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English - Or. English

19 May 2023

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

Theories of Harm for Digital Mergers – Note by Spain

16 June 2023

This document reproduces a written contribution from Spain submitted for Item 8 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm>

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1. Introduction

1. Merger control is horizontal in nature in Spain and there are no specificities for merger control in digital markets as compared to other sectors. However, there is one singularity of the Spanish framework which helps to scrutinize digital mergers, which is the market share notification threshold. This has allowed the CNMC to gain knowledge and experience in assessing mergers in digital sectors (food delivery, ride-hailing apps, classified websites, online publications and databases, software and other platforms), including regarding the different theories of harm.

2. After this first introductory section, Section 2 explains the merger review framework and Section 3 refers to the practical experience of the Spanish CNMC in analysing theories of harm in digital mergers. Section 4 concludes with some takeaways.

2. The (horizontal) merger review framework in Spain and its usefulness (for digital markets)

3. Many jurisdictions establish merger control thresholds based on the annual turnover of the undertakings involved in the merger as the main criteria for notification¹. But some jurisdictions, including Spain, have an additional threshold in place that takes into account the market shares of the companies concerned². Appropriate communication channels with the competition authority³ may effectively mitigate the risk of uncertainty for the notifying parties.

4. The market share threshold has proven effective to capture some potentially troublesome mergers, especially in the digital sphere. It is worth mentioning that the CNMC has analysed almost 25 digital mergers in the last 4 years. More than 70% out of them have been notified exclusively due to the market share threshold (they would have gone under the radar otherwise, had this notification criterion not existed). Some of these operations were not eligible for the simplified form (given their potential impact on competition) and some were subject to remedies to be approved.

¹ In Spain there is also a turnover notification threshold. Article 8.1.b) of the Spanish Competition Act establishes that a merger is to be notified if the joint turnover of the parties is above €240 million (and each of the individually is above €60 million) <https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946>

² Article 8.1.a) of the Spanish Competition Act establishes that a merger is to be notified if the market share of the new entity is above 30% in a relevant market inside the Spanish territory. For parties where the joint turnover is below €10 million, the merger is to be notified only if the market share of the new entity is above 50%. <https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946>

³ Article 55.2 of the Spanish Competition Act considers a formal consultation mechanism for parties to gain certainty on whether a given operation is to be notified (pre-notification informal communication channels can also be used) <https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946>

Figure 1. Digital Mergers analysed by the CNMC in the last 4 years

Digital mergers analysed by the CNMC in the last 4 years						
Year	Case	Sector	Market share threshold	Turnover threshold	Simplified (S) vs Extended (E) form	Unconditional (U) or Remedies (R)
2019	C/1015/19 - BAUER / CLABERE NEGOCIOS - CREDIMARKET	Financial comparison websites	✓		S	U
	C/1023/19 - WISHBONE / PALLADIAN	Software	✓		S	U
	C/1028/19 - PRISA / VOCENTO / GODÓ	Programmatic advertising		✓	S	U
	C/1046/19 - JUST EAT / CANARY	Online food delivery	✓		E	U
	C/1061/19 - TAKEAWAY / JUST EAT	Online food delivery	✓		S	U
	C/1072/19 - MIH FOOD DELIVERY HOLDINGS / JUST EAT	Online food delivery	✓		E	R
	C/1076/19 - EASYPARK / NEGOCIO APARCAMIENTO IVIAL	E-parking	✓		E	U
	C/1083/19 - DEALERSCO / NEWCO	Online motor platform		✓	S	U
2020	C/1090/20 - GFI/IECISA	Software		✓	E	U
	C/1120/20 - ESPRINET - GTI	Software		✓	S	U
	C/1129/20 - EQT / IDEALISTA INTERNATIONAL	Online real estate platform	✓	✓	S	U
	C/1147/20 - BAUER / ACIERTO	Online insurance platform	✓		Not notifiable	
2021	C/1173/21 - RVU / PENGUIN PORTALS	Online insurance platform	✓		S	U
	C/1220/21 - TURNITIN/OURIGINAL	Anti plagiarism software	✓		E	U
	C/1225/21 - MUTUA MADRILEÑA / ELPARKING-TASSPAN	E-parking	✓		S	U
	C/1232/21 - SIEMENS/FORAN	Software for naval industry	✓		E	U
	C/1260/21 - DELIVERY HERO/GLOVO	Online food delivery	✓		S	U
2022	C/1263/22 - NORTON / AVAST	Software (cibersecurity)	✓		E	U
	C/1295/22: KARNOV / TR ESPAÑA / WK ESPAÑA	Legal software, solutions and publications	✓		E	R
	C/1318/22: WEDDING PLANNER / ZANKYOU VENTURES	Platform for wedding specialized services	✓		E	R
	C/1330/22: GLOBANT / LALIGA TECH	Data and information technologies		✓	S	U
	C/1339/22: AYESA / IBERMATICA	IT services		✓	S	U
	C/1346/22: GMOL / ZPG - PENGUIN	Price comparison websites	✓		S	U
2023	C/1364/23: NEWCO / SERVEO - IRIS GLOBAL	Platform for house reform services	✓		S	U
Number of operations			24	18	7	
Notified exclusively due to the market share threshold			17			
% Notified exclusively due to the market share threshold			70,8%			

