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01 Selected merger decisions authorized by the NMCC between March and June 2018.

Firms	Notification threshold	Economic sector	Decision
AUDAX / UNIELECTRONICA	Turnover	Electric power trade	First-phase clearance (8 March)
RECORDATI / MYLAN	Market share	Manufacture of pharmaceutical specialities	First-phase clearance (22 March)
Hidroeléctrica del Cabrera / Saltos del Cabrera	Market share	Electric distribution power	First-phase clearance (22 March)
KSCM / SOCIEDADES ARES	Market share	Land passenger transport	First-phase clearance (5 April)
Grupo Orient Securities / Spring / March / Imagina	Market share	Other telecommunications activities	First-phase clearance (5 April)
RANA / NESTLÉ	Market share	Food industry	First-phase clearance (12 April)
Grupo Catalana Occidente / Sociedades adquiridas	Market share	Insurance	First-phase clearance (12 April)
WELBIT / CREM	Market share	Manufacture of machinery for food, beverages and tobacco	First-phase clearance (12 April)
Contourglobal / Acciona Termosolar	Not disclosed	Supply of electricity, gas, steam and air conditioning	First-phase clearance (19 April)
BANKIA / Caja Granada Vida-Caja Murcia Vida	Turnover	Insurance and pension funds	First-phase clearance (19 April)

02 Spain – Mergers: The National Markets and Competition Commission (NMCC) clears the merger of the three card payment systems operating in Spain (Decision of 1 February 2018, file C/0911/17, *SERVIRED/SISTEMA 4B/EURO 6000*).

The NMCC has approved, subject to commitments, the merger of the three card payment service companies operating in Spain: Servired, Sistema 4B and Euro 6000, of which practically all banking entities present in Spain were shareholders.

As a result of the operation, the Spanish card payment sector casts away one of its specific features -a multiplicity of payment systems-, in favor of a single payment system. In addition, the shareholder’s agreement foresees that the resulting entity will receive the necessary investments to develop its own payment application, offering a domestic payment system provided with all the attributes necessary to compete on equal terms with other payment systems, including international systems such as Visa or Mastercard.

The commitments are aimed at ensuring healthy competition in the card payment systems in Spain in terms of 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. In particular, the merging entity assumes the following:

- (i) Commitments regarding access to the new system: all operators that comply with the criteria laid down in the applicable regulation will be able to access the system.

Refusal and limitations to access can only be justified to prevent specific risks regarding the financial and operational stability of the system. Furthermore, a dispute resolution system for entities to which access to the system is denied shall be put into place.

- (ii) Commitments regarding core services and the application of the new payment system: the rates applied by the merged entity must be cost-oriented and their application must not result in any discrimination in terms of nationality.

Users of the payment application shall not be bound by any exclusive obligations.

- (iii) Optional services are available to all members upon request and shall be invoiced separately to users who take the services. The rates shall guarantee a fair cost allocation related to the service provision.

03 Spain – Restrictive agreements – Institutional advertising: The NMCC fines five companies and three company executives for bid-rigging of public tenders for institutional advertising services (Decision of 3 May 2018, file S/DC/0584/16, *AGENCIAS DE MEDIOS*).

On 7 May 2018, the NMCC imposed fines amounting to €7.12 million upon five companies: Carat España, S.A.U, Inteligencia y Media, S.A. (**YMEDIA**), Media By Design Spain, S.A. (**MEDIA BY DESIGN**), Media Sapiens Spain, S.L. and Persuadé Comunicación, S.A. and three of their managers or legal representatives, for the exchange of commercially sensitive information contrary to Articles 1 SCA and 101 TFEU, with the aim of bid-rigging public tenders concerning public sector advertising based on the framework call for tenders 50/2014.

The contacts between the fined companies were considered by the NMCC as extremely detrimental to competition due to their content and object, enabling market sharing and impacting the conditions in which the different advertising campaigns took place.

The role of YMEDIA was essential to coordinate the exchange of commercially sensitive information between Carat (member of the same group of companies) and the rest of the parties, taking advantage of the fact that YMEDIA had commercial relations with another fined Company (Persuade) to channel the information exchange.

Even though MEDIA BY DESIGN contributed to the illegal conduct, the NMCC was not able to fine that company due to the fact that it had no revenue during 2017. Hence, the Council of the NMCC has ordered the Investigation Directorate to investigate whether the conditions required by case law concerning the “single economic unit” doctrine are met and, if so, if there are good grounds to initiate proceedings against another company of the same group

04 Spain – Restrictive agreements – Courier services: The NMCC fines ten courier and parcel companies (Decision of 8 March 2018, file S/DC/0578/16, *MENSAJERIA Y PAQUETERIA EMPRESARIAL*).

