EUROPEAN COMPETITION LAWS. SPANISH CHAPTER. 2006 UPDATE

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§ [X].01 Overview

[3] Future developments. The Draft Competition Act

On January 20, 2005, the Spanish Minister of Economy made public a White Paper on the Reform of the Spanish System for the Defense of Competition (*Libro Blanco para la Reforma del Sistema Español de Defensa de la Competencia*). Subsequently, the Spanish authorities took part in a debate on the reform of the Spanish antitrust legislation, which has led by the Spanish Council of Ministers, on March 10, 2006, of a Preliminary Draft of the Competition Act. Subsequently, on August 2006, the Council of Ministers adopted the Draft of Competition Act which has been recently submitted to the Parliament for review, amendment and final adoption in 2007 ("Draft Competition Act").

The Draft Competition Act includes important amendments to Spanish current competition legislation, mostly to align the Spanish system for the Defense of Competition with the EC legislation. The elimination of the individual-exemption system and the possibility for specialized civil judges to apply Spanish competition law (which is not a possibility to date) are two of the most relevant changes of the Draft Competition Act. Moreover, it foresees significant changes in relation to the structure of the competition enforcement authorities and the decision-making process in merger control procedures.

The reform aims to improve the effectiveness in the handling of procedures and in the use of the resources of the competition authorities. Furthermore, it intends to adjust the Spanish competition law to the changes introduced in EC competition law by Regulation 1/2003, on the implementation of the rules on competition set forth in Articles 81 and 82 of the Treaty.

[a] Institutional Reform

The Draft Competition Act proposes the substitution of the two current administrative bodies (*Tribunal de Defensa de la Competencia* and *Servicio de Defensa de la Competencia*) for a single independent competition authority, the National Competition Commission (*Comisión Nacional de la Competencia - CNC*).

The Draft Competition Act foresees that the CNC will consist of a President, which will chair both the CNC and the decision-making body (*Consejo* - Council). There will be a division of the enquiry and the decision phases infringement proceedings assignated to two different departments; the Enquiry Directorate (Dirección de Investigación) and the Council (Consejo) respectively. This division of departments

within the same body shall contribute to a better allocation of resources without prejudice of the basic separation between the enquiry and decision phases.

[b] Jurisdictional reform

Currently, the Supreme Court excludes the direct application of the Competition act by civil judges. However, Regulation 1/2003 confers upon the judges the power to directly apply EC competition law. This difference gives rise to certain problems during the proceedings.

Under the new system, a set of specialized civil judges (called Commercial Judges - *Juzgados de lo Mercantil*) will be empowered to apply both Spanish and EC competition rules, as well as to declare agreements contrary to Spanish or EC antitrust regulations void and, if need be, granting compensation for damages.

[c] Procedural and Substantive Reforms

The Draft Competition Act purports to amend the individual exemption system. This will imply the abolition of the obligation to notify the Spanish competition authorities of the execution of restrictive agreements in order to obtain an individual exemption. The Draft Competition Act, in line with the reform introduced by Regulation 1/2003, proposes a self-assessment scheme.

The new system seems to include the possibility of establishing an extraordinary voluntary negative clearance procedure for cases.

[d] Reform on Merger Control Provisions

As opposed to the current system, whereby the Government is ultimately liable for the outcome of merger control procedures, the Draft Competition Act proposes that final merger decisions be adopted by the CNC.

The Government, however, will retain an extraordinary veto right over the CNC merger decisions only to approve mergers prohibited by the CNC or modify the conditions imposed by the CNC. This residual power is limited to cases affecting public interests (e.g., public safety, plurality of the media, public health, environmental protection or competitiveness of the national industry).

Moreover, the Draft Competition Act also amends the procedural regime applicable to public bids, discarding the current differences with the EC merger control scheme. Under the proposed regime, the parties will not have to suspend the implementation of a public bid on the grounds that it has to be notified to and approved by the CNC. The only limit in this regard is the prohibition for the acquirer to exercise its voting rights until clearance.

