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Spain's path towards sustainable competition: Developments, Gaps and Opportunities

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Sustainability has become a central pillar of public policy in Europe and Spain, spreading its importance across all regulatory fields. At the heart of these improvements stands the *2030 Agenda for Sustainable Development*, adopted by all United Nations member states in 2015 which outlines 17 Sustainable Development Goals (SDGs) focused on promoting economic growth, environmental protection and social progress, including the respect of human rights. Undoubtedly, the goals set in the 2030 agenda commit institutions to adapt their policies to be able to tackle such sustainability global challenges.

In this article we delve into the status of the integration of sustainability into Spanish competition policy, assessing the progress made and the challenges that lie ahead. We refer to the leadership of the European Commission in this field and the developments of the Spanish competition authority. In particular, we look at how the CNMC has incorporated sustainability objectives into its strategy and advocacy efforts and has also considered how to integrate such goals in the analysis of agreements and merger cases. In this article, we also tackle the regional contributions of the Catalan Competition Authority.

1. The leadership of the European Commission

The European Union institutions have led the efforts of integrating sustainability goals into its regulatory frameworks, particularly through initiatives like the European Green Deal, which sets out the intermediate objective of achieving a reduction in greenhouse gas emissions of at least 55% by 2030 compared to 1990 levels, with the final goal of becoming the first climate neutral continent by 2050.

When it comes to competition policy, the EC has recognized the great importance of ensuring the alignment between competition policy and these sustainability goals. Hence, the European Commission made, in 2020, a public call for contributions to be able to assess in detail how competition rules could foster sustainability. The feedback received by the European Commission from stakeholders generally highlighted the pressing need of updating the existing competition frameworks particularly in the context of the agreements between competitors with sustainability objectives. Indeed, lack of legal certainty around their legality was considered as a potential disincentive for companies willing to enter into sustainability agreements. This ultimately led to the decision by the European Commission to include a chapter solely dedicated to agreements between competitors that pursue a sustainability objective (which, according to the Guidelines, include not only environmental benefits but also other benefits such as fair salaries or

human rights protection), in its revised version of the Horizontal Guidelines, which entered into force in July 2023 (the “2023 Horizontal Guidelines”).

The 2023 Horizontal Guidelines apply to agreements between competitors captured by article 101 of the Treaty of Functioning of the European Union (“TFEU”), which are those that affect trade between EU member states, including Spain. Particularly, the analysis proposed for sustainability agreements under the 2023 Horizontal Guidelines represent a shift in the paradigm of competition policy for two main reasons. First, for the first time, the sustainability-related benefits of an agreement are explicitly recognized as factors to justify potential restrictions on the competition arena. Moreover, the 2023 Horizontal Guidelines explicitly foresee that the sustainability-related benefits enjoyed by consumers which do not belong to the market affected by a particular agreement can, nevertheless, be considered in the context of the efficiency test under article 101.3 TFEU, as long as such benefits also favor consumers within the relevant market. This is not applicable to other type of agreements between competitors considered in the 2023 Horizontal Guidelines, where only the efficiencies that take place in the relevant market can be taken into account in the efficiency test under article 101.3 TFEU. Hence, under the 2023 Horizontal Guidelines, the number of potential efficiencies derived from sustainability agreements between competitors that the parties can claim under such efficiency test is larger than in other types of agreements.

2. Recognition and advocacy by the Spanish authorities

Spain, as an EU Member State, faces the challenge of incorporating the abovementioned sustainability objectives into its policies and ensuring practical and effective national implementation. In this sense, the actions of the national authority (the National Commission for Markets and Competition, “CNMC”) reflect the current state of this process and the challenges involved. A closer look at the activity of the CNMC regarding this topic reveals that, while it has made progress in incorporating sustainability goals into its agenda, clearer and more defined policies would be desirable when it comes to purely national agreements to provide certainty.

The CNMC formally recognized the need to incorporate the SDGs into its decision-making process in its Strategic Plan for the period 2021-2026. This plan outlines the priorities in the context of advocacy, supporting green and digital transitions in line with the 2030 Agenda, and fostering competition as a driver of productivity, which can contribute to sustainable growth.

In practice and as foreseen in the Strategic Plan, the CNMC’s activity regarding sustainability has so far been mainly focused on advocacy. For instance, according to the CNMC’s 2024 Action Plan, the strategic objective of incorporating the SDGs in the CNMC’s processes resulted in advocacy work related to sustainability such as the report on packaging waste (issued in July) and electric vehicles. In this sense, in the packaging waste sector, the CNMC uncovered some inefficiencies that could hinder sustainability, such as market concentration and/or the lack of effective competition in particular areas

and recommended implementing some corrective measures mainly focused on fostering innovation and improving the management of resources. Similarly, the study on the burgeoning electric vehicle market by the CNMC led to the recognition of its potential to drive the green transition. Indeed, by analyzing these sectors the CNMC has demonstrated its commitment to integrating environmental considerations into its work.

