How to Deal with Market Share Notification Thresholds in International Transactions - The Iberian Experience

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by Pedro Callol*

1. Introduction.

1.1 Spain and Portugal are amongst the few jurisdictions where a compulsory market share threshold exists. This market share threshold has been amended in both countries in the last few years. As a result of the latest legislative amendments, concentrations in Spain which do not have EU dimension must be filed for merger control, and therefore cannot be completed before merger clearance is gained, [1] if:

- A market share of 30% or more of the relevant 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% 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% or more of the affected markets in Spain or a relevant geographic market within Spain**; <u>OR</u>

- The aggregated turnover in Spain of the parties to the concentration exceeds EUR 240 million in the last accounting year provided that at least two of the parties to the concentration each have individual turnover exceeding EUR 60 million in Spain. [2]

The Portuguese Legislature [3] has followed with a reform of the Portuguese market share threshold very much along the same lines as the Spanish reform. Concentrations not having European dimension must be notified in Portugal if: *(i)* the Portuguese turnover of all parties to the merger exceeds EUR 100 million, provided that at least two of the parties each achieve a turnover of EUR 5 million; *(ii)* the merger leads to the acquisition or increase of a market share exceeding 30%, provided that the Portuguese individual turnover of at least two of the parties exceeds EUR 5 million, unless the combined market share exceeds 50% (in which case the EUR 5 million *de minimis* rule does not apply). Portuguese law appears somewhat more conservative than the Spanish *de minimis* rule since it requires minimum turnover of at least two parties, whereas in Spain it is enough that the target company has a minimum turnover for the *de minimis* exemption to kick in.

1.2 In this short paper, we provide some insight on the risks of the market share threshold and how to deal with them. Our experience is derived primarily from Spanish law and the reference to Competition Authority must be understood as Spanish Competition Authority. The experience is to a great extent largely projectable to Portugal, which has a comparable regulation. [4]

The Appendix to this paper contains a diagram depicting the likely scenarios and courses of action when encountering this kind of problem.

2. Enforcement activity against gun-jumping.

In the past, prosecution of gun-jumping was rather rare and mostly limited to cases where the turnover threshold was at issue. The position has changed in Spain under the new 2007 Competition Act though. Indeed, in more recent years the Competition Authority has been very active in monitoring gun jumping in transactions where the market share threshold is met. [5]

The table below provides an indication of the published gun-jumping cases under the 2007 Competition Act and the amount of fines imposed by the Competition Authority.

DECISION	FINED COMPANIES	AMOUNT OF FINE
Decision of 26 January 2010, ABERTIS/TRADIA, Case SNC/0003/09.	TRADIA TELECOM (subsidiary of ABERTIS)	EUR 143,000
Decision of 9 April 2010, CONSENUR/ECOTEC, Case SNC/0005/09.	CONSENUR	EUR 46,500
Decision of 29 July 2010, BERGÉ/MARÍTIMACANDINA, Case SNC/0006/10.	BERGÉ Y CÍA, S.A.	EUR 76,000
Decision of 17 May 2011, TOMPLA, Case SNC/0008/10.	MANUFACTURAS TOMPLA, S.A.	EUR 3,000
Decision of 22 July 2011, DORFKETAL, Case SNC/0009/11.	DORF KETAL CHEMICALS PRIVATE LIMITED	EUR 35,000
Decision of 30 January 2012, GESTAMP/ESSABON-MOR, Case SNC/0015/11.	GESTAMP MANUFACTURING AUTOCHASIS, S.L. and its parental company GESTAMP AUTOMOCIÓN, S.L., and GRUPO ESTAMPACIONES SABADELL, S.L.U. and its parental company BONMOR, S.L.	EUR 124,000
Decision of 10 April 2012, ISOLUX, Case SNC/0017/12.	GRUPO ISOLUX and CORSAN, S.A.	EUR 89,700
Decision of 24 October 2012, VERIFONE/HYPERCOM, Case SNC/0022/12.	VERIFONE	EUR 286,000
Decision of 23 July 2013, ORANGE, Case SNC/0028/13	FRANCE TELECOM ESPAÑA, S.A.U	EUR 61,600

A few lessons may be learned from the recent practice of the Competition Authority in gun-jumping cases.

(a) First, the Competition Authority is vigorously prosecuting breaches of the market share threshold: all the cases reported involve infringement of the market share threshold.

(b) Secondly, the Competition Authority has dismissed the notion that the absence of bad faith (for instance because the acquirer mistakenly thought the threshold was not crossed) is equivalent to absence of culpability. However, on this point, the courts on judicial review have corrected the Competition Authority and stated that, the fact of not using the consultation procedure, cannot be regarded as absence of good faith since the consultation procedure is not compulsory. [6]

(c) The methods by means of which the Competition Authority takes notice of unreported mergers are varied. The Competition Authority may act to enforce the merger filing and control obligations on the basis of a third party complaint or on its own initiative. There are reported instances of the Competition Authority acting on the basis of complaints. [7] On the other hand, sometimes the Competition Authority becomes aware of gun-jumping cases in the course of other investigations or merger control procedures (where a prior, unreported transaction, comes to light). [8]

3. How to face market share thresholds in practice.

When the parties to a transaction have strong interests in Spain and/or Portugal and the notification thresholds are clearly met, then the most reasonable approach will be to file the transaction in Spain and/or Portugal.

