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Serial Acquisitions and Industry Roll-ups – Note by Spain

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More documents related to this discussion can be found at www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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1. Introduction

1. Roll-up strategies and serial acquisitions have been under the radar of competition authorities in recent years. Other causes for competition authorities' concern include common ownership and minority shareholding among competitors. These dynamics of consolidation and concentration of market power on fewer operators in the same sector have sparked the debate about the adequacy of competition agencies' policy toolkit.

2. The Spanish competition authority has also faced these trends of increasing sectoral concentration and common ownership issues. However, the CNMC considers that the current national framework for merger control is appropriate to address these risks. Firstly, through a market share notification threshold (as a complement to the business turnover threshold). Secondly, through a stricter scrutiny for mergers involving sharp increases in market share. Thirdly, by relying on a comprehensive set of criteria for the substantive assessment, enabling the enforcer to adapt the review to the specific circumstances of each operation, on a case-by-case basis. These ways to prevent enforcement gaps will be described below.

3. After this first introductory section, Section 2 describes the practical experience of the Spanish authority in sectors where concentration has increased following a series of different acquisitions. Section 3 refers specific cases where the risks of common ownership and minority shareholding have arisen. Section 4 addresses potential enforcement gaps and how these are tackled by the Spanish framework. Section 5 concludes with some takeaways.

2. Serial acquisitions and industry rolls in Spain

4. The CNMC has not faced a situation fitting the exact profile of serial acquisitions or industry roll-ups. However, the increase in concentration in some sectors may be of relevance.

2.1. Funeral services

5. The funeral sector is perhaps the one of those where the growth in concentration has been more notable. The CNMC has analysed 18 mergers in the funeral sector from 2018 to 2022. From an average of 2-3 mergers assessed per year, the figure increased to 10 mergers reviewed in 2022 and 5 just in the first half of the 2023. Attention to this sector has entailed not only a high number of mergers reviewed, but also gun jumping cases[1], dawn raids and phase II decisions[2].

6. This happened in parallel to the increase in the total number of mergers to be reviewed by the authority in other sectors. Ensuring a sound assessment of mergers in a

[1] Some of them were requested ex officio by the authority as its execution took place before the notification.

[2] Only in 2021 the CNMC analyzed five phase II decisions that ended up being approved with commitments or conditions.

context of pressure on the authority's resources was key to mitigate risks derived from the increasing concentration in a sector where consumers are relatively vulnerable.

7. Apart from a few mergers involving two or more large undertakings, most cases have consisted in large undertakings acquiring small local companies (located each in a different town). These acquisitions are typically authorized, as there is no overlapping of market shares across local markets. Therefore, some large undertakings are growing and building up a strong market position at a regional (or even national) level. A question arises as whether this growth could eventually generate competition concerns.

8. Merger assessment in the sector must take two main features into account:

9. On the one hand, the **creation or strengthening of dominant positions resulting from a transaction**. Wholesale markets (the management of funeral facilities) are very concentrated (one or two companies in small towns and no more than 10 operators in large cities), so a careful assessment of horizontal effects is warranted in a sector where demand is rigid (lacking counterbalancing power). The main theories of harm examined include the fact that competitors may be limited and/or denied access to their facilities or be charged discriminatory and/or abusive prices by their national, regional or even local providers. In these cases, the CNMC has preferably opted for structural (divestment) remedies (particularly in those transactions that have been analyzed in phase II), while being reluctant to accept behavioral commitments (e.g. those of non-abuse, as they are deemed to be redundant if merely equivalent to a commitment to comply with competition law).

10. On the other hand, the vertical effects resulting from a merger affecting not only the provision of funeral services but also the insurance market. Main theories of harm examined have been the risk of expulsion of competitors and the worsening of commercial conditions, in terms of price or quality. Even coordinated effects have been considered in a second phase merger to the point that the commitments presented by the parties were considered insufficient, and conditions were imposed in order to approve the transaction. However, after the CNMC imposed these conditions, the parties withdrew, and the transaction was never executed.

