

SPAIN

Pedro Callol¹

I INTRODUCTION

i Regulations

The merger control regime is regulated by the Competition Act² and its implementing regulation³ 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 modified its Notice on Short Form Merger Filings in October 2015, to eliminate the rule that short-form merger filings were not available 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 Pedro Callol, 'Ever doubted the "convergence" of competition and regulation? Spain integrates its sector regulators and the Competition Authority under a single agency roof' in the *European Competition Law Review* (September 2013 edition).

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 €480 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 €1,545.45.

⁶ It is to be noted that, in some cases, worldwide turnover of the 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, *DorffKetal*, file SNC 0009/11).

II YEAR IN REVIEW

Although more active than in some of the prior years in terms of deal flow, 2018 has been a rather standard year in merger review terms, with only one transaction having been subjected to Phase II. 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, roughly 84 concentrations were subject to merger control in 2018⁷ in all sectors including financial service activities, human health activities, retail sale of automotive fuel in specialised stores, sea and coastal passenger water transport and manufacture of railway locomotives and rolling stock. We set out below some significant merger cases.

i Acquisition of *Compañía Transmediterránea SA* by *Naviera Armas*⁸

The NMCC authorised in Phase I with commitments the acquisition of Transmediterránea by the shipping group Naviera Armas (the parent company of which is Bahía de las Isletas SL).

The merged entity assumes the competitive position of Transmediterránea in the markets for maritime transport of cargo and passengers in two routes: (1) the Spanish peninsula–Balearics; and (2) between the Balearic islands, in which the buyer was not present, without generating any substantial change in the competitive structure of these markets.

However, the operation raised competitive concerns in three routes: (1) south Spanish peninsula–Melilla; (2) Spanish peninsula–Canary Islands; and (3) between the Canary Islands. For this reason, Naviera Armas submitted commitments, and as a result, Förde Reederei Seetouristik Iberia SLU (FRS) would start operating the Motril–Melilla route and the Huelva–Canary Islands circular route dedicated to passengers and cargo maritime transport services. The entry of FRS (involving some related obligations in connection with mooring and ticketing systems, among others) was deemed to solve the competition problems.

ii Acquisition of *Duro Felguera Rail SAU* by *Talleres Alegria SA*⁹

The operation comprised the acquisition of exclusive control of Duro Felguera Rail, a company belonging to the Duro Felguera Group, which designs, manufactures and supplies railway track equipment, crossings of manganese steel and other fixed-track materials.

Both parties overlap horizontally in the market for the manufacture and supply of railway crossings and switches, and in the market of minor components for the manufacture of exchangers and other track services. For this reason, Talleres Alegria submitted a commitment to supply its competitors the essential components for the production of railway exchangers and other track devices in market conditions and in line with the commercial terms and conditions that applied to such competitors prior to the merger.

The NMCC considers the commitment sufficient as it eliminates the competition problems, maintaining competitors' access in commercial and market conditions similar to those present before the operation.

⁷ At the moment of editing this chapter the CNMC had not yet published its memory of activities for 2018.

⁸ Decision of 22 May 2018, *Naviera Armas/Transmediterránea*, file C/0922/18.

⁹ Decision of 26 July 2018, *Talleres Alegria/Duro Felguera Rail*, file C/0945/18.

iii Phase II of Quirón/Clinica Santa Cristina¹⁰

This notified transaction comprises the acquisition of Health Clinic Santa Cristina's healthcare business in Albacete by Helios Healthcare Spai SLU (Quirón Group). There are only two private hospitals with in-patient care in Albacete: Quirónsalud Albacete, run by Quirón Group, and Health Clinic Santa Cristina, the target in this transaction.

As a result of the acquisition, the only private healthcare competitor in the province of Albacete would disappear. Consequently, Quirón Group would have an unbeatable competitive position, as already confirmed by the market tests applied by the NMCC during Phase I proceedings. Additionally, the market power acquired in the delivery of healthcare services with in-patient care could reinforce the position of the resulting operator in the delivery of outpatient services. This situation could arise from the fact that patients tend to prefer the whole medical process to be carried out in the same healthcare centre.

