GLOBAL LEGAL INSIGHTS

Merger Control

Fourth Edition

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Published by Global Legal Group

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Overview of merger control activity during the last 12 months

The creation of the National Markets and Competition Commission ("**CNMC**") in Spain in October 2013 resulted in the Spanish Competition Commission ("**CNC**") merging with several other sector regulators (including the regulators of the energy, telecommunications, media, postal, railway transport, air transport and gambling sectors).

This institutional change has not significantly changed the procedure or the analyses of the different cases, as the basic structure of the entity and the investigation process have remained essentially the same. The Council of the CNMC has replaced the Council of the CNC as a decision-making body and the former Investigation Directorate has been replaced by a Competition Directorate, the structure of which is the same as that of its predecessor.

The CNMC has followed the practice of its predecessor as regards the investigation and assessment of cases. An advantage of this integrated structure on mergers in regulated sectors subject to the CNMC's review is that the information now flows more easily between the sectorial Directorates and the Competition Directorate. Moreover, the request for reports to other Directorates no longer entails a suspension of the time limits in merger cases.

Statistics:

The following chart shows relevant indicators of the CNMC's Activity between 2012 and 2014:

	2012	2013	2014
Notifications	68	58	82
Referrals by the Commission	4	0	3
Decisions	57	55	78
Phase II Openings	2	2	3
Conditional clearances	2	5	3
Conditional clearances after Phase I	1	2	2
Conditional clearances after Phase II	1	3	1
Prohibition decisions	0	0	0

From a substantive point of view, the authority witnessed a significant increase in the number of filings in 2014.

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According to the CNMC's public records, since 1 January 2014 there have been 86 filings (ranging from Case C-0549/14 to Case C-0630/14). It is worth noting that a significant number of transactions have resulted in simplified filings.

Most transactions have been cleared in the first phase. Only two cases resulted in the opening of second-phase proceedings: Case C-0577/14, *JCDECAUX/CEMUSA* (cleared unconditionally); and Case C-0573/14, *SCHIBSTED/MILANUNCIOS* (cleared with commitments). There were also three cases involving first-phase commitments: Case C-0550/14, *REPSOL/PETROCAT*; Case C-0600/14, *DÍA/EL ARBOL*; and Case C-0634/15, *DIA/ACTIVOS EROSKI.*

As regards referrals, three have been made by the European Commission to the CNMC: Case M.7313, *TELEFÓNICA DTS* (Case C-0612/14); Case M.7343, *GRUPO IDC SALUD / GRUPO HOSPITALARIO QUIRÓN* (Case C-0601/14); and Case M.7347 *DIA/ GRUPO EL ARBOL* (Case C-0600/14). In relation to another case in the telecom sector (case M.7421, *ORANGE/JAZZTEL*), the European Commission refused the CNMC's referral request. As for the CNMC, it referred one case to the European Commission (case C-0585/14, *DOLBY/DOREMY/HIGHLANDS*).

No prohibition decision was adopted in 2014.

New developments in jurisdictional assessment or procedure

From a procedural and jurisdictional standpoint, the following developments are worth highlighting:

<u>(i) Enforcement activity in merger cases</u>

As a general trend in its antitrust enforcement policy, the CNMC has shown a clear focus on making sure companies comply with its decisions. To this end, in 2012 it created a division within the Investigation Directorate of the former CNC to monitor compliance by companies with commitments in both merger and sanctioning proceedings. Within such proceedings, sending requests for information to third parties as regards compliance with the conditions imposed is common practice. As regards merger control cases, the former CNC imposed two fines on companies for infringements of conditions imposed (Cases SNC/0025/12, *REDSYS*, and SNC 0024/12, *MEDIASET*). After conducting a prior investigation on the degree of fulfilment of the conditions, the CNC declared that there had been an infringement. Fines imposed on these companies were significantly high. In particular, it imposed a fine of €819,000 on REDSYS and of €15,600,000 on MEDIASET. The CNMC continues to closely monitor companies' compliance with its decisions. Indeed, it has recently announced the opening of new infringement proceedings against MEDIASET for continuing to breach of the commitments imposed on the *TELECINCO/ CUATRO* merger.

