The Merger Control Review

Eighth Edition

Editor
Ilene Knable Gotts

The Law Reviews

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Chapter XX

SPAIN

Pedro Callol[1]

I INTRODUCTION

i Regulations

The merger control regime is regulated by the Competition Act[2] and its implementing regulation[3] and interpretative guidelines.

Authorities

The national competition authority is the National Competition and Markets Commission (CNMC).

The CNMC was created in 2013 bringing together under a single roof the pre-existing National Competition Commission and various sector national regulatory authorities (energy, telecommunications and media, railways, postal, airports).[4] This had an impact over mergers in regulated sectors, hitherto subject to the need for a cross-report from the relevant regulatory authority. The creation of the CNMC eliminated the need for cross-reports from regulators in industry sectors that are now dealt with by the CNMC. Hence, the CNMC has modified its Notice on Short Form Merger Filings in October 2015, which establishes that short-form merger filings were not possible when a cross-report from the competent regulatory Authority was required. Reduced form filings are now possible also in industry sectors where the CNMC has authority (although standard merger filing forms will still be required in industry sectors where the CNMC has no authority, such as banking mergers).[5]

The CNMC has a dual structure, which reflects on its regulatory and competition enforcement rules. A collegiate body, the Council, is the decision-making organ of the CNMC. The Council has 10 members divided into two chambers of five members each, one chamber dealing with competition matters and presided over by the President of the CNMC; the other dealing with regulatory supervision and led by the Vice-President. The chambers may meet separately or jointly in a plenary session. The President has the deciding vote in case of a tied vote at the Council.

1 Pedro Callol is a partner at Callol, Coca & Asociados.
2 Law 15/2007, of 3 July, on Competition.
3 Royal Decree 261/2008, of 22 February, approving the Competition Implementing Regulation.
4 For more details on the combination of regulators resulting in the CNMC, see my article in *The European Competition Law Review*, September 2013 number, 'Ever doubted the "convergence" of competition and regulation? Spain integrates its sector regulators and the Competition Authority under a single agency roof.'
5 CNMC Notice of 21 October 2015, on cases where the short-form filings may be used.

In the area of merger control, the Council of Ministers (the Cabinet) has a role in problematic mergers where the CNMC either considers prohibition or submission to conditions. This role of the Council of Ministers is further described below.

Appointment of the CNMC Council members, including the President and Vice-President, is entrusted to the government upon proposal of the Ministry of Economy. CNMC Council members are appointed for non-renewable terms of six years. The bulk of the CNMC is made of the various directorates, which deal with the investigations and provide the substantial back office research and knowledge required for the day to day work of the CNMC. One of those directorates is the Competition Directorate, which is in turn divided into various sub-directorates of industry and energy, information society, services, leniency and cartels and, finally, a monitoring sub-directorate. There is no specific merger task force, which means that mergers are allocated internally.

Pre-merger notification and approval

Which transactions qualify as a merger

A concentration takes place when a stable change of control of an undertaking takes place as a result of a merger of two previously independent undertakings; an acquisition of control of an undertaking or a part thereof by another undertaking; or the creation of a joint venture or the acquisition of joint control of an undertaking, provided the joint venture is full-function and performs its economic activity on a long-term basis.

An acquisition of control results from contracts, rights or any other means that, taking into account the circumstances of fact and law, confer the possibility of exercising decisive influence over the acquired undertaking. The concept of control encompasses ownership of shares or assets, contracts, rights or other means that provide decisive influence over the composition, deliberations or decisions of the governing organs of the company.

Purely internal restructurings within a company group do not constitute a change of control. Likewise, the acquisition of control must involve a business having access to the market and therefore a business to which a market share or market turnover can be assigned. Hence an acquisition of a business previously providing an internal service solely to the selling group will not amount to a merger, provided that no sales from the acquired business take place to third parties within a start-up period from the acquisition (start-up period of generally three years). Temporary shareholdings by financial entities, holding companies and receiverships are excluded in the circumstances described by the Competition Act.