On 8 March 2018, the NMCC fined ten courier and parcel companies a total of €68 million for participating in a customer-allocation cartel, in breach of Articles 1 of the Spanish Competition Act (**SCA**) and 101 of the Treaty on the Functioning of the European Union (**TFEU**).

Some of the companies entered into verbal, non-aggression agreements, where the parties undertook not to offer their services to competitor’s customers.

The investigation was initiated by a leniency application filed by General Logistics Spain, S.L., that led to four dawn raids of the NMCC in the headquarters of Correos Express Paqueteria Urgente, S.A. (**Correos Express**), MBE Spain 2000, S.L. (**MBE**), Redyser Transporte, S.L. and International Courier Solution, S.L. (**ICS**), where several emails and WhatsApp messages evidencing the anti-competitive conduct were seized.

A total of nine cartels were identified by the NMCC, with each one of those cartels covering agreements related to different operators and time periods. Correos Express, MBE and ICS are the companies that have participated in most of those cartels.

05 Spain – Judicial activity – Gun-jumping: An acquisition of a mobile operator is a concentration that (due to the nature of the markets affected) must invariably be notified for merger control in Spain when the concentration has national dimension (Supreme Court Judgment of 31 October 2017, case 3648/2017).

On 23 July 2013, the NMCC found France Telecom España, S.A.U. (**Orange**) guilty for having failed to notify for merger control the acquisition of the exclusive control of KPN Spain, S.L.U. (**SIMYO**).

Spanish law states that concentrations that meet either one of the (turnover and market share) thresholds must be notified to the NMCC for merger control purposes.

Regarding the turnover threshold, Orange alleged that the turnover of the brand “Ortel” (property of Ortel Mobile España, S.L., a wholly owned subsidiary of SIMYO) should not be taken into account for the calculation of the turnover of the target, since Ortel had been sold prior to the concentration at stake. Nevertheless, since Ortel was not a fully operative undertaking at the time the transaction was completed, the contracts with Ortel’s end customers were managed and served by SIMYO. The NMCC stated that, despite customer contracts being signed under the “Ortel” brand, the contracts were signed on behalf of SIMYO, therefore the corresponding invoices should be allocated to SIMYO. In conclusion, in the NMCC’s view, the transaction exceeded the turnover threshold.

Concerning the market share threshold, the NMCC concluded that Orange acquired a 100 per cent share in the call termination and short message wholesale market in SIMYO’s network. Orange appealed the NMCC’s decision before the High Court and later the Supreme Court.

The High Court and the Supreme Court dismissed the appeal since both courts found that the wholesale call termination markets of each operator should be considered as separate product markets.

According to this definition, each operator would hold 100 per cent market share regarding call termination in its own network. Therefore, any acquisition of a mobile operator will trigger merger control filing obligations in Spain.

06 Spain – Judicial activity: The Supreme Court restricts the concept of abuse of dominant position (Supreme Court Judgment of 5 February 2018, case 2808/2015).

In 2014, UNIPOST, S.A. (**Unipost**) filed a complaint before the NMCC against Sociedad Estatal de Correos y Telegrafos, S.A., (**Correos**) denouncing that Correos was able to offer discounts to large customers, well above the discounts offered by Unipost and other competitors for similar services, which would constitute an abuse of dominant position.

Correos, the postal incumbent, is State-owned, owns the public postal network and assumes the provision of the postal universal service. In addition, Correos has capacity to offer discounts on prices approved by the Regulatory Authority, so that Correos has regulatory space to set prices. In this context, Correos granted discounts of up to 57% on the approved price to large customers, whereas discounts to private postal operators, such as Unipost, have not exceeded 16%.

The NMCC concluded that such conduct amounted in practice to a margin-squeeze that prevented competitors from competing effectively in the segment of large postal service customers.

The High Court (Judgment of 1 July 2015, case 118/2014) upheld the appeal filed by Correos, considering that, even acknowledging the existence of a margin-squeeze, the NMCC had not demonstrated that such practice had exclusionary effects for companies such as Unipost.

