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Conglomerate effects of mergers – Note by Spain

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More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm

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1. Introduction

1. The nationwide authority in charge of the application of competition law provisions in Spain is the CNMC, which is an integrated authority not only empowered to oversee mergers and acquisitions and potentially anticompetitive practices, but also provided with jurisdiction to enforce sector-specific regulation, and with the ability to prepare studies evaluating the functioning of market forces in relation to particular activities and particular industries and, more generally, to engage in advocacy.

2. The investigative, enforcement and fining powers of the CNMC as Competition Authority are aimed at the effective performance of its functions, that is, to preserve, guarantee and promote the existence of effective competition. In order to achieve those goals, the Spanish merger review system defined in the Spanish Competition Act 15/2007 of 3rd July, has strengthened the role played by the CNMC in the control of concentrations, clarifying the criteria for the substantive assessment and increasing the legal certainty for the parties.

3. In this contribution, we will describe the main features in the identification and analysis of conglomerate effects in the Spanish merger review carried out by the CNMC, focusing on conglomerate harmfulness (section 2), conglomerate effects assessment (section 3), conglomerate effects in killing acquisitions (section 4), practical challenges in reviewing conglomerate effects (section 5) and conclusions (section 6).

2. Conglomerate effects harmfulness

4. Conglomerate mergers may involve products that customers perceive as complementary, or for which customers have independent demands. In some cases, these products may involve complementarities on the supply side, and it may also be the case that some customers are interested in only one, or a subset of the products.

5. The enforcement of the Spanish Commission for Markets and Competition (CNMC) does not vary depending on the nature of the merger (horizontal, vertical or conglomeral), and the assessment of these cases is always based in the European Union (EU) *Guidelines on the assessment of non-horizontal mergers*.

6. In line with the Guidelines' view, whereas **conglomerate mergers** do not necessarily lead to competition problems, in specific cases they may be harmful to competition. It is in those cases where the assessment of the merger requires a careful weighting of the efficiencies generated, in order to check if they counterbalance the harmful effects.

7. In particular, the CNMC considers that **conglomerate effects could be harmful** to competition in different ways, for instance by enabling the merged entity's expansion in neighbouring markets, increasing its market power, boosting barriers to entry to potential rivals, to enhance the switching of consumers which value the newly integrated product or service (instead of purchasing them separately), or simply when the merger will likely harm the existing rivals in its market more strongly than under the pre-merger conditions.

8. In some cases, conglomerate effects can lead to **coordinated effects**, specially in markets where conditions are easily identified; a reduction in the number of players in a

market may lead to a tacit or implied coordinated effect. For instance, mergers in the food sector (such as industrial baking) that result in merged entities with a wider range of products than most of its rivals may have an additional impact in its bargaining power as they could include in their commercial offer a complete set of products of their newly acquired portfolio (which may include a particular strong or *must-have* brand).

9. In terms of the potential harm to innovation, it is important to note that despite its importance, **innovation** is extremely difficult to predict. In some sectors, such as digital platforms, innovation has proved to play a relevant role for increasing consumer welfare, but partly because of the characteristics of those markets (constant evolution, less importance on intellectual property protection versus importance of simply being the first one in the market, among other). However, since innovation is differently applied in other markets (e.g. pharmaceutical and patents, for instance), it raises important challenges for competition policy.

10. In fact, the post-merger reality shows that not all conglomerates are successful innovators. So integrating innovation into the competition analysis remains as a challenge, whose driving force is to ensure that a merger does not reduce neither the persistence of a competitive pressure, nor the welfare of consumers.

3. Conglomerate effects assessment

11. Different theories of harm are applied by the CNMC when it comes to assessing mergers with likely conglomerate effects: mainly foreclosure concerns, such as as tying and bundling, sharing confidential information, portfolio effects and replicability or elimination of potential entrants (e.g. by fostering entry barriers).

12. Generally speaking, **tying or bundling** occur when the merged entity would foreclosure its competitors for the sale of a product, on which the merged entity possesses significant market power; tying commonly refers to the situacion where a buyer of a product is tecnhically or contractually required to purchase another products, whereas bundling refers to a situation where the products are only sold together in fixed proportions («pure bundling») or are also available separately, but the sum of the standalone prices is higher than the bundled price («mixed bundling»).