In this light, the NMCC has warned about the risks of unilateral conduct by the merged entity (e.g., significant price increases, decrease in quality), given its monopolist position in Albacete. Any buyer bargaining power could be limited considerably. This risk is increased owing to the existing economic, technical and legal barriers to enter into the market, which would hinder the deployment of new private hospitals in the province of Albacete, at least in the short term.

On the basis of the above, the NMCC considered that an in-depth analysis of the notified operation is necessary, in view of the possible obstacles to the maintenance of effective competition in the market under consideration. Consequently, the Competition Directorate referred the file for Phase II consideration. In Phase II, the concentration was approved subject to a remedy package to safeguard the clinical speciality treatment portfolio and guarantee the supply of healthcare services to all patients at stable prices and quality levels.

iv Merger of Servired, Sistema 4B and Euro 6000¹¹

The CNMC has authorised with commitments the combination of the three card payment service companies operating in Spain: Servired, Sistema 4B and Euro 6000 (SMP), of which practically all the banking entities in Spain were shareholders. The operation was subordinated to the fulfilment of a series of requirements aimed at guaranteeing greater competition in card payment applications in Spain for the benefit of financial entities, business and end users.

With the operation, one of the peculiarities of the Spanish card payment sector disappears (in other countries of the European Union the most usual is that there is a single SMP). In addition, the shareholder's agreement foresees that the resulting entity will face the necessary investments to develop its own payment application that will offer a domestic payment system with all the functions in competition with other payment systems, including international systems. The commitments are aimed at ensuring the proper functioning of the competition in the card payment systems in Spain as well as its openness and accessibility by banking operators subject to objective terms, and including a dispute resolution system for entities to which access to the system is denied.

10 Decision of 4 October 2018, *Quiron/Clinica Santa Cristina*, file C/0966/18.

11 Decision of 1 February 2018, *Servired/Sistema 4B/Euro 6000*, file C/0911/17.

v Acquisition of Petrocorner Retail SLU and Kingbook Inversiones Socimi SA by BP Oil España SAU¹²

This transaction comprises the acquisition by BP Oil España (BP) of the share capital of Petrocorner Retail (Petrocorner) and Kingbook Inversiones Socimi, which entailed the purchase of 65 service stations.

In most areas where BP acquired Petrocorner service stations, there were no overlaps, nor was there sufficient competition. However, there are risks for competition in certain areas because of the high market share that BP will have post-transaction – specifically, in Osorno (Palencia), Villacastín (Segovia) and Almonte (Huelva).

In the case of Osorno, BP also acquired a ‘white label’ (or independent) service station, which had the best prices in the relevant area. Given the risk of price increases in the area, the NMCC has established that BP must comply with the following commitments: (1) BP must sell that particular station to Hostal Los Chopos SA within a period of six months from the merger clearance; (2) the company Hostal Los Chopos SA must assume the commitment to maintain the station under an independent flag or, in any case, a banner different from that of the main operators as classified annually by the NMCC; and (3) BP undertakes not to reacquire this station in a minimum term of 10 years.

Finally, BP is committed to not reaching any new flagging or supply contract with any service station in the Osorno, Villacastín and Almonte areas for five years from the merger clearance.

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 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 II CNMC decision or may authorise the merger, with or without conditions.

¹² Decision of 13 December 2018, *BP Petrocorner*, file C/0980/18.

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. This is normal dynamics in Phase II, where third parties have a relevant role and provide inputs which help shape the outcome of the merger proceedings.

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 is accepted, and has become quite standard, that third parties make representations and submissions to the CNMC regarding a merger also during Phase I merger proceedings. An example of this is the *Helios/Quiron* merger,¹³ 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.

¹³ Decision of 22 December 2016, *Helios/Quironsalud*, file C/0813/16.

Third parties also play a role in reporting mergers that should have been filed for merger review but were not.¹⁴

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

¹⁴ For example, Decision of 29 July 2010, *Bergel/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 AND 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 medium 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. Going forward it cannot be ruled out, perhaps, that the CNMC will include individuals in fines for gun-jumping, in line with what is the trend in antitrust enforcement cases, and may also increase the amount of fines, in line with what seems like a trend at European Commission level and in neighbouring countries such as France.