These enforcement activities in merger control have also resulted in a number of gun-jumping decisions, in which the CNC and the CNMC (collectively, the "**Spanish Competition Authority**") have imposed fines on companies that were found to have neglected a filing obligation. The following chart summarises the outcome of gun-jumping proceedings initiated by the authority in the past three years:

GUN-JUMPING FINES		
Date of the Decision	**Case**	**Fine (€)**
24/10/2012	SNC 0022/12, VERIFONE/ HYPERCOM	286,000

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GUN-JUMPING FINES		
Date of the Decision	**Case**	**Fine (€)**
23/07/2013	SNC 0028/13, ORANGE	61,600
06/03/2014	SNC 0035/14, ESSILOR	5,065

It is also worth noting that in most of these cases, the obligation to notify came about as a result of meeting the market share threshold established under Spanish law in cases in which the transaction results in the acquisition of a market share of 30% in a relevant market in Spain (or 50% if the target has a turnover below €10m). In some cases, it may be difficult for companies to determine whether or not the market share threshold is met, as it may depend on the market definition adopted by the authority. However, the Spanish Authority has been very strict in its enforcement of the gun-jumping obligation and has sanctioned companies even when they have been shown to have acted in good faith and to have voluntarily informed the authority about the execution of the transaction. These circumstances were considered mitigating factors but did not release the parties from the fine.

In cases in which the parties are uncertain as to whether or not a transaction meets the relevant thresholds for notification, a formal query can be submitted to the authority. The Spanish Competition Authority had previously argued that companies had an obligation to submit a query whenever they had doubts about compliance with the thresholds, otherwise they could be held liable for gun-jumping.

The Spanish National Court (*Audiencia Nacional*) has clarified that companies are only obliged to carry out a reasonable assessment of their market share in the potential markets affected by the transaction as these have been previously defined by the authorities, but cannot be sanctioned if the authority decides to adopt a new market definition which they could not have foreseen. In its rulings, the court clarified that companies are under no obligation to submit a formal query to the authority. This position has led the *Audiencia Nacional* to annul fines imposed on two companies in two gun-jumping cases.

In 2015, the CNMC has recently announced the opening of one gun-jumping case (case *GRIFFOLS/ACTIVOS NOVARTIS*).

<u>(ii) Approach to ancillary restraints</u>

Merger control decisions adopted by the CNMC include an assessment of ancillary restraints to the transaction. Following the EU Commission's Notice on Ancillary Restraints, the CNMC only considers ancillary non-competition or confidentiality clauses imposed on sellers with a duration up to three years. However, in special circumstances clauses exceeding this time have been considered ancillary. For example, in a recent case, the CNMC stated that confidentiality clauses exceeding three years were ancillary because in this particular case the protection of industrial property rights was essential for the transaction (Case *OPENGATE/KRASSNY/KEM ONE*, C-0548/13).

Also worth mentioning is the position of the *Audiencia Nacional* as regards a non-compete obligation agreed in the context of an economic concentration that fell outside the scope of the EU Commission's Notice on ancillary restraints. The CNC considered that this clause was a restriction by object and, therefore, null. Additionally, the CNC imposed a significant fine on the party trying to enforce the clause (see case S/0014/07, *SANITARY WASTE*).

The *Audiencia Nacional* annulled the CNC decision on this point, stating that the non-compete clause should not be considered restrictive by object. The court found that, as the restrictive clause was closely related to the value transferred to a buyer in the context of an economic concentration, it would only be restrictive if it had an effect on competition. As

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the administrative file showed that the party affected by the clause was able to successfully compete, the court declared that the fine was unjustified. This was the first time that a Spanish court held that a non-compete clause in a merger case falling outside the scope of the ancillary notice should be considered restrictive by its effects, and not by its object.

(iii) The CNMC's approach to the concept of control

As regards the existence of control, the CNMC usually follows the guidance of the European Commission's practice and recommendations.

In relation to joint control, the Spanish Competition Authority exhaustively assesses veto rights conferred to minority shareholders to determine whether or not these rights grant them control. In this regard, it usually analyses the composition of the board of directors, and the quorum and majorities required to adopt decisions related to the company's strategy. In the past, the Spanish Competition Authority considered that not only decisions affecting the approval of the budget, business plan or appointment of directors granted control, but also decisions regarding investments of lesser amounts. In a recent case regarding the creation of a joint venture in the insurance sector (Case C-0568/14, *MAPFRE/BANKIA/ASEVAL/LAIETANA VIDA/ LAIETANA GENERALES*), the CNMC held that as one of the parent companies of the joint venture (a financial entity) was going to be in charge of distributing the products of the joint venture, it had a significant influence over the joint venture even in the absence of additional veto rights, given the importance of the distribution network in this market.

