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01 Orange launches takeover bid for Jazztel

On 15 September, Orange announced its intention to launch a takeover bid for all the shares of Jazztel at 13 euros per share, thus valuing the company at nearly € 3,400 million.

At the moment, the main shareholder of Jazztel, its president, Leopoldo Fernández Pujals (14,48%), its managing director, José Miguel García Fernández (0,212%), and the secretary-general, José Ortiz (0,41%) all have agreed to the takeover bid.

The takeover is conditioned to acceptance of the bid by 50.01% of the share capital. Furthermore, the transaction is subject to the termination of negotiations between Jazztel and Yoigo, and approval by the regulatory authorities.

According to public sources, the acquisition will result in a telecommunications operator with a 25% market share in the Spanish broadband market, the second largest broadband operator in Spain (Vodafone, the closest competitor has a 22% market share). The merged entity will however lag well behind Telefonica, with its 50% market share.

Additionally, the acquisition will enable Orange to increase by three and twelve percentage points respectively its market shares in the Spanish markets for mobile telephony and fixed telephony. Regarding fixed telephony, the market share will rise from 16% to 28%. Regarding mobile telephony, the increase is almost marginal.

We do not expect that the ownership of new generation networks and FTTH will in principle justify a separate treatment or consideration for the purposes of this transaction. Likewise, we do not believe that any conglomerate effects will arise that merit any obligations or commitments on the part of the merged entity.

Although it is at this stage and without detailed information impossible to provide any assessment or forecast of what the expected outcome would be, our general expectation is that this transaction will be cleared in phase 1 without commitments. This impression is based on the fact that Telefonica, the incumbent, is a very strong operator with significant market power in all related markets. The Commission is likely to be keen to facilitate the formation of players with larger critical mass. The most immediate precedent in this regard is the recent approval of the acquisition of ONO by Vodafone in Spain last summer. This approval, comparable in some respects to the proposed Orange/Jazztel merger (with some overlaps and with some potential for conglomerate effects in some areas), but the Commission cleared that transaction in phase 1 without any commitments due to the existence of alternatives and the existence of specific regulation making it difficult that any competitor foreclosure occurs.

Consequently, our overall expectation is that the transaction will be approved in phase 1 without commitments. This however should not in any event be considered an opinion but only our best guess based on the law and precedent.

Orange has already submitted the merger notification to the European Commission. According to the EU merger regulation, the Commission now has 25 working days to decide either (i) the concentration does not raise serious doubts as to its compatibility with the common market or (ii) the concentration raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

02 The High Court considers the willingness to end the infringement as an attenuating circumstance (Judgment of 28 May 2014).

On 7 February 2011 the National Competition Commission (**NCC**), currently the NMCC, fined STANPA with € 901,518.16 for an infringement of Article 1 of the Spanish Competition Act (**SCA**) consisting of an exchange of sensitive business information in the cosmetic products sector.

STANPA appealed before the High Court arguing, amongst other things, that the NCC had not considered that, prior to the opening of disciplinary proceedings, the association was carrying out a legal audit of the information exchanges for which STANPA was fined and, in fact, the information exchanges were suspended as a precautionary measure, until an opinion had been delivered on the legality of those information exchanges. The legal assessment of the information exchanges later delivered had an impact on the ending of the illegal conduct by STANPA. The NMCC did not take that into account and, in view of that particular fact, the High Court found the fine not proportionate and considered that it was appropriate to reduce the fine imposed on the association by 50%.

03 Gun jumping: The NMCC has fined ESSILOR for failure to notify the acquisition of POLYCORE OPTICAL (PTE) LTD (POLYCORE) (Decision of 31 July 2014, Case *ESSILOR*, file SNC/DC/0035/14).

The NMCC has fined ESSILOR (€ 5,065), a company engaged in the ophthalmic sector, for acquiring sole control over POLYCORE,an entity which was involved in the manufacture of photochromic lenses. ESSILOR failed to notify the acquisition prior to closing it.

After the implementation of the concentration, ESSILOR reported the transaction to the NMCC and indicated that, depending on the market definition, it could be subject to prior notification. Additionally, ESSILOR acknowledged that the absence of prior notification was caused by an error when estimating the market share resulting from the concentration. After analyzing the information provided, the NMCC concluded that the transaction reached the notification thresholds and obliged ESSILOR to notify.

Once the transaction was authorized, the NMCC initiated sanctioning proceedings against ESSILOR. The NMCC concluded that ESSILOR had incurred in gun-jumping. However, the NMCC emphasized that ESSILOR had voluntarily acknowledged the existence of the transaction and that the reason why notification had not been made was an error in calculating the market share. In view thereof, a reduced sanction was imposed (equivalent to 0.0001% of ESSILOR's worldwide turnover).

