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The Use of Structural Presumptions in Antitrust – Note by Spain

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

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Spain[1]

1. Introduction

1. Structural presumptions allow competition authorities or courts to rely on market conditions or structure as a basic tool in their assessments (e.g., in terms of market concentration and the number of competitors), both in merger control and in antitrust.

2. Even though structural presumptions can streamline enforcement and may help to prioritise action (e.g., by alerting on concentrated markets), it is important to bear in mind that they should be combined with more detailed assessments, considering other factors.

3. The Spanish competition framework is flexible, both from an antitrust and merger control perspective, being capable of adapting to many different circumstances. Structural thresholds can be used at certain moments of the analysis, but never in isolation and always combined with other case-by-case circumstances.

4. After this first introductory section, Section 2 and 3 describe the use of structural thresholds in merger control and antitrust respectively. Section 4 and 5 refer to CNMC´s recent experience regarding this matter in merger control and antitrust respectively. Section 6 concludes with some takeaways.

2. CNMC’s general approach concerning the use of structural thresholds in merger control

5. Authorities can use the impact of a merger on concentration in a relevant market to preliminarily proxy the potential harm to competition.

6. However, market share levels and overlaps are analysed together with other factors barriers to entry and market dynamics.

2.1. Notification

7. The first stage where structural thresholds play a role in merger control is the notification. The Spanish merger control framework has two notification thresholds (Article 8.1 of the Spanish Competition Act[2]).

- A turnover criterion: parties have to notify a merger if the joint turnover exceeds €240 million and each of the parties’ exceeds €60 million.
- A market share notification criterion: parties have to notify a merger if the joint market share exceeds 30% in a given relevant market defined within the national market (if the turnover of the acquired entity is below €10 million, then the market share has to exceed 50%, providing some bureaucratic relief for smaller

[1] This contribution has been prepared by the technical staff of the CNMC and does not necessarily reflect the official vision of the institution except when it literally refers to official documents and decisions of the CNMC itself.

[2] https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946

acquisitions but ensuring that relevant transactions for specific markets are still captured).

8. It is worth mentioning that such criteria, especially the market share threshold, have proven to be really effective to capture mergers that merit scrutiny, especially in digital markets. CNMC analysed 31 digital mergers over the last 5 years. 23 out of them (74%) were notified through the market share threshold (they would not have been notified absent this criterion); 11 of them were eligible for the full-fledged (not simplified) form (explained below) and 4 of them were subject to remedies (commitments). That means that these notification thresholds, especially the market share one, are proving useful as a preliminary presumption of what operations may be more relevant (e.g., in digital markets).

2.2. The notification form

9. The second stage where structural thresholds play a role in merger control is the notification form. The Spanish merger control framework (article 56.1 of the Competition Regulation[3]) envisages the possibility of presenting a short form where:

- Firms are not operating in the same relevant market, nor in vertically related markets.
- Horizontal market shares and overlaps are small: (i) a combined market share not exceeding 15% in the relevant market or (ii) a combined share between 15% and 30% but with a small overlap (lower than 2%).
- Vertical market shares and overlaps are small: none of the parties has a market share above 25% in vertically related markets.

10. When none of the merging parties compete directly or operate at different stages of the production process, there is a presumption that the operation is less likely to harm competition, although there may be exceptions, as explained below.

11. There are other instances where the short-form notification is allowed:

- When one party acquires sole control over a firm in which it already exercises joint control. In such cases, the structural presumption is that the acquisition does not substantially change the competitive landscape because the acquirer already exerted influence over the firm's strategic decisions.
- When a joint venture is not expected to engage in significant activities in Spain (if its turnover in Spain does not exceed 6 million euros).

12. Meanwhile, a full-fledged notification is mandatory when market shares and overlaps are relevant:

- Sizeable horizontal market shares and overlaps: a combined market share exceeding 15% with a substantial overlap (higher than 2%) or a combined market share exceeding 30% with some overlap (regardless of the size of the overlap).
- Sizeable vertical market shares and overlaps: one of the parties has a market share above 25% in a vertically related market.

13. In any case the CNMC has the discretion to request a full-fledged notification form on all of the previously mentioned cases eligible for the simplified form according to Article 56.2 of the Spanish Competition Act, which establishes certain possible reasons to

[3] https://www.boe.es/buscar/act.php?id=BOE-A-2008-3646

do so, while also recalling that these reasons are not exhaustive. The CNMC may ask for a full-fledged notification form if it deems that there might be risks to competition despite the apparently low market shares and overlaps. This can happen, for instance, because mid-low market shares may be more relevant in that market owing to specific reasons (e.g. barriers to entry, difference with smaller competitors, absence of countervailing power of demand, etc.) or due to other risks (non-vertical and non-horizontal risks like conglomerate risks or ecosystems, common ownership, etc.) or other factors (lack of reliable information on markets or shares).

