

DOMINANCE

Spain



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GENERAL FRAMEWORK

Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The rules governing the abuse of dominance are set forth in the Spanish Competition Act (SCA) and its implementing regulation .

The national supervising authority responsible for ensuring and maintaining an effective competition in the Spanish market is the Spanish Commission of Markets and Competition (CNMC). The CNMC is entitled to enforce and investigate any abuse of dominance.

The SCA has been recently amended by means of Royal Decree-Law 7/2021, of 27 April, affecting, among others, the sanctioning regime and the CNMC's powers.

Pursuant to article 2 of SCA, the abuse of dominance by one or more undertakings within the Spanish market or part of it, is prohibited. Article 2 of SCA includes an illustrative list of commercial behaviour considered abusive; however, it is not a closed list. Likewise, article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of dominance within the internal market or a substantial part of it. The CNMC and the Spanish courts are entitled to apply article 102 TFEU pursuant to European Union (EU) Regulation 1/2003 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty.

The substantive content of article 2 of the SCA and 102 TFEU is essentially the same, but European legislation shall apply when the abuse: (1) covers the internal market or a substantial part of it, and (2) it is capable of affecting trade between member states. Article 2 of the SCA shall apply when the abuse takes place within the Spanish market. In any case, both rules may be applied at the same time.

The Spanish Supreme Court ruled that the EU doctrine and case law on abuse of dominance may be used as an ancillary instrument for interpreting article 2 of the SCA. In practice, EU case law is systematically applied to national cases.

Law stated - 31 January 2022

Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The SCA does not prohibit the acquisition of market power per se, which is legitimate. Instead, competition legislation outlaws the abuse of dominance. Dominant companies have a 'special duty' consisting of not hindering competition by their behaviour, which is already deemed to be distorted by their own presence in the market.

The concept of dominance is not defined in the law; it has been developed by case law as follows.

Spanish case law has defined this legal term based on the traditional criteria followed by the European Court of Justice (ECJ) in cases such as Continental Can (C-6/1972), United Brands (C-27/1976) and Hoffmann La-Roche (C-85/1976). According to the ECJ approach, dominance has been defined as 'a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers'.

Spanish case Bacardí (TDC R 362/1999) provides a definition of dominance:

Other cases in Spain include: Aluminios de Navarra (TDC 344/1998) , Electra Avellana (TDC 441/1998), Nokia (S/DC/0557/15), Criadores de caballos 2 (S/DC/0580/16), Dama Vs Sgae (S/DC/0590/16), Inhaladores Astrazeneca (S/0027/19) .

In general, a dominant position derives from a combination of several factors that, taken separately, are not necessarily critical. In this regard, Spanish case law use: market share (absolute and relative), stability and volatility of market shares, barriers to the entry, countervailing power of demand, position of rivals versus incumbent, sector-regulation, economic strength of competitors, etc.

Law stated - 31 January 2022

Purpose of legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The essence of article 2 of SCA is controlling the market power held by one entity (or more than one under certain circumstances). If competition exists, quality and innovation increase and prices are lower, which ultimately means more efficiency and consumer welfare. However, if one company holds dominance, such economic strength may lead to impose prices or other commercial conditions for their own benefit without adding any value to clients.

Thus, dominance may lead to higher prices and lower output than would otherwise prevail under normal discipline of the market, this is the core rationale for abuse of dominance regulation.

However, other wider objectives have played an important role in the development of this regulation in Spain, such as the liberalisation process of certain sectors traditionally allocated to the government.

Law stated - 31 January 2022

Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are sector-specific rules applicable to main players of certain industries ('critical', such as energy or telecommunications). These regulations differ from dominance rules and are complementary to them.

Spanish Royal Decree 6/2000, of 23 June, set forth specific obligations and limitations for main players of certain sectors (including, among others, limits to shareholdings, access obligations or public tenders). In the energy sector, dominant players are those holding one out of the five higher market shares in that market or sector. The sectors affected by this regulation are:

- generation and supply of power;
- manufacture and distribution of oil;
- manufacture and distribution of liquefied petroleum gas;
- manufacture and distribution of natural gas;
- mobile telephony; and
- landline telephony.