13. The **sharing of confidential information** takes place when the merged entity would have the chance of foreclosing its rivals by obtaining and sharing sensitive information related to its competitors's products, by means of access to confidential documents or strategies.

14. There are **other theories of harm** to be considered, such as a «portfolio effect», where the merged entity would have a significant advantage as regards the rest of its competitors in the market due to its increase overall business capabilities, that could range from brand popularity, technical or advertising capabilites, etc.

15. Having said so, the market power plays a very significant role in the assessment of conglomerate effects. However, it is not the only aspect considered by the CNMC when it comes to analyzing the case, which, as a rule, gathers information provided by the parties and/or by carrying out market tests regarding commercial and business practice (i.e. bundled products) by the acquiring companies and its bargaining power (pre and post-merger).

16. As stated in question 1, the merger assessment requires a **careful weighting of the efficiencies generated by the transaction,** that can outweight the harmful effects. In this regard, at times the merged parties fail to quantify the efficiencies allegedly reached in the

operation[1], therefore making its analysis by the Competition Directorate of the CNMC hardly possible. Furthermore, it is important to ensure that the efficiencies are specifically identified and that they are transferred to the consumers.

17. The efficiencies' analysis carried out by the CNMC calls for the EU Guidelines' three cumulative conditions[2]: benefit for consumers, inherent to the transaction and its verifiability.

18. Additionally, there could be some differences in the approach of conglomerate merger efficiencies as regards horizontal mergers; in fact, as set out in the Guidelines on assessing non-horizontal mergers, "*specific to conglomerate mergers is that they may produce cost savings in the form of economies of scope (either on the production or the consumption side), yielding an inherent advantage to supplying the goods together rather than apart".*

19. However, value enhancements for the consumer in the form of economies of scope can be realized without the need for bundling, being therefore necessary but not sufficient to provide an efficiency justification.

20. Other kind of efficiencies that may come from conglomerates could be translated into consumer synergies, that is, integrating different services previously provided separately, in such a way that they have beneficial effects for its users and which would not have been reached without the merger (e.g. integrating different services, usually provided separately, in the same app).

4. Conglomerate effects in killing acquisitions

21. Digital markets have very particular features. As stated above, the role of innovation, as well as other characteristics, such as start-ups, the continuous appearance of new markets and the evolution of the existing ones are relevant aspects to be taken into account when assessing merger transactions.

22. As a matter of fact, a case by case analysis is required to be performed in these mergers. In this context and due to the idiosyncrasies of digital markets (rapidly changing or/and evolving), developing new specific theories of harm for undertakings active in those markets could very likely risk to be inaccurate.

23. As regards to killing acquisitions, the CNMC has not yet dealt with any case in which a deep analysis and balance of potential "killing effects" and efficiencies has been needed or where the parties have claimed that such efficiencies could outweigh the negative effects of a given transaction, but it is true that as a result of the special features associated to digital economies and multi-sided markets, a dynamic approach in the evaluation of mergers is becoming more and more commonly added to the traditional static one[3]. This new approach is based, among other things, on the identification of possible efficiencies and innovation that may arise from operations, so in that sense, the Spanish Competition Authority is incrementally introducing this perspective.

24. When analyzing mergers with a digital component, the possibility of a killer acquisition is an aspect that we systematically taken into account and about which we gather information, developing a specific analysis that has to do with the growth potential

[1] C-0353/11 EBRO/SOS ACTIVOS.

[2] The efficiency conditions are set out in the European Union Guidelines on the assessment of horizontal mergers.

[3] This dynamic approach has been applied in the recent case: C-1046/19 JUST EAT/CANARY.

of the target company in the absence of the operation, the rationale of the operation and its efficiencies. The same approach is followed with the conglomerate effects, which are another aspect included in the merger review for all kind of transactions, including the killing acquisitions.

5. Practical challenges in reviewing conglomerate effects

25. A possible **approach to overcome the practical challenges** that arise when investigating conglomerate theories of harm may come hand in hand with tailored information requirements to the parties, which would include strategic data, in order to explain the underlying reason for the merger.

