

CAN THE GOVERNMENT BLOCK THE TAKEOVER OFFER FOR SABADELL BANK USING COMPETITION LAW INSTRUMENTS?

Members of the Government have taken a position against BBVA's hostile takeover bid for Sabadell. The purpose of this column is to provide an assessment from a competition and merger control law perspective of, on whether the government can veto the aforementioned takeover bid.

Perhaps the closest precedent of a hostile takeover bid is Gas Natural's offer for Endesa, launched in 2005, which, after numerous ups and downs and failed maneuvers by the Government of the day, ended up with the ownership of Endesa passing to the hands of Italy's ENEL. The *Gas Natural/Endesa* merger was authorized by the Council of Ministers (at that time the National Markets and Competition Commission, CNMC, did not yet exist, there were instead the Service and Tribunal for the Defense of Competition; and the decision-making body in second phase merger reviews was the Council of Ministers). The clearance of the Council of Ministers was appealed by Endesa, which obtained, in a historic decision, the interim suspension by the Supreme Court. This interim measures Order, together with other anti-takeover measures successfully implemented by Endesa, ended up killing the transaction. Among those measures was the opposition to the jurisdiction of the national authorities to review the merger, on the grounds that the rule that both parties to the merger should realize two thirds of their turnover in Spain was not met (using the worse access to accounting information about the target company that the buyer necessarily has in a hostile takeover). This defense would perhaps be viable for Sabadell if Brexit had not occurred (since in that case the British business would be counted for the purposes of determining the possible community dimension). It should not be ruled out that the Government may now resort to other measures to support Sabadell, such as those it implemented in the past to try to frustrate the successive bids of E.ON and Acciona/Enel for Endesa, even by creating new authorization requirements (attempted in that precedent with poor final results in the face of the European Commission, which acted under Article 21 of the EU Merger Control Regulation, as the bids of E.ON and Acciona/Enel had a Community dimension).

In the specific area of merger control, the legal situation has changed with respect to the aforementioned takeover bid for Gas Natural: now it is no longer the Council of Ministers that has the power to authorize national mergers. Indeed, Law 15/2007, of 3 July 2007, on the Defense of Competition (LDC), inspired by comparative law models, grants the Council of Ministers the power to intervene (based on reasons of general interest other than free competition) in mergers prohibited by the CNMC or conditionally authorized. Only in these two cases may the Government intervene, with the sole possible purpose of (i) confirming the CNMC's Resolution; or (ii) agreeing to authorize the merger with or without conditions; but the LDC in no way contemplates the possibility that the Government may prohibit mergers authorized by the CNMC. The wording of the LDC could lead to thinking that the Government could intervene to worsen a conditional authorization (and thus try to frustrate it); although in the few precedents of use of this power, the Government has intervened to *soften* conditions (concentration *Antena3/La Sexta*).

It is unlikely that the CNMC will prohibit the takeover bid for Sabadell on substantive merger control grounds. Because, in spite of the much publicized alleged excessive bank concentration, it does not appear that the current level of concentration is anti-competitive in merger control terms. It is more likely that in markets such as retail banking there may be excessive concentration in certain areas. A close precedent is that of the *Caixabank/Bankia* operation three years ago, where the CNMC identified competition risks in 86 zip codes where a monopoly or duopoly was created. The merger was therefore authorized subject to conditions such as (amongst others) not to exit the localities where one of the parties was located (to avoid financial exclusion); or to maintain for three years the pre-existing retail conditions in the postal codes monopolized as a result of the transaction. The *Unicaja/Liberbank* merger was subject to comparable commitments in areas of the province of Cáceres.

Consequently, with the information available, the Government could not veto the operation, but it could perhaps torpedo it, trying to impose more onerous conditions than those contained in the CNMC Resolution.

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