5. The market share threshold has also been useful to refer to the EC potentially problematic mergers when they had an international reach but lacked a Community dimension under the EC Merger Regulation⁴ (e.g. Facebook/Whatsapp merger, under art. 4(5) of the Merger Regulation, or the Apple/Shazam, under art. 22 of the Merger Regulation).

6. The CNMC has not identified cases where its notification threshold has failed to capture relevant mergers in the digital economy (or where alternative options, such as transaction value-based criteria or a lowered threshold for turnover, would have been more effective). It is important to bear in mind that market shares can be defined not only in terms of nominal revenue but also in terms of other indicators, like users, devices, downloads, clicks or visits, etc. The market share criterion has flexibility to adapt to these circumstances, paradigmatic of digital markets. A relevant merger can be analysed through the market share criterion even in some cases where the company is not raising substantial revenues (provided that market shares meet the quantitative threshold in metrics which might be relevant to measure the presence of the merging entities in the market).

⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>

7. Needless to say, once an operation has been notified, many more issues other than market shares are factored in. Market power has other dimensions apart from market shares. Especially in digital markets, where multi-sidedness, zero pricing, data, ecosystems and innovation affect the analysis. This leads to complex theories of harm, which are analysed below.

3. The CNMC's practical experience concerning the analysis of theories of harm in digital mergers

8. Several factors of digital markets have to be born in mind when thinking of potential theories of harm.

9. Firstly, the single most distinctive feature concerns the two-sided nature of some segments and/or markets. In this context of network effects the role of exclusivity clauses and the degree of multi-homing become much more relevant.

10. Secondly, data aspects of the digital economy are also of paramount importance. Since data are considered a valuable asset, a potential rationale for the merger could be to get access to data (e.g. customer information). These data driven mergers can raise concerns regarding the ability or incentives of the merged entity place its competitors at a disadvantage. Other relevant dimensions of data include the use of zero-pricing strategies and the importance of ecosystems.

11. Thirdly, innovation plays a key role in digital markets, raising concerns about a merger could mask a killer acquisition to buy a potential/nascent challenger, chilling out competition and innovation.

12. Let us analyse below how all these dimensions have been introduced by the CNMC in order to find the relevant theories of harm in each case.

3.1. Classified webs

13. Even if it is not so recent, a relevant precedent is *Schibsted/Milanuncios*⁵. The transaction concerned the acquisition of Milanuncios, an online platform specialised in classified ads, by a multinational operating in the same industry – including in Spain through Anuntis Segundamano and Infojobs.

14. In terms of market definition, the CNMC was confronted with a two-sided platform. Against this backdrop, the high market shares (above 60% and in some cases, such as the provision of motor-related classified ads, above 90%⁶) turned even more relevant given the role of scale/learning/network effects. The transaction amounted to the elimination of a substantial source of competitive pressure, resulting as much from the parties' shares as from the fact that they were particularly close competitors with comparable (albeit not identical) strategies.

15. The transaction was finally cleared with commitments in November 2014 following a Phase II assessment. These commitments included the licensing of the motor section of the website together with other measures (option for free ads, interoperability to export ads to other platforms). The goal of the commitments was to reduce the extent to which parties could carry out an exploitative or exclusionary conduct.

⁵ C/0573/14 SCHIBSTED / MILANUNCIOS <https://www.cnmc.es/expedientes/c057314>

⁶ Market shares were calculated in terms of visits and number of ads.

3.2. Online food delivery

16. The Spanish CNMC has been active in this sector in recent years, not only with merger control but also with one antitrust investigation (which is analysed below given its connection with merger cases). This sector has undergone a substantial transformation with the rise of the Internet, particularly in recent years. The activity affected by the operation involves two sides: food delivery platforms deal with restaurants, on the one hand, and with end users, on the other.