04 The High Court has reduced the National Markets and Competition Commission fine on two companies in the asphalt industry (Judgment of 23 June 2014).

The High Court upheld the appeals of two companies fined by the NMCC for participating in a a bid-rigging cartel in the asphalt industry in Cantabria. The Court in charge of reviewing decisions of the NMCC, held that the fines were disproportionate since these fines represented the 10% of the undertakings' turnover in the affected market in the year preceding the imposition of the fine.

The High Court held that the maximum limit for fines imposed under competition law is 10% of an undertaking's turnover in the affected market the year prior to the imposition of the fine.

The High Court has stated that, in the case at hand, it is disproportionate to impose the maximum fine given the low participation of the companies and the reduced size of the market affected by the practice. Therefore, the court has reduced the fines to 5% and 8% of the appellants' turnover respectively.

With this judgment, the High Court upholds the Judgment of 6 March 2013, case *Vinos de Jerez*. As is the case here, in the judgment of *Vinos de Jerez* the High Court held that the maximum limit for fines imposed under competition law is 10% of an undertaking's turnover in the affected market. With this interpretation the Court is contradicting the SCA and the NMCC Guidelines on the method of setting fines (**Guidelines**). According to the SCA and the Guidelines, the maximum limit for fines imposed under Spanish competition law is 10% of the total undertaking's turnover (regardless of the market), much in line with EU competition law.

05 The Commercial Court of Madrid has condemned ASEFA S.A. (ASEFA) and Caja de Seguros Reunidos, Compañia de Seguros (CASER) y Reaseguros, S.A. (SCOR) to indemnify MUSAAT for damages arising from anticompetitive practices (Judgment of 9 May 2014).

On 9 May 2014, the Commercial Court Nº 12 of Madrid has issued a judgment condemning ASEFA and CASER two insurance companies, and SCOR, a reinsurance company, to joint and severally indemnify MUSAAT (a mutual insurance and fixed premium company) € 3,550,615.7 for damages arising from

practices infringing Article 1 of the SCA and 101 of the TFEU consisting of boycott and retorsion practices.

The boycott and retorsion practices carried out by ASEFA, SCOR and CASER during the period between 2006 and 2008 prevented MUSAAT from launching a reinsurance insurance policy that did not comply with the minimum prices agreed by said companies in the framework of a cartel previously sanctioned by the NCC (currently the NMCC).

The NMCC considered in its Decision of 12 November 2009 that the insurance and reinsurance companies MAPFRE, ASEFA, CASER, SCOR, SUIZA and MÜNCHENER had fixed prices related to property insurance by means of the use of price guides or manuals in insurance policies and tariffing during a period of six years. According to the NMCC, the cartelists used surveillance and enforcement measures (such as boycott) to ensure compliance with the cartel. The NMCC fined the members of the cartel with € 120 MM.

However, between December 2012 and March 2013 the High Court subsequently annulled the Decision of the NMCC considering that the circumstantial evidences taken into account by the NMCC did not confirm the existence of a cartel nor of a boycott and that the NMCC did not correctly apply EU Regulation 358/2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (R358/03). The Judgments of the High Court have been opposed by the NMCC (with the intervention of the European Commission as amicus curiae) before the Spanish Supreme Court.

Damages claimed by MUSAAT were closely related to the practices analyzed by the NMCC and the High Court. However, MUSAAT did not base its claim on the existence and effects of the cartel, but on the boycott and retorsion practices of three of the members of the cartel. The Commercial Court argued that the assessed boycott and retorsion practices could not benefit from the exemption provided for in Regulation 358/03 and that said practices were a serious threat to free competition causing a substantial harm to MUSAAT's position in the market.

In other words, even if the information exchange and premiums setting between the insurers were not considered anticompetitive based on Regulation 358/03, that Regulation would never exempt the conduct intended to force other insurers and reinsurers to meet minimum premiums.

06 The High Court has annulled the decision of the NMCC fining the manufacturers of paper envelopes for an export cartel (Judgment of 27 June 2014).

In its decision of 15 October 2012, the NCC, former NMCC, fined six paper manufacturers a total of € 3.7 million for their participation in the paper envelopes export cartel. The alleged cartel was performed through the creation of a joint venture, Hispapel S.A. (**Hispapel**), intended for export to the Middle East.

In particular, Hispapel was created to act as a retailing site of the manufactured products by its partners. According to the decision, Hispapel fixed prices through the agreements reached by its Executive Committee, leading to a single and continuous infringement of Article 1 of the SCA and 101 of the TFEU.

