

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Vertical mergers in the technology, media and telecom sector – Note by Spain****7 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm>

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1. The Spanish Competition Authority (CNMC) takes into account the vertical effects of mergers from the very moment of the notification, since its market share threshold envisages also product markets vertically related with any of the markets where the parties of the concentration are active.

2. In particular, the Defence of Competition Regulation establishes that the control procedure shall apply to economic concentrations when a market share equal or higher than 30 percent of the relevant product is acquired or increased. The relevant market is defined taking into account not only the horizontal overlaps, but also the vertical ones. Thus, the merger must be notified when the acquirer gets a market share of 30% in a product market which is upstream or downstream of a product market in which any other party is active.

3. Moreover, the Regulation establishes that the short-form notification will not be available, among others, when the parties in the concentration reach an individual or combined market share of 25% in a product market vertically related. Additionally, the Competition Directorate could instruct the parties the submission of an ordinary form in the case of a party acquiring sole control of a joint venture in which it currently holds joint control, when the joint venture and the acquiring party have strong positions in vertically related markets.

4. In addition to this, the official notification form includes a specific section dedicated to the vertical aspects of the operation and to the efficiencies that should be taken into account when evaluating the concentration operation.

5. Our recent experience shows that parties usually do not include in the notification form detailed information about the vertical effects but focus all the analysis in the horizontal overlaps. Many of the requests for information made by the Competition Directorate during the pre-notification phase are oriented to gather information about the position of the parties (on the understanding of all the companies of the group) in markets that are upstream and downstream from the relevant market.

6. Once the merger has been notified, the vertical effects are analyzed in the same degree that horizontal concerns. In fact, it is not usual to face pure vertical mergers (merging parties only operate at different levels of the supply chain pre-merger) but vertical effects in the context of a concentration where merger parties operate at various stages of the production process.

7. In all cases, our assessment is based on a qualitative approach, taking into account the indications of the European guidelines on the assessment of non-horizontal mergers, mainly focused in the foreclosure effects (inputs and clients) and coordinated effects. The assessment usually apply the “ability/incentives/effects” framework.

8. For example, in 2018, one case in industrial markets was cleared with remedies since risks of input foreclosure in the relevant market were detected during the assessment. In the above mentioned case, TALLERES ALEGRIA (an industrial provider of components for railway tracks) acquired the sole control over DURO FELGUERA RAIL (another manufacturer of components for railway tracks). Both companies overlapped their activity in the manufacture of rail turnouts. But in addition to this, the acquirer was the only manufacturer in Spain of one essential input for the production of the rail turnouts (forged switches). The assessment included the analysis of the production capacity and the capacity

utilization of all the competitors (to identify the possibility of increasing production) and the analysis of the costs structure (among others, to evaluate the real competitive pressure of importers).

9. The merger allowed TALLERES ALEGRÍA to improve its production capacity and to reduce its reliance on some essential components, so that the company could have the chance to compete in international call for tenders. Thus, efficiencies were taken into account when assessing the merger, since the merger allowed the sustainability of a stakeholder in the market in the medium term. However, the analysis also concluded that TALLERES ALEGRIA had not only the ability but also the incentives to foreclosure the supply of essential components to its competitors for the production of the rail turnouts. For this reason, the parties offered as a remedy to continue providing the input to the competitors in market conditions during a period of [≤ 5 years]. The Board considered that this remedy was sufficient for eliminating the possible obstacles to competition that could derive from the operation.

10. Though foreclosure is one of the main competition concerns that can be detected when assessing vertical mergers – as it was in the previous case - the Spanish Competition Authority has faced other kind of risks recently. Thus, some cases have been cleared with remedies in the last two years in the retail fuel sector that arised vertical concerns. In all of them, an oil company bought a network of petrol stations. Although it was made a detailed analysis of the overlap effects at local level, it was likewise detected a risk of anticompetitive exchange of information caused by the presence of the petrol companies in the upstream markets.

