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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Spain --

25 February 2014

This note is submitted by Spain to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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– Spain –

1. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction?

1. Article 9.1 (“*Obligation of notification and suspension of execution*”) of our Competition law (Competition Act 15/2007, of 3rd July) states: Economic concentrations that fall within the scope of application of the previous article (article 8) must be notified to the National Markets and Competition Commission (the Commission, hereinafter) before their execution.

2. Article 8 states: **Scope of application:** The control procedure provided for in this Act shall be applied to economic concentrations when at least one of the two following circumstances is found: a) As a result of the concentration, a market share equal to or greater than 30 per cent is acquired or increased in the relevant product or service market within the national territory or within a defined geographical market therein. (...); b) The combined turnover of all the participants in Spain exceeds EUR 240 million in the last accounting year, provided that at least two of the participants have an individual turnover in Spain of more than EUR 60 million.

If so, is there a mandatory period of following the notification during which the parties are prohibited from consummating the merger?

3. Article 9.2 of our Competition Act states: The corresponding transaction may not be executed before the Administration expressly or tacitly declares its approval of the transaction, with the exception of the lifting of a suspension.

2. Review of mergers falling below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction?

4. On the basis of article 9.1 of our Competition Act, it follows that a merger that does not meet the notification thresholds provided by Article 8 is exempted from the notification requirement and, therefore, shall not be reviewed under merger review provisions because it does not hinder the maintenance of effective competition in all or part of the national market.

Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

5. No.

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

6. Our Competition Act does not provide this possibility. This is due to the fact that a consummated merger that is not subject to mandatory notification does not hinder the maintenance of effective competition. Therefore, no examples can be given.

Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

7. There are **no differences** in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction. As explained above, a consummated merger that does not meet the notification thresholds provided by Article 8 is left out of the merger review.

3. Review of mergers that should have been notified but were not

If parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties?

8. Article 9.5 of our Competition Act states: In the event that the Commission has not been notified of a concentration subject to control pursuant to the provisions of this Act, it, ex officio, shall require the obliged parties to notify so that they make the corresponding notification within a period **no longer than twenty days** as of the reception of the requirement.

9. After the notification period has elapsed without the notification having been made, the Directorate of Competition¹ may initiate ex officio concentration control proceedings, notwithstanding the application of the penalties and coercive fines set out in Articles 61 to 70.

10. According to our Competition Act, executing a merger without prior authorization is considered a **serious infringement** (article 62.3.d)². As for the amount of the fines, serious infringements may **be fined up to 5%** of total turnover (article 63.1.b)³.

11. In practice, a lower percentage has been applied in most cases due to the existence of mitigating factors (i.e. cooperation with the Commission, or unintentional neglect), the duration of the infringement, or if the approval of a merger depends on the fulfillment of commitments.

12. Since 2008 10 ex officio concentration control proceedings have been opened.

¹ Under Spanish Act 3/2013, of 4 June, on the creation of the National Markets and Competition Commission, the Directorate of Investigation is renamed the Directorate of Competition.

² Article 62.3.d): The execution of a concentration subject to control in accordance with the provisions of this Act before it is notified to the National Market and Competition Commission or before an express or tacit resolution authorizing it has been issued and has become executive, without the lifting of the suspension having been decided.

³ Article 63.b): Serious infringements with a fine of up to 5% of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine.

Merging parties	Markets	Amount of fine imposed	Percentage applied
ADESLAS/POLICLÍNICA SAN JOSÉ	Insurance	0	0%
ABERTIS/TRADIA	Telecom	143.000 €	0,003%
CONSEUR/ECOTEC	Waste	46.500	0,0003%
TOMPLA/MAESPA	Paper	3.000 €	0,003%
BERGÉ/CANDINA	Transport	76.000€	0,001%
DORF KETAL CHEMICALS/DUPONT	Chemical	35.000 €	0,04%
GESTAMP/ESSA BONMOR	Automotive	124.400 €	0,002%
ISOLUX/T SOLAR GLOBAL	Electricity	89.700€	0,002%
ORANGE/SYMIO	Telecom	61.600	0,03%
VERIFONE/HYPERCOM	Electronics, and IT	286.000 €	0,0001%

Is there a time limit on when the agency can bring an enforcement action?

13. On the basis of article 68 (“*Prescription of infringements and penalties*”) of our Competition Act, **serious infractions are barred within two years**. The limitation period shall be calculated from the day on which the infringement was committed or, in the event of a continuing infringement, from the day on which it ended.

14. The limitation period for the **penalties** imposed as a result of the Commission of **serious infringement** shall be two years.

If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek?

15. There are no differences in the merger review procedure between an economic concentration that has been notified and an economic concentration, subject to mandatory notification, that has not been.

16. On basis of article 9.5 of our Act, once it has been notified, the Directorate of Competition may initiate the procedure of merger review. In the event that the merger was anticompetitive, the notifying parties, on its own initiative or at the request of the Commission, may propose commitments to solve the obstacles to the maintenance of effective competition⁴.

Have you had success with remedies in these situations? Please provide examples.

17. The approval of an anticompetitive merger can be subject on the fulfillment of commitments proposed by the notifying parties or conditions.