By the same token, the Supreme Court concluded that Correos’ competitors cannot compete with it in the large customer segment. However, alternative operators can and must make optimal use of their own capacity to compete. In this case, the Supreme Court states that the lack of competitive effort on the part of Unipost, leads to the conclusion that an infringement of Articles 2 SCA and 102 TFEU has not been sufficiently proven.

07 Spain – Judicial activity: The Supreme Court orders restarting the investigation of a complaint against Oracle for abuse of dominant position (Supreme Court Judgement of 10 April 2018, case 3568/2015).

On 26 February 2013, Hewlett Packard and Hewlett Packard Española, S.L. (jointly, **HP**) filed a complaint against Oracle Corporation and Oracle Ibérica, S.R.L. (jointly, **Oracle**) before the NMCC denouncing restrictive practices of competition in the field of

relational database management systems, in breach of Articles 2 SCA and 102 TFEU.

These practices would derive from the decision of Oracle to suspend all its software developments for the Itanium processor from Intel Corporation, used primarily in the HP integrity server, which may have led to an unjustified refusal to provide services and abusive discrimination.

The NMCC considered that the existence of an infringement had not been evidenced. HP filed an appeal before the High Court against the NMCC decision dismissing the complaint. The main underlying issue is that the Investigation Directorate of the NMCC and the NMCC Council had different views about the alleged anti-competitive conduct:

- (i) On one side, the Investigation Directorate considered that there was an abuse of dominant position by Oracle. Specifically, the Investigation Directorate stated that the markets affected by the conduct were: (i) the market for high performance relational databases and (ii) the market for high-end servers, both markets of international dimension.
- (ii) On the other side, the NMCC Council considered that Oracle was not dominant and, therefore, the existence of an infringement of Articles 2 SCA and 102 TFEU could not be proven.

The High Court, in its Judgment of 24 September 2015 (case 168/2013) partially upheld the appeal of HP, ordering the NMCC to reassess the matter and issue a new decision; the High Court also considered various facts proved. When confronted with the question, the Supreme Court in its Judgment of 10 April 2018 partially quashed the High Court Judgment. In summary:

- (i) The Supreme Court shares the opinion of the High Court that the Council did not examine the facts with sufficient detail.
- (ii) However, the High Court should not have decided on the facts that must be considered proven or on their legal characterization, meaning in practice that the file had to be sent back to the NMCC for reconsideration.

The Supreme Court annulled the decision, ordering the NMCC to roll back the administrative proceedings to the point in time prior to the administrative antitrust decision and resume the proceedings, carrying out the additional investigation deemed necessary to then decide on the case.

08 EU law – Judicial Activity: The UK’s Competition Appeal Tribunal refers GSK’s

paroxetine pay-for-delay case to the European Court of Justice (ECJ) (Order for reference for a preliminary ruling of 27 May 2018, case CE/9531-11).

The Competition Appeal Tribunal (CAT) has referred to the ECJ the first British case on alleged pay-for-delay conduct, concerning reverse payment settlements in the pharmaceutical sector. This referral to the ECJ is welcome, since it will clarify the rules regarding pay for delay agreements, which have posed complex questions for competition enforcement authorities in the last decade.

The case relates to payment settlements made by GlaxoSmithKline plc. (GSK) to several generic pharmaceutical companies that were set to launch generic versions of paroxetine.

Paroxetine is an anti-depressant (selective serotonin reuptake inhibitor or SSRI), marketed by GSK under the brand name of “Seroxat”. The said product was one of GSK’s highest earning products during the infringement period, accounting for 10% of GSK’s revenue. In return for the payments in cash and in kind by GSK, the generic pharmaceuticals companies agreed to sell a re-branded version of GSK’s Seroxat, under their own brands.

As claimed by the Competition Markets Authority, those patent settlement seemed to amount to a restriction of competition by object and/or effect and delayed the entry of independent generic paroxetine, constituting an abuse of dominant position.

The questions referred to the ECJ pose intriguing debates regarding pay-for-delay cases. For instance, one of the questions posed to the ECJ concerns whether generics producers that cannot access the market due to interim injunctions concerning patent litigation on the drug in question, can be considered as potential competitors under Article 101 TFEU. In addition, the CAT has posed questions concerning whether pay-for-delay agreements could be considered restrictions by object, even if they brought benefits to consumers, which would not have occurred if the patent holder had opted for resuming litigation and had succeeded, instead of solving the dispute through patent settlements.