11. Some of the petrol stations that were transferred by the mentioned mergers were linked to third oil companies by exclusive supply contracts. The acquisition of the petrol stations by the oil companies meant also the acquisition of their respective current supply contracts. Therefore, after the merger, some petrol stations would be property of one oil company while being supplied by another one. By doing so, the oil companies acting as retailers – also present in the wholesale level - could access to the commercial strategy of their competitors as suppliers of their own petrol stations.

12. For the above reasons, the parties offered as a remedy to terminate the supply contracts early and, in the meantime, to designate an independent manager to rule the petrol stations and a trustee to control the management. The Board considered that this remedy was sufficient for eliminating the possible obstacles to competition that could derive from the operations.

13. Although in Spain we have not faced vertical concerns when assessing mergers in the technology, media and telecom sector in the last three years, we cleared in phase II with remedies a relevant case in the telecom sector (TELEFÓNICA/DTS) in 2015 which remains under monitoring at present.

14. In this concentration the main telecommunications operator in Spain (TELEFÓNICA) acquired the main pay-tv operator in Spain (DTS) and some vertical remedies needed to be taken.

15. In first place, it was considered that DTS had previous contracts with other electronic communications operators (apart from TELEFÓNICA) for the distribution of its pay-tv services by satellite, so, in order to prevent that TELEFÓNICA could cancel those contracts, a remedy was taken in order to maintain the integrity of those DTS contracts with other electronic communications operators, to distribute its television offering by satellite. At the same time, it was established that once each contract expired, the service must be

extended for a period of six months and TELEFÓNICA should also refrain from making active sales to customers who acquired this service through third operators.

16. In second place, and in order to prevent TELEFONICA's ability and incentives to block the access to its pay-tv platform for channels editors and favoring its own channels, as well as its own pay-tv platform, a remedy was needed. In this sense, TELEFÓNICA undertook to broadcast channels edited by third-party operators, under certain conditions, over its pay television platform. At the same time, in order to prevent the engrossment of TELEFONICA's tv-platform detrimental to other pay-tv operators, the merged entity would not be able to acquire exclusive transmission rights for those channels edited by third parties.

17. Finally, in the case of access to its network, TELEFÓNICA had the ability and the incentives (it can block or restrict access to its network and to its customers) to substantially reduce competition from third-party Internet-based pay television operators.

18. So, in that regard, the remedies approved allow those Internet-based pay television providers to access Telefónica's broadband customers on terms which allow them to compete effectively.

19. TELEFÓNICA undertook to provide a service giving access to its Internet network in Spain with sufficient capacity and quality assurances for third-party operators. Telefónica will ensure there are at least three routes of access to its Internet network where congestion must not exceed 80%. Moreover, Telefónica undertook not to employ network and traffic management techniques in Spain which could, in a discriminatory manner, degrade the flow of third-party video or similar data over its Internet network.

20. These remedies were designed for a period of 5 years that can be extended for other 3 years.

21. As has been shown, most remedies applied by the Spanish Competition Authority to solve vertical effects are behavioral kind. The possibility of structural commitments is complex in these kind of cases, since the acquired business and the effects of the acquisition are located at different stages of the productive process.

22. The main challenges we have faced when designing non-divestiture remedies are, on one side, the establishment of an appropriate duration limit for the commitments and, on the other side, the implementation of an efficient monitoring system.

23. Since the commitments have a specified duration, their effects are limited in time, so the main challenge is to establish a period of time long enough to allow competitors to look for alternative suppliers or clients, in case of foreclosure concerns, without prolonging the monitoring excessively. Therewith, the valuation of the suitable duration limit for remedies must be done in a case-by-case basis, since the effects will be quite different depending on the competitive structure of the market.

24. In the previous cases, it was considered as adequate a period maximum of 5 years, in line with the recommendations established in the European guidelines, although in the TELEFONICA case it was also included the possibility of a extension for 3 additional years.

25. Regarding the monitoring, our Decisions usually impose to the parties the obligation of sending periodical reports to the Competition Authority, though we consider that the most effective way to ensure compliance of non-divestiture remedies by stakeholders comes from the competitors monitoring, at least in access obligations. This is one of the

reasons why it is relevant for Competition Authorities to make public all the Decisions adopted that include commitments for companies.