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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Spain --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- SPAIN --

1. Introduction

1. Spanish merger control system is an outlier among other systems in the world when assessing its trade-offs between prohibition decisions and conditional clearances.

2. In particular, in Spain, prohibition decisions of mergers are a last resort instrument, which has not been applied in the last five years.

3. Several specific characteristics of the Spanish merger control system and the case-law of the Spanish Supreme Court make quite difficult to issue prohibition decisions in mergers investigated by the Spanish Competition Authority.

4. Therefore, the most problematic mergers are approved under conditional clearances, which usually include complex remedies.

5. In this context, monitoring effective implementation of remedies has become a priority of the Spanish Competition Authority.

6. This paper will analyze the specific characteristics of the Spanish merger control procedure and case-law that make it quite difficult to prohibit remedies. Afterwards, it will study remedies design and monitoring procedures. Lastly, it will summarize the main problematic merger cases of the last five years.

2. Specific characteristics of spanish merger control procedure and case-law

7. When investigating problematic concentrations, most merger control jurisdictions have two options: approve the merger subject to commitments negotiated with the parties or issue a prohibition decision.

8. However, the Spanish Competition Act includes an additional third option, approval subject to conditions designed by the Spanish Competition Authority.

9. This additional tool breaks the balance between prohibition and conditional approval of problematic mergers in Spain in favor of the latter.

10. In particular, as the Spanish Supreme Court case-law established (Sogecable/Vía Digital case's judgement; 2005), prohibition decisions must only be adopted if conditions cannot be imposed and, additionally, these conditions must be proportionate (only offset competition risks arising from the merger) and adequate (eliminate the anti-competitive risks generated by the merger) to solve competition concerns, and guide themselves under the principle of least intervention (chose the viable option easiest to implement and less distortionary of the parties activities).

11. When assessing whether there are viable conditions to approve a problematic merger, the Spanish Competition Authority explores both structural and behavioral remedies. In any case, if the structural remedy is equivalent to a prohibition (divest most of the acquired assets), potential behavioral remedies are assessed.

12. Nevertheless, in some cases (i.e. Abertis/Axion case; 2009), the conditions imposed by the Spanish Competition Authority were deemed too harsh by the parties and the merger was abandoned, therefore becoming equivalent to a prohibition decision.

13. Another specific characteristic of Spanish merger control system is the existence of the so-called third-phase in the merger control procedure.

14. Any second phase decision taken by the Spanish Competition Authority approving a merger subject to remedies (either commitments or conditions) or prohibiting it could be modified by the Spanish Government in the third phase for “reasons of general interest” other than the promotion of competition. These reasons of general interest may relate to defense and national security, protection of public security or health, free movement of goods and services within the national territory, environmental protection, promotion of research and technological development, or safeguarding the objectives of sector-specific regulations.

15. In this potential intervention, the Spanish Government cannot prohibit the merger or impose harsher conditions, but it can waive a prohibition decision or all or part of the remedies established by the Spanish Competition Authority. Moreover, the Spanish Government can modify or introduce new softer remedies.

16. This third-phase intervention by the Spanish Government has only taken place once (Antena 3 / La Sexta case; 2012), and it softened the conditions imposed by the Spanish Competition Authority, which the parties deemed too harsh, announcing that they would abandon the merger if they were not modified. With this third-phase decision, some of the remedies were softened in order to equalize them to the remedies established by the Spanish Competition Authority in a prior merger in the same market (Telecinco/Cuatro case; 2010).

17. The risk of a third phase intervention by the Spanish Government makes prohibition decisions even less appealing in Spain, as it could lead to an unconditional approval of the merger. In contrast, in an authorization decision subject to conditions, the Spanish Competition Authority plays a significant role designing remedies for the merger and total elimination or modification of them by the Spanish Government is less probable.

18. In conclusion, even if the Spanish Competition Authority has not issued any guidelines concerning remedies or prohibition decisions in problematic mergers, most notifying parties know that prohibition decisions are a last resort instrument rarely applied in Spain.

3. Remedies design and monitoring procedure in Spain

19. Remedies are designed within the Spanish merger control system on a case-by-case basis, so it is quite difficult to extract general rules that can be applied to all cases.

20. As it has been stated before, both structural and behavioral remedies are explored, in order to verify whether there are viable solutions to overcome the competition problems detected in the merger, under the principles of proportionality, adequacy and least intervention.

21. Even if structural remedies are usually easier to implement and monitor, they are not always a viable option, for example, due to a lack of proportionality with the identified competition concerns, the nature of the market and the affected assets or the difficulties to find potential buyers.

