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Latin American and Caribbean Competition Forum

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session III: Competition
and Sports**

- Contribution from Spain -

28-29 September 2023

The attached document from Spain is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 28-29 September 2023 to be held in Quito, Ecuador.

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Session III: Competition and sports

– Contribution from Spain –

1. This contribution addresses the relationship between sports and competition, which is the theme of Session III of the Latin American and Caribbean Competition Forum to be held in September 2023.

2. It is structured as follows: The first section contains an introduction. The second section describes issues related to the organisation of sports in Spain. The third section addresses the relationship between sports and competition law. The fourth section summarises some of the main cases connected to sports activities and related markets. Lastly, the fifth section addresses the Spanish framework for marketing audiovisual rights to football competitions and the powers of the Spanish National Markets and Competition Commission (CNMC) in this regard.¹

1. Introduction: sports in Spain

3. Playing sports and following the main sporting competitions are part of Spanish culture. A distinction should be made between physical activity carried out in an informal or unregulated manner, and participation in a competition organised by the corresponding sports federation (amateur or professional). In regard to organised sports, the most popular sports in Spain are football (25% of federation licences), hunting (9.3%), golf (7.8%), mountaineering and climbing (7.5%) and basketball (7.5%).²

4. In Spain, a number of competitions stand out due to their economic significance and importance to markets such as the audiovisual rights and pay-TV markets.³ To illustrate the economic significance of some of these competitions, the audiovisual rights to first-division football were valued at EUR 4 950 million for the domestic market for the 2022–2023 to 2026–2027 seasons.⁴

5. Sport is a multidimensional phenomenon, with educational repercussions, social function and economic importance. In recognition of this social function, the Spanish Constitution itself establishes that the public authorities shall promote sport.⁵ The Treaty on the Functioning of the European Union (TFEU) specifies, among other values or

¹ This contribution has been prepared by CNMC staff and should not be considered as an official CNMC position, except for the official documents mentioned throughout the text.

² Ministry of Culture and Sports (2022), *Anuario de Estadísticas Deportivas 2022* [Yearbook of Sports Statistics 2022], www.culturaydeporte.gob.es/dam/jcr:76870d19-0484-408e-836e-d9faa2d5d406/anuario-de-estadisticas-deportivas-2022.pdf, p. 119.

³ The CNMC itself, in the resolution authorising the Telefónica DTS merger (C/0612/14), designated “some live sporting events of the La Liga first-division football league, Copa del Rey, Champions League football, Europa League football, Football World Cup, Basketball World Cup, Formula 1, Moto GP and the Olympic Games” as premium content.

⁴ www.laliga.com/noticias/laliga-consigue-una-venta-historica-de-tv-para-los-clubes-y-los-aficionados-del-futbol-espanol.

⁵ Article 43.3.

principles to be promoted, the European dimension of sport, and fairness and openness in European competitions.⁶

2. The organisation of sports in Spain

6. Spanish legislation⁷ has created a model for organising official sports activities based around sports federations.⁸ The main features of this model that may be relevant to competition law enforcement are discussed below.

7. **Sports federations** are the entities responsible for promoting, organising and regulating the different official sports competitions at the state level. All the groups involved in each sport (such as athletes, clubs, judges and referees) are members of the sports federation. The corresponding regional federations are also integrated into each sports federation.

8. These private (non-profit) associations are in the public interest: they have priority in obtaining subsidies, and the law entrusts them with a series of public administrative functions by delegation. These functions include organising official non-professional sports competitions, issuing licences to clubs and athletes to participate in these competitions, and granting and controlling subsidies to clubs and sports associations.

9. Setting out these public functions is important for the application of competition law, since the Law on the Defence of Competition itself provides that conduct resulting from the application of a law may not constitute an infringement of competition. In this regard, and by way of illustration, it should be noted that according to the Sports Act, the marketing or exploitation of the audiovisual rights to the different competitions organised by the federations is not a public function entrusted to them (although in the specific case of certain football competitions, marketing is regulated by a specific regulation, as indicated in the final section).