The CNMC publishes on yearly basis the list of main dominant or significant market power players under the aforementioned sector-specific rules.

Law stated - 31 January 2022

Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Dominance rules apply to any undertaking carrying out an economic activity in the market regardless of its legal regime and its financing.

Article 2(3) of SCA expressly states that dominance rules also apply when dominance is granted by a legal provision. This means that some acts carried out under dominance that is acquired by law can still be abusive. In case AENA 2 (CNMC S/0420/12), AENA, a Spanish listed company but majority owned by the government, which is the main airport operator in Spain, was investigated for a potential abuse of dominance. In this particular case, the CNMC considered that no abuse was committed as AENA acted within its duties as airport operator and in the benefit of the public interest.

Nevertheless, there are two exceptions to the application of dominance rules (articles 4 and 5 of SCA). An abuse of dominance shall be legal in the following cases: (1) if such behaviour is authorised by a specific law, or (2) if the effects are de minimis in the market.

The application of dominance rules to public entities is a complex matter that must be assessed on a case-by-case basis. It will depend on whether the public entity acts as just any other player in the market, or under its legal public duties. Spanish case law opted for a wide interpretation of the concept 'economic activity' leading to the application of dominance rules to public entities. Among others, see CNMC cases: Asociaciones Cárnicas (R/583/03) and Funerarias Baleares (650/08).

Law stated - 31 January 2022

Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Acquiring or holding market power is not forbidden. Article 2 of SCA prohibits the abuse of dominance in a market where competition is already weakened due to the presence of the dominant company (CNMC case Criadores de Caballos 2, S/DC/0580/16). The dominant company must self-assess whether it enjoys dominance, in which case it has a special responsibility of not distorting competition through its behaviour.

In some cases, a company may enjoy certain market power but not dominance. Consequently, it would not be covered by dominance rules. Behaviour considered abusive may be lawful if carried out by non-dominant companies.

Law stated - 31 January 2022

Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Pursuant to article 2 of SCA, the abuse of collective dominance is also prohibited. Collective dominance occurs when two or more entities are dominant. Collective dominance is not defined in the law but it has been developed by Spanish

case law based on the criteria set forth by the ECJ, among others, in cases *Compaigne Maritime Belge* (C-395/96 P) and *Airtours* (T-342/99).

The CNMC set forth the following criteria for determining the existence of collective dominance in case *Llamadas Móviles* (S/0391/11), confirmed by the Spanish High Court (Judgment 182/2017) and by the Supreme Court (Judgment 1495/2018); and in case *Mensajes Cortos* (S/0248/10):

- the existence of a common strategy or behaviour that, if followed, would benefit all the dominant companies;
- each dominant player must be able to know the behaviour of the others to monitor if the common strategy is being followed;
- the situation must be sustainable over time, this is, incentives should exist to discourage participants from discontinuing the common strategy; and
- the foreseeable reaction of competitors and consumers cannot put at risk the common strategy of the dominant players.

Law stated - 31 January 2022

Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The prohibition of abuse of dominance applies to companies carrying out an economic activity in the market. This includes without distinction: manufacturers, suppliers or purchasers of goods and services, including dominant purchasers.

The same criteria are followed in the case of collusive behaviour between companies. For instance, in case *Industria Láctea* (S/0425/12), several companies and sector associations active in the market of milk processing were fined for a cartel consisting of information exchanges related to the price of the raw milk that they purchased from the breeders (a purchasing cartel).

In case *British Airways* (T-219/99), the ECJ fined British Airways for abuse of dominance in the market of air travel agency services, on which British Airways was a purchaser of such services offered by the travel agencies.

Law stated - 31 January 2022

Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The application of article 2 of SCA requires an unlawful conduct carried out by a dominant company in a specific relevant market. The relevant market is a legal concept that includes the relevant product market and the relevant geographic market.

