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Global Practice Guides

Merger Control

Spain – Trends & Developments

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Pérez-Llorca

2016

SPAIN

TRENDS & DEVELOPMENTS:

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The ‘Trends & Developments’ sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Trends & Developments

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Pérez-Llorca competition and EU Law practice advises both national and international companies in the various different fields of this area of law, including disciplinary proceedings initiated by the competition authorities to investigate collusive arrangements and abuses of dominance.

The team has a particular expertise in merger control work, in which it collaborates closely with the Corporate team. Over the years, the team's work has been carried out in all of the key sectors of the Spanish economy, including banking, finance, telecommunications, infrastructure and energy.

Authors



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abuses of dominant position and all regulatory aspects concerning merger control. He acts in administrative proceedings before the Spanish and EU Competition authorities, as well as before the regulatory bodies of various different sectors in Spain (the CMT & the CNE in particular). He works closely with the Corporate team in analysing and advising companies on all kinds of mergers, as well as on the drafting and notification, if applicable, of commercial agreements. His most recent work includes, among others, submitting claims against abuse of dominant position in various sectors, as well as advising lawyers on prominent merger transactions. Armengol is the

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Jaime de Blas is a senior associate in the competition and EU law practice. He is a specialist in EU and Competition Law. He advises on restrictive agreements, abuse of dominant positions, economic mergers and state subsidies. He defends clients in the framework of sanctioning proceedings before the National Commission on Markets and Competition ("CNMC") as well as before administrative bodies. Likewise, he elaborates compliance programmes.

Merger between Telecinco and Cuatro cleared subject to commitments: Telecinco is under investigation by the CNMC for potential infringements of these commitments

Merger control filing: commitments

Spanish competition law gives the Spanish Competition Authority (Comisión Nacional de los Mercados y la Competencia, the CNMC) far-reaching powers to investigate, decide on and control the commercial conducts that are able to affect the competitive structure of the market. Amongst these powers, the CNMC is entitled to assess and control concentrations that may affect effective competition in a given market.

The Spanish Competition Act (Ley 15/2007, de 3 de julio, de Defensa de la Competencia, the LDC) sets out two different merger control thresholds: a market share threshold and a turnover threshold. If a transaction gives rise to an acquisition or an increase in a market share that is equal to

or higher than 30% of a relevant product or service market in Spain (market share threshold), and/or if the parties to the transaction have an aggregate turnover in Spain exceeding EUR240 million and an individual turnover in Spain exceeding EUR60 million (turnover threshold), the CNMC must be notified of the transaction.

The Competition Directorate of the CNMC (the investigatory body) will carry out an assessment of the transaction in order to ensure that effective competition in the market or markets concerned will not be hampered as a result of the transaction. Once the transaction has been assessed, the Competition Directorate will prepare a report and a proposed decision to submit to the Council of the CNMC (the decision-making body), who will be in charge of adopting the final decision on the transaction.

The Council of the CNMC may decide to clear the concentration in Phase I, in Phase II or to prohibit it. Regarding each of these outcomes, the Council is subject to a maximum

deadline within each phase to make a decision on the transaction. In particular, the LDC establishes a maximum deadline of one month from the date of formal filing to clear the transaction in Phase I and an additional two-month maximum deadline from the date of the opening of Phase II to decide in Phase II. It is worth noting that in the case of deciding in Phase II, the maximum deadline may be extended by 15 additional days if the Economy Minister intervenes, as well as by one additional month when the transaction is also assessed by the Ministries Council.

Regarding clearance, the transaction may be cleared unconditionally or be subject to the fulfilment of certain commitments, either in Phase I or in Phase II. If the Council concludes that the transaction could significantly hamper effective competition in the affected market or markets by creating or strengthening a dominant position, the parties are entitled to propose certain commitments that could amend or eliminate the potential competition concerns identified by the authority.

Commitments may be proposed either in Phase I or in Phase II, in which case the maximum deadlines to decide on the transaction would be extended by ten or 15 additional days, respectively.

The parties to a transaction can propose two different types of commitments: behavioural and/or structural commitments. Behavioural commitments would consist of either carrying out or ceasing to carry out a particular action, such as terminating an agreement, refraining from increasing prices within a particular timeframe or refraining from selling a certain product. Structural commitments would consist of carrying out a divestment or assignment of an asset or business activity, or providing access to an essential facility.

Structural commitments are usually more burdensome than behavioural commitments. In this regard, the Spanish Supreme Court (Tribunal Supremo) stated in its ruling dated 7 November 2005 that *“a structural commitment should not prevail over a behavioural commitment.”* According to the Supreme Court, structural commitments are not of a *“preferential nature”* but are an *“alternative”* to behavioural commitments, and *“the authorities are entitled to choose one type of commitment or the other, with nothing stopping them from establishing behavioural commitments if they consider them to be more appropriate, thereby additionally benefiting the companies as they will be less affected.”*

Commitments proposed by the parties to a transaction must clearly resolve the competition concerns identified; be complete and effective in amending or eliminating said competition concerns; be easily and quickly implemented; and be easily monitored by the CNMC.

