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Session III: Addressing Competition Challenges in Financial Markets

-- Contribution from Spain --

4-5 April 2017, Managua, Nicaragua

The attached document from Spain is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session III: Addressing Competition Challenges in Financial Markets

-- CONTRIBUTION FROM SPAIN --

1. This document lays down the main lines of action undertaken by Spain's National Market and Competition Commission (CNMC) in the financial sector in recent years. Firstly, the principal actions in relation to economic concentrations are analysed, followed by the challenges that have arisen in the form of anti-competitive behaviour as a result of the technological and regulatory change process under way in the sector. Finally, a brief mention will be made to last year's report on the system of ATM cash withdrawal fees.

1. Economic concentrations

1.1 Concentrations during the banking sector restructuring process

2. The recent restructuring of the Spanish financial sector has given rise to significant bank concentration processes that have been analysed by Spain's competition authority (formerly CNC and now CNMC).

3. The first wave of bank concentrations took place in 2010, basically affecting savings banks, the number of which was substantially cut from 45 to 15 entities. This process consisted fundamentally of mergers involving credit institutions that were dissolved following the creation of a new entity, as in the case of UNNIM CAIXA¹, CATALUNYACAIXA², CAJA ESPAÑA DUERO and NOVACAIXAGALICIA, or through contractual agreements (Institutional Protection Schemes) whereby the participating entities made a mutual commitment to solvency and liquidity without dissolution. The latter arrangements resulted in the creation of BANCA CÍVICA, BANCO FINANCIERO Y DE AHORROS (BFA), BANCO MARE NOSTRUM (BMN), CAJA³, LIBERBANK and KUTXABANK.

¹ Merger of Caixa Manlleu, Caixa Sabadell and Caixaterrassa.

² Merger of Caixa Catalunya, Caixa Tarragona and CaixaManresa.

4. During this bank concentration and restructuring process, several savings banks were also acquired by other financial institutions, as in the case of CAJA DE JAÉN, CAJA DE GUADALAJARA and CAIXA GIRONA, which were acquired by UNICAJA, CAJASOL and LA CAIXA, respectively.

5. In a second phase (2012-2013), a number of banks formed through the concentration and restructuring of savings banks described above were acquired by other credit institutions, such as BANCA CÍVICA, acquired by CAIXABANK, CAJA3 by IBERCAJA BANCO and BANCO CEISS by UNICAJA BANCO.

6. The cases of BANCO CAM, UNNIM BANC, NCG BANCO and CATALUNYA BANC are also relevant. They were acquired by other entities after being placed under administration by the Government (under the Fund for Orderly Bank Restructuring programme (FROB)) and subsequently sold, in 2012 in the first two cases, in 2014, in the case of NCG BANCO and in 2015 in the case of CATALUNYA BANC.

7. At present (2017), the FROB has yet to sell its equity interest in some entities (BANKIA, BANCO MARE NOSTRUM (BMN) and ESPAÑADUERO).

8. The Competition Authority authorised all the above-mentioned transactions on the basis that they did not jeopardise effective competition.

9. Bearing in mind domestic and community precedents, the banking service markets were analysed in terms of customer type: retail banking, corporate banking and investment banking.

- **Retail banking:** focused on individuals, retailers and SMEs. This segment encompasses various instruments such as deposit-taking, the granting of credits and loans, credit and debit card transactions, and the marketing of off-balance sheet products such as investment funds, pension funds and insurance.

10. The Spanish Competition Authority took the view that retail banking is a domestic market, since competitive conditions in each Member State differ considerably. Nonetheless, it pointed out that a gradual reduction in these differences is a likely outcome of the expansion of alternative distribution channels made possible by new technologies, particularly in relation to telephone and Internet banking.

11. In this market, CNMC generally assesses operators' shares based on the value of deposits and loans both at the national level and at the provincial level because, although the geographic market is nationwide, many operators are insignificant at the national level but have a very significant geographic presence at the provincial and/or regional level.