22. In any case, when implementing structural remedies, the Spanish Competition Authority usually requests the inclusion of a clear divestment timetable and a divestment trustee, with a mandate to sell at any price. Moreover, in the most problematic cases, an up-front buyer might be demanded. Additionally, if no buyers are found, crown-jewels divestment solutions might be required.
23. Behavioral remedies are also contemplated and in some cases they complement structural remedies.
24. These remedies can range from wholesale offers to limits in provisioning or retail policies (i.e. renouncing exclusivities, limits to the terms of contracts, etc.)
25. Remedies are always the result of an informal negotiation procedure between the notifying parties and the Spanish Competition Authority, where informal proposals are exchanged and discussed.
26. During this negotiation, insights gathered from other stakeholders in the market (competitors, clients, providers) are usually vital, even if the Spanish Competition Authority always takes into account the existence of different interests and agendas among stakeholders, which are not always compatible with competition public interests.
27. Third parties points of view are gathered both in informal (meetings, conference calls) and formal (market tests) ways, before, during and after negotiating remedies with the notifying parties. In any case, commitments are always formally market tested at least once.
28. If there are difficulties to reach a commitments agreement with the notifying parties, the Spanish Competition Authority starts designing by itself alternative conditions to confront the detected competition problems.
29. These conditions are usually built up on the foundations of the negotiated commitments and are always formally market tested with the parties and third stakeholders.
30. It can also happen that after market-testing potential conditions, new negotiations between the parties and the Spanish Competition Authority allow to reach a commitments agreement.
31. Remedies are always designed as exhaustively as possible, even if it is quite difficult to contemplate all future scenarios. Therefore, they are usually a mix of general principles and detailed rules.
32. When designing remedies, previous experiences (in the same or other markets) are always taken into account. Therefore, remedies design is under a never-ending refinement process.
33. One of the main concerns of the Spanish Competition Authority is not to breach Spanish Supreme Court case-law, which interprets remedies in a restrictive way and does not allow extending their reach under the analogy principle to confront non-contemplated scenarios.
34. Monitoring remedies is one of the priorities of the Spanish Competition Authority and many resources are devoted to this activity. Under Spanish Competition Act, monitoring cannot be externalized to a third party, although in some cases an auditor trustee is introduced to review the parties' activities implementing remedies.
35. Monitoring is usually based on a mix of periodic information providing obligations, trustee reports and specific information requests to the parties or third stakeholders. Afterwards, the Spanish Competition Authority exhaustively analyzes the gathered information and issues periodic compliance reports (after giving audience to the notifying parties) identifying and verifying non-compliance issues.

36. Compliance requests are made and infringement procedures are opened when non-compliance is verified. For example, in the last five years the Spanish Competition Authority has fined in four cases for non-compliance with remedies.

37. Nevertheless, after an infringement procedure, the Spanish Competition Authority cannot modify remedies to ensure future compliance. Even so, sometimes the parties have presented voluntary compliance programs with additional measures to ensure future compliance.

4. Cases

4.1 *TELECINCO/CUATRO case (2010)*

38. The TELE CINCO/CUATRO operation involved the merger of two of Spain's leading free-to-air television (FTA-TV) operators, reducing the main providers of television ads in Spain from four to three.

39. This merger affected the entire value chain of the TV-related audiovisual sector, which runs from the production of audiovisual content to their broadcast to the end viewer. The main competition problems, however, were seen in the TV advertising market in Spain and in the markets for acquisition of audiovisual contents in Spain.

40. The TELE CINCO-CUATRO group had high market shares in terms of total audience, so if the advertising of the channels managed by the parties were marketed jointly post-merger it could become an indispensable outlet for advertisers. Furthermore, the structure of the TV advertising market in Spain could allow and encourage tacit coordination between the resulting entity and its main competitor, ANTENA 3.

41. On the other hand, the combined entity's bargaining power in the acquisition of audiovisual content could be strengthened, which could affect both TELE CINCO's competitors in the FTA-TV market and smaller providers of content.

42. The Spanish Competition Authority took into account the possibility of requiring divestiture commitments, but they were not viable in this case due to nature of the affected assets, which would have made a viable divestiture equivalent to a prohibition decision.

43. The final commitments submitted by TELE CINCO were behavioral and focused on restricting its commercial autonomy when it came to managing TV advertising and acquiring audiovisual content, which could help counteract the competition problems generated by the concentration operation.

44. These commitments can be classified in three blocks.

45. A first group of commitments was directly related to the TV advertising market and involved the commitment that TELE CINCO could not sell in one commercial package advertising for the two FTA-TV channels with the largest viewer levels of those that it managed, with the added condition that the aggregate viewership for the TV channels included in each commercial package could not exceed 22% and it could not tie sales of its various TV advertising commercial packages to advertisers.