The criteria set forth in the EU Commission guidelines on the definition of the relevant market are fully applicable in Spain and are systematically used by the CNMC and the Spanish courts when applying dominance rules. See, for instance, CNMC case *Tubogas/Repsol* (513/01).

Pursuant to such guidelines, the relevant market is defined as follows: (1) a relevant product market comprises all those products or services that are regarded as interchangeable or substitutable by the consumer by reason of the products characteristics, their prices and their intended use, and (2) a relevant geographic market comprises the area

in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently similar.

There is no market share threshold as such that determines dominance. However, Spanish case law has considered market shares above 40 per cent as indicative of dominance in some cases.

Law stated - 31 January 2022

ABUSE OF DOMINANCE

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The concept of abuse is not defined in the law, but it has largely grown out of case law. Holding or acquiring market power is not prohibited, therefore distinguishing between legitimate conducts (competition 'on the merits') and abusive behaviour by dominant firms is a complex matter. Moreover, there are no safe-harbours and dominant firms have a duty of self-assessing their position and have a 'special responsibility' not to abuse.

Article 2 of the Spanish Competition Act (SCA) set forth a list of common abusive behaviours, but it is not a closed list. It includes the following categories of abusive behaviour:

- article 2(a) of SCA prohibits directly or indirectly imposing unfair prices or other unfair trading conditions;
- article 2(b) of SCA prohibits limiting production, distribution, technical developments to the detriment of consumers or companies;
- article 2(c) of SCA prohibits refusals to supply products or services;
- article 2(d) of SCA prohibits applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- article 2(e) of SCA prohibits the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The classic ECJ formulation of an abusive behaviour has considered a form-based approach:

(Case Hoffmann La-Roche , C-85/1976).

The aforementioned concept has also prevailed in Spanish case law. However, both at EU and Spanish level, it turned into an effects-based approach, focusing on consumer welfare instead of just protecting competitors. In this regard, the role of effects has been considered by Spanish case law, among others, see Judgment of the Spanish National Court in Correos 2 (118/2014).

Both approaches are still used by the competition authorities. The Spanish Supreme Court has established that there shall be no abuse if there are reasonable, objective justifications and economic reasons other than hindering competition (among others, Judgment of the Supreme Court, Tandem Transportes y Ruta del Sur , 4495/1998).

Other relevant cases are judgments of the Supreme Court Unión Española de Explosivos (4699/2003), Altadis (915/2002), Correos (1246/2006) and Telefónica de España (9174/2003).

Law stated - 31 January 2022

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse in Spain covers both exploitative and exclusionary practices. This distinction is linked to the main effects likely to be triggered by the abuse (ie, harming consumer welfare (exploitative) or causing harm to other competitors (exclusionary)).

In Spain, both types of practices are prohibited if carried out by dominant firms, and both consumers and competitors are protected by dominance rules. See Judgment of the Supreme Court, Unión Española de Explosivos (4699/2003).

Law stated - 31 January 2022

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The infringement of article 2 of SCA requires the existence of both, dominance and an abusive conduct carried out in a relevant market (or a connected market). Therefore, both requirements are essential (ie, there is no abuse if that dominance is not evidenced in the case).

The Supreme Court in Endesa Distribución (4619/2011) has declared that dominance and abuse are cumulative requirements and in particular, dominance may be held in the market where the company is active or in a connected market.

The requirements for extending an abuse to another connected market are the same as those recognised in EU case law (see judgment of the ECJ in Tetra Pak Internacional, C-333/94): (1) the company must have dominance over a product with no effective substitutes, (2) the link between both markets must be close, (3) it must be feasible for the dominant company to extend its power to the related market or reinforce its power in the one that is already present, in such a way that competition is weakened.

See also, Spanish Commission of Markets and Competition (CNMC) cases Google El Tenedor (S/0004/19), Centrica/Hidrocantábrico (645/08) or Special Prices/Binter Canarias (R713/07).

Law stated - 31 January 2022

Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

It should be noted that any defence should be assessed on a case-by case-basis, but in Spain the main defence is if there is an objective and reasonable justification for the relevant behaviour.