10. Federations are responsible for organising non-professional **competitions**, and there can only be one federation per sport. In the case of professional competitions, clubs may associate and form a league, which will be in charge of organising the competition autonomously but in co-ordination with the corresponding federation (which in any case will maintain its public functions). Only one professional competition per sport is permitted, although this competition may have different divisions or categories.

11. The public administration, through the Supreme Sports Council, is responsible for classifying Spanish competitions as professional and consequently authorising the creation of a league. To agree on this classification, the economic relevance of the competition (including its capacity for economic exploitation) or the regular participation of professional athletes will be taken into account, among other factors.

⁶ Article 165.

⁷ The recently approved Act No. 39/2022, of 30 December 2022, on Sports provides for the basic regulation of sports activities (replacing previous laws).

⁸ The following paragraphs are based on the aforementioned Act No. 39/2022 of 30 December 2022, on Sports.

12. At present, the Spanish competitions classified as professional and organised by professional leagues are the first and second division of men’s football, the first division of men’s basketball, the first division of women’s football and the first division of men’s handball.

13. This regulation on the power to organise official championships is relevant within the framework of competition law, in terms of defining markets and identifying their structure. In this sense, the main consequence is that there is essentially only one organiser per competition, as seen in the most economically relevant competitions, such as football or basketball.⁹

14. In addition to the granting of organising power to the corresponding association of clubs, classification as “professional” – in the football sector specifically – has an additional, very significant, implication in terms of the marketing and exploitation of audiovisual rights, which will be discussed later.

15. On the other hand, Spanish legislation does not expressly regulate whether official competitions (whether organised by the federation or by professional leagues) must be open or closed. In practice, the most economically important official Spanish competitions, such as football or basketball (and many others such as futsal or volleyball) are open, in the sense that access to them is determined by sporting merit through promotion and relegation, without prejudice to the application of administrative, financial and technical membership requirements (e.g. minimum facilities).

16. At the European level, however, the main basketball competition (Euroleague) is a relevant example of a semi-closed league, organised by a group of European clubs outside the International Basketball Federation (FIBA).

3. Sport and Spanish and European Union competition law

17. Within the Spanish and EU **body of competition law**, sport does not have any specific treatment or any type of legal exemption of its own. The treatment accorded to sports by competition law is defined by the application of the Law on the Defence of Competition, its corresponding regulatory developments and the TFEU, as well as the accumulated decision-making practice and case law of the courts.

18. As sports federations perform certain public tasks – and sports clubs, associations of clubs and sports federations sometimes have their own legal forms (often not for profit) – the provisions of the Law on the Defence of Competition (that exempt conduct resulting from the application of a law from the prohibition of anti-competitive agreements and abuse of a dominant position) are particularly relevant. It is also necessary to consider the definition of a company in the sense of competition law, which encompasses any person or entity exercising an economic activity, irrespective of the entity’s legal status and its means of funding.

19. In the field of **jurisprudence**, the Meca-Medina judgment in the Court of Justice of the European Union (CJEU) should be mentioned, which confirmed that the organisational rules of sport are subject to EU competition law, provided that sport is an economic activity. This subjection is articulated through a legal test whereby the organisational rules of a sport, even if they constitute restrictions on competition, do not

⁹ This does not preclude the existence of other scenarios. For example, in paddle tennis there has tended to be more than one international professional circuit (each organised by different private entities), some of whose events take place in Spain.

constitute an infringement of competition if they are inherent and proportionate to legitimate objectives.¹⁰ This consideration of “legitimate objectives” is the way in which competition law takes into account the aforementioned social function of sport and the other values recognised, for example, in the TFEU.

20. Therefore, although sport does not have its own regulations within the legislation on the defence of competition, and the general rules must be applied, EU and Spanish case law have incorporated the “specificity of sport”.

21. The specificity of sport stems not only from the legal recognition of its social function, but also from certain characteristics that are inherent to the functioning of sports competitions. Clubs or athletes are competitors, but they derive value from participating in a championship and therefore need the co-operation and participation of other clubs. And, in the case of seasonal or long-term competitions, such as football or basketball competitions, each club may participate in a maximum number (typically two competitions: one national and one European), due to scheduling. This may have implications for the competitive assessment of club relationships and the possibility of entry or emergence of alternative competitions.

