

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Spain****27 November 2018**

This document reproduces a written contribution from Spain submitted for Item 5 of the 130<sup>th</sup> OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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**JT03438711**

## Spain

### 1. Merger Control in Spain

1. According to the Spanish Competition Act and in line with common EU practice, mergers that meet the applicable thresholds are to be notified to the Spanish Competition and Markets Commission (CNMC). A merger is considered to take place when there is a lasting change in control.
2. The Spanish Competition Act has two different and independent thresholds, a turnover threshold and a market share threshold<sup>1</sup>. Both trigger the obligation to notify a merger.
3. In addition, as a rule, mergers cannot be put into effect before they are cleared either by a decision of the Council of the CNMC or tacitly (if the one-month deadline expires without the adoption of a decision), as there is a standstill obligation. Nevertheless, the notifying parties may submit a reasoned request for the standstill obligation to be lifted.
4. Carrying out a merger which is subject to merger review by the CNMC before notifying it or before it has been cleared is considered a serious offence that can be fined with up to 5 % of the undertaking's total turnover<sup>2</sup>, unless the standstill obligation has been lifted.

### 2. Gun Jumping

#### 2.1. Violation of the obligation to notify a merger

5. The CNMC has investigated a number of cases where the parties failed to notify a merger which met the notification thresholds. These cases generally refer to the market share threshold.
6. The most recent decision was taken in case SNC/DC/0074/16 CONSENUR/CATHISA (2017) where the notifying party was fined for failing to notify a merger that met the market share threshold. Following a number of requests for information and a request for notification submitted by the CNMC, the merger was notified and subsequently cleared after it had been executed. This decision is currently under appeal.
7. In case SNC/DC/0038/15 MASMOVIL (2015), a fine was also imposed as the parties had not complied with the notification obligation. Once notified, the merger was cleared, as it did not have a negative effect on the markets. However, when determining the fine, the Council took into account that the undertaking had *motu proprio* communicated

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<sup>1</sup> In order to provide certainty to undertakings, prior to the submission of the notification they can formulate a consultation about whether the thresholds for mandatory notification are met (article 55.2 of the Spanish Competition Act). This consultation will be solved in a maximum of three months. In addition, there is extensive case law regarding market definition as all decisions are published.

<sup>2</sup> According to articles 62.3.d) and 63.1 b) of the Spanish Competition Act.

that the merger could be notifiable and notified it without the CNMC having to request it. The decision was not challenged by the parties in court.

8. ORANGE was also fined for not notifying its acquisition of SIMYO, which triggered both the market share and the turnover thresholds (case SNC/0028/13, ORANGE, 2013). This decision has been upheld by the Courts.<sup>3</sup>

## 2.2. Violation of the standstill obligation

9. The Spanish Competition authority has also dealt with cases regarding the violation of the standstill obligation. The GESTAMP/ ESSA BONMOR case is worth mentioning as it illustrates the legal challenges such cases may face.

10. In this case, the parties had structured the acquisition in one contract signed on July 2011, which envisioned two stages. In stage one, a minority shareholding of 10% was acquired along with veto rights over certain decisions such as the approval of the Annual Accounts or of additional debt. This part of the operation did not contain a standstill obligation. In stage two, which was subject to a standard standstill obligation, an additional 30% of the target was acquired.

11. The merger was notified in August 2011 and cleared shortly after notification, as it did not threaten to significantly impede competition.

12. After the merger was cleared, the Council of the CNMC found the acquirer to have breached the standstill obligation and imposed a fine. This decision was based on the fact that the acquirer was considered to have acquired control over the target as it had veto powers on key decisions and it had appointed a key manager.

13. However, the Court of First Instance annulled this decision on the following grounds. Firstly, the Court questioned whether the scope of decisions covered by the veto rights actually affected the strategic decisions or commercial policy and thus amounted to control in the sense of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01). Secondly, the Court considered that any change in control was not lasting as the agreement included in the first stage only lasted effectively 48 days and its existence was linked to the second stage, which in turn did include a standstill obligation.