Law stated - 31 January 2022

SPECIFIC FORMS OF ABUSE

Types of conduct

Rebate schemes

Certain rebate schemes carried out by dominant firms have been widely recognised as abusive (including retroactive and incremental rebates).

In *Axion Abertis II* (2748/06), the Commission of Markets and Competition (CNMC) considered the role of effects for assessing the rebates applied by a dominant firm to its clients for contracting services in the television market. Those rebates were held to have exclusionary effects.

Recently, the General Court annulled Intel's €1 billion fine on the basis that the EU Commission had failed to show that the conditional rebates it was applying had anticompetitive effects, as such rebates could not be regarded as a *per se* infringement of EU competition law.

Law stated - 31 January 2022

Tying and bundling

The Spanish Competition Act (SCA) expressly prohibits the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts. Therefore, tying and bundling can certainly be considered an abuse of dominance.

Tying usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant company (the tied product).

Bundling usually refers to the way products are offered and priced by the dominant company (normally, the sum of the prices when sold separately is higher than the bundled price).

The ECJ in case *Microsoft* (T-201/04) set forth the following conditions for this kind of abuse: (1) the tying and tied products are distinct products, and (2) the tying practice is likely to lead to anticompetitive foreclosure. These criteria are accepted by Spanish case law in CNMC case *Producción de Fútbol* (S/0242/10), where the CNMC declared no abuse as the exclusionary effect was not evidenced.

In *Renfe Descuentos* (S/0566/15), the CNMC declared that there is no abusive bundling if an equally efficient competitor may offer the same bundle in the market.

Law stated - 31 January 2022

Exclusive dealing

Spanish case law has recognised that entering into exclusive agreements or non-compete clauses by a dominant firm may be abusive.

In *Axion/Abertis Telecom* (646/08), the CNMC imposed a fine on Abertis for an abuse of dominance consisting of exclusive dealing having the effect of preventing the entry of competitors in the market of broadcasting terrestrial TV signals. In particular, this was because Abertis required large penalties from its clients in the event of early termination of their long-term contracts.

Law stated - 31 January 2022

Predatory pricing

Predatory behaviour consists of deliberately incurring in losses or foregoing profits by a dominant firm (in the short term) aimed at foreclosing competitors with a view to strengthening its market power long term, thereby causing consumer harm.

Spanish case law uses the same test as the ECJ for determining if prices are predatory. This is, the avoidable cost (AAC) (see, Judgment of the Supreme Court, case Altadis , 915/2002) and long-run average incremental cost (LRAIC) (see case Renfe Descuentos, 0566/2015).

According to the ECJ, failure to cover AAC indicates that the dominant firm is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product-specific fixed costs incurred before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and therefore an equally efficient competitor could be foreclosed from the market.

Spanish case law also requires evidence of the predatory intention. See Judgments of the Supreme Court in Tabacalera (375/96) and Puertos de Andalucía (618/05).

Law stated - 31 January 2022

Price or margin squeezes

A dominant undertaking may charge a wholesale price for a product on the upstream market that does not allow an equally efficient competitor to trade profitably in the downstream market on a lasting basis.

In Correos 2 (S/0373/11), the CNMC imposed a fine on the dominant firm for applying wholesale prices to access the network, higher than those applied to its main retail clients. However, the Supreme Court annulled the decision based on the lack of effects, as the conduct of the dominant firm did not exclude other efficient competitors from the market.

Law stated - 31 January 2022

Refusals to deal and denied access to essential facilities

Companies usually choose their trading partners. However, when the product or service is objectively necessary to be able to compete in a downstream market, a refusal to deal may amount to an abuse of dominance where the refusal is likely to lead to the elimination of competition in the downstream market and thereby causing the consumer harm.

The recent ruling of the Supreme Court *Mémora Servicios Funerarios*, dated 10 December 2019, upheld the criteria established by the ECJ in Case Oscar Bronner (C-7/97): (1) the refusal to deal must relate to a product or service objectively necessary to be able to compete effectively in a downstream market, (2) it must be likely to result in the elimination of effective competition in the downstream market, and (3) it must be likely to lead to consumer harm.

