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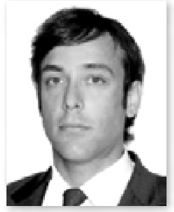
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The Spanish Merger Review Process

By Pedro Callol & Manuel Cañadas

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Applicable Law & Jurisdiction of the Spanish Competition Authority Merger Control Thresholds: Turnover & Market Share Threshold

The Spanish merger review process is regulated by Law 15/2007, of 3 July, on Competition (Competition Act) and by Royal Decree 261/2008, of 22 July, approving the Competition Act's implementing regulation.

The merger review process foreseen in the Competition Act is applicable to transactions meeting the domestic notification thresholds as long as the transaction concerned does not meet the notification thresholds foreseen by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (ECMR), *i.e.*, only concentrations not having a EU dimension can be assessed under the Competition Act.

The Competition Act orders that concentrations which meet either one of the two following thresholds must be filed for merger control:

(a) That the aggregated turnover in Spain of the parties to the concentration exceeds €240 million in the last accounting year provided that each of at least two of the parties to the concentration have an individual turnover exceeding EUR 60 million.

(b) That, as a result of the concentration, a market share of 30% or more of the relevant service or product market in Spain or a relevant geographic market within Spain, is acquired or increased. *However, concentrations are exempted from merger control even when meeting the 30 per cent threshold if: (i) the aggregated turnover in Spain of the acquired company or its assets do not exceed EUR 10 million in the last accounting year as long as (ii) the parties to the concentration do not have an individual or aggregate market share of 50 per cent or more of the affected markets in Spain or a relevant geographic market within Spain.*

Spain is one of the few jurisdictions where a market share threshold triggering compulsory notification exists. Indeed, the market threshold has been the object of considerable criticism internationally, which may be the reason why this market share threshold has been amended twice in the last few years. The first amendment[1] raised the threshold from 25 to 30 per cent of a relevant market.[2] The second modification introduced the *de minimis* rule,[3] so that transactions that meet the market share threshold must be notified only if at least a minimal turnover is realised in Spain.

An interesting twist (possibly unpleasant in some circumstances) introduced by the second modification is the interpretation arising in view of the literal drafting of the new *de minimis* rule inserted in the market share threshold. When reading the *de minimis* rule (in italics, see (b) above), the reader may have noticed that the Legislature uses the term "affected markets". Therefore, if a transaction qualifies for the *de minimis* rule, the 50 per cent threshold must be discarded not only regarding market share in the markets where both acquirer and target are active, or in the markets where the target is active;[4] the notion of "affected markets" implies that also vertically related markets, for instance, may have to be checked. Hence, if, for instance, in a no overlaps transaction where the acquirer has a high market share (e.g. above 50 per cent), but in which the target is active on an upstream or downstream market to the market where the acquirer is active, such a transaction may be reportable since one of the parties has a 50 per cent market share in a vertically "affected market". The Spanish Competition Authority (SCA) has confirmed this view at least in informal conversations.

Merger Control Procedure

Once the notifying party has decided that it will file for merger control, it is possible to pre-notify with a view to giving the SCA the chance to ask for information prior to the formal notification. This has the advantage that the SCA should be expected to decide more speedily on the case (*i.e.*, by reducing the risk of information requests) once the Transaction has been formally filed. There is no set deadline in pre-notification for the SCA to give green light to the formal

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filing. However, from the moment of the pre-filing until the SCA gives green light to carry out the actual filing, about two weeks may typically pass in straightforward cases.

The SCA always recommends pre-filing. However, in our experience, pre-filing has not always led to a swifter decision by the SCA once the transaction has been formally filed. In some cases, pre-filing will be strongly advised. Advice should be sought on a case by case basis in order to design the optimal strategy for each case.

Once a reportable transaction has been filed, a Phase 1 merger decision must be reached within one month from notification. This one month period can be interrupted by the Authority in case, for instance, of formal information requests (there are sometimes information request which we often manage to solve on an informal basis, with the advantage that the clock is not stopped).

At the end of Phase 1, the SCA may take a decision to clear the deal or a decision to open a Phase 2 in-depth review, lasting for two additional months. Phase 2 is seldom initiated, and it is reserved to cases posing substantive issues.