The questions of what can be done to avoid the filing and what the risks of not filing are, come up in a variety of circumstances. For instance, in foreign-to-foreign transactions, between companies with little or no interest in Spain; when the market definition is disputed and therefore there is scope to argue that no filing is required; but the questions also come up in the context of transactions where the parties have very high market shares elsewhere in Europe or worldwide (but the transaction is not reportable elsewhere in principle because of low turnover), and the parties wish the transaction to go unnoticed, wondering what to do about Spain/Portugal as the sole jurisdiction(-s) where the transaction is in principle reportable.

In such situations, there are a number of options:

(a) *First, make sure you do a good job with the market definition.* In some cases market definition may not be straightforward. It is convenient to check out merger control precedents at the EU and particularly, Spanish level.

(b) *File a formal consultation with the Competition Authority requesting a formal opinion on whether or not the transaction requires merger control approval.* Spanish law (not so in Portugal) regulates such a formal guidance procedure. This may be a good option in cases where a high degree of legal certainty is sought. If the Authority decides that no filing is required, certainty will have been gained without going through the entire merger review process.

However, this avenue is not often used by companies: there is no deadline or time limit for the Competition Authority to address this type of consultation, so that in fact the risk is that the transaction must be stayed until a response is delivered by the Authority; and then, if the Authority considers that a filing is required, then closing will be delayed until merger clearance is gained. Furthermore, the work required to formulate the consultation may be considerable in terms of drafting and production of information.

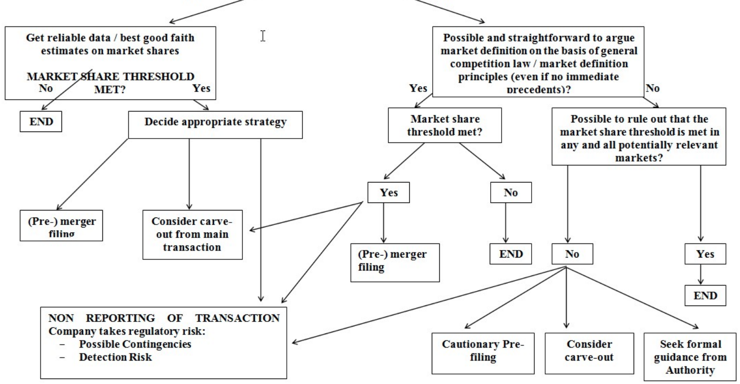
(c) *Consider a precautionary pre-filing*. As with the formal consultation procedure, there is no legally established deadline for the Competition Authority to deal with pre-filings. The advantage of a precautionary filing is that, if during the pre-filing discussions it becomes clear that a filing is required, much of the work has already been advanced (the notification has been drafted) and this is time gained for the pre-notification contacts which are standard in a merger review procedure. As a matter of practice, the Authority may send an informal communication (for instance in the form of an e-mail) stating that, in view of the fact that the market share threshold is not reached, the Authority is of the preliminary opinion that the transaction does not need be notified. In this communication, the Authority would typically include some kind of caveat indicating that this preliminary opinion may be altered in the event that the information on market shares changes; and that the preliminary opinion does not bind the Council of the Competition Authority, which is the body competent to make a formal decision on the matter; and that, should a formal decision on the issue be required, the parties may resort to the formal consultation procedure. But having this kind of email or communication may be an advantage at some point in terms of evidencing good faith.

(d) *Informally inform?* Once a solid market definition has been established on the basis of which no filing requirement arises, a decision may be taken as to whether or not to inform the Competition Authority of the transaction anyway as a matter of courtesy. In some instances, oral explanations provided to the Competition Authority accompanied by a follow-up memorandum may help establish trust. This is a matter that requires careful consideration. In most cases the parties are reluctant to expose themselves; but this path of informal communication may make sense in high-profile (and yet not reportable) cases which are likely to catch the attention of the Competition Authority.

(e) *Attempt a "carve out" or exclusion of the relevant national assets/sales from the entire transaction*. The proposition here would be (once the need for notification has been ascertained) to structure the deal as a entirely non-Spanish (or non-Portuguese) deal, so that it is not subject to Spanish (or Portuguese) merger control law. This, however, may present various practical difficulties. First, the market share threshold is not an asset-based market share; rather, it refers to the relative size of the companies concerned as a share of the relevant national market. Therefore, the main difficulty in carving out Spain and/or Portugal from a multijurisdictional transaction may arise in cases where the only actual link with those jurisdictions is the turnover generated by sales which take place in Spain and/or Portugal. A carve out device may be feasible if the transaction involves assets which are clearly associated with sales in Spain/Portugal. If that is not the case (*i.e.,* it is not possible to establish the association between the carved-out assets or business and the Spanish sales responsible for the relevant increase in market share), it may be difficult to exclude or "carve-out" Spain and Portugal from the transaction.