Finally, the Draft Competition Act also foresees: (i) an increase of the market share threshold that triggers the notification obligation (from 25% to 30%); and (ii) a

simplified procedure for those concentrations which clearly do not give rise to competition concerns.

[e] Leniency

The Draft Competition Act proposes the introduction of a leniency program in relation to restrictive practices which main criteria are in line with those already in force at EC level and in other European Countries.

§ [X].02 Regulated Horizontal and Vertical Practices

[1] Horizontal Agreements

[a] The Nature of an "Agreement"

[iii] Collective decisions or Recommendations

In *Andalusian Jewellery Manufacturers*[1], the TDC considered that the unjustified refusal by the Association of Jewellery Manufacturers of Andalusia (AFBA) to admit an undertaking as a member, even tough it fulfilled the criteria for membership foreseen in the Articles of Association of AFBA, amounted to an infringement of Article 1 of the Competition Act as a collective decision.

[b] Types of Prohibited Arrangements

[v] Output restrictions

In *Andalusian Jewellery Manufacturers*[2], the TDC fined the Association of Jewellery Manufacturers of Andalusia (AFBA) for limiting the manufacture and distribution of jewellery products. In this case, the claimant, a jewellery manufacturer and distributor of the region claimed that AFBA had refused to admit it in the Association for no objective reason (the claimant complied with the requisites established by AFBA). This discrimination, according to the TDC, limited the possibility of the claimant attending some sectorial fairs, for which membership of the regional association was an essential requisite.

The TDC stated that, in this sector, membership of the regional association is an essential condition in order to be able to attend fairs and shows, and that attendance to fairs and shows is an essential part of the business. For this reason, the TDC ultimately concluded that the decision of AFBA led to an actual restriction in the manufacture and distribution of the products, and, thus, ruled in favor of the claimant.

[3] Defenses to Horizontal and Vertical Agreements

[b] Conduct authorized by law

In two recent cases, the TDC examined the possibility of *ex lege* authorized behaviors.

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[1] Fabricantes Bisutería de Andalucía [Andalusian Jewellery Manufacturers] TDC Decision 592/05 [March 17, 2006]

[2] See footnote [1] above.

The first case [*Ecovidrio*][3] involved a series of agreements and pacts related to a system for the management of glass containers and related waste (*Sistema de Gestión de Residuos de Envases de Vidrio*) notified by Ecovidrio (the Ecological Society for the Recycling of Glass Containers). Although Ecovidrio notified the agreements to the antitrust authorities, the TDC considered that the creation and use of these systems in itself did not require an individual exemption, as they are the result of Law 11/97 of April 24, on Containers and Container Waste and they are therefore covered by the *ex lege* exemption under Article 2 of the Spanish Competition Act.

The second case, SGAE/ASIMELEC[4], referred to an appeal filed against the dismissal of proceedings by the SDC with regard to an alleged infringement of Articles 1(1)(a) and 6(2)(a) of the Spanish Competition Act. The alleged infringement arose from the signature, among various Spanish collective societies and a Multisector Association of Spanish Undertakings of Electronic and Communications (ASIMELEC), of an agreement determining the amount be paid to the collecting societies for private copies made through digital recording devices (i.e., CDs and DVDs).

In relation to the alleged infringement of Article 1, the SDC considered that the payment obligation arose directly from the intellectual property legislation. Therefore, a hypothetical prohibition on the basis of Article 1 was not possible as the conduct was covered by law.

On appeal, the TDC concluded that, although the legislation allows charging an amount for private copies and empowers collective societies to make it effective, it does not foresee or cover the execution of agreements among collective societies, manufacturers and importers to establish the amount and the materials on which the obligation of payment will be applied. As a consequence, and given that the legal exemption set forth in Article 2 (1) of the Competition Act must be strictly interpreted, the legal coverage is limited to the right of payment, but not to the agreement to determine the amount. Thus, the TDC considered that Article 2 did not apply to this case.