2.2. Telecommunications

11. In the telecommunications sector in Spain the process of consolidation has been significant since 2010. The last decade witnessed a series of mergers and acquisitions that reshaped the telecommunications landscape in the country.

12. The initial phase of the consolidation started with the acquisition of ONO by VODAFONE[3] in 2014 and of JAZZTEL by ORANGE[4] in 2015, analysed by the European Commission. The latter involved remedies, consisting in the divestiture of part of the fibre network and the wholesale access to Jazztels' network.

13. A very relevant operation was the acquisition of the first pay-TV operator (DTS) by the first telecommunications operator (TELEFÓNICA) in 2015[5]. In this case the main theories of harm considered were not horizontal, but vertical or conglomeral. It is worth mentioning that in Spain it is very common that telecommunication services are typically bundled with pay TV.

[3] https://competition-cases.ec.europa.eu/cases/M.7231

[4] https://competition-cases.ec.europa.eu/cases/M.7421

[5] https://www.cnmc.es/expedientes/c061214

14. Subsequently, other mergers have followed, like the purchase of SUMA by ORANGE in 2019[6] and the acquisition of different rivals by MASMOVIL (especially YOIGO[7] in 2016 and EUSKALTEL[8] in 2021). ORANGE and MASMOVIL have notified the creation of a joint venture, an operation which is being currently analysed by the European Commission[9].

15. It follows from the previous cases that the higher the degree of concentration the stricter the scrutiny. But, apart from that logic reasoning, due heed must be paid to non-horizontal effects too.

2.3. Press and magazines distribution

16. Another sector that is also undergoing a process of concentration is the distribution of newspapers and magazines (distribution from printing facilities to retail sellers). Some factors behind this trend are the shrinking size of the market -which in turn is associated with lower consumption of printed publications- and the presence of economies of scale.

17. The CNMC has analysed 3 mergers in the last ten years, and some more in the years before. The initial mergers consisted in regional consolidation, where the publishing companies (the newspapers themselves) already jointly owned most of the wholesale distributors. Eventually, however, the publishers exited the market, leading to the consolidation of three large distributors at national level, coexisting with some remaining regional operators.

18. One merger at the beginning of the last decade involved the acquisition of small regional players by one of the big three national distributors[10] (BOYACÁ). Recently, in 2021, two of these three national competitors (BOYACÁ and SGEL) announced the creation of a joint venture which the CNMC authorised in phase II subject to conditions[11] (directed at maintaining conditions with publishers, distributors, and traditional points of sale). Those conditions had the effect of blocking the merger, since, finally, the operation was abandoned. Another operation in 2023 involved an internal organisation of the other main competitor[12] (LOGISTA) which also had implications from the point of view of common ownership, so it is explained below in the specific section devoted to this issue.

2.4. Online food delivery

19. The online food delivery sector has also undergone a substantial transformation, including several mergers among other changes probably due to its dynamism and fast evolution.

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[6] https://www.cnmc.es/expedientes/c106719

[7] https://www.cnmc.es/expedientes/c078616

[8] https://www.cnmc.es/expedientes/c118121

[9] https://competition-cases.ec.europa.eu/cases/M.10896

[10] https://www.cnmc.es/expedientes/c050813

[11] https://www.cnmc.es/expedientes/c117121

https://www.cnmc.es/novedad/boyaca-sgel-20220105

[12] https://www.cnmc.es/expedientes/c134822

20. In 2016, the first merger case involved the acquisition by JUST EAT, a multinational online platform offering food delivery services to restaurants and consumers, of a local rival[13] (LA NEVERA ROJA). It was cleared in Phase I subject to commitments that consisted in preventing the merged entity from entering into exclusivity agreements with restaurants, as the CNMC considered it could have created lock-in effects and hindered the entry and expansion of competing platforms. The analysis showed that the Spanish market was not mature at that moment and, as a result, there was significant scope for expansion.

21. The second case was JUST EAT/CANARY[14], in which, again, 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. It 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 market.

22. The third merger consisted in the acquisition of sole control of JUST EAT by MIH FOOD DELIVERY HOLDINGS[15], which had a minority presence in the capital of DELIVERY HERO. The operation was cleared in 2019 in phase I with commitments. Again, since the operation had implications from the point of view of common ownership issues, it is explained below in the specific section.

