The Merger Control Review

Ninth Edition

Editor

Ilene Knable Gotts

The Law Reviews

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CONTENTS

PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
July 2018

Chapter 37

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 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 my article in *The European Competition Law Review*, September 2013 edition, '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 some of the prior years in terms of deal flow, 2017 has been a rather standard year in merger review terms, with no transaction having been subjected

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, *Dorf/Ketal*, file SNC 0009/11).

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 100 concentrations were subject to merger control in 2017,[7] in all sectors including advertising spending, retail distribution of automotive fuels, waste treatment, e-commerce, computer programs, pharmaceutical sector and manufacturing operations of automated teller machines. We set out below some significant merger cases.

i Acquisition of the newspaper business of Publicaciones y Ediciones de Alto Aragón, SA (PEASA) by Heraldo Aragón, SA (Heraldo)[8]

The acquisition by Heraldo of the exclusive control of PEASA implied the market exit of the main operator in the printed newspaper business in the province of Huesca, and the advertising associated with it, including advertising in local radio and television in Huesca. The main effects of the operation occur in the regional or local advertising market in daily printed press in the province of Huesca, where the concentration is a three-to-two merger, with the resulting entity acquiring 90–100 per cent of the market.

The notifying party presents the transaction as the only viable outcome to preserve the acquired business, due to the continuous decline of the printed daily press business.

The CNMC cleared the merger unconditionally, based on the substantial decline of sales of printed newspaper copies in recent years.

ii Acquisition of Mallinckrodt Chemical Holdings (Mallinckrodt) By Glo Bidco, SARL (Glo Bidco)[9]

The operation consists in the acquisition of exclusive control of the business of radiopharmaceuticals for nuclear images of Mallinckrodt.

There are two types of diagnostic technologies in nuclear medicine: single-photon emission computed tomography (SPECT) and positron emission tomography (PET). The operation results in an overlap in the market of industrial SPECT and a vertical relationship between the industrial SPECT market and the downstream market for SPECT unit doses preparation.

The transaction led to substantial market concentration and this was a three-to-two merger in various relevant markets. However, the CNMC granted unconditional, Phase I, clearance, on the basis of a number of powerful merger defences. The barriers to entry to these markets are basically regulatory, the technology is well known and has not evolved significantly, industrial SPECT products are not generally protected by patent and although it is necessary to make an investment to establish a manufacturing plant, which requires specific equipment for industrial SPECT, such investment is perfectly viable for companies operating in the pharmaceutical industry. Furthermore, market shares in the relevant markets are volatile as these are bidding markets where opportunity windows to compete are opened with each tender called by hospitals of the public sector, with contracts not exceeding four

7 At the moment of editing this chapter the CNMC had not yet published its memory of activities for 2017.

8 Decision of 5 May 2016, HERALDO/PEASA, file C/0734/16.

9 Decision of 3 November 2016, GLO BIDCO/MALLINCKRODT, file C/0803/16.

years, the most usual being the concession for periods of one year renewable for one extra year. Regulated cap pricing and monopsony power of the public health system were important factors taken into account to afford quick clearance.

iii Acquisition of Codman Neurosurgery Business by Integra Lifesciencies Holdings Corporation (Integra) subject to commitments[10]

The transaction consisted of the acquisition by Integra of the exclusive control of Codman Neurosurgery Business (CNS), this being a business division of Depuy Synthes Inc, a 100 per cent subsidiary of the Johnson & Johnson Group, active in the field of medical devices for neurosurgery.

The transaction involved the acquisition by Integra of new assets complementary to its business such as antimicrobial catheters and programmable valves that are key products in the area of neurosurgery involving access to the brain or other parts of the central nervous system. There were overlaps in the following markets: (1) intracranial pressure internal monitoring (ICP); (2) external ventricular drainage (DVE); (3) DVE collection bags; (4) valves for the treatment of hydrocephalus; (5) dura repair products; (6) bipolar electrosurgical forceps; and (7) cranial access instruments.

In the ICP market, Integra reinforced its position and posed a risk to effective competition. Therefore, Integra put forward the possibility to: (1) divest the PIC business of Integra, or (2) divest the PIC business of CNS.

The commitments included already a description of the features the buyer should comply with in order to be adequate, as well as the procedure and periods to carry out the divestment. Integra also committed not to reacquire the divested business and to preserve the viability of the business.

iv Merger of Servired, Sistema 4B and Euro 6000[11]

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 13 July 2017, *Integra/Codman Neurosurgery Business*, file C/0865/17.

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

v Gun jumping – CNMC fines Consenur, SLU (Consenur) for failure to notify the acquisition of certain assets of Cathisa Medioambiente, SL (Cathisa)[12]

The CNMC fined Consenur, SLU (Consenur) for having closed the acquisition of Cathisa Medioambiente, SL (Cathisa) in August 2015 without having notified nor gained the relevant antitrust approval.

According to the decision, the CNMC and Consenur agreed on considering relevant the product market for the treatment and disposal of hazardous sanitary waste. However, Consenur argued that the geographic market was national, while the CNMC concluded that the geographic market was limited to the Canary Islands where Consenur had a market share of 79 per cent in 2014.

Consenur was found to have acted negligently as, in case of doubt, Consenur could have applied for formal guidance to the CNMC for a ruling on whether or not the transaction was reportable (see Section IV, below, for a discussion of this formal guidance procedure).

Consenur has been fined a low figure (€20,000), taking into account factors such as the irregular situation being maintained only shortly (a merger filing was carried out quickly upon notice) and that the merger did not raise any substantive issues.

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 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.

12 Decision 14 March 2017, *Consenur*, file SNC/DC/0074/16.

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. A recent 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.

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

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

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

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 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 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.

Appendix 1

ABOUT THE AUTHORS

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Qualified English solicitor and attorney admitted to the Madrid and Barcelona Bars, 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.

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