[c] Individual and group exemptions

[i] Individual exemptions

In the *Ecovidrio* case[5], and despite the constitution agreement being deemed to be excluded from the scope of the Competition Act by virtue of Article 2 of the Competition Act (see Section [3.b] above), the specific content of the individual agreements for the management of a particular recycling system was deemed not to be covered by the legal exemption. For this reason, the TDC assessed the agreements before granting an individual exemption. This is a remarkable case given the degree of

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3 Ecovidrio [Ecological glass], TDC Decision A 350/04 [April 22, 2005]

4 SGAE - ASIMELEC, TDC Decision 634/04 [Nov. 24, 2005]

5 See footnote [3] above.

detail imposed by the TDC on the conditions for the individual exemption. In particular, the conditions included:

(i) The Board of Directors of the company had to be composed of representatives of the glass packaging industry;

(ii) Obligation to remove from the agreements the information request in relation to the affiliation of undertakings intending to use the system;

(iii) The public offer for the broken glass must be open to any undertaking;

(iv) The associates must be entitled to participate at all the decision-making levels;

(v) Limit of the sources of information for Ecovidrio to the Public Administration, glass container companies and contractors;

(vi) Secure information systems to guarantee the maintenance of business secrets;

(viii) Freedom to glass container companies using the system to contract other providers for the supply of glass containers;

(ix) Possibility for local public bodies to terminate the agreements with Ecovidrio, in order to allow the entry of new operators; and

(x) Imposition of publicity, fairness and objectivity in the assignment, distribution and calculation of the price of broken glass.

§ [X].04 Monopolization and Abuse of Dominant Position

[1] Market Definition

[a] Relevant Product Market

The importance of market definition is clear. Indeed, in a recent case, *Binter Canarias*[6], the TDC ruled out the dismissal of the procedures made by the SDC on the grounds that it had performed an inaccurate market definition. The case involved a complaint made by a car rental services provider (Special Prices, Auto Reisen, S.L.) against Binter Canarias, S.A., a company providing air passenger transport services in the Canary Islands, in relation to an alleged abuse of a dominant position. In this case, the alleged abuse consisted of Binter's intention to terminate the advertising agreement executed with the claimant, for advertisement in its free magazine distributed to their passengers and the subsequent refusal to include the prices for each category of car rental vehicles in the advertisement. Allegedly, this behavior was aimed at favoring a competitor of the claimant (Cicar, S.L.).

The SDC agreed with the dismissal since there was no sign of agreement between Binter and Cicar and the unilateral behavior of Binter did not amount to an abuse of dominant position given the lack of dominance of Binter in the relevant market, defined as the sale and purchase of advertising spaces.

However, the TDC considered that the SDC had wrongly defined the relevant market, leading to an inaccurate assessment of the practice. According to the TDC, the distribution of the magazine that contained the controversial advertisement is an integral part of the service provided to its clients by the airline. In addition, the refusal to include the publicity of the claimant or to carry it out in its own terms (i.e., including price information) was not justified by objective reasons. Thus, in absence of a logical explanation for Binter's behavior and since in the TDC´s view the dominant position of Binter in the market for air passenger services in the Canary Islands remained uncontroversial, the TDC ruled out the dismissal of the proceedings.

[b] Relevant Geographic Market

[2] Dominance

In *Canary Island Beers*[7], the TDC again relativized the existence of high market shares as an indicator for dominance. The proceedings were initiated by the SDC as a result of a claim filed by a competitor against Cercasa, a local supplier of beer in the

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6 Binter Canarias, TDC Decision 632/04 [Dec. 5, 2005]

7 Cervezas Canarias [Canarian Beers] TDC Decision 577/04 [April 6, 2005]

Canary Islands. The SDC found that Cercasa (with 70% market share and 90% in the draught beer sector) had abused its dominant position in the Canary Islands market for the supply of beer by entering into abusive contracts with retailers.

The TDC stated that the requirements for abusing a dominant position had not been fulfilled in this case, as the SDC had merely assumed that the market shares provided by the claimant were correct and concluded without further assessing whether Cercasa held a dominant position. The TDC considered the fact that Cercasa had suffered a significant decrease in its market share over the last ten years. The TDC thus relied on the fall in market share to conclude that Cercasa was unable to act independently from its competitors and customers and therefore, its dominant position in the market for the supply of beer in the Canary Islands had not been proven.

