingdom	Winston & Strawn LLP
USA	Winston & Strawn LLP