17. The first merger case was *Just Eat/La Nevera Roja*⁷. It involved the acquisition by JUST EAT, a multinational online platform offering food delivery services to restaurants and consumers, of a local rival. In principle, there were several factors for concern: the multi-sided nature of the market, the very high market shares of the merging parties (measured not only in nominal revenue but also in real indicators such as the orders managed or the number of restaurants enrolled in the platform) and the fact that the two firms were deemed to be close competitors operating similar business models.

18. The merger was cleared in 2016 in Phase I subject to commitments that consisted in preventing the merged entity from entering into exclusivity agreements with restaurants. These exclusivity clauses could have created lock-in effects and hindered the entry and expansion of competing platforms.

19. The analysis also factored in the fact that there were major multinational players which had just entered the market and, at the time, did not enjoy a strong position in the relevant geographic market(s). The analysis showed that the Spanish market was not mature at that moment and, as a result, there was significant scope for expansion. In such circumstances, the primary source of competition concerns (ultimately leading to the approval being subject to commitments) was not so much the parties' position when measured in terms of market power, but the underlying economic dynamics (namely, the economies of scale achieved and the play of network effects). Therefore, absent the commitments, the parties would have had the ability to enter into this exclusivity contracts which restaurants. This would have reduced the customer base for new entrants, undermining its ability to exploit scale and network effects.

20. The second case was *JUST EAT/CANARY*⁸, in which, again, the multinational offering food delivery services to restaurants JUST EAT acquired the exclusive control of Canary Delivery Company, S.L. (CANARY), a Spanish company established in 2014 only operating in the Canary Islands. This merger was cleared without commitments in 2019, as the CNMC, after an exhaustive analysis of the case, considered that the operation could not be expected to imply a threat to competition in the relevant markets. The competitive landscape had changed significantly since the previous merger with a number of strong players successfully entering the market⁹.

21. In this specific case the CNMC assessed, among many other aspects, whether CANARY (which was a fast-growing company in the Canary Islands) had the potential to exert significant competitive pressure. But this was excluded taking various factors into consideration. On the one hand, CANARY, which had been operating for several years, had a low turnover and only one employee. Additionally, it did not invest in R&D, and its

⁷ C/0730/16: JUST EAT/ LA NEVERA ROJA <https://www.cnmc.es/expedientes/c073016>

⁸ C/1046/19: JUST EAT / CANARY <https://www.cnmc.es/expedientes/c104619>

⁹ Again, market shares were calculated in nominal revenue and also in real terms (orders managed and number of restaurants enrolled).

pricing policy was very similar to JUST EAT's. As a result, the target could not be considered an innovative or aggressive competitor and the CNMC ruled out the possibility of treating the operation as distortive to competition. In other words, the killer acquisition theory of harm was analysed but then discarded.

22. The other online food delivery platform service case assessed by the CNMC was C/1072/19 MIH FOOD DELIVERY HOLDINGS/JUST EAT, which consisted in the acquisition of sole control of JUST EAT by MIH FOOD DELIVERY HOLDINGS.

23. MIH FOOD DELIVERY HOLDINGS had a minority presence in the capital of DELIVERY HERO, which in turn had a minority participation in the capital of GLOVO, the main competitor of JUST EAT. Therefore the acquiring company's presence in the relevant market was indirect.

24. In this context, several theories of harm were analysed, also bearing in mind the relevance of these factors in a multi-sided market. Especially the fact that MIH could access sensitive information about GLOVO, having therefore the ability and incentive to use it to the benefit of JUST EAT. And also the risk of coordinated effects given that JUST EAT and GLOVO were close competitors. Finally, the risks that JUST EAT could increase prices (given that MIH would internalize, through its indirect minority participation, the extra sales that GLOVO would absorb as a result) was not so acute given that MIH participation in GLOVO was indirect and minor¹⁰.

25. The operation was cleared in 2019 in phase I with commitments directed at limiting the information that could be shared in the Board of Administration, in order to avoid the access to sensitive information by competitors¹¹.

26. Given the relevance for the theories of harm considered in these mergers, it is worth mentioning that an antitrust investigation was started ex officio in 2020¹². The aim was to investigate the possible presence of parallel vertical restrictions affecting competition in the sector, and whether those restrictions could amount to an infringement of competition law.