[3] Prohibited Conduct

[c] Discriminatory pricing

The TDC recently ruled on discriminatory prices in the case *Prensa/Correos*[8]. The case involved a claim against Correos, the former Spanish postal monopoly, for an alleged abuse of its dominant position in the market for postal services of periodicals. In particular, the claimants had denounced the discriminatory treatment of certain publishers of professional publications by Correos. In this case, the discrimination affected to a publishers association (APP) whose members were deprived of the benefits of a discount program applied by Correos to the members of a competing publishers association (AEDE). In particular, Correos, following a 100% increase in its prices, agreed to defer the application of the price increase to the members of AEDE for a period of five years, in proportion to the size and importance of each publisher. However, it refused to enter into a similar agreement with APP.

In the TDC´s view, the refusal to grant the same discounts, in the same conditions to the members of APP as to AEDE constituted an abuse of a dominant position prohibited under Article 6 of the Spanish Competition Act.

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[8] Prensa/Correos, TDC Decision 584/04 [June 16, 2005]

§ [X].05 Enforcement and Procedure

[8] Form of Closure

Although Article 36.*bis* (1)(c) of the Competition Act sets forth the possibility of closing infringement procedures by means of a settlement agreement between the parties and the SDC, this procedure has been rarely used, giving rise to a very limited number of cases.

However, on 15 September 2005, the SDC adopted a settlement agreement in the case *Asempre/Correos* that to date is the only published settlement agreement[9]. The case began in 2002, when the SDC initiated infringement proceedings against Correos, the former Spanish postal monopoly, for an alleged abuse of its dominant position in the postal services market. In particular, the abuse would consist in: (i) the application of predatory prices supported by cross-subsidies applied between the liberalized services sector and the sector of services reserved for Correos by law; (ii) the execution of contracts for the provision of services with certain large-scale financial entities, containing exclusivity and tying clauses.

The procedure followed a claim lodged by the Spanish professional association of postal distribution undertakings (*Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia - Asempre*) which alleged an infringement of Articles 1 and 6 of the Competition Act.

The predatory pricing claim was subsequently segregated from the procedure and analyzed independently, becoming the object of the settlement proceedings.

Following a negotiation, all the parties concerned (i.e., Asempre and Correos) expressed their approval to the initiation of settlement proceedings. Afterwards, Correos submitted a settlement proposal to the SDC, including all the issues that had been raised by the claimant and the SDC. In that moment, Asempre was authorized to submit comments on Correos' proposal, and finally accepted the final text of the settlement agreement submitted by the SDC.

The SDC submitted the text of the agreement to the European Commission in accordance with Article 11 of Regulation 1/2003.

Since the Commission did not comment on the proposal, the SDC agreed on the settlement of the proceedings.

From a substantive perspective, the settlement agreement details the applicable conditions for the provision of postal services to significant customers (those who enter into contracts amounting to over €100,000 yearly) by Correos, in order to ensure that

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9 Settlement agreement of 15 Sep. 2005, adopted in accordance with Article 36.bis (1)(c) of Law 16/1989 of 17 July for the Defense of Competition, Asempre/Correos, Case No. 2458/03

the prices charged by Correos correspond to the real costs of the service. Correos also undertook to amend the current agreements with significant customers, in order to adjust the prices charged to the requirements of the settlement agreement. Furthermore, the settlement agreement set forth periodical information obligations for Correos.

[a] **§ [X].07 Mergers and Acquisitions**

[1] Transactions Covered by the Competition Act

Exclusive control by a minority shareholder

On December 15, 2005, the Ministry of Economy cleared on first phase a concentration resulting from the public bid launched by Promotora de Informaciones, S.A. (Prisa), (a leading media operator in Spain, particularly in the newspaper and radio sectors) for 20% of the share capital of Sogecable. S.A. (the dominant pay-TV operator, which also owned one free TV channel - Cuatro)[10]. Prisa already controlled 24.5% of Sogecable and the links between both companies were strong prior to the transaction.