- **Corporate banking:** This segment covers banking services for large companies and public bodies and institutions. Community precedents shows that it includes savings products (such as deposits), loan products (short- and long-term loans, guarantee credit, foreign trade financing) and payment products (commercial paper management, foreign payment services such as currency buying and selling). Swaps, leasing and factoring are also included in this segment.

12. In this case, the relevant geographic scope is supranational and may be worldwide in the case of large corporations, although certain services are still offered at the national level, particularly for small- and medium-sized enterprises.

- **Investment banking and financial market transactions:** This segment includes advisory services for issuing instruments, operations in financial markets and private banking services (personalised advice for high net worth customers).

13. As in the previous case, precedents indicate that this is a supranational market, which may be worldwide in the case of money market activities, and national for certain transactions.

**1.2 Concentration in the payment transaction processing sector:
C/0271/10 REDSYS/REDY**

14. The merger of the companies REDSYS SERVICIOS DE PROCESAMIENTO, S.L.U. (“REDSYS”) and REDES Y PROCESOS, S.A. (“REDY”) was notified on 16 August 2010, entailing the integration of the payment method transaction processing activities relating to SERVIRED and 4B system cards.

15. The transaction affected the Spanish markets for bank card payment transaction processing services and for the provision of bank card payment services, in which the financial institutions that were shareholders of REDSYS and of the SERVIRED and 4B systems operated. Specifically:

- The transaction meant a reduction from three to two in the number of operators active in the Spanish bank card payment transaction processing market; only CECA remained as a real alternative to REDSYS, so the market became highly concentrated, with strong entry barriers.
- The fact that the principal shareholders of REDSYS were also the main Spanish banks related to two (SERVIRED and 4B) of the three national methods of payment could give rise to information exchange between SERVIRED and 4B, allowing them to coordinate strategies in the downstream bank card payment methods market.

16. The Investigation Department took the view that the notified transaction generated risks to effective competition in the markets analysed, risks that had to be mitigated by certain commitments from the notifying party. On 4 March 2011, REDSYS and REDY submitted a set of commitments for an initial three-year period:

- REDSYS would be an open supplier of processing services, offering the services without any kind of exclusion or discrimination.
- The resulting entity would maintain a single tariff based on the principle that the current situation would not deteriorate.
- The notifying parties would not become unilaterally involved in the definition and modification of the technical standards and procedures that allow interoperability among all the members of the payment chain.
- The merged entity would not supply disaggregated information to its Board of Directors or to its shareholders and/or customers.
- REDSYS’ governing bodies would not include any member of the SERVIRED or 4B systems, or of any other international payment methods system.

17. The Competition Authority concluded that the set of commitments was sufficient and proportionate to compensate for the obstacles to effective competition caused by the concentration transaction, which was authorised in the second phase.

2. Anti-competitive behaviour

18. As regards restrictive conduct, a proceeding was initiated against four banks in the financial derivatives sector, and the sector is continuously monitored to detect and, if applicable, put an end to, any anti-competitive practices to which the new market operators that have appeared in recent years may be exposed.

2.1 Case S/DC/0579/16 Financial derivatives

19. In April 2016, CNMC resolved to instigate a disciplinary proceeding against Banco Bilbao Vizcaya Argentaria S.A., Banco Sabadell S.A., Banco Santander S.A. and Caixabank S.A. for possible anti-competitive agreements between the entities to fix prices and exchange sensitive commercial information in connection with the trading of interest rate derivatives used to hedge syndicated loan risk³.

20. The conduct analysed was reported in a claim submitted by Inversiones Empresariales Vapat, S.L.U. and its subsidiaries for a possible infringement of competition regulations, particularly Article 1 of Spanish Anti-Trust Law 15/2007 (3 July) (LDC) and Article 101 of the TFEU.

21. The practices analysed relate to the derivative products sector in the context of syndicated loans for project finance, in which the borrower is only answerable for the project assets under the principal loan and in which, to reduce exposure to interest rates, the lenders enter into a hedge agreement (the derivative) with the borrower, which may take the form of a swap, cap or collar.