Thresholds triggering merger control in Spain

The Competition Act orders that concentrations that meet either one of the following thresholds must be notified to the CNMC for merger control purposes:

a That, as a result of the concentration, a market share of 30 per cent or more of the relevant product market in Spain, or a relevant geographic market within Spain, is acquired or increased. A *de minimis* exemption applies if:
- the turnover of the acquired undertaking in Spain does not exceed €10 million; and
- the concentration does not lead to acquiring or increasing a market share of 50 per cent or higher in the relevant product or service market or in any other market affected by the concentration; or

b That the aggregated turnover in Spain of the parties to the concentration exceeds €240 million in the last accounting year, if at least two of the parties to the concentration each have an individual turnover exceeding €60 million in Spain.

If either one of the above thresholds is met, filing is mandatory and the concentration cannot be implemented prior to having been authorised. The Competition Act provides for a derogation system that enables total or partial closing of a merger prior to having gained merger control clearance. This is further discussed under Section III, *infra*.

Consequences of failing to notify a reportable transaction

Closing a transaction without having obtained the required merger control approval is a serious infringement under the Competition Act. The CNMC has been quite active in recent years in monitoring gun jumping, particularly of transactions that had to be reported pursuant to the market share threshold, which the CNMC has shown it has will to enforce. Closing a reportable transaction without having gained merger control approval may carry fines of up to 5 per cent of the turnover of the acquiring group.[6] Closing in contravention of the terms of a merger control decision may result in fines of up to 10 per cent of turnover. Fines are imposed following a separate administrative investigation on gun jumping. Furthermore, companies condemned for gun jumping, may potentially be disqualified from supplying goods and services to the public administrations under the public procurement laws.

Filing fee

A filing fee must be paid and proof of payment included as part of the merger filing. The amount of the fee is determined in an Annex to Law 3/2013 of 4 June, on the creation of the CNMC. The amount of the fee may be updated annually and is currently as follows:

a €5,502.15 when the aggregate turnover of the merging parties is equal or less than €240 million;

b €11,004.31 when the aggregate turnover of the merging parties is between €240 million and € 480 million;

c €22,008.62 when the aggregate turnover of the merging parties is between €240 million and €3 billion; and

d a fixed amount of €43,944 when the aggregate turnover of the merging parties is above €3 billion, adding €11,004.31 to the fee for each additional €3 billion of aggregate turnover of the parties up to a maximum fee amount of €109,906.

The filing fee for short form filings currently amounts to €1,530.15.

II YEAR IN REVIEW

Although more active than in prior years in terms of deal flow, 2016 has (still) been a relatively slow year in merger control terms, with no transaction having been subjected to Phase II

6 It is to be noted that, in some cases, worldwide turnover ofthe infringing group has been used as a basis for the calculation of the fine (Decision of 26 January 2010, *Abertis/Inarlia*, SNC/0003/09). Also occasionally turnover of both acquirer and target are taken into account for the calculation of the fine (Decision of 22 July 2011, *Dorf/Ketal,* file SNC 0009/11).

in-depth review. Conversely, we see some innovative and interesting Phase I reviews in exciting sectors, including some transactions in the 'new' economy. In addition, the CNMC has been quite proactive in approving merger transactions, even highly problematic ones, in Phase I, when necessary, subject to commitments.

Overall, 104 mergers were notified to the CNMC in 2016 in sectors ranging from hospital supplies and pharmaceuticals, to e-commerce, pay-TV and food. 90.3 per cent of merger notifications were pre-notified, and roughly half were notified using the short merger filing form.

We set out below some of the most significant merger decisions, starting with the complex Phase II decision related to the acquisition of the pay-TV business of Canal+ by Telefónica (a merger that occurred in 2015 but the decision was not available at the time of last year's edition of this chapter and was therefore not reported).

i Phase II Decision approving the acquisition of Distribuidora De Televisión Digital SA (DTS) by Telefónica De Contenidos SAU (Telefónica) subject to remedies[7]

The approved transaction consisted of the acquisition by Telefónica (incumbent telecommunications company and also second largest operator in the pay-TV market) of exclusive control of DTS (number one pay-TV operator), through the purchase of 56 per cent share capital owned by Prisa.