In a recent case *Tanatorios Provincia de Huelva* (S/01/2021), the regional Competition Authority of Andalucía considered that the only two funeral facilities in the province of Huelva were essential facilities. The owners refused to give access to such facilities to their competitors who wanted to subcontract the service. The Authority considered such conduct abusive.

Law stated - 31 January 2022

Predatory product design or a failure to disclose new technology

Predatory product design or failure to disclose new technology are not yet standard kind of abusive behaviour in Spain. However, such behaviour could well be regarded as abusive by future case law.

Law stated - 31 January 2022

Price discrimination

Price discrimination consisting of a dominant firm applying different prices for the same goods or services to different clients, thus, placing them at a disadvantage, may be an abusive behaviour.

In CNMC case Estaciones de Servicio (R644/05), the authority established the requirements for this kind of abuse:

- applying different prices;
- for equivalent products or services;
- the clients may be competitors in a downstream market;
- one of the clients or competitors is placed at a disadvantage; and
- there is a lack of objective justification.

In a recent judgment of the High Court of Justice of Castilla y León, Serfunle (850/2020), a dominant company in the funeral industry applied different prices to its clients, who were also competitors, than those applied to non-competitor clients. The authority considered that there was no abuse as the services provided were not equivalent, therefore, the price difference was justified.

Law stated - 31 January 2022

Exploitative prices or terms of supply

Imposing, directly or indirectly, unfair prices or trading conditions by a dominant firm (including excessive prices) may be regarded as abusive behaviour.

In CNMC case Canarias de Explosivos (626/07), an abuse of dominance consisting of excessive prices was confirmed. The authority declared that excessive prices arise if the dominant firm obtains profits that it would not have gained in the case of competition on the merits.

In other relevant cases, the CNMC used other comparison tests, such as historical prices or pricing in other similar areas where dominance does not exist. See case TDC 465/99 Propiedad Intelectual Audiovisual.

Law stated - 31 January 2022

Abuse of administrative or government process

Abuse of administrative or government process is not yet a standard kind of abusive behaviour in Spain.

However, the CNMC established that the behaviour of an entity responsible for regulating an economic activity in an arbitrary and discriminatory manner amounted to abusive behaviour (case Feriantes Ayuntamiento de Peralta).

Law stated - 31 January 2022

Mergers and acquisitions as exclusionary practices

Mergers and acquisitions have not been held to amount to exclusionary practices under article 2 of SCA.

The legal test for assessing mergers and acquisitions in Spain is whether the transaction prevents the maintenance of effective competition in all or part of the Spanish market.

Law stated - 31 January 2022

Other abuses

The list of abusive behaviours included in article 2 of SCA is not a closed list. Spanish case law has recognised behaviour not specifically included in this list as an abuse and it could continue to expand to new forms of abusive behaviour.

Law stated - 31 January 2022

ENFORCEMENT PROCEEDINGS

Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Spanish Commission of Markets and Competition (CNMC) and the Spanish courts are responsible for the enforcement of dominance rules, including both articles 2 of Spanish Competition Act (SCA) and 102 of TFEU.

The CNMC is a public authority responsible for ensuring, maintaining and promoting an effective competition in the Spanish market. Thus, the CNMC is endowed with wide enforcement, sanctioning and investigating powers. Since 2013, the CNMC is also the public supervisor of relevant sectors such as energy, telecommunications, railway, airports, postal and audio-visual industries. Within the CNMC, the Directorate of Competition is the investigation unit and the Council is the decision-making body.

In Spain, there are also regional competition authorities (currently, in the regions of Cataluña, Galicia, Comunidad Valenciana, Aragón, Castilla y León, País Vasco, Extremadura, Andalucía, Murcia, Canarias, Madrid and Navarra). The jurisdiction of these regional bodies covers enforcement of abuse of dominance within the relevant region.