27. The CNMC considered that, in this particular case, taking the legal and economic context into account, the parallel networks of vertical agreements including exclusivities on the part of individual operators were not likely to have a significant impact on the competitive position of actual or potential third party competitors or to restrict competition to any significant extent in the affected markets. Consequently, the CNMC considered that there were no indications that those agreements were likely to be restrictive in terms of

¹⁰ Market shares were calculated in nominal terms (total revenue of the platform and value of the orders) and also in real terms (orders managed).

¹¹ The other online food delivery platform service case assessed by the CNMC was C/1061/19 TAKEAWAY/JUST EAT, which consisted in the acquisition of sole control of JUST EAT by TAKEAWAY.COM N.V.. DELIVERY HERO had a 15.53% in TAKEAWAY. Neither DELIVERY HERO nor TAKEAWAY were present in Spain at that moment. But DELIVERY HERO, which reached a minority participation in JUST EAT with the operation (through its 15.53% in TAKEAWAY), had a minority stake in GLOVO, the main competitor of JUST EAT. The CNMC considered that this minority participation not conferring control should be analysed with other instruments of competition law regarding agreements between firms. The operation was finally cleared without commitments.

¹² S/0026/20 REDES PARALELAS EXCLUSIVIDADES PLATAFORMAS
<https://www.cnmc.es/expedientes/s002620>

competition, either individually or considering their cumulative parallel effect, so the preliminary proceedings were closed.

28. The CNMC assessed the market power of the relevant players¹³. At that moment there were four main operators in the market, and none of them with a market share that by itself could have represented a threat to competition. Several factors other than market shares were also analysed. The dynamism of the market pointed to the fact that the remedies introduced in past mergers (e.g. not introducing exclusivity clauses) had been effective in fostering entry, growth and competition.

29. This shows the synergies between merger control and antitrust. When warranted, sound remedies introduced in merger control can prevent situations of market power, reducing the need for antitrust enforcement afterwards. Furthermore, the deep knowledge of the market acquired in merger control is also useful for antitrust enforcement.

3.3. Ride-hailing apps

30. *Daimler/Hailo/MyTaxi/Negocio Hailo*¹⁴ consisted in the joint acquisition by Daimler and Hailo of two online business allowing end-users to hire taxi services online, MyTaxi and Hailo (which would be merged following the transaction).

31. Some aspects of the analysis suggested that the merged firm would enjoy a very strong position (the market share in certain geographic areas, calculated with a real indicator like the number of trips, combined with the multi-sided nature of the market). However, the analysis of the CNMC (following a market test) pointed out that, even though the new entity would enjoy advantages due to network effects and economies of scale, actual or potential rivals would not enjoy any significant barriers to expansion. The features of the relevant market and, in particular, the fast expansion of the sectors in question, played a fundamental role in this conclusion.

32. Therefore the operation was cleared in 2016 without any commitments from the firms.

3.4. Zero pricing, innovation and ecosystems in other digital services

33. The CNMC has recently had the opportunity to assess mergers in relevant digital markets where other forces play a significant role.

34. In *Turnitin/Ouriginal*¹⁵, a merger affecting anti-plagiarism software (APS) and other services related to education software, some relevant issues for digital markets were analysed. For instance, the effects on innovation, barriers to entry due to lock-in effects, the bundling of digital products and the actual/potential competition of Big Tech. The operation was cleared in phase I. As to innovation, given the low R&D investment to turnover ratio of the target and the capacity to innovate of other players in the market, the merger was deemed not to threaten innovation.

¹³ Market shares were again calculated in nominal terms (total revenue of the platform and value of the orders) and also in real terms (orders managed).

¹⁴ C/0802/16 DAIMLER/HAILO/MYTAXI/NEGOCIO HAILO
<https://www.cnmc.es/expedientes/c080216>

¹⁵ C/1220/21: TURNITIN/OURIGINAL <https://www.cnmc.es/en/node/390313>

35. In *Norton/Avast*¹⁶, a merger affecting cybersecurity solutions for final consumers, some issues relevant for digital markets also arose, such as the role of ecosystems and zero pricing (which leads to calculate market shares not only in revenue but also in real indicators like users or devices). The CNMC also analysed the effects on innovation and barriers to entry due to lock-in effects. The operation was cleared in phase I. The merger was not considered a threat to innovation in light of the competitive landscape and the rise of cyber threats (which mean a permanent incentive to improve products' price/quality ratio). Again, the killer acquisition theory of harm was analysed but the fact that the firms were carrying out different strategies in this regard led to discard that risk.

3.5. Recent digital cases by the CNMC affecting other platforms

36. The CNMC has recently assessed two cases of very different sectors but where multi-sidedness was again quite relevant.