In late June the High Court declared the annulment of the fines imposed by the NCC after considering the applicability of the general exemption under Article 101 (3) of the TFEU. The High Court stated that it was essential to take into account *(i)* the objective need of the manufacturers to create the retailing site in order to export their products to the Middle East and, *(ii)* the difficulties for any one company

taken in isolation to enter individually in this market. Thus, the High Court concluded that the creation of Hispapel was the only mechanism available for the manufacturers to access those markets.

Therefore, the judgment rejects the idea that the joint venture had as purpose the restriction of competition. In particular, the High Court considered that the agreements related to price fixing, the share of each manufacturer and other commercial terms of Hispapel's operations were mere ancillary restrictions, and necessary for the functioning of the joint venture.

The High Court concluded that the agreement did not have restrictive effects since the market share of Hispapel in the destination markets was significantly low. Moreover, the agreement might have been positive for consumers considering its contribution to increase the available offer of paper envelopes in those markets (as a small comment the High Court seems to be taking care of Middle East consumers).

07 The General Court has annuled a fine for Soliver in car glass cartel (Judgment of the General Court of 10 Otober 2014, Soliver vs Commission, case T-68/09).

In its Decision of November 2008, the Commission fined six undertakings after finding they had participated in a cartel in the automotive glass sector in the EEA between 1998 and 2003. The main participants of the cartel (the Club) were international companies, vertically integrated and also active in a number of related markets. On the contrary, the appellant, Soliver, was a smaller company only active in the particular market of car-glass and highly dependent on the Club members in relation to the supply of certain raw materials.

According to the Decision, the cartel was organized in trilateral and bilateral meetings between the Club members and its main objective was the stabilization of the participants' individual market shares in Europe through the sharing of car-glass supply contracts in relation to different car producers and car models. This purpose was served by information exchange, price fixing and other types of conduct.

The Commission qualified the conduct as a single and continuous infringement of article 101 (1) TFEU, since it considered there was a common plan.

The General Court starts its reasoning by defining the steps the Commission has to follow in order to find liability for the participation of a company in a single and continuous infringement. It is necessary to show *(i)* that the undertaking has participated in one or more stages of the infringement, *(ii)* that it was aware of / could reasonably have foreseen the other undertakings' activities at European level (including the fact that these activities were intended to contribute to the achievement of the cartel's overall plan and the general scope and essential characteristics of the cartel).

After assessing both requirements, the Court reached the conclusion that the Commission rightly held that Soliver had participated in some of the aspects/stages of the infringement (by maintaining bilateral contacts with members of the Club). However, the Court considered that according to the evidence available in this case, the Commission could not have reasonably inferred that Soliver was aware of the real context of its anti-competitive behavior. In other words, Soliver did not know that it was contributing to a global plan which had as main objective the stabilization of market shares through the sharing of supplying contracts. In this regard, *"the mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice to render that undertaking responsible for the overall cartel […] Article 81(1) EC does not apply unless there exists a concurrence of wills between the parties concerned"*.

Therefore, the General Court annuls the part of the Commission's Decision relating to Soliver since it has not been shown that this company participated in the alleged infringement.

08 The General Court finds that Spain's tax rules regarding the amortization of goodwill for foreign acquisitions is compliant with EU State aid rules.

The General Court has recently quashed two European Commission decisions which considered unlawful the Spanish corporate tax provision allowing companies taxable in Spain a a tax deduction in connection with acquisitions of shareholdings in foreign companies. The Spanish corporate tax law permitted companies established in Spain to amortize the financial goodwill stemming from the acquisition of stake in non-Spanish companies (i.e. writing-off the excess price paid for the acquisition of a stake over the market value of such stake).

In the first of the now annulled decisions, issued in 2009, the Commission found that such provision distorted the maintenance of effective competition in the Internal Market regarding the acquisitions of stakes in non-Spanish companied within the EU. According to the Commission, the tax scheme conferred an unjustified advantage to companies established in Spain, especially in the context of competitive takeover bids.

The second decision, issued in 2011, reached the same conclusion above, but regarding acquisitions of stakes in companies outside the EU.

Amongst others, two Spanish based companies Banco Santander (and one of its subsidiaries) and Autogrill lodged appeals against the decisions.

According to the General Court, the Commission failed to prove that the Spanish tax regime was selective, which is one of the cumulative criteria to classify a measure as aid. In particular, the General Court has found that the provision on the amortization of financial goodwill is not aimed at any particular category of undertakings or the production of goods, but a category of economic transactions, and that such a scheme is available to any undertaking.

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