Key industry sectors reviewed and approach adopted with regard to market definition, etc.

Since January 2014, the CNMC has assessed a number of sectors, although it has not taken a special interest in any of them. The activity of the CNMC in relation to merger control is limited to the filings it receives. As explained above, the obligation to notify was due to the fulfilment of the market share threshold in a significant number of cases. Therefore, the product and geographic market definition are certainly relevant in relation to the number of mergers analysed by the CNMC.

The CNMC usually adopts a case-by-case approach, although when several transactions are notified in one sector within a short period of time, it normally relies on its previous decisions as a roadmap.

Several acquisitions made by investment funds have been subject to merger control review by the CNMC. As such, transactions are unlikely to give rise to any relevant overlaps; they rarely give rise to serious competition concerns.

The CNMC has analysed a significant number of transactions in the financial and insurance sector in relation to the restructuring phase of the Spanish banking markets, especially in relation to savings banks. As banks normally have a significant turnover, almost all transactions in the sector meet the merger control thresholds. However, in recent months there has been a decrease in the number of transactions in this field, since the mentioned restructuring process is almost complete. Filings in this sector rarely give rise to serious concerns. In fact, the CNMC has taken into account the need to rationalise the structure of the banking system and the difficulties of certain institutions, especially savings banks, to survive unless they merge.

Also, a number of transactions in the life insurance and pension funds sectors have been analysed by the CNMC. Transactions in these markets are normally subject to notification, since the turnover of the companies is calculated in terms of premiums, thus the turnover

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threshold is normally met. However, these transactions raise low-level concerns and are not meticulously analysed by the authority (See cases C-0629/14, *CASER/CMV/CMP* and C-0615/14, *NCG BANCO/CXG AVIVA.*)

Narrow geographic market definition (local markets) is the reason for a number of mergers being notified in sectors such as film theatres or supermarkets. Even if participant turnover is low, the market share threshold is easily met in regional or local markets. In this regard, the CNMC tends to consider the narrowest possible market definition to determine if the relevant thresholds are met (See case C-0598/14, *CINESA/PARQUE CORREDOR.*)

A narrow product market definition has also led to the notification of relatively small transactions in the telecom sector. In line with the precedents of the European Commission, the CNMC has considered that each virtual mobile phone operator has a 100% market share in the market for the termination of calls in its own network. Therefore, market share thresholds are met in every acquisition of virtual mobile phone operators (see Case C-0635/15, *MASMOVIL/EMBOU/EBESIS*).

The CNMC has also been rather active analysing transactions in the markets for car parts and in the pharmaceutical and chemistry industries. The assessment carried out by the CNMC in some of these markets has taken into account the nature of internal competition. In this regard, the CNMC has cleared transactions with market shares in Spain exceeding 90% by taking into account lower market share at the EEA level and the presence of potential international competitors (See Case C-0596/14, *TBC/FRAUENTHAL.*)

Except for possibly pharmaceutical products, where the market is always defined on a case-by-case basis, for the rest of these sectors (financial, insurance, supermarkets or telecommunications) the CNMC has a well-established practice on defining the markets and identifying the competitive drivers. Knowing this practice in advance may save a lot of time and effort in the filing and clearance process, as it gives the parties the opportunity to identify any potential concern early.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

Article 10 of the Competition Law expressly sets out the criteria that the CNMC must take into consideration in its substantive assessment. These criteria include (a) the structure of all the relevant markets, (b) the market, economic, and financial position of the undertakings concerned, (c) the actual or potential competition, (d) the alternatives available to suppliers and consumers, (e) the barriers to entry, (f) the evolution in supply and demand trends, (g) the bargaining power of customers or suppliers, and (h) the potential economic efficiencies.

In its assessment of the previous criteria, the CNMC tends to follow the guidance of the European Commission in its decisions and notices. As a result, this authority's practice does not generally differ from that of the European Commission.

The first step in the CNMC's assessment is the structure of the market, including the market shares of the parties involved in the transactions and its evolution over time. In this regard, the CNMC is very unlikely to consider that there are competition concerns where the parties do not have a significant market share or if the total market share is reduced. In this regard, transactions resulting in market shares below 30%, or where the total market share is below 5%, are rarely considered problematic.