37. In *Wedding Planner / Zankyou Ventures*¹⁷, a merger affecting two digital platforms offering wedding planning services in Spain was analysed. Even if there were not precedents of these sectors, other cases in digital markets suggested that general tools (such as search engines or social networks) should not be considered part of the same market and this was confirmed by the market test. Therefore, the purchase affected the provision of online search services related to weddings and the market for digital platforms offering wedding planning services in Spain. And market shares of the merged entity in these markets were high (above 50%, measured in revenue, or more, when measured in web traffic through visits).

38. Against this backdrop, theories of harm were to be analysed in a multi-sided market with network effects with scale, scope and learning economies. And other barriers to entry such as brand image. Even if exclusivity clauses had not been used in the past, the merger increased the ability and incentives to do so by the merged entity. Other theories of harm were also analysed, like the risks of price increases for business users and the effects on innovation.

39. Therefore the operation was cleared in December of 2022 in phase I with commitments not to include exclusivity clauses, neither directly nor indirectly through incentives or penalties (and informing business users of these conditions), for a period of 3 years. The CNMC considered these commitments necessary in order to ensure that smaller players or potential new entrants could grow to a sufficient scale.

40. The CNMC, considered that this was sufficient to allay the risks of price increases for business users, taking some mitigating factors into account: competitive pressure from other wedding platforms (since there was also a competitor with a comparable presence in terms of revenues) and from potential competitors and other operators (like search engines or social networks which, even if not part of the same relevant market, exert some competitive pressure).

41. Regarding the effects on innovation, the market test also pointed out its qualitative relevance. But a negative impact of the operation was discarded. R&D is not quantitatively so relevant as in other digital sectors and the technology is not especially complex. Part of

¹⁶ C/1318/22: WEDDING PLANNER / ZANKYOU VENTURES <https://www.cnmc.es/expedientes/c131822>

¹⁷ C/1220/21: TURNITIN/OURIGINAL <https://www.cnmc.es/en/node/390313>

the innovation in the sector consists in differentiation and sophistication of services and this is not directly affected by the operation.

42. The merger *Karnov / TR España / WK España*¹⁸ affected legal software, solutions, databases, training and publications. Market shares and overlaps were sizeable in the markets of legal databases and publications (with market shares of the joint entity of 30%-40% and overlaps of 10-20%), although there were also comparable competitors.

43. In legal databases, the merged entity increased its ability and incentives to raise prices and to tie and bundle products. But at the same time there were mitigating factors: the presence of competitors, some countervailing power of demand (by some relevant clients) and some competitive pressure that free content providers may exert (even if not part of the same relevant market). Potential effects on innovation were also considered but the market test did not point to specific risks in that regard.

44. In legal publications, the merged entity increased its ability and incentive to incorporate direct or indirect exclusivity clauses in its agreements with the main authors of legal publications, which could lead to market foreclosure (given the two sided nature of the market). Although there were also mitigating factors: some countervailing power of demand, the lack of relevant switching costs and the absence of significant barriers to entry.

45. The operation was cleared in November of 2022 in phase I with commitments for a period of 3 years, which can be extended for a period of 2 years. The merged entity committed not to include exclusivity clauses or incentives in the contracts with authors who publish with the merged entity. The merged entity also committed to refrain from linking products directly (allowing effectively the separate acquisition of products that are part of a bundle) or indirectly (allowing the separate acquisition of products that are part of a bundle in reasonable market conditions) in order not to leverage market power from one market to another and in other not to generate lock-in effects and single-homing. Other remedies (like limitations on prices or even divestiture of one of their databases) were considered not necessary according to the information gathered in the market test.

4. Main conclusions

46. The enforcement of competition law in digital markets is especially challenging. But competition policy tools are flexible enough to adapt to the disruption driven by digitization, including regarding theories of harm.

47. The Spanish CNMC has gained experience in all these issues in recent years, thanks in part to the market share notification threshold, which has proven effective to assess operations which may raise concerns in digital markets.

48. Even if a case-by-case approach is needed, the CNMC has opted in general for using light-touch behavioural remedies (like a removal of exclusivity or tying/bundling clauses) in order to ensure multi-homing and an exploitation of network/scale/learning economies by new entrants and competitors.

49. So far, the CNMC is not aware of having faced a merger in the digital markets responding to the pattern of killer acquisitions or purely data-driven mergers.

¹⁸ C/1263/22: NORTON / AVAST <https://www.cnmc.es/expedientes/c126322>