2.3. Substantive assessment

14. The substantive assessment of the CNMC is totally flexible and does not rely on specific structural presumptions. Article 10 of the Spanish competition Act refers to several factors to be analysed: the structure of markets, the position of the parties and competitors, etc. But without including any specific thresholds or presumptions.

3. CNMC's general approach concerning the use of structural presumptions in antitrust

15. Structural presumptions may also offer a starting point for assessing dominance and market power depending on a firm's market share, in the context of assessing a potential abuse of dominant position. However, they should be complemented by further analysis.

16. When determining dominance and market power, the CNMC applies legal standards grounded on both Spanish and EU case law, complemented with EC Guidelines when applying the Treaty of the Functioning of the EU (together with the Spanish Competition Act). The evaluation of dominance generally begins with an analysis of market shares, alongside with other factors such as countervailing buyer power and barriers to entry and expansion in the market[4].

17. High market shares can, by themselves and absent exceptional circumstances, serve as sufficient evidence of the existence of a dominant position, and this is particularly true when a firm holds a market share of 50% or more, as stated in the EU Guidelines, relying on EU case-law.

18. This reasoning is connected to the concept of structural presumptions, as a firm's market share serves as a preliminary indicator of its dominance. A very high market share is presumed to confer substantial market power, reducing the need for more exhaustive evidence of dominance unless there are exceptional countervailing factors. This presumption is based on observable market structures, such as the firm's share relative to its competitors, which allow authorities to infer dominance without needing to prove every aspect of the firm's competitive behaviour in detail.

19. That is the reason why, in addition, the comparison between the dominant firm's market share and that of its nearest competitors is highly relevant. A large disparity can further solidify the firm's dominant position, as it indicates a limited competitive constraint from rivals.

[4] See Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (paragraphs 16 and 17), and Judgment of the CJEU of February 14, 1978, United Brands. C-27/76, ECLI:EU:C:1978:22 (paragraphs 91 and 122) and Judgment of the CJEU of February 13, 1979, Hoffman-La Roche, C-85/76, ECLI:EU:C:1979:36 (paragraph 48)

20. Another structural presumption in line with the former is the one which establishes that dominance is not likely if the undertaking's market share is below 40% in the relevant market[5], also envisaged in EU Guidelines relying on EU case-law. Indeed, when a firm's share is below 40%, the structure of the market implies that the firm is subject to competitive forces, and further detailed analysis is usually not required to establish the absence of dominance.

4. CNMC's practical experience in merger control

21. The CNMC has recently assessed three cases of very different sectors (although all of them digital) where the analysis of market shares was quite relevant. Market shares were very different in these three cases but all of them involved remedies (commitments). This means that structural presumptions on market shares and overlaps are just an initial point that must be necessarily combined with the assessment of many other factors. And the same levels of concentration and overlaps may be more or less worrisome depending on case-by-case circumstances.

4.1. Wedding organization platforms

22. In *Wedding Planner / Zankyou Ventures*[6], a merger affecting two digital platforms offering wedding planning services in Spain was analyzed. 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). But also other factors were analyzed, such as barriers to entry (a multi-sided market with network effects with scale, scope and learning economies and brand image) and the lack of countervailing power of demand (by business users).

23. The operation was cleared in November of 2022 in phase I. Remedies were included to prevent the use of exclusivity clauses to safeguard actual and potential competition. 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).

4.2. Legal databases and publications

24. The merger *Karnov / TR España / WK España*[7] affected legal software, solutions, databases, training and publications. Market shares and overlaps where 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:

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[5] See Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (parragraph 14)

[6] C/1318/22: WEDDING PLANNER / ZANKYOU VENTURES https://www.cnmc.es/expedientes/c131822

[7] C/1295/22: KARNOV / TR ESPAÑA / WK ESPAÑA https://www.cnmc.es/expedientes/c129522

- 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.
- 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.

25. 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. This was considered again sufficient to ensure actual and potential competition to discipline the merged entity to keep competitive prices and quality.

4.3. Measurement of advertising efficiency

26. The merger *Ebiquity/Mediapath*[8] affected the measurement of the efficiency of advertising investment in TV and in some digital media (with market shares of the joint entity of around 80%-100% and overlaps of 0-20%).

27. The operation was cleared in November of 2023 in phase I, with commitments to prevent exclusivity in services and data-sharing. The CNMC considered that this was sufficient to allay the risks of price increases, taking some mitigating factors into account: some countervailing power by big advertisers, lack of need for sophisticated knowledge or investment to enter the market, the absence of a big change as a result of the operation (the acquired company was not a very dynamic competitor). etc.

