



Ramón y Cajal
ABOGADOS

Antitrust & Pharma Trends in Spain in 2021



Infringement decisions of the CNMC

RADIOFÁRMACOS

Infringement decision resulting in a fine of 5.76 million euros imposed on NOVARTIS and CURIUM and two of their managers for sharing contracts for the supply of PET radiopharmaceuticals to public and private hospitals, in breach of Article 1 LDC and Article 101 TFEU.

- The alleged anti-competitive conduct took the form of unnecessary subcontracting agreements and an exclusive allocation of customers.
- They are also subject to a prohibition on contracting with the public administration subject to the duration and scope to be determined in due course by the State Public Procurement Advisory Board (Junta Consultiva de Contratación Pública del Estado).

Ongoing CNMC investigations

ISDIN

Possible fixing of online resale prices of its skincare products, which would constitute a vertical agreement contrary to Article 1 LDC and Article 101 TFEU.

- The investigation stems from a complaint filed by undertakings engaged in the distribution and marketing of pharmaceuticals and body and healthcare products.
- The CNMC warns of investigations of similar practices by other manufacturers in the pharmaceutical and parapharmaceutical segments.

LEADIANT

Possible practice of excessive pricing of an 'orphan' drug for patients with cerebrotendinous xanthomatosis that would entail an abuse of a dominant position contrary to Article 2 LDC and Article 102 TFEU.

- The conduct under investigation arises from a complaint filed in 2019 by OCU, which criticised LEADIANT for multiplying the price of the drug in question by a thousandfold.
- In July 2021, the Dutch competition authority imposed a fine of €19.5 million on LEADIANT for this type of conduct.

MERCK

Possible use of judicial mechanisms based on intellectual property law in order to delay and hinder the entry of competitors into the Spanish market for combined hormonal vaginal ring contraceptives, which would constitute an abuse of a dominant position contrary to Article 2 LDC and Article 102 TFEU.

- The investigation was triggered by a complaint by INSUD PHARMA and led to inspections at MERCK's headquarters.

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CNMC decisions to close the case

ABBVIE

Dismissal of AMGEN's complaint against ABBVIE concerning an alleged policy of exclusive discounting of its product HUMIRA (prescribed for pathologies such as rheumatoid arthritis, ankylosing spondylitis, or juvenile idiopathic arthritis), which would constitute an abuse of a dominant position prohibited by Article 2 LDC and Article 102 TFEU.

- The decision questions whether ABBVIE had a dominant position in the market for the active ingredient of HUMIRA (i.e., the market for adalimumab) due to (i) the rapid penetration of biosimilars, and (ii) the increased use of tenders to purchase this product, which would limit the supplier's bargaining power.
- In the same vein, the CNMC rejected the argument that ABBVIE's rebate policy for HUMIRA was abusive because it did not include exclusivity clauses that would have exclusionary effects on the market.

Inhaladores ASTRAZENECA

Dismissal of TEVA's complaint against ASTRAZENECA, which gave rise to inspections at the latter's headquarters in 2019, concerning, according to the complainant, a predatory pricing policy for its product SYMBICORT, prescribed for respiratory diseases, which would constitute an abuse of a dominant position contrary to Article 2 LDC and Article 102 TFEU.

- The decision rules out the possibility that ASTRAZENECA had a dominant position in the market for ICS/LABA medicines (ATC4), which is, according to the CNMC, the correct market definition instead of the relevant market for budesonide/formoterol active ingredients (ATC 5).
- Furthermore, the CNMC considered that ASTRAZENECA's pricing policy did not constitute predatory pricing; rather, it was a reaction to TEVA's aggressive rebate policy.

Merger control

4 mergers cleared unconditionally in the first phase:

COLORCON/ IDEAL CURES

Although the transaction gave rise to very high horizontal overlaps at the national level in the broad market for pharmaceutical coatings and, within this market, in the standard coatings segment, the transaction was cleared unconditionally because the relevant geographic market was deemed European or worldwide and, in this area, market share additions were below 1%.

PAI PARTNERS /ALTAN

The transaction only led to potential horizontal overlaps and minor vertical relationships in the market for the production of generic injectable medicines and their sale to hospitals.

MCH/NEGOCIO B2B URIACH

The transaction was cleared within barely 12 days from formal notification as there were no horizontal overlaps or vertical relationships between the parties.

PERRIGO / HRA PHARMA

The transaction did not give rise to any horizontal overlaps or vertical relationships between the parties' activities in Spain.



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Other relevant CNMC activity

Main conclusions of the Public Consultation on medicines in pharmacies

- ➔ Criticism of the **uniform pricing between generics and originals**, preventing differentiation between the two types of medicines which led, among other things, to a reduction in incentives for R&D, the withdrawal of products from the market due to lack of profitability, or stock shortages.
- ➔ Some stakeholders complained that the **margins received were not sufficient** to guarantee the viability of many pharmacies, or, in the case of the wholesale segment, to cover the drug distribution service.
- ➔ Almost absolute consensus regarding a possible **authorisation for pharmacies that allows them to offer new services** to consumers.

CNMC Strategic Plan 2021-2026

- ➔ The CNMC includes the pharmaceutical sector as one of the sectors that should be subject to closer surveillance due to the risk of potential competition weaknesses caused by structural or temporary circumstances, such as the COVID 19 crisis.

Relevant activity of Spanish courts

PFIZER

The Spanish National Appeal Court (Audiencia Nacional) upheld the ICNMC's 2017 **decision in the PFIZER/COFARES** case in which it concluded that PFIZER's dual pricing policy did not constitute an anti-competitive system of vertical agreements contrary to Article 1 LDC or Article 101 TFEU, but merely complied with the provisions of the current legal framework.

- The dual pricing policy consists, in short, in the fixing, by the laboratory to its distributors, of different prices for medicinal products depending on whether they are intended for the Spanish market or for a foreign market. In this case, the price paid by distributors for PFIZER's medicines for the Spanish market was lower because of price intervention of the Spanish State.
- The former CNC (predecessor of the CNMC) had already **closed the investigation into this conduct in 2009**, although this decision was **annulled by the Audiencia Nacional in 2011** (annulment upheld by the Supreme Court) as it was found that the evidence of the infringement had not been sufficiently investigated.



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Contact



Pedro Suárez
psuarez@ramonycajal.com



Pablo González de Zárate
pgonzalezdezarate@ramonycajal.com