Once the SCA publishes its decision to open a Phase 2 in-depth review, third parties whose interests or rights might be affected by the decision on the transaction have a 10-day period to ask the SCA to be included as interested parties in the procedure at hand.

Risks of Failing to Notify

Failing to notify a reportable transaction to the SCA may attract fines if detected. In addition, the SCA will require infringing parties to notify reportable transactions in a set time frame.

Where the acquirer implements a reportable transaction without (i) having filed a notification; or, (ii) having obtained the mandatory clearing, fines could be of up to five per cent of the acquirer's total turnover in the last accounting year (whole group's turnover, in all markets).

On the other hand, in the event that an acquirer has implemented a transaction in breach of remedies resulting from the merger decision, or of a blocking decision, fines could go up to 10 per cent of the acquirer's total turnover in the last accounting year (whole group's turnover). In the latter case, the Competition Act also foresees the possibility of coercive daily fines for everyday of delay to re-establish the situation to what is ordered in the Decision (*i.e.*, implement a merger remedy or undo the transaction, if blocked). Coercive fines may be of up to EUR 12,000 daily.

The following considerations can be drawn from published gun jumping cases:

(a) First, the SCA has been quite active in monitoring gun-jumping in recent years.

(b) Regarding the maximum amount of the fine, the SCA has in the past taken into account as reference the global turnover of the acquirer's group.[5] However, in more recent cases, only national turnover in Spain has been taken into account.[6]

(c) Despite the above, in practice fines do not reach maximum amounts.

(d) In order to modulate the amount of the fine, the SCA takes into account:[7]

- The size of the particular transaction.[8]
- Whether or not the particular transaction is a non-issues transaction.[9] Even in cases where competition issues were detected by the SCA during the merger control proceedings the fines have been relatively low.[10]
- The market share and turnover of the acquired company in the relevant markets.[11]

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1. This first change was put in place by the 2007 Competition Act, currently in force.
2. It is important to bear in mind that the relevant figure is that of market share in Spain; even if the relevant geographic market is supranational or even global, it is necessary to check the share of the parties in the Spanish market to verify whether or not the 30 per cent mark is reached.
3. The de minimis rule is of application since March 2011.
4. Remember: acquisitions of the type 0+50 per cent qualify for filing.
5. Decision of 26 January 2010, case SNC/0003/09, ABERTIS / TRADIA.
6. Decision of 22 July 2011, case SNC/0009/11, DORF KETAL.
7. Decision of 10 April 2012, case SNC/0017/11, ISOLUX.
8. Decision of 26 January 2010, case SNC/0003/09, ABERTIS / TRADIA; and Decision of 30 January 2012, case SNC/0015/11, GESTAMP/ESSA BONMOR.
9. Decision of 9 April 2010, case SNC/0005/09, CONSENUR / ECOTEC; and Decision of 29 July 2010, BERGÉ / MARÍTIMA CANDINA, case SNC/0006/10.
10. Decision of 26 January 2010, case SNC/0003/09, ABERTIS / TRADIA. The clearance of the transaction was subject to conditions in that case. See Decision (phase 2) of the SCA of 16 July 2009, case C-110/08, ABERTIS / AXIÓN; and Decision of 15 October 2008, case C-84/08, TRADIA / TELEDIFUSIÓN MADRID.
11. Decision of 9 April 2010, case SNC/0005/09, CONSENUR / ECOTEC; Decision of 23 July 2013, case SNC/0028/13, ORANGE / SIMYO; Decision of 24 October 2012, case SNC/0022/12, VERIFONE/ HYPERCOM; and Decision of 17 May 2011, case SNC/0008/10, TOMPLA/MAESPA.

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He was previously (2008-2014) a corporate partner leading the EU competition practice as one of Spain's larger law firms. Before that (2002-2008) he created and led the EU & competition practice of a London 'magic circle' law firm in Spain. Prior to that he worked with Arnold & Porter in Washington, D.C., and London (1999-2002), and before that he trained with some of Spain's best practitioners in Madrid and Brussels.

Pedro Callol gained his Law Degree at Universidad Complutense and Business Degree at San Pablo University (Madrid). He is a Law Graduate at University of Chicago Law School (Fulbright – Banco Santander Scholar). Master in European Law, College of Europe, Bruges (sponsored by the Spanish Ministry of Foreign Affairs).

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