Regarding sustainability agreements between competitors, the CNMC expressed its views on the intersection between competition policy and the need to prioritize sustainability objectives in its response to the 2020 European Commission's public call for contributions. In particular, in its submission, the CNMC acknowledged the growing importance of sustainability (including environmental, economic and social goals) in public policy and highlighted the need for competition policy to be aligned with all environmental objectives. However, it also recognized the challenges that competition policy faces in directly addressing these environmental concerns arguing that, including sustainability objectives in the substantive analysis of competition decisions involves many complex issues to be resolved, such as the measurement of efficiencies or the cost-benefit weighing. Moreover, the CNMC highlighted the potential risk of diverging interpretations among the different actors in charge of implementing competition policy. In this sense, the CNMC advocated that an appropriate legal approach to tackle the intersection between competition policy and sustainability goals must, in any case, be given at an EU level since, otherwise, there would be a risk of market fragmentation, which could lead to a situation where the same agreement could be considered anti-competitive in one Member State whilst not in another. In its response to the European Commission's call for contributions, the CNMC also suggested that, rather than altering the substantive criteria applied in competition assessments, the focus of competition authorities could be directed towards projects that align with the SDGs.

The CNMC has taken into consideration sustainability benefits in the application of the Spanish Market Unity Guarantee Act, as the responsible for overseeing the enforcement of such national law — committed to ensuring businesses can operate across Spain without regional regulatory barriers—. In the context of such proceedings, the CNMC has recognized that some competition restrictions may be justified by public interest considerations, as they refer to environmental protection. For example, the CNMC issued a report regarding the denial by a local City Council of a construction permit for a gas station and car wash, concluding that such a restriction was indeed justified by overriding reasons of public interest, such as protecting public health and the environment. These decisions show the CNMC's recognition of the need to balance environmental goals and competition law.

3. Assessment of sustainability agreements by the CNMC

Notwithstanding its significant advocacy efforts as described above, the CNMC has not issued specific regulations or detailed guidance on how sustainability agreements between competitors will be treated under national competition law. Unlike other

countries, such as the Netherlands, where authorities have published guidelines and analyzed multiple cases, we are not aware of the existence of public record of the CNMC having reviewed a sustainability agreement or issued specific criteria for their assessment. As a result, companies in Spain are left to navigate the issue with little certainty. However, based on the publicly available information, it is reasonable to anticipate that the CNMC will analyze sustainability agreements relying on the European framework as their primary reference point.

In this sense, according to Spanish regulation, agreements that restrict competition are prohibited under Article 101 of the TFEU and/or Article 1 of the Spanish Competition Act (“LDC”), depending on whether the agreement at stake has, or not, effects on intra-Community trade.

In light of the above, sustainability agreements between competitors that affect trade within the EU will be subject to the prohibition of anticompetitive agreements under Article 101 TFEU and, hence, will be analyzed in accordance with the 2023 Horizontal Guidelines. On the other hand, sustainability agreements between competitors that do not affect intra-Community trade, will be solely subject to national competition law. In those cases, the CNMC can operate with greater discretion when applying the law and may choose whether to apply the framework established in the 2023 Horizontal Guidelines or to deviate from them.

In this sense, while some competition authorities across Europe have issued national policy guidance on the analysis of sustainability agreements that fall entirely in the scope of national law (for example, the Dutch competition authority, “ACM”), the CNMC has not yet published its own guidelines. Hence, while, for instance, there is evidence pointing at the fact that the ACM will take a more flexible approach than the 2023 Horizontal Guidelines (for instance, the ACM seems not to be interested in actively investigating environmental agreements between competitors as long as consumers receive a share of the benefits - even if the competitive restraints of the agreement are not fully compensated), the CNMC has not expressed a stance suggesting a more lenient analysis than that proposed in the 2023 Horizontal Guidelines. Consequently, as things stand, it appears unlikely that the CNMC will deviate from the European framework analysis for purely national cases.

That said, even if the current regime imposes a self-assessment approach where each company should assess the legality of their agreements from a competition law perspective, the CNMC is characterized by its approachability and its openness to informally discuss sustainability agreements, including agreements between competitors. Indeed, in the CNMC’s response to the 2020 European Commission’s consultation, it highlighted the potential use of the advisory functions foreseen in Article 5.2 of Law 3/2013 to provide legal certainty in relation with sustainability agreements and underlined the CNMC’s willingness to engage with stakeholders.