4. Cases of competition law application in sports and related markets

22. In Spain, there are a number of cases of competition law being applied in sports.

23. In what is strictly a **sports organisation**, mention will be made of the CNMC ruling in the ACB case, the only example of the Meca-Medina case law being applied by the Spanish competition authority. It is also possible to mention cases that have been clarified or are being clarified exclusively in court (the Pedro León and Super League cases).

24. Secondly, there are a number of **cases arising from disputes between organisers and clubs** over the commercial exploitation of competitions, several of which have been closed by the competition authority (the bowling matches broadcasting, Royal Spanish Football Federation and rugby cases).

25. Third and lastly, in downstream markets in the value chain, conduct by audiovisual operators will be mentioned in relation to the **acquisition and resale of audiovisual rights** (Mediapro and clubs case; Mediapro, DTS and Mediapro football case), as well as the Telefónica-DTS merger.

4.1. Cases related to the organisational rules of a sport

4.1.1. ACB case¹¹

26. The **Basketball Clubs Association (ACB)** organises the main national basketball championship. The two clubs that finish in the top two positions in the league immediately below are promoted to this open league each season, and the two clubs that finish in the last two positions are relegated.

¹⁰ Judgment of the CJEU of 18 July 2006, Meca-Medina, C-519/04P.

¹¹ CNMC Council Resolution of 11 April 2017, ACB, S/DC/0558/15, www.cnmc.es/expedientes/sdc055815.

27. The ACB has also established a series of administrative and financial requirements to enter its league, including auditing the club's financial situation, certifying that the facilities meet a series of minimum requirements and paying an entrance fee, this last requirement being the most burdensome. If a club does not meet these requirements, it cannot be promoted to the ACB, meaning that a team that was to be relegated can remain in the top flight.

28. Following a complaint, the CNMC investigated these requirements. The Spanish authority concluded that the **ACB had engaged in an anti-competitive agreement** by introducing the entrance fee. The fee had a restrictive effect, since it prevented or made it difficult for clubs promoted on sporting merit to compete with the incumbent clubs, which were protected, thereby altering the normal conditions of competition. **The CNMC applied the Meca-Medina test**, considering that the legitimate objectives that a restrictive sports rule may pursue include: "... the protection of the health of participating athletes, the safety of spectators, the uncertainty of sports results, the sports training of young people and, also, the financial stability of the teams and clubs participating in the competition." The CNMC concluded that the entrance fee was not intended to improve the competition or achieve any legitimate objective (since it was distributed among all clubs), that it was not proportionate (since it was higher than the average income of a second-division club) and that it was discriminatory (since the eight founding clubs had never paid it).

29. The question of the **separation of public and private activities and the possible legal protection of the ACB's conduct** is of particular interest. The ACB argued that the Supreme Sports Council approved its rules and that it therefore had legal protection. The CNMC considered that the Supreme Sports Council's approval of statutes does not mean that its conduct results from the application of a law. Therefore, the CNMC confirmed the restrictive interpretation of the legal protection of sports federations' actions, which had already been put forward in the bowling matches broadcasting case (discussed below).

30. A second issue of relevance in the CNMC resolution is the **mention of open and closed leagues**. The ACB argued that the CNMC was actually ruling against closed leagues and that this lacked precedent. In response, the resolution says that the CNMC does not grant any preference to a model and that it does not call into question the possibility for the ACB to adopt a closed model, respecting competition regulations.

31. In a first-instance judicial review, **the National High Court upheld the ACB's appeal and annulled the CNMC resolution**.¹² The National High Court did not rule on the dominance position, the separation of activities, the question of the open or closed model, or the application of the Meca-Medina test. It annulled the Spanish competition authority's resolution on the grounds that the market definition had been too narrow and that the conduct had been incorrectly classified. The National High Court considered, in contrast to the CNMC's assessment that the ACB was the only possible bidder, there was the possibility that other professional leagues could emerge that could compete with the ACB. The National High Court also argued that if the conduct constituted an anti-competitive agreement between the ACB member clubs, these clubs should have been sanctioned, not the association – otherwise, the conduct was in fact unilateral (abuse of a dominant position).