It is also common that even in cases of high market shares, the CNMC does not find competition concerns when the parties provide evidence of the non-existence of barriers to

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entry into the market, or of the presence of relevant competitors, even in other geographic markets. In several cases in the chemical sector in which the transactions resulted in high market shares, the CNMC excluded competition concerns due to the presence of relevant European players in these markets.

The CNMC usually analyses options available for the different suppliers, distributors, consumers and end users. Recent entries into the market are considered an evidence of the non-existence of barriers to entry. The existence of new products or presence of operators in neighbouring markets may reduce competition concerns. For this reason, identifying alternatives to the parties at early stages of the proceedings may simplify the CNMC's assessment. It is worth noting that the authority is increasingly carrying out market tests in the first phase to verify the information provided by the parties.

Another factor considered by the Spanish competition authorities in merger assessment has been the countervailing power of the demand. Indeed, in several cases, the existence of a demand with strong market power has excluded competition concerns, although the transaction may give rise to high market shares. In this regard, the fact that clients organise tenders to select their distributor may be a factor according to which competition concerns can be excluded. In a recent case regarding the merger of the main two Out-of-Home (OOH) operators in Spain, one of the reasons why the CNMC excluded competition concerns was the strong negotiating power of the demand and the competitive pressure exercised by players in neighbouring markets.

Competition concerns can be excluded on the basis of the instability of market shares over time. Therefore, in cases of tendering markets for instance, the CNMC is expected to carry out an in-depth assessment of the duration of the contracts, number of participants and results of the tenders in recent years.

Coordinated effects have increasingly been considered by the CNMC in its assessments. Although it is uncommon for the CNMC to perform an in-depth assessment of coordinated effects in the first phase, the need to carry out such an in-depth assessment may be a reason to initiate second-phase proceedings.

Finally, efficiency claims are rarely accepted as an argument to balance potential restrictive effects arising from a transaction. This is because it is difficult to quantify them and prove that the benefits have been passed on to the final consumer. However, in some cases remedies have been adopted to ensure that a significant part of the efficiencies are passed on to final consumers by reducing prices (see Case C-271/10, *REDSYS/REDY*).

Approach to remedies (i) to avoid second-stage investigation and (ii) following second-stage investigation

As mentioned above, since January 2014 five clearance decisions that were subject to compliance with certain commitments from the parties have been issued; two during second phase proceedings and three during first phase proceedings.

With regard to remedies, the Spanish Competition Authority tends to favour structural commitments and conditions. However, its recent practice evidences an increasing tendency to study and accept behavioural solutions to competition concerns raised in merger cases.

When the parties identify the risk of a potential competition concern arising from a reportable transaction, it is very important that they start considering possible remedies as soon as possible to submit commitments in the first phase and therefore avoid second-phase proceedings. The proposal of commitments usually involves some discussion with the CNMC officials.

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A successful proposal of commitments to get clearance during the first phase should include clear-cut remedies, since the time to discuss remedies with the CNMC is limited and officials are not willing to enter into an in-depth discussion about the remedies.

In addition, the remedies offered by the parties should be clearly defined in the decision approving them so as to avoid discrepancies between the CNMC and the companies as regards their implementation. Once commitments are accepted, the parties must submit an action plan regarding the implementation of the commitments. In a recent ruling, the Spanish Supreme Court stated that the CNMC can only modify the action plan submitted by the parties in order to construe or specify the commitments but it cannot amend them or widen their scope. It is for the authority to ensure that commitments are sufficiently precise to ensure their implementation before accepting them. As a result of this ruling, the CNMC is expected to require a clear definition of how the parties intend to implement the commitments offered in future cases.

In none of the cases cleared with commitments since January 2014 has the authority considered it necessary to appoint a hold-separate manager. In cases of structural remedies, the CNMC has not required the notifying party to put forward an up-front buyer.

Since January 2014, the cases involving commitments imposed by the CNMC in **first-phase proceedings** are the following:

a) Case C-0600/14, *DIA/GRUPO EL ARBOL*: This transaction involved the acquisition by one of the largest supermarket chains in Spain of another company present in the same market through 421 outlets. The authority raised concerns in relation to seven local areas in which combined market shares exceeded 55% and had market share additions of more than five points. Although it was considered that barriers to entry had been reduced by legal reforms, the weak countervailing power of the demand, and the difficulties of finding good spots for the outlets, led the authority to maintain such concerns. The authority cleared the transaction with a commitment to divest one outlet in each of the seven local areas. This represented the elimination of overlaps in four of the local areas and a significant reduction of the combined market shares in the other three.