The CNMC investigation powers are regulated by the Spanish Competition Act (SCA) and Law 3/2013 on the creation of the CNMC. These powers may be summarised as follows:

- Request of information: any individual or legal entity, including any public entity, is obliged to collaborate with the CNMC, informing and providing, on time, any information requested by the CNMC, including any data or information that may be deemed appropriate for the case investigation. Any information provided to the CNMC shall be true, clear, complete and accurate.
- Dawn raids: dawn raids are unannounced visits at the company headquarters, offices or other facilities, made ex officio by the CNMC. Generally, they are carried out prior to opening an official investigation proceeding. During the dawn raid, the CNMC may:
 - access the facilities;
 - check documents, including electronic documents, and take copies of such documents;

- seal off the facilities,
 - request the attendance of specific employees or directors; and
 - request clarifications and any other additional documents deemed appropriate. To enter premises, the CNMC requires consent of the affected party or a search warrant. Legally privileged documents are protected;
- Interviews: the CNMC may interview any employees, representatives, directors or any other individual who may provide relevant data and information on the investigation, and it may be recorded. Normally, the interviewee is assisted by a legal counsel.

Failure to fulfil any of the aforementioned duty of collaboration with the CNMC is regarded as a serious infringement.

Spanish commercial courts may also declare the existence of an abuse of dominance.

Law stated - 31 January 2022

Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The abuse of dominance is regarded as a very serious infringement that may result in fines up to 10 per cent of the total global turnover of the dominant company in the last financial year.

Personal fines may also be imposed on legal representatives or members of the management bodies who have intervened in the abusive behaviour, unless they show evidence that they did not attend the meetings or they voted against the behaviour. Personal fines may be up to €60,000 for each individual.

The CNMC may also impose daily fines for ensuring, among others, enforcement of a sanctioning decision, ceasing an abusive behaviour or removal of its effects. The penalty fine may be up to 5 per cent of the daily average total global turnover of the infringing party in the last financial year.

For determining the amount of the fine, the CNMC will consider:

- size and features of the relevant market;
- market share of the infringing entity;
- scope of the infringement;
- duration of the infringement;
- effects on the consumers and other players of the market; and
- any illegal profits obtained as a consequence of the infringement.

The CNMC will also consider, when establishing the amount of the fine, if there are aggravating or mitigating factors.

The CNMC will also require the infringing party to cease on the abusive behaviour, to remove the effects thereof in the market, or impose other conditions or remedies.

Likewise, failure to collaborate with the CNMC (for instance, frustrating any request of information or interview) or hinder or preventing by any means an investigation proceeding of the CNMC is a serious infringement that may result in fines up to 5 per cent of the total global turnover of the infringing entity in the last financial year.

The statute of limitation for very serious infringements is four years, and two years for serious infringements, and it

shall be interrupted by any proceeding or information request by the CNMC.

According to Act 9/2017 on contracts with the public authorities, the CNMC may also impose upon the infringing party the prohibition to contract with government authorities, which bans the dominant company from participating in any public tender. The CNMC may declare the scope and duration of this prohibition, or leave such decision to the Spanish Advisory Board of Public Tenders who will decide by means of an ad hoc proceeding.

Finally, an aggrieved customer who endured the abusive behaviour can claim damages in court from the dominant player.

Some of the most relevant fines imposed by the CNMC for infringing abuse of dominance rules are the following:

- In *Mensajes Cortos* (0248/10), the CNMC imposed fines on Telefonica, Vodafone and Orange for a collective abuse of dominance consisting of applying excessive prices in the market for wholesale SSM and MMS short message services. The total fine amounted to €120 million. However, the CNMC decision was annulled by the Spanish Supreme Court as the Supreme Court considered that collective dominance was not evidenced in the case.
- In case *Astel/Telefonica* (557/03), Telefónica received a fine amounting to €57 million for an abuse of dominance in the market of landline telephony. However, this decision was also annulled by the Spanish High Court as the court found that competition in the market was not seriously disturbed.
- In *Endesa Instalación* (S/0211/09), Endesa received a fine amounting €23 million for abuse of dominance in the market of power generation.
- In *Axión/Abertis* (646/08), the CNMC impose a fine amounting to €22 million to a dominant firm for an abuse of dominance in the market of broadcasting terrestrial TV signals.