The SDC's Report expressly states that one company can control another if, despite owning less than 50% of the voting rights, it actually exerts decisive influence over the latter. In reaching this conclusion, the criterion used by the SDC was the attendance at the shareholders general meeting over the last five years. The SDC found that 44% of the share capital of Sogecable was in fact the majority needed to pass any kind of decision at the shareholders meetings.

[2] Test of Jurisdiction

On February 3, 2006, the Council of Ministers cleared, subject to conditions, the proposed bid by Gas Natural, SDG, S.A., the dominant Spanish gas operator, to takeover Endesa, S.A., a major Spanish power company[11]. The notification of this transaction on September 12, 2005 opened an EU-wide debate on the applicable jurisdiction.

Gas Natural considered that the transaction did not meet the Community turnover thresholds, since both the target (Endesa) and the acquirer (Gas Natural) achieved more than two-thirds of their EU turnover in Spain. However, Endesa claimed that it made more than one-third of its EU turnover outside Spain in accordance with new accounting principles and regulations. For this reason, it claimed that the transaction would meet the EU-notification thresholds and should be notified and assessed by the EC Commission.

Furthermore, Portugal formally requested the EC Commission to assess the transaction under Article 22 of the Merger Regulation. The Spanish authorities opposed that request, while Italy joined Portugal in requesting the EC Commission's assessment of the concentration.

The Commission finally rejected the Portuguese and Italian requests, considering that they had failed to evidence:

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[10] SDC Report on case N-05098, PRISA/SOGECABLE [Dec. 15, 2005].

[11] TDC Report on case C 94/05, Gas Natural/Endesa [Jan. 5, 2006], Decision of the Council of Ministers [Feb. 3, 2006]

(a) the alleged threat to competition in their countries as a result of the transaction; and that

(b) the EC Commission was better positioned than the Spanish competition authorities to examine the implications of the case.

Eventually, the EC Commission decided that the Community thresholds were not met and, therefore, that the transaction should be assessed by the Spanish competition authorities.

In its Report to the TDC, the SDC summarized the criteria to be used when assessing the turnover of the parties to a transaction in order to determine whether the turnover threshold is met. These principles are as follows:

- The starting point must be the audited annual accounts of the previous financial year.
- The figures in the annual accounts must be adjusted by the purchases and sales of other companies or assets implemented after the closing of the annual accounts but before the notified transaction,
- The turnover of joint ventures controlled by any of the undertakings involved and third parties must be split between the controlling companies.
- The moment the transaction is planned (in this case, for example, the announcement of the public bid) is the point at which the turnover should be calculated.

[3] Substantive Assessment

[c] Legal Assessment

Clearance of concentrations giving rise to high market shares

On May 26, 2005, the Ministry of Economy cleared on first phase a concentration consisting of the acquisition of the chemical division of the Uralita Group (Aragonesas) by Ercros, even though the market share of the acquirer in the relevant market (chloroform) after the acquisition would be 90-100% in Spain[12]. The main reasons causing the SDC to clear the transaction at the first phase were: (a) the fact that the geographical market was European in scope, (b) the existence of a single client with significant countervailing power; and (c) the fact that the market was deemed to be in recession for environmental reasons.

When analyzing possible competition concerns arising from the transaction, the SDC disregarded the existence of a portfolio effect in view of the nature of the products

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[12] SDC Report on case N-05035, Ercros/Grupo Aragonesas [May 26, 2005]

involved. Chemicals have the characteristics of commodities, and are therefore not greatly influenced by brand or producer loyalty.

In addition, in December 2005 after second phase proceedings, the Council of Ministers unconditionally cleared the acquisition by a company that manufactured and sold food processing machines (Catelli Food Technology) of two competitors (SIG Comaco S.p.a. and SIG Manzini S.p.a.). The transaction was cleared even though in 2004 the parties had 55% of the market for the commercialization of fruit and tomato processing machines.