b) Case C-0634/15, *DIA/ACTIVOS EROSKI*: This transaction entailed the acquisition by one of the largest supermarket chains of up to 160 outlets of another major chain. The authority cleared the transaction with a commitment to divest three outlets.

c) Case C-0550/14, *REPSOL/PETROCAT*: This decision involved the acquisition by the leading Spanish integrated oil operator of a competitor in the retail business. The transaction would lead to a combined market share of over 30% in certain Spanish regions in the market for retail distribution of oil products through service stations. This scenario would not be compatible with the sector rules, which prevent any operator from exceeding a 30% market share. Therefore, REPSOL offered to divest as many service stations as necessary to keep the combined market share below 30%. The authority also raised concerns in relation to the vertical effects of the transaction in the wholesale business. Since REPSOL is an integrated operator, following the transaction PETROCAT service stations were likely to be supplied by REPSOL. In this regard, REPSOL offered a behavioural remedy and undertook to allow third parties to continue supplying an agreed percentage of oil products to PETROCAT service stations.

Since January 2014, the cases involving commitments imposed by the CNMC in **second-phase proceedings** are the following:

d) Case C-0573/14, *SCHIBSTED/MILANUNCIOS*: This decision involved the acquisition of the online classified advertisement business of MILANUNCIOS in Spain. As a result of the transaction, the acquirer came to control the main websites of classified advertisements in several segments with market shares exceeding 50% in some markets. The CNMC identified competition concerns as regards online classified advertisements

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in the motor sector for professional customers. To solve these concerns, the acquirer proposed to grant a two-year licence to exploit on an exclusive basis MILANUNCIOS's section on online classified motor advertisements for professional customers. Three days after submitting the proposal of commitments, the acquirer entered into an agreement with a potential licensee that was also submitted to the CNMC for its review. The CNMC accepted this behavioural commitment.

e) Case C-0612/14, *TELEFÓNICA/DTS*: This transaction had initially been notified to the European Commission, which decided to refer it to the Spanish Competition Authority. The transaction involved the acquisition of the main pay-tv operator in Spain by the former Spanish telecom incumbent. The transaction would be cleared if several behavioural commitments were provided for a period of five years which could be extended for up to three more years, including mainly: (i) granting other pay-tv operators access to up to half of its premium TV channels; (ii) stop buying exclusive rights for coveted content sold through one-time video on-demand sales; (iii) refrain from hindering the change of current and future pay-tv clients by limiting its permanence and retaining policy; and (iv) granting wholesale access to its ADSL network in conditions that allow alternative operators to compete.

   It is worth noting that the acquisition of control over DTS by TELEFÓNICA had already been subject to review by the Spanish Authority in a previous procedure (Case C-0230/10, *PRISA/TELEFÓNICA/TELECINCO/DIGITAL+*). At that time, the notified transaction envisaged the acquisition of joint control by Telefónica with other companies also present in the audiovisual sector. At that time, the parties decided to modify the structure of control over DTS to avoid TELEFÓNICA taking control, due to the concerns expressed by the authority.

Key policy developments

In general terms, there have been no significant policy developments in the field of merger control in Spain in the last year. However, the incorporation of the competition authority with several sector regulations has resulted in some changes in the practice of the authority as regards the request of reports to sector regulators in merger cases. In the past, requesting these reports entailed a suspension of the maximum time limits until the report was received. In addition, in the Communication about simplified procedure in merger cases, the authority stated that whenever a report from a sector regulator was required, no simplified filing could apply.

A consequence of the creation of the CNMC is that reports required from regulators forming part of it, no longer implies a suspension of the maximum time limits to adopt a decision. In practice, the CNMC no longer requests the submission of an ordinary form solely because an internal report is required. Also relevant is that in some recent cases, the CNMC has accepted the notification with a short form whenever reports from other regulatory bodies (such as the General Insurance Directorate (*Dirección General de Seguros*)) not included in the CNMC were requested. In this regard, the authority has not made public a list of regulators from which it intends to request a report. Therefore, its practice has not always been consistent. It would be advisable for them to adopt clear criteria in this regard and to make them public.

Reform proposals

Although some concerns about the functioning of the new CNMC were expressed when this public body started its activities, Spanish merger control regulations and institutions continue to work with a high degree of quality. The CNMC normally takes its decisions within short deadlines and maintains a substantial flow of communication with the parties.

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