4. Sustainability goals in Spanish merger control

The CNMC has also expressed its view regarding merger control. In particular, in its response to the European Commission's public call for contributions, the CNMC acknowledged, consistent with the view expressed by the European Commission in the Bayer/Monsanto case (Case M.8084), that certain mergers can have negative effects on the environment. Specifically, because such mergers may reduce the diversity of environmentally friendly products and technologies available to consumers. Therefore, within the framework of merger control, the CNMC advocated for sustainability criteria to be integrated into the assessment of potential harm to innovation stemming from a merger.

Specifically, the CNMC provided the following examples of mergers that could produce harmful effects for sustainability: (i) transactions that reduce the variety of sustainable products on the market or compromise the long-term viability of such products due to the disappearance of small and sustainable producers from the market (as a consequence of market concentration); and (ii) *killer acquisitions*, where non-renewable energy driven companies acquire startups active in the market of renewable energy creation with the intention of halting the development of these technologies.

In addition, the CNMC also highlighted that, in Spain (as in other Member States), general public interest considerations may also be considered in merger control analysis. Specifically, under Spanish law, the Council of Ministers may review mergers that the CNMC has decided to prohibit or have authorized subject to commitments or conditions following a Phase II investigation. In this sense, the CNMC stated in its reply to the European Commission's call for contributions, that in this "third phase" of merger control the Government may assess the merger based on general interest criteria beyond competition law, including the protection of public safety, public health, and environmental sustainability.

In this regard, it is reasonable to expect that, the CNMC, having included sustainability objectives as a guiding principle in its Strategic Plan and as a transversal element of its decision-making processes, is prepared to evaluate sustainability criteria in its merger control analyses. Therefore, although there are not known precedents of such an approach, it remains a possibility in the near future.

5. Sustainability goals and the Catalan Competition Authority

The interplay between competition law and sustainability has also been addressed at the regional level. In particular, the Catalan Competition Authority ("ACCO") also replied to the 2020 European Commission's public call for contributions, where it advocated for using competition policy as a tool to foster sustainability, rather than just adapting it to ensure that competition rules do not obstruct the achievement of these goals. In this sense, the ACCO highlighted the critical importance of transparency regarding the environmental impact of the products and services offered in the market. From this viewpoint, the ACCO understands essential for end consumers to have clear information to be able to consider environmental factors in their purchasing decisions. Moreover, it

argues that a lack of such transparency would lead to a market failure because, if a consumer cannot distinguish between sustainable and non-sustainable products, the supplier would lack incentives to adopt sustainable models. As a result, this information asymmetry could trigger a "race to the bottom," whereby market dynamics exclude higher-quality, sustainable products in favor of those with lower quality or greater negative impact. With all, according to the ACCO, for competition policy to be a real and effective driver towards sustainability, it is important to enhance transparency around the sustainability attributes of products and services because, by doing so, suppliers will be motivated to innovate and achieve greener models, fostering a "race to the top" that, combined with growing public awareness, will lead to a real "Green Competition."

In addition, in the context of competition enforcement, the ACCO supports incorporating sustainability considerations as a key parameter of analysis. These considerations could be applied positively, by recognizing the sustainability benefits in conduct assessments under Article 101.3 TFEU, or negatively, by treating environmental harm as an aggravating factor that justifies higher sanctions given the critical nature of the interests at stake. This perspective reflects the potential direction that the ACCO may adopt in the scope of its regional enforcement actions where, apparently, it strives for integrating sustainability considerations as a relevant component in the application of competition law.

6. The progress made and the challenges that remain

In conclusion, it is clear that the integration of the SDGs into competition policy reflects a growing recognition of the need to balance economic, social, and environmental objectives. To address that need, the European Commission revised the Horizontal Guidelines where a clear framework for assessing sustainability agreements under Article 101 TFEU was established, ensuring consistency and legal certainty for agreements that affect intra-Community trade.

In Spain, the CNMC is bounded to apply such framework when assessing sustainability agreements that fall within the scope of Article 101 TFEU. However, at a purely national level, while the CNMC has incorporated the SDGs into its strategic priorities and decision-making processes, its approach has been primarily advocacy driven. In this sense, although the CNMC's engagement with stakeholders and its advocacy efforts signal a willingness to support sustainability initiatives within the bounds of competition law, the absence of specific national guidelines or relevant precedents addressing sustainability agreements solely subject to the Spanish Competition Act creates some uncertainty for businesses operating in the Spanish domestic markets.

As such, while it is reasonable to expect alignment of the CNMC with the principles established in the Horizontal Guidelines even when assessing agreements with purely national effects, a more explicit framework or further guidance would be valuable to provide the legal certainty needed to foster collaboration and innovation among competitors pursuing sustainability objectives.