Law stated - 31 January 2022

Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The CNMC is entitled to impose sanctions directly in case of infringement of the SCA. Thus, a fine on abuse of dominance is imposed by the CNMC directly and its final decision is subject to judicial review.

In any case, the CNMC may also adopt interim measures during an investigation.

Law stated - 31 January 2022

Enforcement record

What is the recent enforcement record in your jurisdiction?

The most recent abuse of dominance cases investigated by the CNMC are the following:

- In CNMC case *Inhaladores Astrazeneca* (S/0027/19), the CNMC investigated the behaviour of a dominant firm in the pharmaceutical sector for offering drugs to hospitals at prices below its average variable costs or even its marginal costs. The CNMC concluded that there was no abuse as there was insufficient evidence of a deliberate strategy by the dominant firm to foreclose its competitors.
- In the recent judgment of 8 September 2021, the Spanish High Court confirmed the CNMC decision in case *Criadores de Caballos* (0580/16). The CNMC found that the Spanish National Purebred Horse Breeders Associations (ANCEE) abused its dominant position in the market by applying non-objective and discriminatory

conditions to the members of the Association.

- In Google (S/0007/20), the CNMC investigated if Google's online advertising practices amounted to an abuse of dominance. The CNMC considered that Google's behaviour consisting of excluding certain categories of advertising from its services was objective, transparent and non-discriminatory behaviour. Hence, it was finally declared that there was no abuse.
- In case Google El Tenedor (S/0004/19), the CNMC investigated the conduct of Google related to Google's own service for booking restaurants online that could put other restaurant booking systems at a disadvantage. It was finally declared that there was no abuse since there was insufficient evidence to establish an anticompetitive effect on the market.

According to the SCA, the maximum length of an antitrust investigation for an abuse of dominance behaviour is 18 months. However, it should be noted that this period may actually be longer than 18 months as a result of any suspension of the proceeding adopted by the CNMC for the reasons set forth in the SCA.

Law stated - 31 January 2022

Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Unlike in the case of collusive behaviour rules, the SCA does not foresee any specific provision as regards the nullity consequences of a contract involving a dominant company. However, it is certainly possible to declare null and void a contract (or part of it) deriving from an abusive behaviour.

The question of whether the entire contract or just specific clauses will be declared invalid will depend on the circumstances of the case.

In Judgment Sogecable (162/2012), the Spanish Supreme Court recognised the contractual consequences of an abuse of dominance. In particular, in this ruling it held that the termination of a contract by a dominant firm was invalid and constituted an abuse of dominance as it was based on an abusive contractual provision.

Law stated - 31 January 2022

Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement derived from abuse of dominance is certainly possible under Spanish laws, including claims for damages. Spanish courts could also adopt various measures against dominant companies (ie, refrain from specific conduct).

Law stated - 31 January 2022

Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Damages claims have a specific regulation in the SCA since EU Directive 2014/104/EU on antitrust damages actions was implemented in Spain (articles 71 to 81 of SCA).

According to the SCA, any victim of an abuse of dominance is entitled to full compensation for the harm suffered, which covers compensation for actual loss and loss of profits, in addition to the payment of interests from the time the harm occurred until compensation is paid.

Claims for damages shall be filed before the Spanish courts, which will award the damages. Such claims may be both 'stand-alone' or 'follow-on'.

Under Spanish law, damages compensation requires concurrence of: (1) an unlawful conduct, (2) a harm economically valuable, and (3) a link between the abuse and the harm suffered. In the case of cartels, the SCA provides a legal presumption that the cartel causes harm to the victims. However, in cases of abuse of dominance such presumption is not applicable, so the harm must be evidenced and the burden thereof corresponds to the claimant.

Moreover, claimants must quantify the damages, which is a complex matter. The court is also empowered to quantify the amount of damages if it is practically impossible or very difficult to quantify the harm suffered on the basis of the evidence available.

