Information Exchange and Related Risks

A Jurisdictional Guide

Foreword by
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SPAIN

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I. Applicable Laws, Regulations and Principles

In Spain, information exchanges can be analysed as concerted practices under both Spanish and EU competition rules. Although there are no specific regulations or guidelines for the assessment under Spanish law, both authorities and courts profess to follow EU case law and the guidance of the European Commission, and there is growing national jurisprudence. In recent years, the approach of the authorities has been increasingly strict, and a wide range of conducts have been found to infringe the law, including several cases that were treated as cartels under the leniency program. Companies and individual directors found to have engaged in such information exchanges may be punished by fines and may also face damages claims and public contracting bans, although there are no criminal penalties. On the other hand, information exchanges may be permitted, even if restrictive of competition, where they are de minimis or necessary to generate procompetitive efficiencies.

1. Applicable Law

Information exchanges in Spain are assessed under Article 1 of the Law 15/2007, of July 3, for the Defence of Competition (LDC) and Article 101 of the Treaty on the Functioning of the European Union (TFEU). Specifically, Article 1 LDC applies to all cases with effects in Spain, while Article 101 TFEU will also apply in cases of conduct capable of affecting trade between EU Member States. Within Spain, the autonomous regions have exclusive jurisdiction over conduct with effects only within their borders, although the law applied is, in any event, the LDC.

The structure of Article 1 LDC and Article 101 TFEU is identical: both Article 1(1) LDC and Article 101(1) TFEU prohibit agreements, decisions of associations and concerted practices that have as their object or effect the prevention, restriction or distortion of competition;[1] Article 1(2) LDC and 101(2) TFEU declare such practices null and void; and Articles 1(3) LDC and 101(3) TFEU establish the possibility of exempting pro-competitive conduct from the prohibition.

Spanish and EU law also provide for similar penalties: fines for up to 10% of turnover for the most serious infringements, although the approach to the setting of fines is different under Spanish law as explained below.

2. Guidelines

There are no specific regulations or guidelines in relation to information exchanges in Spanish law. In practice, both the National Commission for Markets and Competition (CNMC) and other competition authorities in Spain in their decisions[2] and the courts

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1 LDC, art 1(1) also prohibits recommendations by associations, or "collective recommendations" and "consciously parallel" conduct, although in practice we are not aware of any decision based on "consciously parallel" as opposed to "concerted" conduct.

2 CNC decision of 07/02/2011, case S/0155/09 – *STANPA*, 44 *et seq.*

in their judgments[3] have stated that they follow the principles established by the EU courts and set out by the European Commission in their block exemption regulations and guidelines.

Specifically, Spanish authorities and courts will apply the Horizontal Guidelines[4] to assess the compatibility of horizontal information exchanges with competition law. Similarly, in the case of vertical exchanges of information, the CNMC has previously stated that they should be analysed in the light of Regulation 330/2010. As long as the parties are not competitors such exchanges do not generally pose competition issues and can be considered a necessary complement to the vertical relationship. Nevertheless, vertical information exchanges can raise concerns if information supplied is being used to reach anticompetitive agreements.[5]

3. Case Law

The approach of Spanish competition authorities to exchanges of commercially sensitive information among competitors has become increasingly strict in recent years and there have been a large number of decisions by the competition authorities. Those decisions, in turn, have given rise to court decisions on appeal and, as a result, a growing body of case law.

Previous decisions of the competition authorities are not formally binding on the authorities for future cases although the CNMC and other competition authorities frequently cite them as support for their reasoning in later decisions. As to case law, the rulings and interpretation of the law emanating from consistent decisions of the Supreme Court constitute binding case law for lower courts (particularly, the Audiencia Nacional, or Spanish national court and the regional appeal courts, but not the Supreme Court itself) and competition authorities in Spain. Other decisions of the Audiencia and other courts are not binding authority on themselves or on competition authorities but are persuasive and provide helpful guidance.