In line with the final requirement indicated above, in order to verify compliance with the commitments agreed between the parties and the CNMC, the CNMC is given far-reaching powers to monitor the fulfilment of these commitments, to initiate antitrust proceedings in case of a breach of these commitments (which qualifies as a very serious infringement), and ultimately to impose heavy fines on the infringing parties.

Merger Telecinco/Cuatro: transaction cleared in phase II subject to commitments

On 28 October 2010, the CNMC cleared the transaction comprising the acquisition by Gestevisión Telecinco, S.A. (Telecinco) of exclusive control over Sociedad General de Televisión Cuatro, S.A.U. (Cuatro), by means of the acquisition of its entire share capital.

The CNMC identified its main concerns regarding competition in the television advertising market and in the market for the acquisition of audio-visual content. In this regard, the transaction was cleared in Phase II, subject to the fulfilment by Telecinco of the commitments indicated below, which were included in an action plan outlining the implementation of said commitments.

The first block of commitments addressed the television advertising market and primarily consisted of the following commitments: (i) not to sell advertising for the channels Telecinco and Cuatro through a single commercial package; and (ii) not to apply tied-sales to advertisers regarding its various television advertising commercial packages.

The second block of commitments was aimed at limiting Telecinco's power in the free-to-air television market and at safeguarding effective competition in the television advertising market, basically consisting of: (i) not extending its offer of free-to-air television channels by leasing DTT channels from third-party operators; and (ii) not blocking quality enhancements on television channels that could potentially be launched by its competitors, channels Net and La Sexta, with which the resulting entity shares DTT multiplexes.

Finally, a third block of commitments addressed counteracting any potential vertical effects that could arise from the increase in Telecinco's power as a buyer of audio-visual content. These commitments included: (i) limiting the duration of its exclusive content acquisition contracts to three years; and (ii) restricting its ability to exclude national television producers as suppliers of programmes to free-to-air television competitors.

These commitments were agreed for an initial period of three years, which could be extended by two additional years if the CNMC considered that the potential competition concerns arising from the transaction had not been amended or

eliminated. In fact, on 21 February 2014, the CNMC decided to extend the initial three-year period by two more years.

Monitoring activity: fines imposed on Telecinco

After the conditional clearance of the transaction in Phase II, subject to the commitments described above, the CNMC exercised its power in monitoring the fulfilment of these commitments and consequently fined Telecinco several times for infringing them.

In particular, the CNMC has fined Telecinco twice and is currently investigating the company for potential new infringements.

As previously indicated, in order to implement the commitments agreed on with the CNMC, Telecinco was required to provide the Authority with an action plan explaining in detail each of the commitments within the month following the clearance decision. Telecinco did not comply with this obligation and was required by the CNMC to submit the action plan. This was considered to be a very serious infringement under Article 62.4 c) of the LDC and Telecinco was fined.

One year later, the CNMC investigated Telecinco for the potential infringement of certain commitments and concluded that it had indeed infringed said commitments. In particular, the CNMC realised that the majority of the advertisers in the market had acquired advertisements simultaneously on both channels, and that a number of advertisers that previously advertised via Telecinco were also doing so through Cuatro after the transaction.

Given that the concentration strengthened Telecinco's power in the market for the commercialisation of television advertising spaces, allowing the company to impose commercial conditions on the demand for advertising spaces — result-

ing in less freedom of choice — the CNMC concluded that the infringement of the commitments impeded the pursued outcome and allowed Telecinco to benefit from a stronger market position. As a consequence, the CNMC fined Telecinco up to EUR15.6 million.

Furthermore, in March 2015, the CNMC stated that they are currently investigating Telecinco for a potential new infringement of the commitment not to apply tied-sales to the advertisers of its various television advertising commercial packages. In particular, the CNMC understands that Telecinco links the marketing of the channels Telecinco and Cuatro by applying a rebates policy subject to obtaining a certain global investment share in the company's group of channels.

Although this information does not prejudice the outcome of the investigation itself, if the CNMC concludes that Telecinco has infringed the commitments, Telecinco would be considered liable for a very serious infringement and a new fine would be levied.

Conclusion

Commitments are a positive solution for companies in order to resolve any concerns regarding competition that may arise from particular concentrations.

However, when a transaction is cleared subject to the fulfilment of certain commitments, the acquirer of the transaction must carefully observe its compliance of these commitments during the period agreed with the CNMC. In order to ensure this, the LDC grants the CNMC with far-reaching powers to investigate any potential infringement and the companies may be held liable for having committed a very serious infringement, resulting in a heavy fine.

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