23. To sum up, the analysis of each operation took into consideration the specific context of the sector at the given moment of each case.

2.5. Procurement and wholesale distribution of electrical equipment

24. Another sector in which the CNMC has assessed transactions where subsequent transactions have taken place is the procurement and wholesale distribution of electrical equipment. Both cases were notified recently (in 2022 and 2023): C/1338/22 SONEPAR/REXEL SPAIN and C/1369/23 SONEPAR/DIGAMEL. In both cases, SONEPAR, a multinational company active in the procurement and wholesale distribution of electrical equipment, acquired sole control of REXEL SPAIN (in 2022) and DIGAMEL (in 2023), both companies also specialised in the procurement and wholesale distribution of electrical equipment.

25. The analysis of the transactions was largely determined by the different profiles of the targets. Both operations were analysed upstream (procurement) and downstream (wholesale distribution). However, the most relevant issues for competition were in the wholesale distribution (the upstream procurement markets were national from a geographical perspective and the addition of market share was not so sizeable).

26. The first operation was unconditionally cleared in phase I: even if there were horizontal overlaps (between SONEPAR and REXEL) in some geographical areas around Spain, there were mitigating factors such as the presence of other players with a granular presence in Spain, the lack of relevant switching costs or barriers to entry, the countervailing power of demand and the pressure exerted by new players (such as online and do-it-yourself retailers, even if belonging to a different relevant product market).

[13] https://www.cnmc.es/expedientes/c073016

[14] https://www.cnmc.es/expedientes/c104619

[15] https://www.cnmc.es/expedientes/c107219

27. The second operation was also unconditionally cleared in phase I, but the analysis needed was more thorough and a market test was warranted. The target's (DIGAMEL) presence was essentially limited to the region of Galicia, in North-Western Spain. In that region the transaction meant a significant addition (10%-20%) to the relevant share of the notifying party (20%-30%). The market test pointed at a subnational relevant geographic market. At the same time, the market test confirmed some of the abovementioned mitigating factors, such as the countervailing power of demand together with its price elasticity and the importance of diversification. Also, the lack of relevant switching costs or barriers to entry and the competitive pressure exerted by new players (such as online and do-it-yourself retailers, even if belonging to a different relevant product market) and providers all around Spain (even if belonging to a different relevant geographic market).

28. Again, the framework for merger control has shown that it can capture relevant roll-up acquisitions and that the substantive assessment criteria allow for a closer scrutiny when needed.

3. Common ownership

29. Another source of concern for competition authorities is the one related to common ownership and minority shareholding among competitors. The CNMC has recently faced this issue in two cases.

3.1. A specific case of minority shareholding in press and magazine distribution

30. As has been said above, the CNMC has recently (2023) faced this minority shareholding issue in a case in the wholesale distribution of newspapers and magazines (distribution from printing facilities to retail sellers)[16].

31. After the several mergers previously described, the last one was reported as a mere internal consolidation and restructuring by one of the three national distributors, called LOGISTA. But it implied an upgrade and expansion of the common ownership with a second national distributor (BOYACÁ).

32. Before the concentration, LOGISTA had 8 regional affiliates, and 3 of them were co-owned by BOYACÁ. The concentration consisted in the absorption or consolidation by LOGISTA of the 8 regional affiliates into a single new entity, for efficiency reasons. However, the second national distributor, BOYACA, would co-own this new entity with a minority share. Although this minority share would not grant control, it would confer the right to appoint some of the members of the board of directors.

33. The operation was authorized in phase II with commitments. These remedies consisted basically in BOYACA's abstaining from appointing members at the board for a period of time and setting limits and barriers to the exchange of strategic information indefinitely. The CNMC considered the structural decline very specific of this market and the presence of economies of scale when assessing the behavioural remedies proposed by the parties.

[16] C/1348/22 LOGISTA PUBLICACIONES / DISTRISUR. https://www.cnmc.es/expedientes/c134822

3.2. A specific case of minority shareholding in online food delivery

34. As has been said above, the CNMC has also faced this minority shareholding issue in a case in online food delivery (2019).

