The Spanish Government authorises the BBVA/Sabadell Takeover, prompting scrutiny Under Spanish and EU law.

The much expected (see here for details on the immediate political and legal context) Government authorization (**Decision**) in phase III for Sabadell's takeover offer by BBVA has just been published, unveiling one more episode (likely not the final one) of questionable political intervention aiming to serve particular interests (diametrically opposed to the general interest the current Government nominally seeks to protect). The conditions included in the Decision are on top of the conditions already ordered by the National Competition and Markets Commission, the **CNMC**, which remain in place.

The Decision is based on the provision of the Competition Act which enables the Government to intervene in CNMC conditional or prohibition merger conditions based on reasons of general interest distinct from competition. The issues of general interest invoked by the Decision are *(i)* the adequate safeguard of the goals of sector regulation related to economic growth and business activity; *(ii)* protection of employment; *(iii)* territorial cohesion; *(iv)* social policies related to the work of the bank foundations; *(v)* promotion of research and development. The explanation provided to substantiate why intervention is required to safeguard any of the alleged public policy goals, in spite of the Government's efforts, remains open to discussion: for instance, a larger bank would arguably provide a financially sounder platform for business activity and social activity, and even protection of employment is arguably better served if a general gain on banking competitiveness (nationally and internationally) is achieved. Any possibility of adverse antitrust effects flowing from the concentration is addressed by the CNMC conditions. The same goes for protection of any research and development projects that could be at stake, which could arguably be better served by a larger, stronger, institution (if at all, with inclusion of a specific condition aimed at protecting specific projects identified). Finally, territorial cohesion within Spain would arguably be better served by combining two institutions of regional origin into a single, larger, national institution.

The protection of the general interest goals invoked is entrusted to the condition attached by the Government to the merger authorization: BBVA and Sabadell must keep legal personality, balance sheet and management separated for at least three years. The effectiveness of the Government condition is subject to monitoring; and the Government may decide to extend its duration for two additional years. The Decision also states that the management separation must include *at least* the maintenance of separate decision-making in connection with matters which affect credit and financing, particularly to SMEs; human resources; branch network and banking services; social work through the two respective foundations. Hence, it seems that the separation of management between both banks does not necessarily have to extend to the entire business or operative areas, but only to the ones expressly pointed out (which are quite broad anyway, but do not seem to comprehend all the activities of a large, multi-product bank). This might easily provide fertile ground for BBVA to invoke the proportionality principle, as perhaps a lesser degree of intervention might suffice. The Government attempts to address this concern by explaining that the multiple interests affected and scale of the transaction require avoiding partial conditions, opting of a single, global merger condition.

In practice, however, it seems that the conditions attached to the Decision amount to a very substantial limitation tantamount to a prohibition to fully implement the takeover offer for three (possibly five) years. It is a creative outcome short of outright prohibition (off bounds for the Government under existing law). Yet it poses a lot of legal doubts in terms of proportionality, leaving aside practical questions such as the fact that, five years down the line, a lot of things might have happened and the legal and market context is as of today largely unpredictable.

With that in mind, BBVA is left with the option of either abandoning the takeover offer or continue with it accepting the Government conditions, with or without filing an appeal against the Decision before the Supreme Court. The Supreme Court is the highest judicial body with a track record of independence, having overturned the other historic Government merger decision in the hostile takeover *Gas Natural/Endesa* (see prior discussion here). Also, there is Supreme Court case law from the beginning of the century (*Prosegur/Blindados del Norte* case, 2002) annulling Government merger conditions on the basis that these amounted to a disproportionate intervention in the freedom of enterprise. Proportionality is, therefore, a key legal principle in the area, as rightly identified by the Decision.

The European Commission (**EC**) has shown some interest in the matter, although it has not yet made clear what its legal basis for potential action in this matter might be. The takeover offer has national dimension. As a result of this, the EC cannot avail itself of Article 21 EUMR, which enables the EC to act against national government interference in mergers with Community dimension unless the Government has genuine national interest concerns. Yet, the principles surrounding application of Article 21 EUMR could apply to BBVA's takeover offer *mutatis mutandis*. In an already well-known EC case (*VIG* Decision) the EC has made it clear that a sham invocation of national interest principles under foreign direct investment (**FDI**) screening rules would be incompatible with EU law. Even if Article 21 EUMR is not applicable to this matter, it cannot be ruled out that the EC scrutinizes the Decision on the basis that the takeover offer for Sabadell is not genuinely capable of posing a threat to the principles invoked by the Government and/or that those principles are themselves a sham invocation (which is compounded by the politically motivated debate around the takeover offer). Even if Article 21 EUMR does not apply, the EU law principles on free circulation of capital could still be invoked by the EC. The other recent precedent potentially applicable to the case is the Court of Justice of the EU *Xella Magyarország* case, where the Court opined on the merits of the national or public interest grounds invoked by the Member State and on the proportionality of the member State measures adopted against the concentration. Precedents under both Article 21 EUMR and EU fundamental circulation freedoms also include EC decisions around the competitive takeover offer for Endesa.

Both the *VIG* and *Xella Magyar* cases refer to the interaction of EU law with national FDI screening. Formally, the Government intervention in the BBVA/Sabadell takeover is based on very similar legal grounds as those existing in the FDI screening laws: Article 10 of the Competition Act refers to the power of the Government to intervene in mergers on grounds of 'general interest' which include areas such as *national defence and security*; *protection of security or public health*, as mere examples; on the other hand, Article 7 of Law 19/2003, of 4 July, on foreign investment, as amended, provides the basis for FDI screening and Government authorization regarding investments which may affect activities related to *national defence, or activities that affect or may affect the public order, public security and public health*.

Indeed, the rationale for FDI intervention seems very close to the legal basis afforded to the Government to intervene under the Competition Act, prompting a clear analogy between the Member State action in the *VIG* and *Xella Magyar* cases and the Government intervention in the BBVA/Sabadell transaction.

Surely more to follow in the near future.