The TDC based its report recommending the clearance of the operation on, among others, the following factors: (i) the high supply-side substitutability; (ii) the countervailing power of the demand; (iii) the low barriers to entry; and (iv) as a consequence, the pressure exercised by potential competition[13].

Factors mitigating competition concerns arising from the operation

One of the factors considered by the Spanish competition authorities as positive in merger assessment is the size of competitors. In a recent case in the telecommunications market, the Ministry of Economy cleared the operation during the first phase owing to the significant competition faced by the new entity from the main market players[14].

Furthermore, in *Miquel Alimentació/Puntocash*[15] the TDC recommended the Council of Ministers to clear the acquisition of Puntocash, S.A. (a Spanish subsidiary of Carrefour) by its competitor Miquel Alimentació Grup, S.A., both of which were active in the cash & carry wholesale distribution markets, on the basis of the existence of various compensating factors.

Indeed, despite the parties' relatively high combined market share, the TDC concluded that no significant competition concerns would result from the transaction, stressing the following factors: (a) the strong presence in the cash & carry wholesale distribution markets of an international player (Makro); (b) the significant number of

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[13] TDC Report on case C 90/05, Catelli/Comaco/Manzini [Nov. 3, 2005]

[14] In addition, the Ministry of Economy cleared a concentration on the first phase involving the acquisition of a competitor in the telecommunications markets (SDC Report on case N-05079, Ono/Auna tlc. [Oct. 10, 2005]). In this case, Ono, a Spanish telecommunications and cable operator, acquired Auna, one of its closest competitors. The transaction affected: (i) the telecommunications market; and (ii) the market for pay-television.

In the analysis of the transaction, the SDC took into account the fact that, although Ono and Auna were the two largest cable operators in Spain, the new entity would face competition from two dominant operators in the relevant markets (Telefónica, in the telecommunication markets, and Sogecable, in the market for pay-television).

In conclusion, the transaction was deemed to foster competition by strengthening competitive pressure on the dominant operators and therefore cleared unconditionally during the first phase.

[15] TDC Report on case C95/06, Miquel Alimentació/Puntocash [April 19, 2005].

operators in the market; (c) the countervailing power of the demand, due to the professional nature of the clients; and (d) the possible competitive pressure coming from undertakings operating in neighboring markets (such as traditional wholesale distribution). The TDC´s Report and proposal has been assumed[16] by the Council of Ministers.

Creation or reinforcement of a dominant position

On January 27, 2006, the Council of Ministers, acting on the basis of the TDC's Report, recommended the prohibition of a concentration consisting of the acquisition of sole control by Telefónica de España, S.A.U. (TESAU) of Iberbanda, S.A., an Internet operator[17]. The main reason was the consolidated dominant position that TESAU holds in the telecommunication markets in which Iberbanda is active, namely, the provision of wholesale and retail services for broadband Internet access in Spain.

The TDC considered that if the transaction were finally authorized, TESAU would control one of only three operators to which the Government granted licenses for Internet access through radio (LMSD) technology, after TESAU had itself been excluded from the license proceedings. TESAU would have had access to the said technology as a result of the transaction. The TDC concluded that this would reinforce the already dominant position held by TESAU, insofar as it had significant potential for development in rural areas and as a basis for the future development of Wimax technology.

The parties re-notified the transaction on April 17, 2006. Surprisingly the Ministry of Economy has declared the transaction on first phase[18].

Barriers to entry

In the period from May 2005 to April 2006, the Spanish authorities have identified a large number of potential barriers to entry in the framework of the analysis of notified concentrations, such as:

(1) Legal barriers, including concessions

In the context of a concentration in the cash & carry wholesale distribution markets (*Miquel Alimentació/Puntocash*),[19] the TDC analyzed the proliferation of restrictive regional legislation in Spain, which could constitute an important barrier to enter this market. The TDC was particularly concerned by the fact that this legislation would increase the information costs of the companies, consolidate the market power of the

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[16] Decision of the Council of Ministers [May 19, 2006]

[17] TDC Report on case C 93/05, Telefónica/Iberbanda [Jan. 2006] and Decision of the Council of Ministers of [January 27, 2006].