¹² www.cnmc.es/expedientes/vs055815

32. However, also in 2023, the **Supreme Court upheld the CNMC’s appeal against the aforementioned National High Court Ruling, annulling it and confirming the existence of a violation.** The Supreme Court has established, among other things, that the agreements within the ACB governing bodies are agreements of an association of companies, and are therefore included in the conducts prohibited in Article 1 of the Law on the Defence of Competition, as the CNMC had ruled, and that it is possible to sanction the association in this case. On the issue of separating activities, the Supreme Court considered that the oversight of the Supreme Sports Council does not exempt the ACB from liability, but it must be taken into account in order to reduce such liability. For this reason – and for other reasons initially appealed by the ACB, which were also upheld – the Supreme Court reduced the amount of the sanction.¹³

4.1.2. *Pedro León case*¹⁴

33. This case has been clarified in court. According to the information available, the aforementioned professional footballer brought an action against the National Professional Football League (LNFP) before the ordinary courts for having refused his playing licence, as his club had exceeded the maximum spending thresholds for staff, all in application of the LNFP’s economic control rules. The player filed a complaint against the LNFP for abuse of a dominant position, considering that these economic control rules intervened disproportionately in the clubs’ ability to compete.

34. After a long judicial process, the Provincial Court of Madrid ruled in favour of the LNFP in 2019. The judicial body concluded, in what constituted an application of the Meca-Medina test in judicial proceedings, that the restrictive effects of the expenditure control rules are inherent and proportional to the achievement of a legitimate objective – the financial sustainability of the club and, consequently, of the competition as a whole.

4.1.3. *Super League case*

35. This case is being clarified in the Spanish courts. According to the information available, in 2021, the promoter of the proposed new European football competition – the Super League – filed a complaint against the clauses in the International Federation of Association Football (FIFA) and Union of European Football Associations (UEFA) statutes that require clubs to seek their authorisation if they wish to organise or participate in alternative international championships, and to cede the exploitation rights to the competitions in which they participate. The complaint is also against threats that these organisations made to clubs participating in the new project. The Super League considers these clauses and threats to be an abuse of a dominant position and an anti-competitive agreement.

36. In an interim order, the Spanish court has argued that, far from undermining the European values of the sport, the creation of a new professional competition would boost competition and increase supply. The court points out that football’s socio-educational function is guaranteed, regardless of the emergence of a new competition. In addition, the

¹³ www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Oficina-de-Comunicacion/Archivo-de-notas-de-prensa/El-Tribunal-Supremo-sanciona-a-la-ACB-por-conducta-anticompetitiva-por-las-condiciones-economicas--desproporcionadas-y-discriminatorias--que-exigia-para-el-ascenso

¹⁴ See the following public news for a summary: <https://www.laliga.com/en-ES/news/official-statement-33> and <https://iusport.com/art/80995/la-audiencia-avala-la-actuacion-de-laliga-en-el-caso-de-pedro-leon>.

court considers that the mechanism of redistribution to grassroots football used by UEFA is neither necessarily the best possible mechanism nor better than the mechanism proposed by the Super League. The court therefore concluded that UEFA's conduct cannot be justified as protecting the general interests of European football, but that it "has all the characteristics of an unjustifiable abuse of a position of dominance."¹⁵

37. In any case, **the Spanish courts have submitted a preliminary question to the CJEU**, which is pending judgment. In essence, the Spanish court asks whether the disputed clauses are compatible with the TFEU and, in particular, with the articles referring to anti-competitive agreements, abuses of a dominant position and fundamental freedoms.¹⁶

38. At the time of writing, **the CJEU judgment has not yet been pronounced**. However, the Advocate General has taken the view that the prior authorisation required by UEFA to participate in alternative competitions and the threats made by UEFA to the Super League promoters would not violate the TFEU. The only exception would be the threat to expel players from their national teams, which would be disproportionate. The Advocate General argues that, although the FIFA and UEFA statutes restrict market access, not authorising a closed competition such as the Super League may be justified in order to achieve the objective of protecting the European model of sport as set out in Article 165 of the TFEU.¹⁷

4.2. Cases related to the commercial exploitation of competitions

4.2.1. *Bowling matches broadcasting case*¹⁸

39. The oldest of the cases cited in this contribution is the first in a set of cases concerning disputes between clubs and organisers over the commercial exploitation rights of competitions.