22. Specifically, the Competition Authority's analysis is focused on the approach adopted by the financial institutions when fixing the price of the derivative, so as to assess whether such fixing takes place at arm's length or, conversely, is the result of an agreement between them. The case has yet to be resolved.

2.2 Challenges due to the appearance of new operators

23. The financial sector is undergoing major changes, partly as a consequence of the new legal regime approved at the community level, under the Second Payment Services Directive (PSD2)⁴, among others.

24. PSD2, which must be transposed into Spanish law in April 2018, opens up the opportunity to offer new digital payment services, together with the ones already offered by banks and other traditional operators, the ultimate purpose being to establish a single integrated electronic payments market.

25. The Directive opens the door of the payments market to companies that provide services for consumers or traders. Specifically, the scope of PSD2 includes the so-called third-party payment service providers that offer the following types of services:

- Payment initiation services: online services allowing consumers to make instant payments for their online reservations or Internet purchases, without the need to use a credit card, establishing a payment chain between the payer and the trader, with online access to the payer's bank account.

³ <https://www.cnmc.es/2016-04-07-la-cnmc-incoa-expediente-sancionador-contra-banco-bilbao-vizcaya-argentaria-banco>.

⁴ European Directive 2015/2366 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC.

- Account information aggregation services: online services allowing the payment service user to be provided with aggregate information on one or more payment accounts held by the said user, either with another payment service provider or with several service providers, thereby offering an overview of the user's financial situation as regards payments.

26. In order for the provision of these new services to be possible, PSD2 requires banks not to block or hinder access to information on funds available in consumers' accounts, which should allow consumers to benefit from competitive card services. The information accessible, always with the payer's consent, would be limited to the funds available in the account before payment is initiated (as a yes/no response).

27. PSD2 also enhances security demands imposed on parties that initiate or process electronic payments. These new requirements, which apply to all payment service providers, should reduce the risk of fraud and improve consumer data confidentiality.

28. In this regard, CNMC plays a surveillance role to guarantee that the access obligations laid down in PSD2 are not jeopardised as a result of the approach adopted by banks. It is an exercise in which a suitable balance must be assured between the access rights provided by the community directive, on the one hand, and the security standards that must be fulfilled by payment service providers pursuant to the directive, on the other.

29. CNMC⁵ has already had the opportunity to analyse both variables in connection with a claim brought by a provider of account information aggregation services against a bank for conduct allegedly conflicting with competition regulations by hindering, in various ways, its users' access to the bank's online banking service, thereby obstructing the aggregation service provider's access to the information on users' bank accounts needed to carry out its business.

30. CNMC took the view that the bank's approach, in principle, showed no signs of conflicting with competition regulations, as it was based on objective, reasonable criteria and did not prevent access to the data but made access conditional on compliance with security protocols to avoid fraudulent actions. However, although the claim was dismissed, CNMC emphasised that legitimate concern for legal certainty and IT security in the banking business cannot serve to disguise anti-competitive attitudes.

31. Instant payments are another aspect of the financial sector that CNMC is following with particular interest. The Euro Retail Payments Board (ERPB)⁶ has defined these payments as follows:

“Instant payments are defined as electronic retail payment solutions available 24/7/365 and resulting in the immediate or close-to-immediate interbank clearing of the transaction and crediting of the payee's account with confirmation to the payer (within seconds of payment initiation). This is irrespective of the underlying payment instrument used (credit transfer, direct debit or payment card) and of the underlying arrangements for clearing (whether bilateral interbank clearing or clearing via infrastructures) and settlement (e.g. with guarantees or in real time) that make this possible.”

32. The underlying payment instrument in the instant payment mechanism is the Instant SEPA Credit Transfer (SCTinst).

⁵ <https://www.cnmc.es/node/344232>.

⁶ ECB entity responsible for promoting a competitive market for retail payments in euros within the EU (<https://www.ecb.europa.eu/paym/retpaym/euro/html/index.en.html>).