Presumably, the ECJ’s awaited judgment on this preliminary ruling will have far reaching consequences regarding the pharmaceutical sector (together with other cases pending before the European Courts), given the novelty of competition issues that is being raised by patent settlement agreements.

09 EU law – The ECJ receives the first request for a preliminary ruling on the EU Damages Directive.

The Lisbon District Court (Tribunal Judicial da Comarca de Lisboa) made the first preliminary ruling before the ECJ regarding Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (**EU Damages Directive**).

By a decision issued in 2013 (upheld on appeal) the Portuguese competition Authority fined Sport TV for abusing its dominant position in the pay-TV sports channels market. Cogeco Cable filed a claim against Sports TV seeking compensation for the alleged damages as a result of the infringement of Articles 9 and 10 of the EU Damages Directive. Under Article 10 of the EU Damages Directive, Member States shall ensure that the limitation periods for bringing actions for damages are at least five years. But, on the other hand, the Portuguese Civil Code establishes that the right to bring actions expires within three years.

The relevant facts took place before the date of publication of the EU Damages Directive (5 December 2014), and the claim was filed before 27 December 2016, Directive implementation deadline for Member States.

In view of the foregoing, the Lisbon District Court asks to the ECJ to rule if it is possible to exclude the application of a national provision that is contrary to the EU Damages Directive in claims filed before the expiry of the EU Damages Directive's transposition period related to facts that took place before its publication.

10 EU law / Judicial and administrative activity / Gun-jumping: The European Commission fines Altice €125 million for gun jumping; and the European Court of Justice clarifies the concept of gun-jumping under EU merger control law (ECJ Judgment of 31 May 2018, *EY v. Konkurrenceradet*, case C-633/16).

On 24 April 2018, the European Commission (EC) fined Altice €124.5 million (the highest fine imposed in Europe for gun-jumping) for the acquisition of PT Portugal without having notified the operation to the EC and obtained the mandatory clearance.

In February 2015, Altice notified to the EC its plans to acquire PT Portugal. The transaction was conditionally cleared by the EC on 20 April 2015, subject to the divestment of Altice's businesses in Portugal. However, the EC concluded that Altice acquired control over PT Portugal before the EC authorised the transaction. In particular, certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal (*i.e.*, by granting Altice veto rights over decisions concerning PT Portugal's ordinary business). In addition, the EC concluded that Altice actually exercised decisive influence over

aspects of PT Portugal's business (*e.g.* giving PT Portugal instructions on how to carry out a marketing campaign). On 31 May, only a few days after the Commission Decision, the ECJ issued its judgment on the *Ernst & Young P/S v. Konkurrenceradet* case. The facts of the case revolve around a merger between KPMG and EY Denmark. At the time of that merger agreement, KPMG International gave notice to KPMG International of the termination of the cooperation agreement between KPMG Denmark and KPMG International. The merger was reportable to the Danish NCA which considered that the early termination contract amounted to gun-jumping. EY challenged the administrative ruling and, because Danish merger control law reflects the EU merger Regulation, the national court referred the question to the ECJ for a preliminary ruling. The ECJ considers that the standstill obligation in merger control covers those business decisions or operations which wholly or partly, in fact or law, contribute to the change of control of the target company; conversely, measures which are preparatory or ancillary to the concentration, but do not have a direct functional link to the implementation of the concentration are not caught, in principle, by the prohibition of gun-jumping. Importantly, the Court declared that mere termination of a cooperation agreement in the case at hand did not amount to gun-jumping. As AG Wahl had stated, even though "*the termination of the cooperation agreement was part of the merger Agreement, it was not inextricably linked to the transfer of control* (and thus it did not give) *EY the possibility of exercising decisive influence on KPMG DK*". In other words, "*although the termination might have had some effect on the market, it would not have meant that KPMG DK would no longer have been a competitor for EY*" (Opinion of AG Wahl of 19 April 2018 in case C-633/16, paragraph 81).

The EC Altice Decision signals a trend in the prosecution of gun-jumping, exceeding other recent tough enforcement decisions in this area at national level in Europe. The ECJ Judgment in the EY case provides some useful (albeit broad) criteria on what companies can or cannot do when seeking merger control clearance, an area that will continue to be sensitive and where caution is advised.

11. Case comment: Syndicated financial instruments and antitrust: the recent price-fixing investigation related to derivative products in project-finance transactions in Spain.

The NMCC has issued an antitrust Decision with potential to shake the banking industry. See our comment published at the European Competition Law Review (with permission from the publisher) by clicking [here](#).

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