40. In the 2002–2004 period, the **Spanish Bowling Federation (FEB)** obliged clubs or supporters' clubs participating in the championship that it organised to transfer the audiovisual rights to the television station with which it had entered into a prior agreement. It threatened not to register those clubs that refused to do so in the championship.

41. The (now-defunct) **Tribunal for the Defence of Competition (TDC)** concluded, first, that **the FEB held a dominant position** in the organisation of the bowling championships, since it was the only one with the capacity to organise them. Secondly, the Tribunal ruled that **the FEB had committed an abuse of that dominant position** by restricting the clubs' freedom to choose an audiovisual operator.

¹⁵ Order of 30 January 2023 of the Provincial Civil Court of Madrid, section 28, appeal1578/2022, www.poderjudicial.es/search/indexAN.jsp#.

¹⁶ Order of 11 May 2021 of the 17th Commercial Court of Madrid, appeal 150/2021, www.poderjudicial.es/search/documento/AN/9523335/Real%20Decreto%20alarma%20sanitaria%20Covid-19/20210518.

¹⁷ Conclusions of 15 December 2022 of the Advocate General of the Court of Justice of the European Union, <https://curia.europa.eu/juris/fiche.jsf?id=C%3B333%3B21%3BRP%3B1%3BP%3B1%3BC2021%2F0333%2FP>.

¹⁸ Resolution of the Tribunal for the Defence of Competition of 26 September 2006, Emisión partidos de bolos [Bowling matches broadcasting], 597/05, www.cnmc.es/expedientes/59705.

42. On appeal, the **National High Court upheld the TDC’s decision**. The National High Court’s conclusion regarding the separation of the FEB’s public functions from its other functions is of particular interest. In this conclusion, the National High Court emphasised that, in accordance with Spanish regulations, the FEB acts as a public administration in its activity of registering supporters’ clubs in competitions. However, an activity such as selecting a specific audiovisual operator and making competition registration conditional on assigning rights to said operator is not an administrative activity, but rather an economic activity subject to regulations on the defence of competition.

43. Therefore, in light of that ruling, it follows that the legal exemption is applied in a restrictive manner, at least with respect to the sports federations’ conduct towards the clubs – a criterion implemented in the subsequent ACB decision, referred to above.

44. Finally, it should be noted that the conduct was prosecuted as unilateral conduct (abuse of a dominant position), an approach that the National High Court did not challenge, but which was not followed in the subsequent ACB case, as described above. In the following two cases, the conduct of the respective sports federations was also investigated for possible abuse of a dominant position.

4.2.2. Royal Spanish Football Federation case¹⁹

45. Since the second-division-B and third-division football championships are non-professional, they are organised by the Royal Spanish Football Federation (RFEF). However, the clubs formed an association in order to market the audiovisual rights. The RFEF regulations stipulate that, in any case, clubs must obtain its authorisation before being able to broadcast a match. The RFEF threatened not to send referees to matches for which it had not authorised television broadcast.

46. In 2017, the association of clubs filed a complaint before the CNMC against this threat and also against the requirement for prior authorisation. The CNMC closed the case, concluding that there was no abuse of a dominant position by the RFEF. The resolution considered it justified that the RFEF must give prior authorisation for broadcasting, since it is part of the organisation’s activity. The resolution also stated that this power was not used in a disproportionate or discriminatory manner and, in fact, authorisation had never been refused. Potential disproportionate action by the RFEF could have entailed a violation, as stated in the resolution (“since the second-division-B and third-division clubs are holders of their image rights, the RFEF’s action must necessarily be limited with regard to the commercialisation of these clubs’ audiovisual rights, thus minimising the distortions to such clubs’ freedom of enterprise”; “it is considered that a potential unjustified limitation by RFEF of the commercial exploitation of the image rights of the second-division-B and third-division clubs, jointly or individually, could imply a violation of the LDC, although this situation has not arisen to date”).²⁰

¹⁹ CNMC Council Resolution of 19 July 2018, Royal Spanish Football Federation, S/DC/0606/17, <https://www.cnmc.es/expedientes/sdc060617>.