The CNMC approved the transaction after an in-depth (Phase II) investigation, subject to commitments. Telefónica proposed a five-year duration commitment package (renewable for three additional years) from the moment the CNMC decision is deemed final (i.e., 30 April 2015). During this period, Telefónica may request an amendment to the commitments offered if a significant change in the structure or regulation of the markets in question occurs.

The concentration was notified to the CNMC on 17 October 2014, following a streamlined referral from the European Commission under the EU Merger Control Regulation 139/2004 (ECMR). Various modified commitment proposals were necessary before the final commitment package could take form. The commitments submitted by Telefónica, and ultimately approved by the CNMC as conditions to the merger decision can be summarised as follows.

Commitments regarding the pay-TV market in Spain

Telefónica commits not to hinder the mobility of its current and future pay-TV customers with the establishment of any limitations to switching pay-TV provider. In particular, Telefónica will process the service termination requests of its customers in no longer than 15 days for clients with an unbundled offer; Telefónica will waive the application of permanence clauses of end users under certain circumstances and will not solicit certain categories of customers for two months following the cancellation request.

Telefónica also commits to honour existing DTS contracts with other electronic communication operators, for the distribution of the DTS television signal. Once the contract

7 Decision of 23 April 2015, *Telefónica/DTS*, file C/0612/14.

term has expired, Telefónica shall extend this service for a period of six months, giving up its rights to actively sollicit customers who have hired this service through intermediary operators.

Wholesale marketing of individual media content and TV channels in Spain

One of the problematic areas in this merger was the potential capacity of Telefónica to affect competition by means of its privileged access to media content. Telefónica will make available to other pay-TV operators the supply of premium channels (those with exclusive release rights over content of Majors or First Division Football League, Football King's Cup, Champions League, Europa League, Football World Cup, Basketball World Cup, Formula 1, Moto GP and the Olympic Games live sports events).

Under the merger remedies, each pay-TV operator will have access to a maximum of 50 per cent of channels comprising Telefónica's wholesale supply. Pricing levels at the wholesale level should ensure the replicability of Telefónica's retail offering, preventing the possibility that margin-squeeze situations may arise.

The exclusive exploitation of the contents acquired by Telefónica is limited to two years and to certain types of broadcasting windows, while other windows (such as VOD of movies and TV catalogue) are restricted from being acquired by the merged entity on an exclusivity basis. As a general rule, Telefónica may not acquire exclusive broadcasting rights that it will not exploit. In addition, the resulting entity will limit to three years the duration of its contracts for the acquisition of content.

The commitments shall not apply to the resulting entity's own productions.

Additionally, Telefónica acquires a must-carry obligation to broadcast through its pay-TV platform, under certain conditions, the channels edited by third-party operators. The resulting entity will not be able to acquire exclusive broadcasting rights to third-party channels.

Commitments regarding the access to Telefónica's internet network in Spain

Telefónica has the ability and incentives (e.g., by restricting access to its network) to substantially reduce competition coming from third-pay-TV operators via the internet. In this regard, the commitments package enables pay-TV providers to access Telefónica's broadband customer base in competitive conditions. Telefónica commits to provide third-party access to its internet network in Spain, with capacity and sufficient guarantees of quality and in FRAND terms.

Conflicts with third-party operators related to the implementation of the commitments may be subject to arbitration before the CNMC.

ii Acquisition of La Nevera Roja by Just Eat[8]

This transaction takes place in the markets of home delivery of prepared food via the internet. The markets concerned are two-sided markets, therefore with two sources of potential demand: restaurants interested in selling via the internet platform, and end customers interested in acquiring food.