II. Types of Information Sharing That May Be Caught under the Competition Rules

Exchanges of information between competitors have in recent years been one of the most common infringements of Spanish competition law. In nearly 40 of over 60 fining decisions adopted by the CNMC under Article 1 LDC from 2015 until August 2020, the CNMC imposed fines for, among other practices, exchanges of information between competing undertakings.

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3 Judgment 5013/2019 of the Audiencia Nacional of 19/12/2019, appeal nº 666/2015.

4 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ January 14, 2011, C-11 (Horizontal Guidelines).

5 See, e.g. CNMC decision of 07/10/2018, case S/DC/0539/14 – *Medicamentos Veterinarios*.

However, as the description below makes clear, information exchanges were caught by the competition rules in Spain in a wide range of situations. Many of the CNMC decisions refer to exchanges that form part of more complex infringements consisting of several anticompetitive practices, such as price-fixing agreements or market sharing, some established stand-alone exchanges of information have themselves been treated as cartels under the leniency provisions of the LDC, and in other cases the CNMC has found information exchanges between parties engaged in cartel conduct to constitute infringements even if the exchange was not linked to the cartel itself. Similarly, there have been cases of hub and spoke exchanges and other situations, including attempted cartels and unilateral signalling.

1. Exchanges of Price Lists

Exchanges of price information have been deemed infringements by object under Article 1 LDC and Article 101 TFEU by competition authorities in Spain.

In 2011, the then Comisión Nacional de Competencia (CNC) fined STANPA, the National Association for Perfumes and Cosmetics, for exchanges of information including price lists and other statistics that took place via the committees of the Association between January 2004 and May 2008. The decision expressly based itself on the Horizontal Guidelines. Then in 2012, the CNC fined Suzuki and Honda €1.8 million and €2.1 million, respectively, for an infringement of Article 1.1 of the LDC consisting of a stand-alone and one-off exchange of wholesale prices for motorcycles.[6] The price lists exchanged included wholesale price information for several motorcycle models, recommended resale prices to distributors, expected wholesale price increases, distributor remuneration structure and recommended resale prices to consumers. In both cases, the parties insisted that the price lists in question were past prices, but the CNC found that they were referred both to the current prices and, implicitly, those for the foreseeable future.

2. Exchanges of Non-price Information

While recent cases provide very little positive guidance in relation to authorized information exchanges, the cases of the extinct Tribunal de Defensa de la Competencia (the TDC) before 2007 do provide some comfort. In particular, in 2002, the TDC declared, in the FENIL Statistics case, that an agreement by the Federación Nacional de Industrias Lácteas (National Federation of Dairy Industry, or FENIL) to collect aggregate data on prices and volumes of milk sold by the Autonomous Region did not constitute a restrictive agreement requiring authorization.[7]

In 2004, the TDC gave its decision in the "Brewery statistics" case, the first major decision in relation to information exchange as a result of the notification by the Asociación de Cerveceros de España (Spanish Brewery Association or ACE) of a system for the collection of statistics relating to the production and sale of beer. The TDC considered that the agreement gave rise to an increase in the risk of collusion between the companies

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6 See CNMC decision of 19/01/2021, case S/0280/10 – Suzuki-Honda.

7 TDC decision of 01/03/2002 in case A 309/1, Información Estadísticas FENIL.

and denied the authorization, because among other reasons, the information exchanged constituted business secrets and the concentrated nature of the market.[8] Subsequently, in 2007, the TDC authorized an amended system of data exchanges for five years, subject to compliance with a number of conditions.[9]

Since around 2013, however, the CNMC has adopted a stricter approach toward exchanges of non-price information and has decided that exchanges of information that do not relate to future quantities or prices are cartels. Perhaps the most well-known example of a case of this type is the car manufacturers case CNMC decision of 23/07/2015, case S/0482/13 – *Fabricantes de automóviles.* In 2015, the CNMC imposed fines in total amount of €171 million on 21 manufacturers and distributors of car brands and on two consultancy firms for having exchanged commercially sensitive information in the Spanish market for the distribution and after-sales services of vehicles. The CNMC found these conducts to be a cartel, and, in fact, the investigation was prompted by the information supplied under the leniency program by one of the car manufacturers.