²⁰ Other investigations into the RFEF have also been closed in relation to the organisation of second-division-B and third-division and women’s football competitions.

www.cnmc.es/expedientes/s003519

www.cnmc.es/expedientes/s004219

4.2.3. Rugby case²¹

47. In 2018, a first-division rugby club filed a complaint that the Spanish Rugby Federation (FER) claims ownership of the television rights and claims, in its regulations, in the event of a televised match, a proportion of the advertisement panels and that these panels display no advertisements for drinks in competition with the sponsoring beverage.

48. The CNMC closed the investigations, concluding that the FER did not abuse its dominant position. The resolution emphasised that, despite the regulation's literal wording, the clubs could reject the broadcasting contract offered by the federation and seek alternatives, without any reprisal from the FER. It added that the FER did not obtain net income from broadcasting, since the product is not highly valued in the marketplace (in fact, the federation had to pay part of the cost of the audiovisual broadcasting, which increased the value of the advertising panels to the benefit of the clubs). It also explained that, in practice, the system allowed the existence of advertising by competing beverage companies. Therefore, the resolution concluded that the FER did not, in practice, limit the freedom of the clubs and did not appropriate income from them related to the commercial exploitation of the competitions.

4.3. Cases related to the acquisition and resale of audiovisual rights to sporting competitions

49. Finally, mention should be made of the CNMC resolutions investigating the conduct of audiovisual operators in relation to the acquisition and resale of audiovisual rights to sporting competitions.

50. **Most of these cases took place prior to regulating the commercialisation of the audiovisual rights of the top football competitions** in 2015, when a centralised sales system was established by law. Prior to 2015, each club individually sold the rights to the TV operator (called the “arena model”: each team sells the rights to the matches held at its stadium). The disputes arose from the accumulation of rights by certain operators – rights that are highly lucrative in the pay-TV market.

4.3.1. AVS, Mediapro, Sogecable and first- and second-division football clubs case²²

51. In 2010, the CNMC Council ruled that, **due to their effects, individual contracts of three or more years between football clubs and television operators** for the exclusive assignment of audiovisual rights to their matches in the La Liga and the Copa del Rey competitions **constituted anti-competitive agreements**. Likewise, clauses granting extensions or preferential acquisition rights that de facto extended the term of the agreements for more than three years were also declared anti-competitive.

52. The Council was of the opinion that a three-year term “is sufficient to obtain the efficiencies derived from this type of exclusivity, while ensuring a minimum frequency of competition for football clubs’ audiovisual rights.” The Council also identified a series of non-competition agreements between audiovisual operators in connection with acquiring

²¹ CNMC Council Resolution of 12 April 2023, Rugby, S/0005/19, www.cnmc.es/expedientes/s000519.

²² CNMC Council Resolution of 14 April 2010, AVS, Mediapro, Sogecable and first- and second-division football clubs, S/0006/07, www.cnmc.es/expedientes/s000607.

the aforementioned rights. The resolution ordered the companies to cease the prohibited conduct and sanctioned the audiovisual operators for the non-competition agreements.

4.3.2. *Mediapro case*²³

53. The audiovisual rights manager Mediapro acquired the audiovisual rights to almost all of the first-division football clubs, holding, according to the Council, a dominant position in the market for the resale of these rights. This audiovisual rights manager was vertically integrated, controlling a downstream subsidiary in the pay-TV market (i.e. a television channel).