The merging firms were close competitors and the transaction strengthened their network externalities. The CNMC determined that third parties could only with difficulty

8 Decision of 8 February 2016, *Just Eat/La Nevera Roja*, file C/0730/16.

replicate the network effects of the merged entity. Nonetheless, the CNMC ultimately considered that the amount of the total internet requests for home delivery in Spain was quite reduced due to the demand for telephone-managed deliveries. To ensure smooth clearance, the acquirer submitted Phase I commitments to reduce the barriers to entry by third parties, notably a restriction on any exclusivity clauses or clauses akin to exclusivity in dealings with restaurants.

iii Acquisition of Panrico by Bimbo[9]

This concentration concerned the acquisition of the second operator by the market leader in the sector of sliced bread. The same transaction had been proposed the previous year, where the divestment of the sliced bread business of the merged entity was offered. However, the CNMC did not consider at the time that the potential buyer (Oaktree, an investment fund) was an appropriate buyer as it had no specific sector experience. On this second occasion, a fix-it-first remedy was presented at the early stage of the merger review process, offering the divestiture of two factories, one manufacturing line and a favourable supply agreement of sliced packaged bread to Adam Foods, an experienced operator. The supply agreement was also devised in a manner that reduced the incentives for future dependence from Adam Foods.

iv Vertical integration in the healthcare business – acquisition of QuironSalud by Fresenius[10]

The acquisition of Quironsalud by Fresenius Helios had been initially notified to the European Commission, who referred the transaction to the CNMC under Article 9 ECMR. On 22 December 2016, the CNMC issued its Phase I decision authorising the transaction without commitments. Two separate relevant markets were affected by the merger: the market for health and private hospital care in Spain; and the market for the supply of medical and pharmaceutical products to hospitals.

With regard to the market for health and private hospital care in Spain, the transaction presented no overlap, other than in the provision by private operators of haemodialysis treatments for public patients in certain regions.

In relation to the supply of medical and pharmaceutical products, the transaction had vertical effects since Fresenius Group was active in the upstream market, while Quiron is active in the downstream hospital market.

The CNMC considered the possibility that Fresenius could benefit from Quiron's position in the downstream market as a purchaser accessing sensitive commercial information from other suppliers; the CNMC also considered the possibility that the vertically integrated entity, with considerable market shares in some markets upstream, might have incentives to foreclose other hospital businesses; a third-party competitor of Fresenius (B.Braun) also voiced concerns that the vertical integration could create the ability to discriminate in favour of Fresenius in the purchasing of hospital supplies even by the public sector hospitals, which may employ doctors who would also be employees of Quiron simultaneously. These concerns were dismissed given that, downstream, Fresenius has a reduced market share in the procurement markets (the CNMC did not segment the purchasing market between

9 Decision of 21 June 2016, *Bimbo/Panrico II,* file C/0748/16.

10 Decision of 22 December 2016, *Helios/Quironsalud,* file C/0813/16.

private hospital and public hospital demand); also the CNMC dismissed the concerns from many medical practitioners employed in the private sector (Quiron) and the public sector (participating in the procurement decisions of the latter), on the grounds that public procurement law ensures objectivity in the purchasing decision-making process.

v Gun jumping – CNMC fines Grifols SA (Grifols) for failure to notify the acquisition of certain assets of Novartis International AG (Novartis)[11]

The CNMC fined Grifols €106.500 for failure to comply with the obligation to notify a concentration subject to the *de minimis* market share threshold exception (i.e., when the turnover of the target does not exceed €10 million).

In particular, the CNMC considers proved that the acquisition by Grifols of Novaris executed on 9 January 2014, without previous notification, constitutes an infringement of the Competition Act. The transaction was finally notified on 10 March 2015.

The CNMC found about the transaction through press release announcements dated on 12 November 2013 and the corporate websites of both companies.

According to the decision, Grifols had considered that the market share resulting from the transaction in the market of diagnostic business of blood transfusions (i.e., the relevant market) was 49 per cent, relevant threshold as turnover of the target in Spain was below €10 million. However, after the pertinent information requests, the CNMC concluded that the actual market share had amounted to 52.2 per cent. Therefore, the transaction met the legal notification threshold and should have been notified for merger clearance prior to its implementation.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

Pre-notification is customary and is advised when possible. Pre-notification is not subject to statutory deadlines. In most cases, two or three weeks should be allowed, although it can take longer if the transaction is complex from a competitive standpoint, or if the CNMC requires additional information to be included in the notification form.

The formal merger control investigation is divided into Phase I and Phase II proceedings. The majority of files are cleared in Phase I, whereas only a fraction is referred to Phase II in-depth analysis.