[18] SDC Report on case N - 06038 Telefónica/Iberbanda [May 5, 2005]

[19] See footnote [15].

existing operators, minimize the risks of potential competition and lead to inefficient price increases, thereby damaging the Spanish internal market.

(2) Structural barriers

In a recent case which was cleared by the Council of Ministers after second phase proceedings, the main concern of the TDC (despite the presence of other disturbing factors such as the high market share of the merged entity in some Spanish regions), was the structural links between the parties arising from the transaction.[20]

The SDC had considered that the concentration between two competitors (Adeslas and Igualmequisa) in the private health care insurance markets could negatively affect competition in the Spanish regions of Vizcaya and Alava where the two subsidiaries of the target company (IMQ Seguros and Iquimesa Seguros) operated. The reason was that one of the merging companies, Adeslas, was the top national insurance company for health care services and reimbursement of medical expenses, whereas Igualmequisa was seventh, but had a strong position in the said regional markets (particularly in Vizcaya, where Igualmequisa had 87.9% of the market).

However, the TDC found that the high market shares did not result in a reinforcement of the parties' current market position, due to the inexistence of significant overlapping at a national level.

The TDC's main concern was the structural links strengthened by the transaction, due to the fact that both parties were present in the downstream markets for the provision of health care services. In this regard, the TDC took into account Igualmequisa's past behavior in these markets (imposition of exclusivity provisions on doctors and clinical staff that were challenged in various infringement proceedings before the Spanish competition authorities). Moreover, the TDC analyzed the demand in these markets and concluded that it did not have a significant countervailing power to balance the market power of the parties. For this reason, it proposed that the Government clear the transaction subject to conditions and obligations (*See* § [X].05 c *below*).

Risk of coordinated effects

On May 25, 2005, and for the first time since the adoption by the Commission of the Guidelines on Horizontal Concentrations, the Spanish competition authorities applied them in order to evaluate possible coordinated effects arising from a concentration.

The transaction consisted of the acquisition by Quiksilver, Inc. of its competitor Ski Rossignol, S.A. Both undertakings are active in the markets for the manufacturing and commercialization of snowboard and ski equipment. In this case, the SDC finally concluded that the absence of barriers to entry, the volatility of the demand and the lack

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[20] TDC Report in case C 89/05, Medical Insurance Groups [Sep. 26, 2005]; Decision of the Council of Ministers [Oct. 21, 2005].

of brand loyalty excluded the existence of coordinated effects and cleared the transaction during the first phase[21].

Ancillary Restrictions

The SDC has applied the ancillary restraints doctrine in line with the EC Notice on ancillary restraints, and has cleared a transaction containing an ancillary restriction, even though it was established in favor of the vendor. In this regard, in January 2006, the Spanish oil company Cepsa notified the competition authorities of its acquisition of sole control over the company Lubricantes del Sur, S.A. (Lubrisur) - a company dedicated to the manufacture of mineral components for lubricants and extracts, and the commercialization of waxes and related products -, through the purchase of 35% of the share capital of the latter[22]. Prior to the transaction, Lubrisur was jointly controlled by Cepsa and another oil company, namely BP Oil España. S.A.U.

Although Lubrisur was active in two different markets (the market for the supply of lubricants and the market for the commercialization of waxes), the SDC's analysis is limited to the second market, due to the fact that Lubrisur's production of lubricants is exclusively targeted at its parent companies.

In connection with the supply of lubricants, the parties concluded a manufacturing and supply agreement which imposed an obligation on Cepsa to produce and deliver prepared and packed lubricants to BP (the vendor), in accordance with the latter's instructions. The contract had an initial term which could be subsequently extended and was considered by the SDC as an ancillary restraint for a five-year term. The main justification for the agreement rested on the need to avoid a sudden interruption in BP's traditional supply channels. In addition, the contract was neither exclusive nor granted BP privileged status by comparison with third parties. For this reason, the SDC concluded that it would not have discriminatory or exclusionary effects.