46. These commitments aimed at allowing advertisers to effectively choose the main television channels of the merged entity where they wanted to air their advertisements. In addition, they limit the maximum size of the television advertising packages offered by TELE CINCO to an appropriate level, wanted to prevent TELE CINCO's television advertising from becoming indispensable for a significant number of advertisers.

47. The effect of the above commitments on the TV advertising market was strengthened with the following commitments:

48. TELECINCO also undertook to break its agreements for joint management of advertising on free-to-air DTT channels of third parties and to sign no new agreements of this kind. In the case of advertising on pay-TV channels, TELECINCO undertook to maintain the statu quo, that is, to manage advertising of the pay-TV channels of third parties through a separate company and with clearly differentiated commercial policies.

49. A second group of commitments served to limit the power of TELECINCO in the FTA-TV market and indirectly served also to safeguard competition in the television advertising market. TELECINCO undertook not to extend its offer of free-to-air TV channels by leasing DTT channels from third party operators and not to block quality enhancements in the television channels that may be launched by its competitors Net and La Sexta, with which the merged entity shared DTT multiplexes until 2015.

50. A third block of commitments was aimed at counteracting the vertical effects generated by the merged entity's heightened power as buyer of audiovisual contents. TELECINCO undertook to limit the duration of its exclusive contents acquisition contracts to three years, without including preferential acquisition rights or rights of extension. This made it possible for the exclusive rights that TELECINCO had acquired or may acquire from contents generators (for example producers of films and TV series) to come onto the market periodically. TELECINCO also limited the period for which it may exploit a particular film in exclusivity on FTA-TV to five years. TELECINCO undertook to restrict its ability to exclude national television producers as suppliers of programs to FTA television competitors.

51. An initial period of three years was established for the commitments, extendable by a further two years if the market circumstances that made them necessary had not changed. This extension was implemented.

52. Moreover, TELECINCO was fined twice for non-compliance with the remedies. The most important infringements related to de facto tying practices of TELECINCO's main advertising products. Just before the second fine TELECINCO implemented voluntary measures, increasing Chinese walls and separation of negotiations within its advertising unit, in order to ensure better future compliance with the commitments.

4.2 ANTENA 3/LA SEXTA case (2012)

53. This case was a rerun of the TELECINCO/CUATRO merger, involving the merger of the remaining two of Spain's leading free-to-air television (FTA-TV) operators, reducing the main providers of television ads in Spain from three to two.

54. This new merger aggravated the competition concerns identified in the TELECINCO/CUATRO's merger, especially in the TV advertising market, where a maverick (LA SEXTA) disappeared and tacit collusion concerns between the main two players increased.

55. The remedies negotiations with ANTENA 3 were not successful, as it was only ready to offer a watered-down version of TELECINCO's commitments.

56. However, competition problems in this new merger were bigger and monitoring remedies compliance in the TELECINCO/CUATRO case had taught the Spanish Competition Authority valuable lessons that could be applied in this case.

57. In particular, remedies related to the advertisement market had to be strengthened, in order to restrict harmful commercial practices (such as simulcasting of advertisements; linking prices or rappels to TV advertising campaigns shares, etc.), facilitate advertisers bargaining positions (increasing traceability of negotiations) and disincentive de facto tying of advertising products (by separating commercialization teams).

58. Therefore, this strengthened version of TELECINCO/CUATRO's commitments was adopted by the Spanish Competition Authority as conditions for the new merger.

59. ANTENA 3 announced that it would not proceed with the merger under those conditions and that LA SEXTA risked shutting down its operations due to the lack of profitability.

60. The Spanish Government decided to intervene during the third phase of the merger procedure, stating that it wanted to safeguard the objectives of the audiovisual sector regulations, by preventing the possible disappearance of LA SEXTA. It modified the strengthened conditions in the advertisement market, in order to equalize them to those established in the TELECINCO/CUATRO merger.

4.3 SCHIBSTED/MILANUNCIOS case (2014)

61. This merger involved the two main multisector online classified advertisements platforms in Spain.

62. This merger took place in two-sided markets, where the demand of advertisers and potential final clients converged. In these markets, economies of scale and network effects are very relevant, so the investigation centered in analyzing competitive pressures of third competitors and whether the merger created a risk of reaching a tipping point where the network effects of the resulting entity were not replicable.

63. Several relevant segments were differentiated in online classified advertisements (motor; real estate; job-seeking; education; etc.), due to the fact of the existence of specialized platforms in each segment. Moreover, within the demand of advertisers, two categories were differentiated (professional and amateur).

