

## MARKET COMPETITION AND CONSUMER RIGHTS: ANALYSIS OF CNMC REPORTS IPN/CNMC/027/21 AND IPN/CNMC/047/21 AND DIRECTIVE (EU) 2020/1828

### 1. REGULATORY CONTEXT

The development of free competition in a market economy entails the protection of consumers' and users' rights and safeguards. These include legitimate economic interests and the right to receive information, in accordance with the constitutional principles governing social and economic policy<sup>1</sup>. In recent years, some of the legislative developments in the European Union ("EU") have aimed to strengthen the protection of consumer rights in order to adapt the regulations to the digital environment by homogenising the different national regulations. The trend is to tighten the regulation of unfair conduct that harms consumers through increased regulatory interventionism. This will ensure free competition. Specifically, Directive (EU) 2019/216 of the European Parliament and of the Council of 27 November 2019<sup>2</sup> on better enforcement and modernisation of EU consumer protection rules and Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020<sup>3</sup> on representative actions for the protection of the collective interests of consumers and collective actions await transposition in Spain.

The aforementioned Directives provide the inspiration for the national and regulatory framework for consumers, highlighting the administrative-sanctioning and the judicial facets of injunctions and compensatory measures. Accordingly, two draft consumer bills have been prepared, the preliminary analysis of which should be linked to the recent reports published by the National Commission for Markets and Competition ("CNMC"): (i) the Report of 15 September 2021, IPN/CNMC/027/21, ("CNMC Report of 15 September") on the Preliminary Draft Law on the improvement of EU consumer protection rules and the system of consumer penalties and other complementary laws, ("CNMC Report of 15 September"); and (ii) the Report of 21 December 2021, IPN/CNMC/047/21, ("CNMC Report of 21 December") on the Preliminary Draft Law regulating customer services for consumers acting as clients.

---

<sup>1</sup> Recent entry into force of Law 4/2022, of 25 February, on the protection of consumers and users in situations of social and economic vulnerability. This amends Article 3 concerning the concept of consumer and user and vulnerable consumer, of the General Law for the Defence of Consumers and Users and other complementary laws approved by Royal Legislative Decree 1/2007 of 16 November.

<sup>2</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council regarding better enforcement and modernisation of consumer protection rules in the European Union.

<sup>3</sup> Directive (EU) 2020/1828 must be transposed by member states by 25 December 2022. The provisions will, however, apply from 25 June 2023.

## 2. SUMMARY OF REPORT IPN/CNMC/027/21 OF 15 SEPTEMBER 2021 OF THE CNMC

Firstly, and according to the CNMC's report of 15 September, the Preliminary Draft Bill for the improvement of consumer protection regulations and the system of consumer sanctions and other complementary laws includes for the first time the prohibition against hidden advertising on social networks, until now not expressly regulated<sup>4</sup>, and the prohibition against the publication of false or manufacturer-paid reviews and evaluations of products for sale on the internet. It also includes controls on online search engines: it is prohibited, without providing sufficient information to consumers, to give higher ratings and reviews to one's own goods or services than those of competitors. Search engines will have to display a description of the parameters used to establish the ranking of search results. It also prohibits conduct relating to the dual quality of goods, i.e. marketing a good as identical and under the same brand name in different EU states, in circumstances where the product has differences in quality, is considered unfair.

Another new legislative provision highlighted in the CNMC Report of 15 September is the regulation of the concept of the "online marketplace" which, under a technology-neutral approach, constitutes a service that uses programmes integrated into a website or application on behalf of the business and allows consumers to enter remote contracts with other businesses or consumers. The information obligation, relating to whether the third party offering the good or service is a private business, will be a key issue to avoid the infringement of consumer rights.

In short, the first final provision of the Preliminary Draft Bill for the improvement of consumer protection regulations and the system of consumer penalties and other complementary laws addresses the amendments to Law 3/1991, of 10 January, on Unfair Competition, derived in turn from the changes in Directive 2005/29<sup>5</sup> and classifies (i) the act of deception and the dual quality of goods; (ii) the covert commercial practice and promotion through information society services; (iii) misleading online conduct related to rating, purchase automation and manipulation of consumer reviews; and (iv) the aggressive practice of unsolicited visits made by the business as unfair conduct.

---

<sup>4</sup> This provision is parallel to similar ones in the field of advertising: the Law on Information Society Services and Electronic Commerce provides that communications made by electronic means must be clearly identifiable as such (Article 20.1) and the Draft Bill of the General Law on Audiovisual Communication states that it is necessary to require online providers to separate their commercial communications from the content broadcast.

<sup>5</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive).

### 3. SUMMARY OF REPORT IPN/CNMC/047/21 OF 21 DECEMBER 2021 OF THE CNMC

Secondly, the CNMC Report of 21 December emphasises that customer service, through factors such as the receipt of queries, the management and resolution of complaints or incidents, the delivery of the product or the provision of the service, and the guarantee or return policies, are relevant parts of the quality of the product or service. The CNMC takes a positive view of the Draft Bill regulating customer care services for consumers acting as customers, insofar as it safeguards consumer rights in relation to customer care services. The aim is to reduce the number of complaints and claims. The recommendations contained in the CNMC Report of 21 December affect the “contact centre” sector to a greater extent. Telecommunications services are considered basic services of general interest. Measures such as the prohibition on the use of answering machines, if it is an exclusive means of customer service, and the obligation to maintain personalised communication when the consumer makes an enquiry, complaint or claim are relevant, since they are compulsory for companies in the sector.