14. The interpretation of the concept of “lasting change” in this case sets a high standard going forward.

## 3. The Standstill Obligation

15. The standstill obligation can be lifted at the notifying parties’ reasoned request stating the harm the suspension of the execution would cause. This is specifically addressed

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<sup>3</sup> On gun jumping, see also cases C/0410/11 VERIFONE/HYPERCOM and C/0185/09 CONSENUR/ECOTEC.

in article 9.6 of the Spanish Competition Act<sup>4</sup>, which is further developed in Article 58<sup>5</sup> of Regulation 261/2008. This is a discretionary decision by the Council of CNMC, which will take into account the potential harm to competition that the anticipated execution may cause.

16. The CNMC is flexible in this respect and has applied the provisions in a number of occasions. For instance, in case C/0802/16 DAIMLER/HAILO/MYTAXI/ NEGOCIO HAILO the Council agreed to lift the standstill obligation partially and subject to certain commitments that guaranteed the commercial autonomy of the Spanish affiliate of the target until the merger was cleared. The standstill obligation was also partially lifted in case C/0493/13 COPE/VOCENTO/PUNTO RADIO. In both cases, the particular reasons for lifting the obligation were declared confidential, as they usually regard to financial and commercial issues that are meant to be secret.

17. Moreover, there are specific provisions regarding initial public offerings which will not be subject to the standstill obligation as long as certain criteria are met which include specific deadlines for the notification and limiting the exercise of voting rights to what is strictly necessary to safe keep the total value of the investment prior to dispensation by the Council.

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<sup>4</sup> Article 9. Obligation of notification and suspension.

(..) 6. The Council of the National Competition Commission may decide to lift the suspension of the concentration referred to in Section 2 of this article, on the proposal of the Directorate of Investigation and prior motivated request.

The resolution shall be issued prior appraisal, among other factors, of the damage that the suspension of the execution would cause to undertakings participating in the concentration and that executing the operation would cause to free competition.

Lifting the suspension of the execution may be subject to the fulfilment of conditions and obligations that guarantee the efficacy of the decision that is finally adopted.

<sup>5</sup> Article 58. Lifting of the suspension of execution

1. According to the terms of article 9.6 of Act 15/2007 of 3 July 2007, the notifying party may request at any time during the proceeding, including when presenting the confidential draft notification form, that the total or partial suspension of execution of the concentration be lifted.

2. The notifying party will request the lifting of the total or partial suspension of execution by submitting a reasoned brief setting out the harm that the suspension would cause to the concentration and, if applicable, submit to the Directorate for Investigation commitments aimed at eliminating the possible negative effects execution of the concentration could have on effective competition.

3. The lifting of the suspension of execution will be decided by the Council of the National Competition Commission at the proposal of the Directorate for Investigation.

**Annex- Comprehensive list of gun jumping cases in Spain**

<b>Case</b>	<b>Notifying Party</b>	<b>Decision Date</b>
<b>SNC/DC/074/16</b>	CONSEUR	14/03/2017
<b>SNC/DC/0038/15</b>	MASMOVIL	05/11/2015
<b>SNC/DC/037/15</b>	GRIFOLS	16/10/2015
<b>SNC/DC/0035/14</b>	ESSILOR	31/07/2014
<b>SNC/0028/13</b>	ORANGE	23/07/2013
<b>SNC/0023/12</b>	ANTENA 3-LA SEXTA	13/11/2012
<b>SNC/0022/12</b>	VERIFONE/HYPERCOM	24/10/2012
<b>SNC/0017/11</b>	ISOLUX	10/04/2012
<b>SNC/0015/11</b>	GESTAMP/ESSA BONMOR	30/01/2012
<b>SNC/0009/11</b>	DORF KETAL	22/07/2011
<b>SNC/0008/10</b>	TOMPLA	17/05/2011
<b>SNC/0006/10</b>	BERGÉ	29/07/2010
<b>SNC/0003/09</b>	ABERTIS/TRADIA	26/01/2010