[4] Enforcement and Procedure

[j] Review

Effects of judicial appeal of decisions on merger control

On January 27, 2006 the Council of Ministers cleared, following the TDC's proposal, the acquisition by Sociedad de Servicios Radiofónicos Unión Radio (controlled by the Spanish dominant media Group PRISA) of Antena 3 Radio. The TDC only proposed certain conditions to be fulfilled by the acquirer[23]. The Spanish Supreme Court had previously prohibited an identical transaction by virtue of a judgment of June 9, 2000 on

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[21] SDC Report on case N-05039, Quiksilver/Rossignol [May 25, 2005].

[22] SDC Report on case N-06008, Cepsa/Lubrisur [Feb. 27, 2006].

[23] TDC Report on case C 91/05, Radios [Dec. 2005] and Decision of the Council of Ministers of January 27, 2006.

the basis of its potential negative impact on competition and plurality in the media, despite the conditional clearance granted by the Council of Ministers in 1994.

In June 2005, the Government amended Law 31/1987 of December 18 on the Organization of Telecommunications and amended the existing limits on the ownership of radio stations, which had led the Supreme Court to annul the 1994 clearance. Given the new circumstances, the parties to the merger decided to notify the transaction again.

[5] Remedies

[c] Divestment, Undertakings and Other Measures

In the *Medical Insurance Groups* case,[24] the TDC concluded that the transaction could only be cleared if certain conditions were met, and proposed the Council of Ministers impose the following obligations (the majority of which were accepted by the latter):

(1) The parties must expressly include in all their agreements with health care providers, hospitals and doctors, clauses excluding exclusivity.

(2) The parties must conclude agreements with the insurance companies that request the provision of health care services in centers under the parties' control in the regions of Vizcaya and Alava for a five-year period. These agreements must reflect market conditions and comply with the principles of fairness, transparency and non-discrimination.

(3) The parties must conclude agreements with the insurance companies that request the sub-contracting of the health care insurance contracted with three public mutual funds in Vizcaya for a three-year period. The agreements must also reflect market conditions and comply with the principles of fairness, transparency and non-discrimination.

Furthermore, in the *Gas Natural/Endesa* case,[25] the SDC submitted the case to second-phase assessment before the TDC and refused to assess the upfront commitments proposed by Gas Natural in order to avoid the anti-competitive effects of the transaction on the market.

The TDC proposed to the Council of Ministers the prohibition of the operation, considering that the imposition of conditions would not be sufficient to remove the competition concerns raised by the transaction. This conclusion was based on the highly concentrated nature of the supply in both relevant markets (gas and electricity). The TDC considered that the transaction would lead to:

(a) a horizontal reinforcement of the resulting entity, since the parties compete in both sectors, although the overlap was negligible.

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[24] See footnote [20] above.

[25] See footnote [10] above.

(b) vertical integration that would strengthen Gas Natural's dominant position in the supply of gas as a fuel for power stations. The combination of a major electricity producer with the dominant gas operator could lead to a restriction of competition by means of excluding competitors in the market for gas supply to power stations.

Finally, the TDC rejected the argument that the alleged efficiencies of the transaction could countervail the competition concerns described.

The Council of Ministers decided to clear the transaction, although it imposed conditions (twenty) on the parties in order to ensure the maintenance of effective competition in the affected markets. Thirteen of these conditions were substantive, while the remaining seven entailed procedural obligations, of which the most important would be the following:

- Each year, Gas Natural should release onto the market, through public auction a volume of gas amounting to 10% of the total demand in the Spanish market (i.e. an amount equivalent to the volume distributed by Endesa in 2005). This obligation was imposed for a three-year-period.

- Gas Natural should divest power plants with a capacity of 4,300 MW, including 400 MW in Andalusia and 400 MW in Catalonia. Limits were also imposed on its ability to acquire new power plants.

- Gas Natural should divest all the assets currently making up Endesa's gas and electricity distribution business.

A final decision of the Spanish Supreme Court on this transaction is still pending. However, the implementation of the transaction has been temporarily suspended as an interim relief.