In cases of abuse of dominance, case law is not as developed as in relation to the enforcement of cartels, but it has certainly been recognised by the Spanish courts. In the Conduit case, for the first time, a Madrid court (Judgment 85/2005) held that Telefónica was liable to pay damages to a competitor for an abuse of dominance. In this particular case, the court recognised damages as direct losses, but no loss of profits.

In Centrica (appeal number 45/2010 of the Commercial Court of Barcelona), the court also held that Endesa was liable to pay damages deriving from an abuse of dominant position.

In case 638/2018, the Spanish Regional Court of Barcelona held that Endesa was liable to pay damages derived from an abuse of dominance consisting of access denial to power distribution lines.

Law stated - 31 January 2022

Appeals

To what court may authority decisions finding an abuse be appealed?

Any decision of the CNMC declaring the existence of an abuse of dominance may be appealed before the Spanish High Court (Audiencia Nacional). During this judicial proceeding the Audiencia Nacional is entitled to a full review of the case, both facts and law.

In general terms, the appeal does not suspend the obligation of paying the fine imposed, unless the infringing party shows a serious and irreparable damage (such as, for instance, risk of insolvency) and submits a guarantee to the High Court.

The judgment of the Audiencia Nacional may be appealed before the Spanish Supreme Court if the case has the requisite 'Supreme Court interest'. The Supreme Court will not review the facts of the case, but will just rule on points of law admitted to be pleaded.

Law stated - 31 January 2022

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Any actions carried out by non-dominant firms must comply with the provisions of the Spanish Unfair Competition Act. Under the Unfair Competition Act, any behaviour against the principle of good faith may be deemed illegal.

The Spanish Unfair Competition Act includes a list of unfair acts, such as predatory pricing, acts of confusion or misleading to the consumers, aggressive acts, acts of denigration, comparison, imitation, exploitation of a third party's reputation, violation of trade secrets, etc.

Law stated - 31 January 2022

UPDATE AND TRENDS

Forthcoming changes

Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

There are no expected legislative changes in this area.

Currently, the main Commission of Markets and Competition (CNMC) priorities include the transition towards digitalisation and more sustainable 'new' economy. Some priority sectors for the period 2021 to 2026 include digital markets and sectors that may have been weakened as a result of the covid-19 crisis, such as pharmaceutical, insurance, funeral or financial sectors. Likewise, the manipulation of tenders in the field of public procurement will continue to be a priority for the CNMC.

Law stated - 31 January 2022

Jurisdictions

	Australia	Gilbert + Tobin
	Austria	Schima Mayer Starlinger
	Belgium	Cleary Gottlieb Steen & Hamilton LLP
	Brazil	Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados
	Bulgaria	Wolf Theiss
	Canada	Baker McKenzie
	China	DeHeng Law Offices
	Denmark	Bruun & Hjejle
	Ecuador	Robalino
	European Union	Cleary Gottlieb Steen & Hamilton LLP
	France	UGGC Avocats
	Germany	Cleary Gottlieb Steen & Hamilton LLP
	Greece	Nikolinakos & Partners Law Firm
	Hong Kong	Eversheds Sutherland (International) LLP
	India	Shardul Amarchand Mangaldas & Co
	Indonesia	ABNR
	Ireland	Matheson
	Italy	Rucellai & Raffaelli
	Japan	Anderson Mōri & Tomotsune
	Morocco	UGGC Avocats
	Nigeria	Streamsowers & Köhn
	Norway	Advokatfirmaet Thommessen AS
	Poland	Linklaters LLP
	Portugal	Gómez-Acebo & Pombo Abogados
	Saudi Arabia	Al Tamimi & Company

	Slovenia	Odvetniska druzba Zdolsek
	South Korea	Yoon & Yang LLC
	Spain	Ontier
	Switzerland	CORE Attorneys Ltd
	Turkey	ELIG Gurkaynak Attorneys-at-Law
	United Kingdom	Cleary Gottlieb Steen & Hamilton LLP
	USA	Cleary Gottlieb Steen & Hamilton LLP