5. CNMC's recent practical experience in antitrust

5.1. Intellectual property

28. The CNMC has conducted several investigations concerning collective intellectual property rights management organizations. In Spain, these collective management organizations[9] have often held a legal monopoly, historically managing the rights of

[8] C/1406/23: EBIQUITY/ MEDIAPATH https://www.cnmc.es/expedientes/c140623

[9] Currently, the Spanish Ministry of Culture has authorised the creation of 9 collective management organizations (five collecting societies for authors' intellectual property rights (Sociedad General de Autores y Editores (SGAE), Centro Español de Derechos Reprográficos (CEDRO), Visual, Entidad de Gestión de Artistas Plásticos (VEGAP), Derechos de Autor de Medios Audiovisuales (DAMA)

multiple right holders within specific industries. These sectors typically include music, audiovisual productions, literature, and visual arts, among others, allowing the organizations to serve as intermediaries for right management in these fields.

29. The most recent decision dates from 2024, DAMA-UNISON RIGHTS VS SGAE[10]. SGAE is the main collecting society for songwriters, composers and music publishers in Spain, representing as well audiovisual authors such as directors and screenwriters. It was fined €6.4 million for an abuse of dominant position (violation of Article 2 of the Spanish Competition Act and Article 102 of TFEU).

30. The decision assesses SGAE's dominant position by evaluating market shares: the fact that such shares were in some cases above 90% was relevant in concluding the existence of a dominant position.

31. By contrast, in those markets in which, due to changes in market conditions, the share decreased to levels below 50%, dominance was no longer considered. In this regard, SGAE had not held a dominant position in audiovisual markets since 2018, especially due to the fact that there was a strong competitor (DAMA) from 2018 onwards.

32. The CNMC pointed out that the significant shift in market shares in favour of DAMA did not reflect the typical dynamics of these markets but rather stemmed from a specific, exceptional circumstance: namely the decision by foreign collective management organizations to change the national entity with which they established reciprocity agreements. This resulted in a transfer of a substantial number of audiovisual authors from one management organization to another, something rather unusual.

33. Even in markets where market shares were high, further analysis was needed to conclude the existence of a dominant position: the likelihood of entry by potential competitors or the potential for future expansion by existing competitors, as well as the presence of entry barriers and the countervailing buyer power.

34. The lack of sufficient countervailing power is felt both upstream (one or few collecting societies deal with thousands of authors) and downstream (in this case, affected users were radios and televisions, and although demand is indeed more concentrated than upstream demand, given that the number of audiovisual or radio communication service providers is significantly smaller than that of authors, their negotiating power is constrained by the crucial role that the use of the musical and/or audiovisual repertoire plays in their operations). This insufficient countervailing power is also due to the lack of alternatives explained by economic factors (direct negotiation is not efficient for authors and users and most competitors are not developed enough to be a viable alternative) and legal issues (some rights have to be collectively negotiated in Spain, as mentioned above).

35. Regarding barriers to entry, in sectors subject to intellectual property rights, they arise mainly from legal barriers, network effects, and economies of scale and scope.

- Firstly, in terms of legal barriers, it is worth mentioning in Spain some rights are reserved for specific entities and there are "mandatory collective management

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and Sociedad Española de Derechos de Autor (SEDA)); two performing artists' copyright collecting societies (Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) and Artistas Intérpretes, Sociedad de Gestión (AISGE)); and two producers' copyright collecting societies (Asociación de Gestión de Derechos Intelectuales (AGEDI) and Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA)).

[10] S/0641/18 DAMA-UNISON RIGHTS VS SGAE https://www.cnmc.es/expedientes/s064118

rights", for which the Spanish sectorial legislation of intellectual property[11] commands exclusive management through an intellectual property right entity. There are other specific legal requirements (the compulsory need of authorisation by the Ministry of Culture and the requisite of non-profit entity status).

- Secondly, and as far as network effects are concerned, the wider the repertoire, the higher the ability to attract users upstream; the higher the userbase, the easier to attract authors. Given that SGAE is the historical operator in these markets, with a particularly significant share in the music sector, the decision points out that it is the main beneficiary of these network effects, further strengthening its dominance.
- Thirdly, there are also scale economies (decreasing average costs the wider the repertoire), which primarily arise from costs related to activities like authorization, monitoring, and collection. New entrants face a cost disadvantage compared to established entities, whose lower average costs reduce the incentives for rights holders to switch. As the volume of managed repertoire grows, the likelihood of new competitors entering decreases, making these economies of scale a barrier to entry. Additionally, entities reduce transaction and negotiation costs for right holders.
- Finally, regarding economies of scope, the fact that SGAE operates in both music and audiovisual sectors provides advantages such as shared fixed costs and lower transaction costs related to negotiation. In the music sector, it holds a dominant position, giving it a comparative advantage in the audiovisual sector despite the competitive pressure exerted by DAMA. Managing one type of right reduces costs compared to new entrants.

