

Merger Control

Fifth Edition

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Overview of merger control activity during the last 12 months

Law 15/2007 of 3 July (the “**Competition Act**”) sets out the following thresholds for mandatory notification of mergers to the National Markets and Competition Commission (the “**CNMC**”):

- (i) As a consequence of the transaction, the relevant undertakings acquire a market share of 30% or higher in the national market or a part of it regarding a certain product or service. The market share threshold increases to 50% if the target’s aggregate turnover in Spain is below €10m in the previous financial year.
- (ii) The turnover of the relevant undertakings in Spain in the previous financial year amounts to €240m or more, provided that at least two of the undertakings concerned have a minimum turnover of €60m in Spain during the same period.

The Competition Act also includes a suspension obligation, such that the implementation of a transaction fulfilling any of these thresholds must be suspended until clearance is granted.

The CNMC is the result of the combination of the former competition authority with several other sector regulators (including the regulators of the energy, telecommunications, media, postal, railway transport, air transport and gambling sectors). An advantage of this combined structure on mergers in regulated sectors subject to the CNMC’s review is that the information now flows more smoothly between each sector’s directorates and the Competition Directorate. Moreover, the time limits in merger cases are no longer suspended by the request for reports from other directorates.

Statistics:

The following chart shows relevant indicators of the CNMC’s Activity between 2013 and 2015:

	2013	2014	2015
Notifications	58	82	93
Referrals by the Commission	0	3	0
Decisions	55	78	90
Phase II Openings	2	3	1
Conditional clearances	5	3	3
Conditional clearances after Phase I	2	2	2

	2013	2014	2015
Conditional clearances after Phase II	3	1	1
Prohibition decisions	0	0	0

As this chart shows, the number of notifications filed increased by 10% in 2015 as compared to 2014. From January to May 2016, 32 notifications were made to the CNMC, which is a slight decrease in the number of filings as compared to 2015.

It is worth noting that approximately half of the notifications resulted in simplified filings. Simplified filings imply a significant reduction of the information that needs to be provided to the CNMC. In this regard, in October 2015, the CNMC published a communication clarifying the cases that can benefit from a simplified filing in merger control cases. This communication stated that in addition to those cases specifically mentioned in the Competition Act, the CNMC would also accept the use of a simplified form in other cases where competition concerns can be excluded. Whether or not a notification can be made under simplified form is assessed on a case-by-case basis.

Since January 2015, most transactions have been cleared in the first phase. Only the case *TELEFÓNICA/DTS* (Case C-0612/14) resulted in the opening of second-phase proceedings, and it was finally cleared with commitments.

There were also three cases involving first-phase commitments in this period: Case C/0634/15, *DIA/ACTIVOS EROSKI*, Case C-0643/15, *TAMINCO/CEPSA* and Case C-0730/16, *JUST EAT/LA NEVERA ROJA*.

As regards referrals, the European Commission has referred two cases to the CNMC since January 2015: Case M.7466, *DIA/EROSKI-ACTIVOS* (Case C-0634/15) and Case M.7569 *ENAGAS/OSAKA/UGF/SAGGAS* (Case C-0652/15). During this period, the CNMC referred no cases to the European Commission. This may be indicative of a change in the CNMC's approach since, in the past, CNMC referrals to the European Commission have been relatively common.

No prohibition decision has been adopted in this period.

New developments in jurisdictional assessment or procedure

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

Enforcement activity in merger cases

As a general trend in its antitrust enforcement policy, the CNMC has appeared to clearly focus on ensuring that companies comply with its decisions. To this end, in 2012 it created a division within the Investigation Directorate of the former Comisión Nacional de la Competencia ("CNC") to monitor compliance by companies with commitments in both merger and sanctioning proceedings. Within these proceedings, sending requests for information to third parties as regards compliance with the conditions imposed is common practice.

In 2015, the CNMC opened two cases for infringements of the conditions imposed (Cases SNC/0039/15, *ATRESMEDIA*, and SNC/0036/15, *MEDIASET*). After conducting a prior investigation on the level of fulfilment of the conditions, the CNMC declared that there had been infringements. Fines imposed on these companies were fairly high. In particular,

it imposed a fine of €2.8m on ATRESMEDIA and of €3m on MEDIASET. With regard to MEDIASET, this is the second time that the CNMC has fined it for breaching the commitments imposed on the *TELECINCO/CUATRO* merger. The fine in the previous proceedings amounted to more than €15m.

These enforcement activities in merger control have also resulted in a number of gun-jumping decisions, in which the Spanish Competition Authority imposed fines on companies that were found to have failed to fulfil a filing obligation. In 2015, the CNMC initiated ten investigations regarding potential gun jumping cases. In two of these cases, the CNMC finally opened formal proceedings and imposed fines. A €39,578 fine was imposed on MASMOVIL in Case SNC/0038/15, *MASMOVIL* and another amounting to €106,500 was imposed in Case SNC/0037/15, *GRIFFOLS*.

It is also worth noting that in these two cases, the obligation to notify resulted from meeting the market share threshold established under the Spanish Competition Act. In some cases, it may be difficult for companies to determine whether or not the market share threshold is met as it could depend on the market definition adopted by the authority. However, the Spanish Authority has been very strict in enforcing the gun-jumping obligation and it has fined companies even when they have been shown to have acted in good faith and 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 Authority had previously argued that companies had an obligation to submit a query when they had doubts about compliance with the thresholds, or 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 National Court to annul fines imposed on two companies in two gun-jumping cases.