Specifically, the CNMC considered that the companies had participated in a single and continuous infringement amounting to a cartel, consisting of the systematic exchange of current and future highly disaggregated commercially sensitive information covering virtually all the activities carried out by the participating undertakings through their distribution and after-sales network: sale of new and used vehicles, provision of workshop services, repair, maintenance and sale of official spare parts. The key factor for the CNMC to consider the conduct an infringement by object was that the parties to the investigation exchanged information concerning the remuneration and profit margins of their respective dealer networks, which were apt to "influence the final sales price set by the dealers, as well as conditions of commercial policies and strategies".[10] Therefore, in light of the characteristics of the affected market, the information exchanged was "sufficiently representative and therefore capable of reducing uncertainty" so that competitors could adapt their behaviour in the market accordingly.

3. Exchanges of Employee Data

In the *Tenders for Computer Applications* case,[11] the CNMC addressed the exchange of detailed employee data among companies participating in tenders for the provision of computer application services. In its decision, the CNMC stated: "there is an exchange of certainly sensitive information which under normal circumstances would not have taken place between the companies. As explained above, technical staff is essential in this market as it is the main competitive variable between the companies. It is therefore highly atypical to share not professional profiles but the personal CVs of the professionals who were at the disposal of the companies participating in the agreement at the time. In particular, this information is essential to the companies' strategy and competitiveness, so that sharing it with the degree of anticipation and exhaustiveness shown is only justified in a context of anti-competitive agreements that seek to preserve the *status quo*."[12]

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8 TDC decision of 30/03/2004, case A 329/02, *Estadísticas cerveceros*.

9 TDC decision of 11/07/2007, case A 360/06, *Estadísticas cerveceros 2*.

10 CNMC decision of 23/06/2015, case S/0482/13 – *Fabricantes de automóviles*, 47.

11 CNMC decision of 26/07/2018, case S/DC/0565/15 – *Licitaciones De Aplicaciones Informáticas.*

12 Ibid 123.

4. Exchanges of Purchase Price Information

In the 2019 decision in the *Dairy Industries 2* case,[13] the CNMC addressed anticompetitive conduct consisting of the exchange of purchase price information. In *Dairy Industries 2*, the CNMC fined eight companies and two associations active in the market for the purchase of raw cow's milk over €80 million for having exchanged information concerning purchase prices of raw cow's milk, purchase volumes of farmers and milk surpluses, with the purpose of adopting a joint strategy to control the market for the supply of raw cow's milk. These exchanges, according to the CNMC, made it possible to coordinate commercial strategies to the detriment of the interests of farmers, who were prevented from setting their own prices. The decision refers to the Horizontal Guidelines as well as EU court jurisprudence when assessing the restrictive nature of the information exchanges[14]

5. Hub-and-Spoke Cases

Competition authorities in Spain have also investigated several exchanges of information in the form of hub and spoke arrangements, including, among others, in the CNMC decisions in case S/DC/0607/17 – *Tabacos* and case S/0404/12 – *Servicios Comerciales AENA*.[15]

In May 2019, the CNMC declared the existence of a very serious single and continuous infringement of Articles 1 of the LDC and 101 of the TFEU by its effects, which was an exchange of commercially sensitive information among tobacco manufacturers, along with their distributor, on cigarette sales from 2008 until, at least, 2017. The CNMC imposed total fines of €57.7 million.[16]

Specifically, the decision stated that the distributor, Logista, had been supplying the manufacturers with daily and free-of-charge information on sales to tobacconists of all the products it distributed,[17] disaggregated by brand and province. The CNMC concluded that the information exchanged complied with the characteristics included in the Horizontal Guidelines[18] because the information was (i) strategic (quantities sold by all manufacturers); (ii) with maximum market coverage (around 99% of market sales, given Logista's position as main wholesaler distributor); (iii) highly disaggregated (all products distributed by province); (iv) very recent; (v) exchanged with the maximum frequency (daily); (vi) not public (to access the data the manufacturers had to enter a username and password); and (vii) not accessible to all market operators (only to Logista's clients).