64. The investigation concluded that final clients and amateur advertisers had other alternatives to the resulting entity or were very sensitive to price (and did not need fast rotation of stocks). Moreover, in several segments there were significant competitive alternatives with enough network effects as to remain viable competitors.

65. Nevertheless, in the motor segment, there were no viable competitive alternatives (due to their low volumes of advertisements and audience), so the merger could significantly harm professional advertisers in this segment.

66. Designing viable remedies was a challenge, as structural remedies were out of question (for being disproportionate) and behavioral remedies were very difficult to implement, in a very dynamic market that changed quite fast.

67. Finally, commitments were agreed with the parties, implementing an upfront license for two years, which was a mix of structural and behavioral remedy. The referred license gave to the licensee the following rights, among others:

- Exclusive right to export automatically automotive professional ads to the automotive section of MILANUNCIOS website.
- Exclusive right to access to contact information of the professional advertisers who publish in the automotive section of MILANUNCIOS website.
- Exclusive right to receive the income from the automotive online classified ads published by professional advertisers in the motor section of MILANUNCIOS website.
- Rights to boost the brand of the licensee and to improve the traffic on its online platform.

4.4 TELEFÓNICA/DTS case (2015)

68. This case involved the main two pay-TV operators in Spain, with a resulting market share of near 80%, and the merger strengthened TELEFÓNICA's position in the residential electronic communications markets in Spain (where it was the main player, with 35-45% market shares), as a result of the increased importance of four-play convergent offers (fixed + mobile electronic communications services + pay TV).

69. As a consequence of the merger, TELEFÓNICA acquired the highest value pay-TV clients in Spain, who also had high propensity to spend on electronic communication services. In the context of convergent offers, TELEFÓNICA gained a golden opportunity to reinforce its presence among those clients in the electronic communications markets (by retaining them or gaining them if they had a third provider).

70. The pay-TV client base of TELEFÓNICA also gave this operator irreplicable buyer-power of premium pay-TV audiovisual contents in Spain and in order to protect its privileged position in the pay-TV market, TELEFÓNICA could have incentives to block or restrict the quality of OTT pay-TV services in its internet network.

71. Remedies negotiations were quite complex, as structural remedies were out of question (disinvestment of clients or of audiovisual contents was not viable), competitors demanded a prohibition and providers of audiovisual content did not have interest in raising competition concerns.

72. Moreover, the remedies had to take into account the following mitigating factors:

- Pay-TV had low penetration in Spain, which was caused, among other factors, by availability of a very competitive (in audiovisual contents and number of channels offered) terrestrial free-to-air TV, with a coverage of almost 100% of the households in Spain, piracy and the cultural tradition of viewing the most important sport events (especially football) in public venues, such as bars and restaurants.
- DTS competitive position was less strong than its market shares and exclusive audiovisual contents implied, as its business model (using satellite) could not replicate convergent offers (fixed and mobile telecom offers+pay TV) launched by TELEFÓNICA and VODAFONE.

- After the merger, two potential strong competitors remain in the market (VODAFONE and ORANGE), who have many incentives to exert significant competitive pressures on TELEFÓNICA, in order to continue gaining clients for their convergent offers (in a context of a very fast deployment of 4G and fiber networks). Moreover, the asymmetries between the three operators give them incentives to maintain different competitive strategies (convergent offers without pay TV; non-exclusive alliances with OTT operators, etc.)
- OTT pay-TV only offers (Wuaki TV; Netflix; etc.) had a significant opportunity to develop a significant commercial presence in Spain, both in a stand-alone way and by reaching agreements with third telecom operators.

73. There were some break-downs during the negotiations, so the Spanish Competition Authority initially designed its own conditions. Finally, an agreement was reached on commitments. Its main elements are:

- Commitments (such as limited permanence obligations) that facilitated the acquisition of TELEFÓNICA's pay-TV clients by third pay TV competitors.
- Limits (i.e. terms of contracts; categories of rights such as library SVOD, etc.) to acquire exclusive audiovisual contents or pay TV channels.
- Wholesale offer of channels with premium audiovisual contents.
- Commitments that reduce the risk of quality degradation of OTT pay-TV offers in TELEFÓNICA's internet network.

5. Conclusion

74. The specific characteristics of the Spanish merger control system have made quite difficult to adopt prohibition decisions, although sometimes approvals subject to conditions have had an equivalent effect.

75. Remedies design, combining structural and behavioral obligations, is a complex process, where the parties and third stakeholders' views are essential, and which is constantly refined and applied on a case-by-case basis.

76. Monitoring remedies compliance is one of the priorities of the Spanish Competition Authority, which devotes significant resources to it and has opened several infringement procedures for non-compliance.