18. In accordance with article 41 (“*Supervision of the fulfillment of the obligations, decisions and resolutions*”), the Commission shall **oversee** the execution and the fulfillment of decisions and resolutions which may be adopted in the context of control of concentrations. In the event of breach of obligations, decisions, or resolutions of the Commission, the Council of the National Markets and Competition Commission (the Council, hereinafter), at the proposal of the Directorate of Competition, shall decide on the application of **coercive penalties and fines**, on the adoption of other enforcement measures as foreseen in the legislation and, as the case may be, on a dissolution of the concentration.

⁴ Articles 57, 58 and 59 of our Competition Act.

3.1 *Examples:*

3.1.1 *ADESLAS/POLICLÍNICA SAN JOSE (Insurance Market)*

19. On February 2nd 2007 Iquimesa Health Services, a subsidiary of Adeslas Insurance Company, acquired sole control of the hospital Polyclinic San José (Vitoria). The merger was executed without being notified.

20. On February 2nd 2008, on the basis of article 9.5 of our Competition Act, the Commission requested the notification of the acquisition. The merger met the notification thresholds provided by Article 8.1.a). The Commission received the notification on February 29th 2008.

21. On July 10th 2008 the merger was reviewed and cleared with commitments in first phase. In particular, Adeslas committed to justify objectively any refusal to provide services, and to establish a general objective rate for all insurance companies, limiting their ability to impede or prevent competitors' access in its health centers⁵.

22. On 7 November 2011, the Council declared that supervision was completed. During the period of supervision, Adeslas had complied with the commitments.

23. On the other hand, on January 29th 2009 the Directorate of Investigation initiated proceedings against Adeslas on the basis of an infringement of article 62.3.d⁶. However, no fine was imposed because in December 2009 the Council declared that the sanction procedure had expired and urged to file the proceedings⁷.

3.1.2 *ABERTIS/TRADIA (Telecom Market)*

24. On July 18th 2008 the acquisition of sole control of Teledifusión Madrid, by Tradia Telecom, controlled by Abertis Group, was notified to the National Competition Commission. The merger had been executed without prior notification.

25. On July 16th 2009, the merger was authorized with commitments in second phase by the Council. The Council resolution established that Abertis committed to allow the access to television signal transport and broadcasting market and the access to transmission and transport of radio broadcast signals market to encourage effective competition⁸.

26. On May 11th 2011, the Council declared that the supervision of the corresponding resolution was terminated. During the period of supervision, Abertis had fully complied with the commitments proposed⁹.

27. In addition, on January 26th 2010 the Commission decided to open infringement proceedings against Abertis, in accordance with articles 9.5 and 62.3.d. The Commission imposed a fine of 143.000 € on the company¹⁰.

⁵ C/0051/08 <http://www.cnmc.es/es-es/competencia/expedientes>

⁶ SNC/0004/09.

⁷ Article 6 of the Royal Decree 1398/1993, of 4th August: If there was no resolution after six months from the initiation, the sanction proceedings would expire.

⁸ C/0084/08 y C/0110/08 <http://www.cnmc.es/es-es/competencia/expedientes>

⁹ VC/0110 <http://www.cnmc.es/es-es/competencia/expedientes>

3.1.3 VERIFONE/HYPERCOM (Electronics and IT)

28. On November 17th 2010 Verifone Systems and Hypercom Corporation reached an agreement through which the first company acquired sole control of Hypercom. On June 2nd 2011, Klein Partners acquired Hypercom's business in Spain and UK. On August 4th 2011, the merger of Verifone and Hypercome was finally executed. According to Verifone, the merger fell under notification thresholds because the company did not acquire the business of Hypercom in Spain and the UK.

29. However, in accordance with the Community doctrine, the Commission stated that the relevant date was the signature of the agreement, the date from which merger must be notified. On November 10th 2011 the economic concentration was notified and on December 29th 2011 was authorized with commitments in first phase¹¹. In particular, Verifone committed to ensure the compliance with contracts already signed by Klein for Spain and the UK, and to include the signing of a new license agreement, which would give Klein the access to the source code of the software of Hypercom, and a license for marketing products Hypercom in other countries European Union for 5 years, with certain limitations. At present, the merger is under surveillances¹².

30. On 28 May 2012, under articles 9.5 and 62.3.d), the Commission decided to initiate infringement proceedings against Verifone. The company had to pay a fine of 286.000€¹³.

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigations not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws?

31. On the basis of our Competition Act, the Commission cannot challenge a cleared and consummated merger except if the merging parties do not have supplied the information required by the Commission or have supplied incomplete, incorrect, misleading or false information (article 62.1.c).

What remedies are available then? Is there a time limit on when such a post-merger review take place? Please provide examples.

32. Once the cleared merger is executed, the authorities shall take a closer look at the merging company to ensure it does not carry out anticompetitive practices in the market under the provisions set out in our Competition Act, such as agreements between two or more independent market operators which restrict competition, cartels, abuse of a dominant position or distortion of competition by unfair acts¹⁴.

¹⁰ SNC/0003/09 <http://www.cnmc.es/es-es/competencia/expedientes>.

¹¹ C/0410/11 <http://www.cnmc.es/es-es/competencia/expedientes>.

¹² VC/0410/12 VERIFONE/HYPERCOM.

¹³ SNC/0022/12 VERIFONE/HYPERCOM <http://www.cnmc.es/es-es/competencia/expedientes>.

¹⁴ Articles 1, 2 and 3 of the Competition Act 15/2007.