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13 CNMC decision of 11/07/2019, case S/0425/12 – *Industrias Lácteas 2*.

14 Judgment of 04/06/2009 of the Court of Justice of the European Union in case C-8/08, *T-Mobile*; Dominique Ferré, "Anticompetitive object: The ECJ decides on the criterions to assess the anticompetitive object of an exchange of informations (T-Mobile Netherlands)", Concurrences N° 3-2009, Art N° 29662 Concurrences+.

15 CNMC decision of 10/04/2019, case S/DC/0607/17 – *Tabacos*; and CNMC decision of 02/01/2014 – *Servicios Comerciales AENA*.

16 The CNMC considered that the conduct of British American Tobacco, S.A. was time barred, since it publicly departed from the practice in 2012. Further, the CNMC analysed the existence of an alleged infringement related to the exchange of commercially sensitive information on prices, but it concluded that it had not been sufficient, and thus did not impose any fines in relation to this conduct.

17 Except for British American Tobacco's products from 2013.

18 Horizontal Guidelines (n 4) paras 86–94.

The decision stated that through the exchange of information, the companies achieved complete transparency of the daily sales by brands and tobacco references in each province, and added that there was no objective reason to consider that the exchange on sales caused efficiencies in the market, but rather the opposite, since it had perpetuated the status quo and eliminated the incentives to deviate from the prices established by competitors, all in a market where competition was already very weak, in the eyes of the CNMC, given its characteristics (highly concentrated, with the main four companies comprising more than 95% of the market share during the previous decade, and inclined to collusive behaviours due to the high barriers to entry). As to Logista's involvement, the CNMC considered that the distributor "not only failed to take any precautions to preserve the confidentiality of each manufacturer's information – a task for which it had special responsibility given its quasi-monopolistic situation – but actively disseminated the sensitive information of the manufacturers in its possession".[19] According to the decision, Logista acted as a "focal point", compiling the sales information of all the manufacturers, and then passing it on to all of them, and had decisively participated in the conduct and benefitted from it by consolidating its status in the sector. Therefore, the CNMC considered it appropriate to impose a fine of €21.9 million. This decision has been appealed before the Spanish Audiencia Nacional.

In case S/0404/12 *Servicios Comerciales AENA*, the CNMC fined 18 airport car rental companies for an exchange of commercially sensitive information with the participation of AENA, the public company trusted with the management of airports of general interest in Spain. According to the CNMC decision, AENA sent detailed reports to the car rental companies present in several airports in Spain with information on monthly turnover and subscription to car rental contracts. Although this exchange of information was considered to be stand-alone in the investigation phase of the proceedings before the CNMC, it was later deemed to be a single and continuous infringement related to a cartel investigation followed by the CNMC under reference S/0380/11 *Coches de Alquiler*. (As a result of that changed finding, the decision was annulled by the Audiencia Nacional.[20])

6. Signalling

The CNMC has also investigated the indirect exchange of information among competitors by way of public announcements of intended price increases.

In case S/0469/13 – *Fabricantes de papel y de cartón ondulado*, the CNMC fined 18 companies active in the production of paper and corrugated cardboard and a sector association (*Asociación de Fabricantes de Cartón Ondulado* (AFCO)) a total of €57.7 million for alleged anticompetitive practices contrary to Article 1 LDC and Article 101 TFEU. One of the investigated conducts in this case was the exchange of information on past and future paper prices among competitors, with the intervention of AFCO, with the aim of altering the Producer Price Index (PPI), which is a commonly used reference index for paper prices in Europe. The CNMC interpreted that, by means of the said exchanges of information in relation to the PPI, the parties aimed to jointly increasing the PPI

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19 Case S/DC/0607/17 – *Tabacos*, page 128, footnote 15.