54. In 2011, the Council concluded that the operator abused this dominant position by reselling the rights in a non-transparent and discriminatory manner to the detriment of certain television operators and in favour of its downstream subsidiary, and by linking the sale of these rights to the sale of other types of content or services. An infringement of abuse of a dominant position was declared and the operator was sanctioned.

4.3.3. *DTS digital-TV distributor case*²⁴

55. In 2015, the CNMC Council sanctioned the operators DTS and Telefónica for concerted practice in the markets for the acquisition, resale and exploitation of audiovisual rights to regular football competitions for the 2012–2013 to 2014–2015 seasons (Spanish league and European league). The two operators agreed not to compete with each other; they reserved the acquisition of audiovisual content for DTS, so that DTS could subsequently adopt a resale system aimed either at reserving use of the rights for DTS and Telefónica, or at establishing a specific distribution system for Telefónica. Likewise, in the latter case, access was unjustifiably refused to third party pay-TV operators.

4.3.4. *Mediapro football case*²⁵

56. At the time of the resolution, the audiovisual rights manager Mediapro held a very significant position in the market for the wholesale commercialisation of premium pay-TV channels in Spain, thanks to its two exclusive-content channels for the Champions League and La Liga. These two channels are very important in order to compete in the Spanish pay-TV market.

57. The CNMC investigation into the possible abuse of Mediapro's dominant position was based on the application of possible discriminatory conditions to the new Over the Top (OTT) Internet broadcasting platforms in Spain, in the wholesale commercialisation of the two channels, compared with the conditions offered to the traditional operators, such as Telefónica.

58. The case ended with a settlement in 2018, whereby Mediapro offered its two channels to the new Internet broadcasting operators on fair and non-discriminatory terms.

²³ CNMC Council Resolution of 17 March 2011, Mediapro, S/0153/09, www.cnmc.es/expedientes/s015309.

²⁴ CNMC Council Resolution of 23 July 2015, DTS Digital-TV Distributor, S/436/12, www.cnmc.es/expedientes/s043612.

²⁵ CNMC Council Resolution of 7 February 2018, Mediapro football, S/DC/0604/17, www.cnmc.es/expedientes/sdc060417.

4.3.5. *Telefónica-DTS merger*²⁶

59. In 2015, the CNMC authorised the telecommunications operator Telefónica to purchase the audiovisual operator DTS, with commitments. These commitments included the obligation for Telefónica to offer other audiovisual operators access to its premium channels, so that the new entity would not exclusively monopolise the most important content for competition in the television market. These premium channels included those with content from the Spanish football league and cup, the European football league, the Football World Cup, the Basketball World Cup, the MotoGP and Formula 1 championships, and the Olympic Games. This wholesale offer must be made available to other operators in an objective, public, transparent and non-discriminatory manner.

60. These commitments had a duration of five years and were extended in 2020 for three years, expiring in May 2023.

5. Centralised marketing of audiovisual rights in Spain

61. Prior to 2015, decentralised commercialisation of the audiovisual rights to football competitions in Spain led to the need for a complicated web of agreements between clubs and operators that resulted in intense judicial conflict between the different parties and frequent intervention by the competition authority. This fragmented and strained model hindered the generation of revenues similar to those obtained by the new centralised sales models implemented in other European countries. At the same time, it potentially slowed down the development of pay-TV, as it did not offer a transparent and stable framework in the conditions of sale of audiovisual rights over time.

62. Therefore, and in view of certain precedents of the European Commission that accepted the centralised sale under certain conditions, **the government approved Royal Decree-Law No. 5/2015,²⁷ designed to protect and regulate the centralised sale of audiovisual rights to the main football competitions:** the first division, the second division, the Copa del Rey and the Supercopa de España. Subsequently, in 2020, the regulation's scope was extended to include the rest of the official state football championships.

63. According to the regulation, the clubs hold the audiovisual rights, but they are obliged to cede the power to jointly market them to the organiser of the championship. La Liga organises the first and second divisions, and the RFEF organises the Copa del Rey, the Supercopa and the rest of the official state football competitions, provided that they are not declared professional competitions. In this case, the professional league created for such a purpose would acquire the status of organising entity. At present, the women's first division is also a professional competition.