5.2. Online travel agencies (OTAs) intermediation services for hotels

36. In July 2024, BOOKING.COM[12] was sanctioned with a fine of €413.2 million for abusing its dominant position since 2019, in breach of Article 2 of Spain's Competition Act and Article 102 of the TFEU. In addition to the financial penalty, the company is subject to binding behavioural obligations for 10 years.

37. The CNMC based the assessment of its dominant position on market shares, relevant barriers to entry and insufficient countervailing power.

38. In the market for online booking intermediation services to hotels by OTAs in Spain, BOOKING.COM´s market share ranged between 70% and 90% during the period from 2019 to 2022, measured by the commissions charged to hotels. Similar trends were observed in both the amount of bookings and the number of bookings managed. Moreover, BOOKING.COM´s market position was further reinforced during the COVID-19 pandemics, and even the entry of a financially strong competitor like Airbnb did not significantly erode its dominance. The CNMC also pointed out in the Decision that these high market shares were relevant not only from a static point of view, reflecting the current situation, but also from a dynamic perspective. The maintained or even reinforced share over recent years—regardless of changing market conditions— was considered a clear reflection of the fact that that these shares pointed to an entrenched dominance.

[11] Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia

[12] S/0005/21 BOOKING https://www.cnmc.es/expedientes/s000521

39. The assessment of dominance required a structural analysis of additional critical factors such as the likelihood of entry by potential competitors, the future growth of existing competitors, entry and expansion barriers, and the countervailing bargaining power of the demand.

40. Against this background, regarding the assessment of barriers to entry and expansion, the CNMC concluded these were relevant due to the main characteristics of the market for online booking intermediation services.

- Firstly, indirect network effects play a crucial role in this market, and they arise due to the fact that the increase in one group of users (hotels), makes the platform more attractive to the other group, (end customers), and vice versa. This interdependence leads to market concentration, as new entrants need to reach a critical mass of both hotels and customers for these network effects to come into play. Taking into consideration the fact that BOOKING.COM holds the largest market share, it benefits the most from these network effects, reinforcing its dominant position.
- Secondly, the role of platform-generated data further amplified these network effects. Platforms like BOOKING.COM collect vast amounts of data from both hotels and customers, allowing them to improve services through better user recommendations and transaction matching, and as the user base grows, so does the platform's knowledge of preferences, increasing loyalty and making the platform even more appealing.
- Thirdly, the market is shaped by high fixed marketing costs and advantages for first movers. Established players like BOOKING.COM highly invest in brand development and online search advertising, with BOOKING.COM spending billions annually. This creates a significant barrier for new entrants, as they would need to incur substantial advertising costs to gain visibility and compete with the established leaders. These marketing expenses are somehow a fixed cost that new entrants must overcome. BOOKING.COM, with its strong brand recognition, requires less ongoing investment to maintain its position compared to competitors trying to catch up, further solidifying its dominant status.

41. Finally, regarding the assessment of countervailing power, the CNMC concluded that the lack of it was due to the fragmented demand among hotels in Spain. The market comprises a significant number of small and independent hotels, that are increasingly reliant on online travel agencies (OTAs) for distribution. This reliance underscores the limited bargaining power of individual hotels against a dominant platform like BOOKING.COM.

5.3. Online marketplaces and electronic devices

42. In July 2023, APPLE and AMAZON[13] were sanctioned with a respective fine of €143.6 million and €50.5 million for an anticompetitive agreement to limit the sale of Apple products in the Amazon marketplace (together with other advertising and marketing restrictions), in breach of Article 1 of Spain's Competition Act and Article 101 of the TFEU.

[13] S/0013/21 https://www.cnmc.es/expedientes/s001321

43. The analysis of market shares in this case was relevant to conclude that even if the European Vertical Block Exemption Regulation (VBER[14]) had been applicable (*quod non*, because the provisions did not relate to the conditions under which the parties may purchase, sell or resell the goods or services), the agreement between Amazon and Apple would have not taken advantage of the exemption owing to, among other reasons, the fact that market shares of Apple and Amazon were above 30% in the affected markets. In this type of cases, the VBER establishes this structural presumption that when market shares are high, some specific conducts may have a more restrictive impact on competition, warranting a case-by-case analysis (and not an exemption).

6. Main conclusions

44. The Spanish competition framework is flexible enough to address various market challenges and risks to competition. This contribution has shown, when describing in the general framework and specific cases, that the authority may make use of structural presumptions (such as increased concentration following a merger as an indicator of potential competitive harm or using market shares to signal dominance or market power) but never in isolation and always confronting those presumptions with a case-by-case assessment.

[14] Regulation 330/2010. The new 2022 VBER (Regulation (EU) 2022/720) repealed the previous version of the VBER (Regulation (EU) 330/2010), providing for a transitional period of one year to allow vertical agreements in force on 31 May 2022