20 See, among others, judgment 3361/2017 of the Audiencia Nacional, of 19/07/2017 (appeal: 94/2014).

to justify future price increases in the downstream market for cardboard. In this case, the CNMC also fined AFCO for a collective price recommendation as it published articles announcing estimate price increases for paper, which also served as price signaling for competitors in the paper and cardboard markets. (The CNMC decision in case S/0469/13 was later annulled by the Audiencia Nacional on procedural grounds.[21])

On the other hand, in case 2759/07 *Teléfonos Móviles*,[22] the CNMC investigated Telefónica, Vodafone and France Telecom for an alleged anticompetitive practice consisting of the coordination of future price increases. Although the investigative body of the CNMC found that the announcement of price increases by Telefónica could only have an anticompetitive intention, the Council of the CNMC concluded that there was no evidence of coordination among the said operators and that the pricing strategy of Vodafone and France Telecom consisted of adjusting their prices to those of the market leader (Telefónica) and did not constitute an infringement of Article 1 of the former Law 16/1989.

III. Enforcement Policies and Practice

1. Authority in Charge of Enforcement

In Spain competition law is enforced by the CNMC, created by Law 3/2013, of 4 June, on the Creation of the National Commission for Markets and Competition, which has jurisdiction over any infringement with effects extending beyond a single region, and the Regional Competition Authorities (RCAs) who have jurisdiction for infringements with effects within the autonomous region in question.

The CNMC combines the functions of a competition authority with those of a regulator for the energy, telecommunications and audiovisual media, transport and postal sectors. Decisions are taken by a collective decision-making body, the Council, which generally meets in two chambers, one for competition matters and the other for regulatory matters. Although there are specific directorates for each of the regulated sectors, competition cases are investigated by the Directorate of Competition, while there is also a separate Directorate for Promotion of Competition dedicated to competition advocacy within government and society with jurisdiction across all sectors.

At the regional level the structure varies from region to region. 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 an investigative and a decision-making body. The RCAs of Canarias, Madrid, Murcia and Navarra also have an investigative body but no decision-making body; instead, cases are referred to and decided by the Council of the CNMC on behalf

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21 See, among others, judgment 558/2015, of 28/12/2018 (appeal: 4825/2015).

22 CNMC decision of 02/07/2009, case 2759/07 – *Teléfonos Móviles;* Casto Gonzalez-Paramo and Sonia Perez Romero, "The Spanish Competition Authority acquits three telecom operators of alleged anticompetitive practices consisting in parallel increasing mobile phone rates (Teléfonos Móviles)", 2 July 2009, e-Competitions Art N° 27432 Concurrences+.

of the regions. The other Spanish autonomous regions (Castilla La Mancha, Asturias, Baleares, Cantabria and la Rioja) do not have their own competition authority and cede jurisdiction directly to the CNMC.

The allocation of jurisdiction between the CNMC and the RCAs is determined by Law 1/2002, of 21 February, regarding the Coordination of the Competences of the State and the Autonomous Regions in Competition Matters, and there are a number of coordination mechanisms established in the LDC and by the CNMC. The RCAs only have jurisdiction for investigations in relation to infringements where the effects are limited to their regional territory, but often assist the CNMC in their own investigations and referrals upwards or downwards.

In addition to the competition authorities, Spanish commercial courts are also entitled to apply Article 1 LDC (and Article 101 TFEU) and could therefore theoretically declare the existence of an infringement and award damages and other remedies, even in cases where there has not been a previous decision to that effect by the CNMC or a RCA. Nevertheless, in practice, cases in the courts involving breaches of Article 1 LDC tend to be follow-on claims, given the difficulty of investigating such conduct for private parties.

2. Relevant Procedures

The procedure for competition investigations is set out in the LDC and the main steps of any competition authority investigation are as follows:

- *Origin of the investigation*: The competition authorities may start an investigation *ex officio*, when the authority is aware of *indicia* of infringement, or after the receipt of a complaint or leniency application. In this regard, it is notable that the majority of information exchange cases in recent years have either been the subject of a leniency application or have resulted from cartel investigations under the leniency notice.
- *Reserved investigation*: 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 file, and at this stage the competition authority may conduct dawn raids. There is no maximum duration for reserved investigations, which can vary in length and in some cases have even lasted several years.
- *Formal investigation*: If the authority decides to open a formal investigation it will notify the parties under investigation and publish the decision to do so. From the formal opening of the investigation, the authority has 18 months to come to a final decision. The formal investigation is divided in two separate phases of approximately 12 and 6 months, respectively (although the 12 and 6 month deadlines are not binding):
  - *Investigation phase*: During the first 12 months from the opening of the formal investigation, the authority will review the evidence gathered and may send information requests to the investigated parties or conduct further inspections.