Phase I proceedings last in principle for one month, counted from the date when a complete notification is filed with the CNMC. Where the notifying party submits commitments (this possibility exists during the 20-day period after the filing), the Phase I statutory maximum period is extended by 10 additional days.

Phase II proceedings maximum period is of two months, counted from the date when the CNMC decides to open a Phase II. The maximum period is extended for 15 additional days if commitments are submitted in Phase II (the notifying party can offer commitments up to 35 days after the start of Phase II).

In the event of Phase II decisions blocking or imposing obligations, the Minister of Economy is entitled to refer the case to the Council of Ministers within 15 days of the Phase

11 Decision 16 October 2015, *Grifols/Novartis*, file SNC/DC/037/15.

II decision being issued. If referred to it, the Council of Ministers has one month to issue a final decision, which may confirm the Phase IICNMC Decision or may authorise the merger, with or without conditions.

All maximum periods can be interrupted by the CNMC in regulated events such as formal information requests.

ii Parties' ability to accelerate the review procedure, tender offers and hostile transactions

As discussed, pre-notification in practice normally makes the review easier.

The merger cannot be closed prior to having gained the prerequisite merger clearance. It is possible to request a derogation from the suspension effect of the merger filing. This derogation is nowadays very rarely granted. In the past, the exception has been used in limited instances to enable quick closing of a merger in non-problematic geographic areas, while enabling a Phase II review limited to problematic areas (for instance in supermarket, gas station and other mergers with local geographic markets). As a general rule, the CNMC in practice has a preference not to use this derogation procedure, as it entails considerable analysis; rather, where possible, the CNMC prefers to move towards quick merger clearance if the circumstances merit it.

Public offers can be launched including as condition for the validity the merger control clearance. The Competition Act enables launching of a public tender without having gained merger control provided that the CNMC is notified the merger within five days from the formal application for authorisation of the public tender with the Securities Exchange Commission (CNMV); and that the voting rights are not exercised save when required to preserve the value of an investment, with the authorisation of the CNMC.

Hostile public offers are rare in Spain. Past experience shows that hostile takeovers particularly in strategic sectors can be extremely complex. The hostile bid for Endesa launched by Gas Natural in the prior decade was not successful, and competing offers required intervention from the European Commission under Article 21 of the ECMR. On that same transaction, the initial merger control authorisation gained by the first bidder (Gas Natural) was frozen by the Supreme Court on interim review.

iii Third-party access to the file and rights to challenge mergers

Third-party access is expressly contemplated in the Competition Act in Phase II merger proceedings. Parties with a legitimate interest have the possibility to access the merger file and submit comments to the statement of objections and proposed commitments.

The law does not foresee the possibility that interested parties have a role in Phase I. Phase I proceedings are confidential and the file cannot be accessed by third parties. However, as there is no express provision banning participation of third parties in Phase I merger proceedings, it has become largely accepted that third parties can make representations and submissions to the CNMC regarding a merger also during Phase I merger proceedings. A recent example of this is the *Helios/Quiron* merger, commented above, where the participation of a third party in the proceedings was expressly discussed in the merger decision.

Indeed, the CNMC will listen to third parties concerns and if these have merit, the CNMC should be expected to raise the level of scrutiny of a given merger.

Third parties also play a role in reporting mergers that should have been filed for merger review but were not.[12]

iv Resolution of authorities' competition concerns, appeals and judicial review

The CNMC should, at least in theory, solve most initial concerns in pre-notification. The CNMC will make use of formal information requests stopping the clock when necessary. Once the proposed transaction has been formally filed, the CNMC may be keen, depending on the circumstances, to deal with any questions informally, without stopping the clock (particularly if the transaction has been pre-notified).

Merger decisions by the CNMC may be appealed within two months before the High Court. In instances where the Council of Ministers decides on the merger, the Supreme Court is competent to review the merger decision.

v Effect of regulatory review

Mergers reviewed by the CNMC may be reviewed concurrently by other administrative agencies dealing, for instance, with regulatory and licensing issues. The potential friction and lack of coordination between the CNMC and sector regulators has been minimised in some instances in economic sectors where the CNMC acts also as a regulatory authority. In areas such as banking, where the regulator is not within the CNMC, merger review is suspended while the sector regulator completes its review.