33. In Spain, the instant payment project is being developed by Bizum, launched in 2016 and promoted by the 27 main Spanish credit institutions, the system management company SOCIEDAD DE PROCEDIMIENTOS DE PAGO, S.L. (SPP) having been formed in June 2016. As SPP's shareholders include the majority of the financial institutions operating in Spain, CNMC is following with particular attention both its configuration and its implementation so as to ensure that competition law is not violated.

3. CNMC's report on ATM cash withdrawal fees

3.1 *Background*

34. In 2015, ATM networks in Spain underwent a significant change. The new policy, launched by one of the main banks when it decided to unilaterally charge customers of other banks for the use of its ATM network, created a paradigm shift in the network remuneration system, causing a knock-on effect in the other banks, which were forced to adopt a position, and with the authorities, which had to intervene to bring order to the new framework.

35. The Bank of Spain received complaints regarding the charging of a double fee to users for cash withdrawals, so the government approved a regulatory amendment precluding the double fee, which was included in Royal Decree-Law 11/2015 (2 October) on ATM cash withdrawal fees.

36. This regulation created a new model for the charging of fees for cash withdrawals from non-proprietary ATMs, including a transition period to 1 January 2016. CNMC was entrusted with the preparation of an annual report on the agreements or decisions adopted by credit entities to determine and apply the fee for cash withdrawal using a card or other payment instruments.

3.2 *CNMC's report on ATM cash withdrawal fees*

37. The purpose of CNMC's report is to analyse developments in the sector and the decisions and agreements of credit entities and participating agents in connection with ATM cash withdrawal fees, in the light of competition regulations. The main findings in the June 2016 report ([see link](#)) were as follows:

3.2.1 *Change of remuneration system*

38. There has been a shift from a multilateral arrangement in which the entities agree to share their ATM network in exchange for a pre-agreed fee (exchange fee) to an arrangement whereby each entity or group of entities charges the other entities a fee, determined unilaterally in the absence of an agreement, for the use of its ATMs.

39. In the first model, the bank owning the ATM (acquirer) charged a pre-agreed fee, within the system in question (4B, Servired or Euro 6000), to the user bank (issuer bank) and the latter, in turn, charged its customer a fee for the service. The fee charged by the acquirers had previously undergone Competition Authority controls requiring a cost-oriented approach prior to approval. This model limited the amount charged by the acquirers to the issuers, although the issuers were free to determine the amount charged to their customers.

40. Under the new model implemented following the approval of Royal Decree-Law 11/2015, the acquirers (ATM owners) determine the fee charged for the use of their ATMs by customers of other entities. This fee is, however, doubly limited: the acquirer is prohibited from charging the fee directly to users, as it must be paid by the issuer bank; and the double fee is avoided by restricting the amount that the issuer entity may charge to its customers, stating that the issuer entity may only charge its customer the amount paid to the acquirer, "without applying additional sums of any kind".

3.2.2 *Implications of the new model*

41. The new model highlights the importance of reaching (or adhering to) agreements with other entities in order to extend the network. For small entities or those that have a small ATM network, the change brought in by the reform could be disadvantageous, since the service cannot be provided on the same terms. There is a risk that some entities could be left behind due to being unable to access network sharing agreements on reasonable terms.

42. Under the new system, the entities that own the ATMs determine the prices by setting the fee, which leaves the issuers no room to offset the fee, except at their own cost, unlike the previous scenario in which the issuers were free to determine the fee charged to their customers for the use of non-proprietary ATMs. The net effect on the issuers is difficult to ascertain since it will depend on their customers' behaviour; a consistent, lasting move towards their proprietary ATMs will cushion the impact in terms of higher payments to third parties for the use of non-proprietary ATMs.

43. The impact of the change on end users is not clear. The final effect on the fees applied to users depends on the entity of which they are customers, on their ATM withdrawal preferences, on the policy applied by the issuers to their customers, on the geographic location of the networks and customers and, in general, on a set of variables that it has not yet been possible to analyse due to the short time that has elapsed since the new model came into force.