35. The third merger described above consisted in the acquisition of sole control of JUST EAT by MIH FOOD DELIVERY HOLDINGS[17], which had a minority presence in the capital of DELIVERY HERO. The latter had in turn had a minority participation in the capital of GLOVO, the main competitor of JUST EAT. Therefore, the buyer's presence in the relevant market was indirect.

36. Several theories of harm were analysed, 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. Other concerns that arose were the risk of coordinated effects given that JUST EAT and GLOVO were close competitors, and the risk 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 minor.

37. The merger 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 competitors.

4. Potential enforcement gaps

38. The merger control framework in Spain has proven to be appropriate in terms of capturing, scrutinising and having the possibility of evaluating acquisitions of small companies by large undertakings.

39. Many jurisdictions establish merger control thresholds based on the annual turnover of the undertakings involved in the merger as the main criteria for notification, but some, including Spain, have an additional threshold in place that takes the market shares into account.

40. In this sense, an undertaking with a market share larger than 30% must report any intended acquisition above 10 million euros, irrespective of the market share of the acquired asset. Additionally, an undertaking with a market share larger than 50% must report any intended acquisition, irrespective of the turnover and market share of the acquired asset. That is, any acquisition by a large undertaking (50% share or greater) is subject to the merger control regime. Therefore, there is a limit on the capacity of an undertaking to grow undetected[18].

41. This helps to analyse some potentially troublesome mergers in all sectors, especially in digital ones[19] (70% mergers in digital markets assessed by the CNMC are notified due to the market share criterion, they would go under the radar otherwise). The market share criterion has flexibility to adapt to specific circumstances (for instance, in

[17] https://www.cnmc.es/expedientes/c107219

[18] Article 8.1.a) of the Spanish Competition Act

https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946&p=20230629&tn=1#a8

[19] See Spanish contribution to the OECD roundtable on "Theories of Harm for Digital Mergers" (2023).

digital activities 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.). 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). Informal communication during the pre-notification phase and a formal consultation process[20] can give some certainty to the firms regarding the need to notify a given operation.

42. The market share is relevant not only for notification purposes, but also for the depth of the analysis. Operations with relevant overlaps do not take advantage of the simplified form and an ordinary form is required instead. The relevant overlaps are defined in two different ways[21].

43. For horizontal overlaps, an ordinary form is required if the joint market share is above 15% and the addition exceeds 2%, or if the joint market share is above 30% and there is an addition of quota (regardless of is size).

44. For vertical overlaps, an ordinary form is required if the individual/joint market share is above 25% in a vertically related market.

45. This framework fits serial acquisitions and industry roll-ups. If a firm exceeds the thresholds of a 15% or a 30% market share through subsequent acquisitions, an increasingly closer scrutiny is guaranteed.

46. Finally, the criteria for substantive assessment[22] are flexible enough to fit these types of competition issues. Not only the risks of serial acquisitions, but also the fact that common ownership and minority shareholdings may affect the competitive context. Therefore, the authority may gather information through different sources to assess those risks and internal documentation may be of particular relevance.

5. Main conclusions

47. The Spanish competition authority may not have face a prototypical scenario of serial acquisitions and industry roll-ups However, it has faced environments of growing sectoral consolidation and common ownership issues.

48. Against this backdrop, the current toolkit in Spain has proven effective. Firstly, the flexible market share threshold allows for the notification of relevant operations. Secondly, there is a higher scrutiny of operations where the increase of market share is of relevance. Finally, the substantive criteria set by the law allow for an assessment of risks such as serial acquisitions and common ownership issues.

[20] Article 55.2 of the Spanish Competition Act

https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946&p=20230629&tn=1#a55

[21] Article 56 of the Spanish Competition Act and Article 57 of its developing regulation

https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946&p=20230629&tn=1#a56

https://www.boe.es/buscar/act.php?id=BOE-A-2008-3646&p=20210428&tn=1#a57

[22] Article 10 of Spanish Competition Act https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946&p=20230629&tn=1#a10