The Merger Control Review

Twelfth Edition

Editor
Ilene Knable Gotts

The Law Reviews

THE MERGER CONTROL REVIEW

TWELFTH EDITION

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THE LAWREVIEWS

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-803-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ASHURST

BAKER MCKENZIE

BERNITSAS LAW

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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, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. 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.

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. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, 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 28 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

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 in 2018. 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 amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions (see discussion of *Google/Fitbit* in the Japan chapter), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has recently adopted the potentially most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. Two recent referrals should provide significant guidance regarding the impact of this new referral process.

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 is similarly no 'local' effect 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 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, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before 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.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. 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 before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

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 Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. 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 addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

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 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. Even within the EC, there remain some jurisdictions 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 antitrust 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 US, 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 competition authority, 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 EC 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 is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission 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, Japan, the Netherlands, Norway, South Africa, Ukraine, Vietnam and the United States). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). 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).

We are at a potentially transformational point in competition policy enforcement. This book should, however, provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2021

Part II

Jurisdictions

Chapter 25

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.

ii 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 national sector regulatory authorities (energy, telecommunications and media, railways, postal, airports). 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 also possible 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 regulatory authority, such as banking mergers).[4]

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 the case of a tied vote at the Council.

In the area of merger control, the Council of Ministers (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.

1 Pedro Callol is a partner at Callol, Coca & Asociados. The author thanks Jorge Vellido for his assistance in updating this chapter.
2 Law 15/2007 of 3 July 2007 on Competition.
3 Royal Decree 261/2008 of 22 February 2008, approving the Competition Implementing Regulation.
4 CNMC Notice of 21 October 2015 on cases where the short-form filings may be used.

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. Renewal of various Council members, including the president, who is acting on a prorogued mandate, is still due at the time of writing.

The bulk of the CNMC is made up 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. The Competition Directorate deals with the enforcement of competition law and 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. The Competition Directorate is a professional office with career civil servants who act impartially and with a business-like attitude when addressing companies' issues.

iii 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. Shifting alliances have, in some instances, received a particular treatment in Spain, distinct from what could generally be acceptable under EU law and the European Commission Consolidated Jurisdictional Notice.

Thresholds triggering merger control in Spain

The Competition Act provides 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 previous 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 in Section III.

In our experience, the market share threshold poses some practical questions; for instance, the market share threshold can be met if the target company alone has a 30 per cent (or 50 per cent, as the case may be) share in a relevant market, even if the acquirer has a zero per cent market share, although this would be a candidate for a short-form merger filing and quick review. Market definition must be carried out on the basis of existing merger control practice and precedents persuasive in Spain, including those of the CNMC. Generally, the market share threshold need not be problematic; it can be dealt with expediently and in a constructive fashion.

Finally, it is worth mentioning the impact that the EC Communication on the referral mechanism (the Communication)[5] is likely to have on concentrations that do not meet national thresholds but may be examined by the EC under the referral mechanism. The Communication foresees that national competition authorities may refer certain concentrations that significantly affect competition to the Commission, even though they do not meet applicable national merger control thresholds. Consequently, a concentration that is not reportable under the Spanish Competition Act may end up being examined by the Commission. This will probably cause uncertainty because the referral of the transaction can take place up to six months after the transaction has been closed.

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 actively monitors gun-jumping, including that of transactions that had to be reported pursuant to the market share threshold, which the CNMC has shown it has will to enforce (with the majority of gun-jumping investigations being triggered by the market share threshold). 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. 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 public administrations under the public procurement laws. In April 2021, the Competition Act was amended to clarify, inter alia, that the relevant turnover for the purposes of the calculation of fines is the worldwide turnover of the infringing company. It is expected that this will lead to increased enforcement in the form of higher fines.

5 European Commission Communication of 26 March 2021, on guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.

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 2013 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 to 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 is currently €1,545.45.

II YEAR IN REVIEW

2020 has been the year of the coronavirus pandemic, which has also affected the activity of competition authorities across the board. The CNMC has been no exception. During the first months of the pandemic, the CNMC focused on enforcement priorities other than merger control, but it quickly adopted working from home practices, and a great deal of merger control activity ensued throughout 2020 and the first part of 2021. The CNMC acquired a new presidency in autumn 2020, which is clearly moving it towards stricter merger control enforcement. This can be seen, for instance, in the substantial increase of second phase reviews, which, in 2021, will see an unprecedented number of files being processed. Noteworthy merger cases include the following.

i Acquisition of Bankia by Caixabank

The acquisition of Bankia, SA by Caixabank, SA is perhaps the most significant merger of the year, as it gave birth to the largest bank in Spain; unsurprisingly, the analysis of the transaction has been very thorough, and led to a clearance with conditions.