    If the authority finds sufficient evidence of an infringement, it will send a Statement of Objections (SO) to all interested parties. After receipt of

the SO the parties will have access to any leniency applications and supporting materials in the offices of the competition authority (no copies are provided or permitted, but parties can review the materials *in situ*) and the parties will be granted 15 working days (with a possible extension of seven additional days) to submit observations and propose evidence in response to the SO.

After receipt of the responses to the SO, the authority will then draft a Proposed Resolution (PR), taking into consideration its findings and the arguments of the parties, as well as the evidence available. The PR will be notified to the interested parties who, again, will be granted 15 working days (with a possible extension of seven days) to submit observations.

The case team will then refer the case to the decision-making body, together with a report (the "proposed report") including the PR and the written submissions made by the interested parties.

- *Decision phase*: During the decision phase the Council of the CNMC and other decision-making bodies will have six months in which to make a final decision. To that end they may order the case team to gather further evidence or carry out other actions, agree to an oral hearing with the parties (although this is very rare in practice) and take other steps.

  The final decision may declare the existence of an infringement and the undertakings responsible; order the parties to bring the anticompetitive conduct to an end; order the parties to restore the situation so as to eliminate the effects of the prohibited conducts; impose fines; impose conditions or obligations; or impose any other measures authorized by competition rules. In the final decision the authority will also decide on whether an immunity or leniency applicant has complied with all the requirements for immunity or reduction and the amount of any reduction of the fine.

If the maximum period of 18 months (which may be extended on several grounds) lapses without a decision being taken, the proceedings are considered to have expired and the investigation null and void. Nevertheless, in such circumstances competition authorities are expressly authorized to open a new investigation – provided that the infringement has not stopped in the meantime.

It is difficult to discern a specific policy focus in relation to information exchange among Spanish competition authorities. As to enforcement priorities in general, the CNMC and the RCAs have made clear that their clear priority is anticompetitive conduct in relation to public contracting and, of course, current priorities are also closely tied to enforcement of possible infringements related to the global COVID-19 pandemic, namely in the financial sector, insurance, sanitary and pharmaceutical products, and funeral services.

Nevertheless, in general, in Spanish antitrust law there have been a large number of cases relating to activities concerning trade associations, which often provide the context for information-sharing arrangements. Similarly, the leniency program has been a key source of investigations, including notable cases of information sharing that have been characterized as cartels.

IV. Applicable Sanctions and Exposure

1. Administrative Sanctions

For very serious infringements of Article 1 of the LDC (cartels), the Spanish competition authorities can impose fines of up to 10% of turnover on the infringing companies, while other breaches of Article 1 of the LDC may receive fines of up to 5% of turnover.

The LDC sees cartels as a very serious infringement of competition rules that can attract fines of up to 10% of the total turnover of the infringing undertaking in the financial year prior to the imposition of the fine. When the turnover of the infringing undertaking cannot be calculated, the CNMC may impose a fine of up to €10 million. Legal representatives or members of management bodies who have directly participated in the cartel can also be fined up to €60,000.

Significant fines are imposed frequently in cartel cases: in the period of 2017–2019, nine cartels were sanctioned, with fines amounting to a total of €359.6 million (€317 million after deduction of exemptions and reductions under the leniency program). In general terms, fines have increased significantly in recent years, in particular for larger undertakings, as a result of jurisprudence requiring the competition authorities to calculate fines on the basis of a percentage of total turnover rather than affected sales. In this regard, almost half of the fines imposed by amount in the last three years were imposed in 2019, with only two cartels being sanctioned in that year (22% of the total number of cartels fined).