26. Additionally, market tests should be launched, reaching rivals, customers and providers of all markets involved. Personal interviews of relevant stakeholders in the affected markets could also help unveil the functioning of the markets.

27. Depending on the case and its particularities, the **information requirements** or market tests should be addressed to rivals, clients, suppliers, etc. The CNMC usually collects data by including questions as regards barriers to entry, in order to be able to analyze both the possibility of entry by one of the merging party into the market where the other party is active, and the effect of the elimination of such potential entrant as a result of the merger, as well as the existence of non-competition clauses between the buyer and the seller of the acquired company, for instance. Hitherto, given the relatively short deadlines, quantitative methods of analysis (econometric models, for instance), are rarely used[4], unless a second phase is opened, and therefore an in depth investigation, including a quantitative approach is usually required.

28. In recent merger cases, strategic information submitted to and discussed within the Administration Board has been requested to the merging parties, in an attempt to better understand the purpose of a particular merger[5].

29. In terms of **prioritisation**, as a general rule, conglomerate mergers are a priori not seen as harmful to competition as horizontal mergers, and as stated before, they provide substantial scope for efficiencies. Notwithstanding, as set out in the Guidelines, "*there are circumstances in which non-horizontal mergers may significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position*" (a non-horizontal merger may change the ability and incentive to compete in ways that cause harm to consumers); those aspects are gaining more weight in the globalization context and particularly in digital markets where conglomerate effects in neighbouring markets do have relevant implications in terms of access to data.

30. The CNMC has accepted **behavioural remedies** in several occasions regarding conglomerate effects. For instance, in the case C-0472/12 DEOLEO/HOJIBLANCA[6], the merger gave rise to competition problems that were overcome by behavioural remedies. Those remedies were designed in order to deter possible confidential information flows

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[4] Cases such as C/0098/08 GAS NATURAL/UNION FENOSA or C/0432/12 ANTENA 3/LA SEXTA.

[5] Case C/0966/18 QUIRON/SANTA CRISTINA, cleared in second phase.

[6] Another relevant merger in which conglomerate effects were analysed was C-0748/16 BIMBO/PANRICO II, in the bakery and pastries sectors, in which the acquirer withdrew from a first notified merger file, after presenting remedies, and later filed a new transaction and committed to divest some assets, so that an identified competitor could have a portfolio that could be comparable to that of the resulting entity (however, the remedies for that particular case were structural).

among members of the Board committee, which could develop into coordination strategies in neighbouring markets. In fact, as a rule, in order to minimize this sort of harm, the CNMC is increasingly confirming that the parties involved in a merger do not have cross-shareholdings in undertakings in related markets (close markets and/or vertical markets), including minority (non-controlling) shares[7].

31. Be as it may, the CNMC is flexible in terms of the type of remedies that best address the competition problems caused by mergers[8], and although structural remedies are usually the most effective ones, a market oriented approach and a case by case analysis is always considered to be important regarding remedy design.

6. Conclusions

32. In summary, the current Spanish merger control regime captures transactions with conglomerate effects that fulfill the notification thresholds and are assessed. When reviewing these operations, the CNMC focuses on aspects such as foreclosure concerns, like tying and bundling, sharing confidential information, portfolio effects and replicability or elimination of potential competitors.

33. The information gathered to make the assessment is essential so data collection is being gradually extended in the form of requesting strategic planning documents of the merger parties, or holding interviews with key players of a particular market. The main concern of the CNMC is to apply the theories of harm in a rigorous way, in order to reach solid conclusions on the likely effects, including conglomerate effects that a particular merger could or could not, lead to.

34. Last but not least, as regards commitments in cases where the merger entails competition concerns in terms of conglomerate effects, a deeper knowledge of the competitive market forces and of its plausible effects enables the application of market-focused commitments, which have proven to be useful in terms of fostering the maintenance of competitive restraints post-merger.

[7] Case C1072/19 MIH FOOD DELIVERY HOLDINGS/JUST EAT, cleared in first phase with remedies.

[8] Case C/0612/14 TELEFONICA/DTS includes network access by other operators which can be regarded as a behavioural remedy, however very close to a structural remedy.