The CNMC merger decision of 23 March 2021[6] considers that the operation would not 'pose a threat to effective competition' in the markets for corporate banking, investment banking, factoring, cards, point of sale, insurance production and distribution, and fund and pension plan management. Consequently, the decision focused on several aspects in the market for retail banking services in 86 postal codes, where the resulting entity would either have a monopoly position or lead to very weak competitive pressure.

The conditions adopted can be classified in three main groups: (1) commercial conditions to prevent (consumer) financial exclusion; (2) ATM-related conditions; and (3) conditions related to common minority holdings (where the resulting entity undertakes to divest its percentage of capital stock until reaching compliance with the planned limit). The ATM-related conditions are set for 18 months and they intend to avoid leaving some

6 File 1144/20.

third-party banks without access to ATMs, which they enjoyed pre-merger. Therefore, Caixabank undertakes to maintain access to its ATMs that were previously available to customers of entities that had an agreement with Bankia.

Additional conditions seek to prevent customers in 86 postal codes from being financially excluded (i.e., being left without any local bank retail branches). The conditions are set for three years and consist of:

a ensuring no municipality is left in a situation in which the merged entity lacks competition (unless the CNMC allows it);

b maintaining existing conditions for Bankia's customers in areas where Caixabank will be the monopolist entity;

c ensuring conditions are substantially maintained or, at least, not worsened, in the other postal code areas where competition is weakened, even if no monopoly arises;

d not charging commission for counter services to Bankia's former customers; and

e offering Caixabank's 'social' account to Bankia's customers that meet the requirements.

Finally, Caixabank must inform Bankia's customers of new fees that would apply and of products, promotions certain rights that are available to them.

ii Grupo Bimbo/Fábrica de Paterna de Siro merger

The acquisition of two of Siro's industrial facilities (for the manufacture of packaged bread) by Bimbo was cleared with commitments by the CNMC on 12 June 2020.[7] The transaction resulted in Bimbo becoming the largest and undisputed leader in terms of manufacturing capacity of packaged bread.

The commitments were necessary to address the CNMC's concerns regarding Bimbo's reinforced position as a brand manufacturer for Mercadona (a large supermarket retail chain), because the transaction included an agreement between Bimbo and Mercadona (which had previously been supplied by Siro). Therefore, the main risk identified was the relationship in the bakery market between own-label bread and the manufacturer, with the merged entity becoming the first competitor with large market shares both in the wholesale market for packaged own-label bread and in terms of manufacturing capacity for industrial bread production. To gain clearance, Bimbo committed: (1) to remove any link between the Bimbo-branded and private-label bakery products supplied to Mercadona; (2) not to enter into negotiations related to Bimbo-branded products with Mercadona; and (3) not to agree to being appointed as a priority manufacturer of private-label products for Mercadona.

iii Çimsa/Activos Cemex merger

This decision[8] was cleared after a lengthy Phase II review, which the CNMC decided to conduct due to potential competition issues in the markets for in-bulk white cement and bagged white cement.

The transaction consisted of Çimsa acquiring several assets from three companies within Cemex Group, specifically the white cement divisions. As a result of the acquisition, Çimsa became the largest competitor in both packaged and unpackaged white cement markets with more than 50 per cent market share in the latter. The clearance of the operation was subject

7 Merger file C-1087/19.

8 Decision of 29 September 2020, File 1052/19.

to two main conditions. First, the divestiture of Çimsa's silo in Alicante, which had to be transferred to Cementos Molins before closing, along with the related goodwill, and, second, guaranteed supply to customers in Southern Spain from the Motril silo.

iv Acquisition of Ferro's business by Pigments

This transaction consisted of Pigments' acquisition of certain assets, liabilities and companies owned by Ferro. The importance of the transaction relies on the fact that innovation, and not pricing, is the main element through which companies in the ceramic tile sector compete. Thus, the main concerns raised related to potential lower investments in innovation because the resulting entity would acquire close to 50 per cent market shares in the frits, enamels and digital inks markets.