Additionally, in relation to exchanges of information in the context of a merger, the LDC provides for a fine of up to 5% of the turnover of the notifying party or parties in the financial year in which the concentration took place if the transaction is put into effect before obtaining the CNMC's authorization. Thus far, however, fines for "gun jumping" in Spain have not been the result of anticompetitive exchanges of information but instead, the CNMC has fined companies for breaching the notification requirement when the market share threshold provided for in the LDC was met, as well as existing divergences in the concept of control that led the parties not to file the transaction when required.

A. *Administrative Fines on Directors and Legal Representatives*

Where a company is found to have participated in an infringement, the Spanish competition authorities can also impose fines up to €60,000 on legal representatives and directors found to have participated in that conduct. For this to happen the following requirements must be met: (i) the individual has the status of legal representative or member of the management bodies of the offending company (this has been interpreted broadly by the courts, who consider this condition met if the individual can adopt decisions that "mark, condition or direct" the actions of the company); and (ii) that the individual participated in the agreements or decisions contrary to the competition rules.[23]

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[23] In July 2020, the Spanish government published a draft proposal to amend the LDC. The current version of the proposal foresees, among other things, that fines for individuals may be increased to up to €400,000.

2. Bans on Public Contracting

Under Spanish Law 9/2017, of 8 November, for Public Sector Contracts (Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público (LCSP)), since 2015, persons sanctioned for serious infringements that distort competition, including possible information exchanges between competitors, can be banned from contracting with public bodies for a maximum period of up to three years.

Article 72 LCSP states that the debarment can be imposed in two ways: (i) by a decision of the competition authority in which there is an express pronouncement on the scope and duration of said debarment, or (ii) in the event that the decision of the competition authority does not expressly rule on this issue, through the appropriate ad hoc procedure. The CNMC sought to have undertakings involved in bid rigging banned from future public contracts for the first time in case S/DC/0598/16, Electrificación y Electromecánica Ferroviarias in April 2019. Since then, the CNMC has issued three more decisions in which it declared the debarment as applicable (cases S/DC/0612/17, Industrial Assembly and Maintenance; SAMUR/02/18: Transporte Escolar Murcia; and S/DC/0626/18, Radares Meteorológicos). However, the CNMC has not fixed the scope or duration of the prohibition in any of these cases. Since the LDC does not grant it the power to do so, it instead has referred those cases to the State Advisory Board for Public Contracts (Junta Consultiva de Contratación Pública del Estado). All those cases are currently suspended pending appeal.

The Autoritat Catalana de la Competència (the ACCO, or RCA for Catalonia), on the other hand, has already directly imposed a ban on two occasions (cases no. 94/2018 Licitacions Servei Meteorològic de Catalunya and no. 100/2018 AEROBUS), although the legal basis for those bans is not clear and, again, appeals are pending.

3. Private Damages

Any natural or legal person who has suffered harm caused by anticompetitive conduct has standing to bring a damages claim. That includes both direct and indirect purchasers, and following the case law of the *Kone* judgment of the Court of Justice of the European Union, umbrella purchaser claims can also be pursued.

As to the level of damages, damages actions under Spanish law are compensatory in nature and only the amount of damages that the claimant provides evidence for can be granted. Those who have suffered harm can claim compensation for the damage actually suffered, which may encompass direct damage, lost profits and interest, although the Spanish Supreme Court has expressly accepted the passing-on defence (in a judgment predating the Directive 2014/104/EU, in the context of the Spanish Sugar cartel).

In this regard, while claims in relation to decisions of the Spanish competition authorities concerning information exchanges have been limited to date, a very large number of cases have been brought against the major truck manufacturers based on the European Commission characterizing as a cartel a long-running exchange of gross price information.

V. Safe Harbours and Exemptions

There are no safe harbours or exemptions specifically for information sharing under Spanish or EU law, although general exceptions and exemptions to the prohibitions in Article 1 LDC and Article 101 TFEU apply as follows.

1. Article 1(3) LDC and Article 101(3) TFEU

First, Article 1(3) of the LDC and Article 101(3) of the TFEU set out the so-called criteria for exemption that apply to conduct that would otherwise infringe Article 1(1) LDC or Article 101(1) TFEU but which contributes to improving the production or marketing and distribution of goods and services or to promoting technical or economic progress, provided that such improvements can be shared fairly by consumers, do not create restrictions on competition that are not necessary for the attainment of the improvements, and do not eliminate competition from a substantial part of the affected market.