Approach to ancillary restraints

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, as a general rule, the CNMC only considers ancillary non-competition or confidentiality clauses imposed on sellers for a period of up to three years. However, under special circumstances, clauses exceeding this period of time or imposed on non-controlling shareholders have been considered ancillary. For example, in a recent case, the CNMC considered ancillary non-compete and non-solicitation obligations imposed on non-controlling sellers for two years (Case *C/0718/15 TÜV SÜD/ATISAE*).

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 Authority exhaustively assesses veto rights conferred on 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, quorum and majorities required to adopt decisions related to the company's strategy. In the past, the Spanish Authority considered that not only decisions affecting the approval of the budget, business plan or appointment of directors, granted control (see Case C-0648/15, *GODÓ/MEDIASET/EDICA*).

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Since January 2015, 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 lead to serious competition concerns.

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 threshold is normally met. However, these transactions raise low-level concerns and are not meticulously analysed by the authority (See Cases C-0717/16, *VIDACAIXA/BARCLAYS SEGUROS* or C-0698/15, *GACM/RACC SEGUROS*).

Narrow geographic market definition (local markets) is the reason for a number of mergers being notified in sectors such as gas distribution, healthcare services 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-0663/15, *RIBERA SALUD/UTE ALZIRA*).

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 SNC/0038/15, *MASMOVIL*).

The CNMC has also been rather active analysing transactions in the market for pharmaceutical and chemistry industries. The assessment carried out by the CNMC in some of these markets has taken into account the nature of international competition. In this regard, the CNMC has cleared transactions with high market shares in Spain by taking into account lower market share at the EEA level and the presence of potential international competitors (see Case C-093/15, *QUÍMICAS DEL EBRO/PEROXYCHEM*).

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 assessing these 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 market structure, 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 nonexistence of barriers to 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 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 for 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 which the Spanish competition authorities have considered when assessing mergers is the countervailing buyer power. Indeed, in several cases, the existence of strong market buyer power has excluded competition concerns, even though 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 which excludes competition concerns. 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 buying power and the competitive pressure exercised by players from 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, the number of participants and the results of the tenders in recent years.

The CNMC has increasingly considered coordinated effects in its assessments. Although 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 (see Case C-0643/15 *TAMINCO/CEPSA QUÍMICA-ACTIVOS*). However, in some cases remedies have been adopted to ensure that a significant part of the efficiencies is passed on to final consumers by reducing prices (see Case C-271/10, *Redsys/Redys*).

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

As mentioned above, since January 2015 four clearance decisions that were subject to commitments by the parties have been issued; one during second-phase proceedings and three during first-phase proceedings.

With regard to remedies, the Spanish 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.

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 allow 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 2015 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 2015, the following are the cases involving commitments imposed by the CNMC in **first-phase proceedings**:

- Case C/0634/15, *DIA/EROSKI (ACTIVOS)*: This transaction involved the acquisition by one of the largest supermarket chains in Spain of 160 outlets from another company present in the same market. The authority raised concerns in relation to three local areas in which combined market shares exceeded 50% and with market share additions

of more than 20%. Although barriers to entry were considered to have been reduced by legal reforms, the weak countervailing buying power and the difficulties to find suitable locations for the outlets led the authority to uphold these concerns. The authority cleared the transaction with a commitment to divest one outlet in each of the seven local areas.

- Case C/0643/15, *TAMINCO/CEPSA QUIMICA-ACTIVOS*: This decision involved the acquisition of CEPSA's methylamine business by the leading player in the EEA. The acquired business was almost the sole player in Spain and thus the transaction had limited effects in the Spanish market for methylamine. The CNMC considered that the transaction would also strengthen the position of the purchaser in the downstream markets in which methylamine is used as an input. The main concern for the CNMC was that the acquired business was supplying a specific methylamine to the main competitor of the purchaser in the downstream market in Spain. In fact, the acquired business was the only producer of this input in Spain. Therefore, after the transaction, the purchaser would have incentives to force a market foreclosure in relation to this input, given the lack of alternative suppliers in the market. The acquirer undertook to maintain the current conditions for the supply of methylamine to its competitor for four years.
- Case C-0730/16, *JUST EAT/LA NEVERA ROJA*: The transaction involved the merger of the two main online platforms for food delivery orders. In order to guarantee effective competition, the acquirer undertook not to apply exclusivity obligations to the restaurants using the service, nor to link the fees to the percentage of orders made through the platform.

Since January 2015, the following is the only case involving commitments imposed by the CNMC in **second-phase proceedings**:

- 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 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 other 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. The parties decided to modify the control structure 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 past year. However, the publication of a new Communication regarding the use of simplified form in merger control cases is particularly relevant.

In this regard, the merger of the competition authority with several sector regulations in 2013 resulted in some changes in the authority's practice of requesting 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. Therefore, the authority stated that the simplified filing procedure could not be applied whenever it required a report from a sector regulator.

However, following the creation of the CNMC, the fact that a report is required from regulators forming part of this body does not entail the suspension of the maximum time limits to adopt a decision. In this regard, the Communication on simplified procedure has clarified that if the report has to be issued in relation to the sectors regulated by the CNMC, the transaction can still benefit from the simplified filing procedure.

Reform proposals

Although the functioning of the new CNMC gave rise to concerns when it was created, the efficiency and work of Spanish merger control regulations and institutions continues to be of a high standard. The CNMC's response time is reasonably short and communication with the parties is frequent.



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