### 4. DIRECTIVE (EU) 2020/1828 AND PROCEDURAL MECHANISM FOR THE PROTECTION OF CONSUMERS' COLLECTIVE INTERESTS

The link between the provisions of the CNMC Report of 15 September and the CNMC Report of 21 December lies in the clampdown on unfair conduct affecting consumers' rights. Infringements of consumer rights, as well as unfair conduct arising from acts of deception or covert commercial practices<sup>6</sup> (understood as conduct that markets products across borders as identical to another, in circumstances where they have different characteristics or conduct that promotes a product including disguised advertising communications and where money has been previously paid to the business), will have access to administrative sanctions and subsequent contentious-administrative judicial proceedings. In addition, the aforementioned infringements may also lead to civil-commercial legal action through consumer representation or class actions, as provided for in Directive (EU) 2020/1828, pending transposition. This Directive aims to harmonise a procedural regime for collective litigation in defence of consumers' and users' interests in the Member States. In addition, it aims to minimise the distortion of free and fair competition between businesses and to enhance national and cross-border consumer safeguards through legal remedies such as injunctions and damages actions. However, its material scope does not alter national rules for contractual or non-contractual dispute resolution; moreover, it does not affect private international

---

<sup>6</sup> Also included, and in accordance with the new wording proposed in the Preliminary Draft Bill for the improvement of EU consumer protection rules and the system of consumer sanctions and other complementary laws, is the new wording of Article 5.3 of Law 3/1991 of 10 January on Unfair Competition (“LCD”): “Any marketing of goods as identical to goods marketed in other Member States, where such goods have a significantly different composition or characteristics, shall also be considered unfair unless justified by legitimate and objective factors”; new wording of Article 26.1 of the LCD, disguised commercial practices: “include as information in the media or on information society services or social networks, communications to promote a good or service, for which the trader or professional pays for such promotion, without it being clearly specified in the content, or through images and sounds clearly identifiable to the consumer or user, that it is advertising content”

law in relation to the rules of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>7</sup>.

The possible collective actions against infringing employers regulated by Directive (EU) 2020/1828 and affecting the content of the CNMC Report of 15 September and the CNMC Report of 21 December are of a cross-border and representative nature. Representation actions for the protection of consumers' collective interests can be both national and cross-border. National representative actions will be those brought by an entity authorised in Spain i.e. a consumer organisation, before national courts, on behalf of both domestic and foreign consumers. Cross-border actions are actions brought by a qualified entity<sup>8</sup> in another EU Member State to protect the collective interests of different consumers in different Member States.

On one hand, class actions seeking injunctions, whether interim or final, will require the legal entity in question to cease the infringement. Anticipatory injunctions may even be envisaged. Therefore, it seems to follow from Directive (EU) 2020/1828 that injunctions lead to declaratory relief.

On the other hand, class actions seeking injunctive relief<sup>9</sup> will aim at getting businesses to provide remedies to affected consumers. This includes compensation, repair, replacement or reduction of the price and, where appropriate, termination of the contract or reimbursement of the price paid. In fact, it establishes a mechanism similar to the content of Article 15 of the Civil Procedure Act 1/2000 concerning intervention in proceedings for the protection of the collective rights and interests of consumers, although some nuances are introduced. Member States shall regulate the manner in which the consumers concerned must expressly or tacitly indicate their willingness to be represented in the action brought and to be bound by its outcome. In other words, except for specific cases<sup>10</sup>, the Directive does not oblige Member States to opt in<sup>11</sup> or opt out<sup>12</sup>, and it is up to the Member States themselves to take this decision when transposing the Directive.

---

<sup>7</sup>See Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>8</sup> Directive (EU) 2020/1828, Article 4, establishes stricter standing requirements than for entities entitled to bring national representative actions.

<sup>9</sup> Directive (EU) 2020/1828 Article 9 and 11.

<sup>10</sup> For example, in the case of a national representative action involving consumers resident in other Member States, it will be necessary for them to join the action through an *opt-in* system (Article 9(3)).

<sup>11</sup> The Anglo-Saxon opt-in procedural mechanism, consisting of an adhesive intervention, is one in which the consumer expressly or tacitly agrees to be represented by a qualified entity in representative or class action proceedings, and will therefore be bound by the judgment that is issued. Article 15 of the Civil Procedure Act 1/2000 of 7 January provides for a publicity regime to which class actions must be subject.

<sup>12</sup> The opt-out system is the procedural mechanism whereby all consumers who are deemed to be affected will be bound by the representation action brought and its effects, unless they expressly express their wish to opt-out

## 5. Conclusion

As a result of the above, there is no doubt that the clampdown on unfair conduct affecting consumer rights will take on a crucial cross-border role, so that administrative sanctions and compensation for damages for the lack of contractual conformity may converge in the exercise of collective actions by qualified entities of EU Member States, which in turn may be financed through investors (litigation funds and any other type of private investor) if their national legislation does not prohibit it. It is foreseeable that the above analysis will coincide with the final approval of the preliminary draft laws and the transposition of Directive (EU) 2020/1828.

This Legal Briefing was prepared by Juan Jiménez-Laiglesia, Jorge Masía and Ana Parés, Partner, Counsel and Associate of the Competition practice area and Félix J. Montero and Silvia de Paz, Partner and Associate of the Litigation and Arbitration practice area.

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 8 March 2022 and Pérez-Llorca does not assume any commitment to update or revise its.

For more information,  
please contact:

**Juan Jiménez-Laiglesia**

Competition Partner  
[jjimenezlaiglesia@perezllorca.com](mailto:jjimenezlaiglesia@perezllorca.com)  
T: + 34 91 436 04 53

**Félix J. Montero**

Litigation and Arbitration Partner  
[fmontero@perezllorca.com](mailto:fmontero@perezllorca.com)  
T: + 34 91 426 31 37

**Jorge Masía**

Competition Counsel  
[jmasia@perezllorca.com](mailto:jmasia@perezllorca.com)  
T: + 34 91 423 47 31