There is no block exemption regulation under Article 1(3) LDC that would apply to horizontal information sharing at EU or national level. Nevertheless, the European Commission's Horizontal Guidelines recognize that information sharing can give rise to a number of pro-competitive efficiencies by helping companies allocate investments and production efficiently, identifying risks and permitting benchmarking, among other things.

Spanish competition authorities and courts profess to follow those principles, but in practice the approach of the authorities has been strict and Article 1(3) LDC has rarely been applied (which may be a function of the fact that the majority of cases have either been cartels cases or related to cartel cases).

2. Article 4 LDC: Conduct Resulting from the Application of a Law

Pursuant to Article 4 LDC, the prohibitions set out in the LDC do not apply to conducts, including agreements, that could be considered cartels that "result from the application of a law". Similarly, EU law recognizes a defence of state compulsion where anticompetitive conduct is compelled by the state.

However, like the EU state compulsion defence, Article 4 LDC is narrowly interpreted and applied. First, the government regulation authorizing the conduct must be a law with at least the same rank as the LDC: secondary legislation will not suffice. Second, Article 4 LDC will not be sufficient if the law in question merely permits the conduct or encourages the conduct; for Article 4 LDC to apply the conduct in question must be mandatory.

Similarly, the competition authorities and courts have consistently found that government agencies other than the CNMC or the RCAs do not have any jurisdiction to determine whether a conduct falls within Articles 1, 2 or 3 LDC. Therefore, the mere fact that conduct is government-approved, or even that government agencies participate in it, is no defence. Spanish courts have, however, declined to uphold fines when the regulatory

context of the practices under investigation was misleading and the Administration had actively participated in the conduct.[24]

3. Article 5 LDC/De Minimis: Conduct of Minor Importance

Article 5 LDC establishes a de minimis exception similar to that recognized under EU law, whereby the prohibition in Article 1(1) LDC does not apply to conducts that "due to their limited importance, are not capable of significantly affecting competition".

The exception is developed in Articles 1 and 2 of the Royal Decree 261/2008, of February 22, approving the Regulation for the Defence of Competition (the RDC) and will apply to an information exchange between competitors provided that their market share is less than 10% and the conduct in question cannot be characterized as price fixing, the limitation of sales or production, or market sharing in any form. Similarly, under EU law and in accordance with the European Commission's 2014 notice on agreements of minor importance,[25] information sharing would be considered de minimis if the parties' market share is less than 10% and the information sharing cannot be considered a "by object" restriction.

Again however, in practice the approach of the authorities has been strict and Article 5 LDC has not been applied. Spanish authorities have in many cases characterized information sharing as a by object infringement and even as a cartel.

VI. Information Sharing Best Practices

As described above, Spanish competition authorities have found information exchanges between competitors to be infringements of Spanish and EU competition law in a wide range of situations, even where the objective characteristics of the information exchanged did not appear to be of concern for competition. In particular, the CNMC has adopted a severe approach over recent years, deeming information exchanges as "by object" infringements or as cartels, even when the data in question did not concern future prices or quantities. That circumstance clearly urges caution when embarking on any kind of information sharing since, if qualified as a "by object" infringement, the authorities will not be required to prove any anticompetitive effects of the exchange in the market.

Accordingly, advising on whether an exchange of information between competitors may be an infringement is not a simple task, and it is necessary to assess the exchange in detail, taking into account the structure of the market concerned, the characteristics of the information exchanged and the way in which the information exchanges take place.

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[24] For instance, Audiencia Nacional ruling of 15 October 2012, appeal nº 608/2011, referring to the Spanish competition authority's decision in case S/0167/09 – *Productores Uva y Mosto Jerez.*

[25] Notice on agreements of minor importance that do not appreciably restrict competition under Article 101(1) of the TFEU (De Minimis Notice) (2014/C 291/01).