What notable recent developments, trends or notable recent mergers or proposed mergers have been reviewed by the regulatory authority in Spain and why is it notable? Are there any statistics published on annual merger reviews conducted in Spain?

by Martínez Lage, Allendesalazar & Brokelmann Abogados

www.mlab-abogados.com

The Spanish Competition Authority (CNMC) presents statistics on its merger control activity in its annual report, which is published on its website, usually on a yearly basis. The 2018 report is yet to be published, although the publication of daily information on its website on its activity in general, and regarding merger control in particular, already give a hint of the 2018 developments and trends.

Until 2017, the number of transactions notified to the CNMC had experienced a steady upward trend, from 59 operations notified in 2013 to 104 in 2016. In 2017, however, there was a slight dip, down to 94 operations notified to the CNMC. In 2018, with official statistics still to be released, it would seem that 83 operations have been notified to the CNMC, thus continuing with the downward trend of 2017.

In another appreciable trend, over the years, the number of transactions filed using the short form has clearly outnumbered the transactions filed with the ordinary form, with two thirds of the transactions in the period 2013-2017 being filed using the short form. This form is used in cases in which it is unlikely for the notified concentration to raise competition concerns, and, thus, less information is required from the notifying parties. The fee to be paid for the analysis of the operation is also reduced and not linked to the parties' turnover.

A relevant feature of the Spanish merger control regime is the existence of a market share threshold which is alternative to the turnover threshold. In that respect, it is interesting to note that in the same 2013-2017 period, 66% of the transactions were filed because the market share threshold was met, while only 25% where filed due to the turnover threshold (in the remaining 10% of cases both thresholds were exceeded).

CNMC officials have recently praised the market share threshold, which has allowed, for instance, the European Commission —through the referral mechanism of the EU Merger Regulation— to review mergers such as Facebook/Whatsapp or Apple/Shazam which did not meet the national turnover threshold but did exceed the market share threshold. The possibility of formally consulting the CNMC on its approach to market definition to help the parties to a merger determine whether a filing is mandatory reduces the legal uncertainty which may be attached to thresholds based on market shares. On the contrary, the adoption of a threshold based on the value of the transaction, as in Germany, does not seem to be an objective of the Spanish legislator for the time being.

In the last two years, as previously, the vast majority of mergers were unconditionally cleared in Phase I, and only three cases in 2017 and four in 2018 were subject to remedies in Phase I.

Phase-II cases are rare before the CNMC, with none in 2017 and only one Phase-II investigation opened at the end of 2018 (in the hospital sector).

No prohibition decisions have been issued in the last years. In fact, the CNMC, which was created in October 2013, has never prohibited a transaction. Its immediate predecessor, the Comisión Nacional de la Competencia (CNC), created in 2007, never prohibited a transaction either, although the conditions imposed in certain cases led the parties to desist from the transaction.

Regarding remedies, the CNMC has recently not shown an aversion to behavioural remedies, in contrast to other authorities that favour divestment commitments which are considered easier to monitor. The use of behavioural remedies by the CNMC in Phase I clearances may indicate that the Spanish competition authority is willing to address proportionality concerns even if they require an ex post monitoring by the authority. For instance, at the beginning of 2018, the CNMC cleared with remedies the concentration of the three card payment systems operating in Spain (Servired, Sistema 4B and Euro 6000), of which practically all the banks in Spain were shareholders. The remedies were aimed at ensuring competition in the payment sector in Spain and were established with a duration of five years initially, which may be extended for another three years. They were related to the access to the new payment system, as well as to the prices to be applied both to the core services and to the optional services.

As to sectors, three out of seven Phase-I remedies decisions were issued in acquisitions in the petrol station sector, with the CNMC looking down into the detail of locally defined markets and requiring either divestments or the termination of supply contracts. Local markets are also at the heart of the analysis in the only Phase-II investigation opened in the last two years by the CNMC, which has yet to be finalized and concerns the hospital sector.

Other sectors which warranted remedies' decisions in Phase I were the manufacturing industry (from medical devices to rail turnouts) and the maritime transport sector, regarding in particular the route between the mainland and other Spanish territories (the Canary Islands and Melilla), showing again the relevance of geographical market definition.

The CNMC closely monitors compliance with the remedies and has imposed fines in the past on companies which failed to comply with the conditions imposed in their merger clearances. Thus, two television operators have been fined with several million euros for failing to comply with the conditions imposed in the respective clearances of their acquisitions of competing TV operators, with one of them being fined a second time for a new failure to comply with the conditions.

As to trends regarding fines imposed in the field of merger control, it is worth noting that, in number, most of the fines in this field are for failure to notify the transaction (gun-jumping). In some of these cases, it was the market definition by the parties which led them to overlook a notification which was mandatory based on the market share threshold. However, fines for failure to notify have been, in general, moderate in their amounts, at least compared to the fines lately imposed by the European Commission for gun-jumping.

For information contact Helmut Brokelmann (Managing Partner) on T: +3491 426 4470 or hbrokelmann@mlab-abogados.com