In that light, it is not surprising that the Competition Authority does often not view this kind of carve out structure positively, unless it very clearly prevents the transaction from being "implemented in Spain". When the only link with Spain is represented by turnover in Spain, the carve-out must very clearly prevent the turnover generating facilities in Spain from being effectively merged or acquired.

There are various unreported cases and at least one reported case where the Spanish Competition Authority has more or less explicitly accepted this type of carve-out device. [9] In some cases, the existence of a carve-out is not documented: if the carve-out is properly devised, no merger review process starts at all or the fact that implementation is delayed in Spain and/or Portugal is not reflected in the clearance decision. In our recent experience, it appears that, when confronted with them, the Authority is rather wary of this kind of arrangement, which must be devised and executed carefully and on a case-by-case basis.



1 The implementation of a reportable concentration prior to obtaining merger approval is regarded by the Competition Act as a serious infringement which is punishable by fines of up to 5% of the infringing company's turnover. In some cases, world-wide turnover of the infringing company has been taken as the reference for calculating the fine for gun-jumping in Spain (SNC/0003/09, *Abertis/Tradia*). In more recent cases, only turnover in Spain has been taken into account (SNC/0009/11, *Dorf Ketal*). The most immediate consequence of failing to notify a reportable transaction is the risk of being investigated for gun-jumping. As a result of such investigation, which is in itself burdensome, fines are likely to ensue. Ultimately, a de-merger order may also potentially ensue.

2 An interpretative twist may arise in view of the literal drafting of the *de minimis* rule inserted in the market share threshold (see above in black letters). When reading the rule (in bold letters, see above), the reader may have noticed that the Legislature uses the term "affected markets". In the original Spanish: *Quedan exentas del procedimiento de control todas aquéllas concentraciones económicas en las que, aun cumpliendo lo establecido en ésta letra a), el volumen de negocios global en España de la sociedad adquirida o de los activos adquiridos en el último ejercicio contable no supere la cantidad de 10 millones de euros, siempre y cuando las partícipes no tengan una cuota individual o conjunta igual o superior al 50 % en cualquiera de* ***los mercados afectados****, en el ámbito nacional o en un mercado geográfico definido dentro del mismo.*

A possible interpretation of the rule as so drafted is that, if a transaction qualifies as *de minimis*, the 50% 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 (acquisitions of the type 0+50% qualify for filing); the notion of "affected markets" may seem to imply that also vertically related markets, for instance, may have to be checked. Hence, if we are talking about an acquisition by a company with a high market share (*e.g.*, above 50%) of another company with no market share in the same market, but which is active on a product vertically or otherwise related to the product where the acquirer is active, this interpretation suggests that such a transaction may be reportable since one of the parties has 50% in a vertically "affected" market.

This interpretation is highly debatable and has thus far not resulted in any precedent we are aware of. However, there are some informal indications by the Authority and rumours which force us to take a cautious stance regarding the above interpretation and seek specialist advice if a merger may fall under the threshold pursuant to this interpretation.

3 Law 19/2012, approved by the Portuguese Parliament on 22 March 2012.

4 This paper does not consider the public policy implications of the market share threshold. For these, you may look at my papers *El umbral de cuota de mercado en el control de concentraciones*, Práctica Mercantil Abogados, Madrid, 2013 and *A practical guide on how to deal with market share notification thresholds*, European Competition Law Review, London, Nov. 2011. Suffice it to say now that the market share threshold has been criticised because it may require incurring some relatively costly analysis at the beginning of a transaction, when speed and legal certainty are of the essence. From a public policy standpoint though, the market share threshold may be somewhat more efficient than a turnover threshold in detecting transactions which pose antitrust issues. For instance, a banking merger will typically involve large turnover thresholds but pose no antitrust risks. An acquisition by, say Google, of a startup company with a sophisticated company may involve little turnover and therefore not be reportable in a country with no market share thresholds, and yet this transaction may well pose more competition concerns than the large banking merger.

5 SNC/0005/09, *Consenur/Ecotec*.

6 Judgement AN 28 September 2012, 566/2010. A reference to the "formal guidance" procedure enabled by Spanish law to gain certainty on whether or not a transaction is reportable is provided under point 3, below.

7 R/0034/09, *Bergé / Maritima Candina*.

8 Merger review concluded with Decision C-0279/10, *Dorf Ketal / Johnson Matthey*.

9 Merger clearance Decision *Philip Morris / Amer-Tupakka*, N-04015. One recent case where this kind of device is discussed is the *Verifone / Hypercom* acquisition, C-0363/11.