IV OTHER STRATEGIC CONSIDERATIONS

Generally speaking, it is far better to pre-notify transactions if at all possible. The CNMC has in the past recommended pre-notification and it clearly does not like that transactions are notified for merger control without pre-notification. Furthermore, pre-notification enables discussion on a preliminary basis on many strategic issues, including the recurrent usage of the short-form filing, occasionally even in situations not expressly foreseen by the applicable regulation.

Another benefit of pre-notification is expected timing for approval. Even though initially pre-notification implies additional delay, in practice the CNMC will reduce the time dedicated to the review and often issue speedier approval if pre-notification has taken place. In non-problematic cases, recent experience shows that the CNMC is often granting approval in 10–20 days from filing.

It is possible to apply for formal guidance from the CNMC regarding whether or not a change of control arises as a result of the projected merger and the merger thresholds are met. One issue here is the lack of a binding deadline for the CNMC to act on a request for formal guidance, an area that might change in the future.

Merger control is an important tool and CNMC has in the past vigorously investigated and pursued gun jumping or closing of reportable transactions without having obtained the necessary merger clearance. The CNMC has made it clear recently that it is ready to use its powers to punish individual directors and managers for competition breaches (which

12 For example, Decision of 29 July 2010, *Bergé/Maritima Candina*, file R/0006/10.

has hitherto not been the case in situations of gun jumping, a situation that may change). Likewise, new legislation that entered into force recently arguably makes it possible to exclude from public tender those companies that have been condemned for gun jumping.

V OUTLOOK & CONCLUSIONS

The current CNMC is the result of the integration of Spain's main national regulatory authorities in various network industries and regulated sectors into the Competition Authority back in 2013 (see above). That integration was criticised at the time. In the short- to mid-term, another legal reform might be expected to separate, again, those national regulatory authorities from the Competition Authority.

The CNMC is well aware that the formal guidance procedure enabling it to give clarity on the reportability of a merger is impaired by the lack of a binding deadline. This may perhaps change by dealing with the matter in the new legislation that will possibly be introduced to revert to the previous model of separation between competition enforcer and sector regulators.

In conclusion, no radical changes are in principle to be expected in the merger control arena in Spain, with the qualification of the limited changes likely to arise (primarily but perhaps not exclusively) at the institutional enforcement level if the CNMC goes back to its previous form (with the competition and regulatory authorities separated again). The CNMC or its successor is likely to continue to enforce competition policy vigorously, including merger control laws.

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Qualified English solicitor and attorney admitted to the Madrid Bar; Pedro Callol has 20 years of antitrust and specialist litigation experience. Prior to founding his own expert law firm, he was a leading EU and competition partner in one of Spain's large law firms. Before that he created and led the EU and competition practice of a London 'magic circle' law firm in Spain. Prior to that he worked with Arnold & Porter in Washington, DC and London. He has a law degree from the Complutense University (Madrid) and a business degree from San Pablo University (Madrid). He is a law graduate of the University of Chicago Law School (Fulbright – Banco Santander scholar). He holds a master's in European law from the College of Europe, Bruges (sponsored by the Spanish Ministry of Foreign Affairs).

Mr Callol is the president of the Fulbright Alumni Association of Spain, the Secretary of the Board of the Chicago Alumni Association of Spain and member of the Board of directors of the Spanish Competition Law Association (AEDC) and of the Advisory Board of the American Antitrust Institute, Washington, DC.

He was twice acknowledged as one of the 'top 40 under 40' by *Iberian Lawyer* and he is a specialist currently recognised by *Chambers and Partners*, *Global Competition Review*, *Best Lawyers*, *The Legal 500* and *Who's Who Legal*. He is the author of many specialist publications and is the Spanish correspondent of the *European Competition Law Review*. He leads specialist seminars in the Carlos III and San Pablo Law Schools.

His working languages are English, Spanish, French, German, Italian and Catalan.