The transaction was cleared on 30 December 2020[9] with the following commitments: to biannually inform the CNMC of investments made; not to reduce investment in any viable research and development (R&D) project; and not to substantially modify any R&D project without the CNMC's authorisation.

v Acquisition of Autogrill by Areas

The CNMC cleared the acquisition of Autogrill by Areas subject to three commitments in Phase I.[10] The transaction relates to the concession food service business in the transport sector in Spain, in which the resulting entity acquired high market shares.

To gain merger clearance, Areas committed: (1) to terminate contracts in Madrid-Atocha station and Palma de Mallorca airport; (2) not to participate in tenders for business in certain locations; and (3) not to increase the resulting market share for three years.

vi Enoplastic/Sparflex merger

This merger was cleared by the CNMC on 23 February 2021.[11] The transaction consisted of the acquisition of sole control of Sparflex by Enoplastic, both of which were active in the packaging foil market for cava and sparkling wines. The CNMC conditioned the approval in view of the existing risk to competition in the relevant market, in which the resulting entity would acquire a market share of between 60 per cent and 70 per cent.

The CNMC considered the risks of unilateral effects on prices and quality, given the absence of an alternative entity capable of competing with it. The resulting entity has undertaken to divest a production unit to a purchaser considered suitable by the CNMC, alongside the related goodwill and the workers needed to operate it.

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.

9 File 1116/20.

10 Decision of 6 January 2021, File 1145/20.

11 File 1128/20.

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 are referred to Phase II in-depth analysis.

Phase I proceedings last in principle for one month, counted from the date 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.

The maximum period for Phase II proceedings is two months, counted from the date the CNMC decides to open a Phase II review. 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 proceedings).

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.

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 of the formal application for authorisation of the public tender with the Securities Exchange Commission; and that the voting rights are not exercised except 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 EC Merger Regulation. 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. These are normal dynamics in Phase II, where third parties have a relevant role and provide input that 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/Quironsalud* merger,[12] 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.[13]

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 also acts 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 dislikes transactions being 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.

12 Decision of 22 December 2016, *Helios/Quironsalud*, File C/0813/16.

13 For example, decision of 29 July 2010, *Bergé/Maritima Candina*, File R/0006/10.

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 often grants approval within 10 to 20 days of 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 the 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 recently made it clear that it is ready to use its powers to punish individual directors and managers for competition breaches (which has hitherto not materialised in any actual fines to individuals 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. Specifically, the CNMC has initiated proceedings against Nufri, Sociedad Agraria de Transformación for having closed the acquisition of Grupo Idulleida before gaining merger clearance.[14]

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 in 2013 (see Section I). The integration was criticised at the time. In the medium to longer term, it cannot be ruled out that a future legal reform will again separate the national regulatory authorities from the Competition Authority. This possibility has been discussed, although there does not currently appear to be momentum for it.

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.

The current economic crisis has triggered considerable financial difficulty for many companies in a country where tourism and transportation-related activities are very important to the economy. In this regard, the failing firm defence is acknowledged and may well apply to concentrations in the current circumstances, provided it can be appropriately substantiated and evidenced. In the past, the CNMC has invoked the failing firm defence in restrictive circumstances only, and has avoided its use in temporary crisis situations (e.g., the *Antena 3/La Sexta* merger).[15] However, the CNMC continues to be sceptical of this line of defence, even in the current climate.

Another area that overlaps with merger control, and that is directly related to concentrations, is that of foreign direct investment (FDI) screening. In April 2020, the government introduced a new FDI screening regime, which is very broad in scope and which,

14 Decision of 28 November 2019, *Grupo Nufri*, File SNC/DC/093/19.

15 Decision of 13 July 2012, *Antena 3/La Sexta*, File C/0432/12.

like merger control, requires clearance prior to the closing of an acquisition, under penalty of fines of up to the consideration of the transaction. The regime has been reformed twice since its inception in April 2020, with the last reform taking place in November 2020. At the time of writing, this regime poses serious issues of interpretation, pending the approval of an implementing regulation; therefore, careful advice may be required.

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 the trend in antitrust enforcement cases, and may also increase the amount of fines, in line with the apparent 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 over 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 in 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 a member of the board of directors of the Spanish Competition Law Association 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*, where he is ranked among the top six competition practitioners in Spain and Portugal. He is the author of many specialist publications and is the Spanish correspondent of the *European Competition Law Review*. He lectures on competition law matters in the San Pablo Law School in Madrid.

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ISBN 978-1-83862-803-1