64. The **regulation governs how such marketing should be carried out**, in order to minimise anti-competitive effects in the pay-TV market, where these rights are a very significant factor of competition. On this point, the regulation includes elements already required by the CNMC (and the European authority) in its decision-making practice:

²⁶ CNMC Council Resolution of 22 April 2015, Telefónica DTS, C/0612/14, www.cnmc.es/expedientes/c061214.

²⁷ Royal Decree-Law No. 5/2015 of 30 April 2015, on urgent measures in relation to the marketing of the exploitation rights to audiovisual content of professional football competitions, www.boe.es/buscar/act.php?id=BOE-A-2015-4780.

- Rights must be awarded through a public, transparent, competitive and non-discriminatory procedure.
- The award will be divided into lots. The same company may not purchase two or more lots exclusively, unless there are no other equivalent offers. Therefore, the “no single buyer” rule exists in Spain, but with some qualifiers.
- The duration of the contracts must not exceed three years. In 2020, this provision was amended so that it now simply states that “the duration of marketing contracts shall be subject to EU competition rules.”

65. The **marketing entities must send the planned tender to the CNMC so that it may issue a prior report**, verifying that it complies with the above requirements. The CNMC’s report is mandatory and non-binding, and is issued without prejudice to the possibility of initiating investigations for non-compliance with competition regulations.

66. In addition, the regulation also governs the criteria for distributing the income obtained among the clubs, imposing a limit on the maximum difference or inequality allowed. It also provides that a portion of the proceeds will be used, among other things, to support grassroots football.

67. When considering the aforementioned regulation, **the CNMC issued a report analysing the suitability of the new model from the point of view of competition.**²⁸ “The CNMC considers that the joint sale of the rights involves a horizontal agreement between competitors with the main effect of fixing the price. In principle, this formula is prohibited by national and EU competition law. However, the European Commission considers that it presents certain efficiencies and improvements for consumer welfare, which allow the formula to be used. Consequently, the government could be legally entitled to establish such a system in Spain.” The report also added the following: “As for the Spanish case, the CNMC considers that the joint sale system of the rights is difficult to justify from the point of view of competition, compared with the system in place until now. Therefore, although the model proposed by the Royal Decree-Law could represent certain improvements, provided that the alleged efficiencies are confirmed, it would be advisable that they be evaluated under the principles of necessity and proportionality.”

68. With regard to the **reports issued by the CNMC in application of the regulation**, some of the most relevant issues that they recurrently evaluate include:

- Contract duration: Despite the modification introduced in this regard in 2020, the CNMC continues to consider that the duration of contracts should not exceed three years. After all, each award means that a market of great economic importance is closed to competition. The authority’s position, therefore, is that this closure should take place for the shortest possible time.
- Attribution of powers exceeding those granted in the regulation: Although the Royal Decree-Law grants the organisers only joint marketing powers, these entities have economic and control incentives to appropriate powers that may be considered related, especially the production of audiovisual content. Therefore, in its reports, the CNMC systematically recommends that organisers eliminate mentions of ownership of rights that are not recognised.

²⁸ IPN/CNMC/0001/14, www.cnmc.es/expedientes/ipncnmc000114.

- Advertising restrictions: Clearly, most professional football matches generate a significant amount of advertising revenue, and organisers may sometimes be tempted to introduce provisions that favour certain advertisers over others, or that require certain advertising to be included. Therefore, the CNMC recommends not including commercial obligations related to advertising that are not covered by the applicable legal regulations and that are unjustified and contrary to the principle of freedom of enterprise.
- Division into lots: The possibility of having several lots for which companies can bid reinforces competition. In general, the division into lots presented by the organisers of competitions in Spain is satisfactory.

69. Some of the recently issued reports include: INF/DC/116/21,²⁹ on the national league; INF/DC/116/22,³⁰ on the Copa del Rey; and INF/DC/118/22,³¹ on the Supercopa de España.

²⁹ www.cnmc.es/expedientes/infdc11621

³⁰ www.cnmc.es/expedientes/infdc11622

³¹ www.cnmc.es/expedientes/infdc11822