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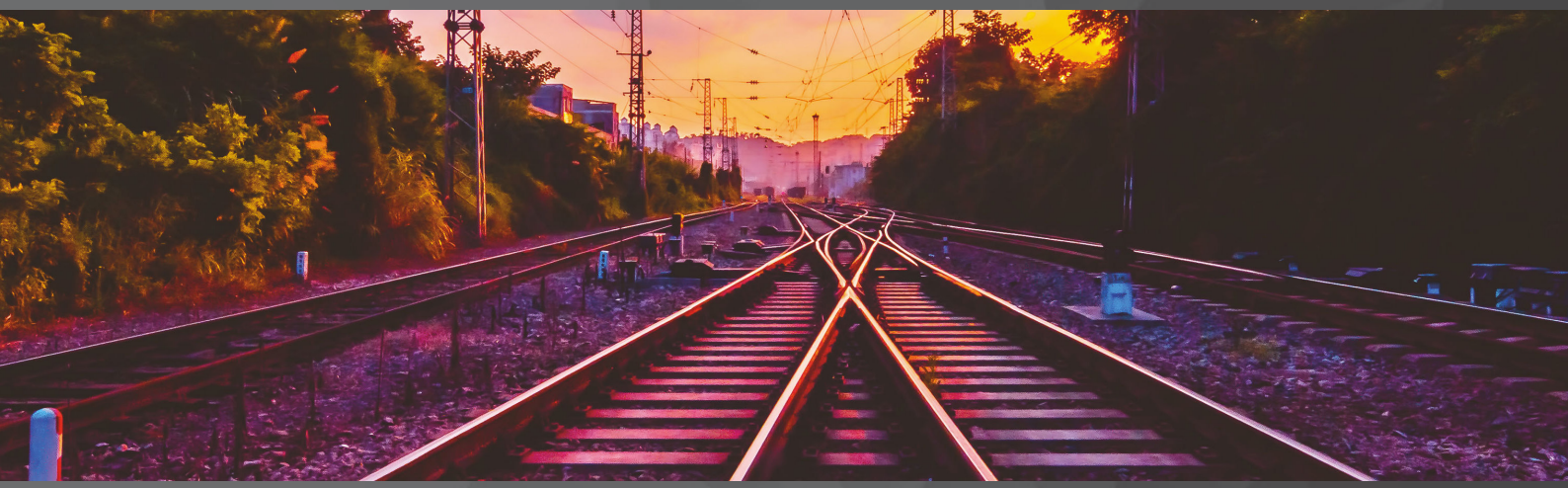

Merger Control 2020

A practical cross-border insight into merger control issues

16th Edition

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Foreword

The Spanish merger control regime is regulated by Law 15/2007 of 3 July on Defence of Competition (the "Law 15/2007" or the "Spanish Competition Act").

The Spanish Competition Act was enacted in light of the changes introduced at EU level, particularly by Regulation 1/2003 and Regulation 139/2004 on Merger Control (the "EUMR").

Additionally, the Spanish Government adopted Royal Decree 261/2008, on the implementation of the Spanish Competition Act (the "Royal Decree"), which entered into force on 28 February 2008, further developing some of the provisions of the Spanish Competition Act.

As will be explained in question 2.4 below, on 6 March 2011 the Sustainable Economy Act 2/2011 entered into force, modifying the Spanish Competition Act in so far as it included a *de minimis* rule which provides for the exception of notifying certain concentrations with a market share below 50%, provided the Spanish turnover of the target was lower than €10 million in the previous financial year.

In October 2011, the Spanish Competition Authority (the "CNMC") published guidelines on the abbreviated procedure for notifying concentrations under Article 56 of the Spanish Competition Act and Article 57 of the Royal Decree. These guidelines were replaced in November 2015 in order to expand the scope of the use of short form notifications to concentrations which, due to the requirement to obtain other regulatory clearances, required a full-form notification.

Law 39/2010 on the General State Budget for 2011 amended Article 23 of Law 15/2007, relating to merger filing fees (see the answer to question 3.10).

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

Until now, the CNMC has been the administrative body in charge of assessing concentrations under the Spanish Competition Act. The CNMC is an autonomous authority organically and functionally independent from the Government but attached to the Ministry for Economy and Business.

On 5 June 2013, the Spanish Government enacted a new Law 3/2013 of 4 June, establishing the new Markets and Competition National Commission (the *Comisión Nacional de los Mercados y la Competencia* ("CNMC")). The new Authority merged the Spanish Competition Authority (*Comisión Nacional de la Competencia* ("CNC")) with the six Spanish supervisory sector regulators (with the exception of the *Comisión Nacional del Mercado de Valores* ("CNMV"), or National Securities Market Commission).

However, it is worth noting that the substantive provisions of the Competition Act were not affected by such law, but only by the institutional organisation (see the answer to question 1.2).

The CNMC consists of the chairman, the Council, and four different investigation directorates responsible for investigations and the instruction of the cases in different fields, namely: a Directorate for Competition; a Directorate for Telecommunications and the Audio-visual sector; a Directorate for Energy; and a Directorate for Transport and the Postal sector.

In turn, the Council is the decision-making body and is composed of two chambers; namely, a chamber dealing with competition-related matters, and a chamber dealing with regulatory matters. The chamber for competition matters is chaired by the chairman and is composed of four additional members.

Phase I and Phase II merger investigations are conducted by the Directorate for Competition, and the Council adopts final decisions upon recommendation (*informe propuesta*) of the Directorate for Investigation.

The Government may only intervene under exceptional circumstances in respect of negative or conditional Phase II decisions. The Government may not intervene in respect of Phase I decisions, even if they are conditional (see the answer to question 5.1 below). Under Law 15/2007, the Government has only once exercised its powers to intervene in a Phase II procedure, for instance in case C/0432/12 *Antena 3/La Sexta*, by decision of the Council of Ministers on 27 August 2012 (see the answer to question 5.1 below).

Contrary to other antitrust provisions, such as the prohibition of anti-competitive agreements and the abuse of a dominant position, regional antitrust authorities are not competent in the field of merger control. However, Law 15/2007 aims to increase the participation of these authorities (see the answer to question 3.6 below).

Furthermore, the supervisory chamber of the Council which deals with regulatory matters has consulting duties when a merger occurs affecting a field within its jurisdiction (see the answer to question 1.4 below).

In general terms, the CNMC enjoys strong independence from the Government. However, some changes are expected to be conducted in this regard, to fulfil a complete autonomy (see question 1.2).

1.2 What is the merger legislation?

The merger control provisions are set out in Law 15/2007. In addition, the Regulation on the Defence of Competition implemented by Royal Decree 261/2008 develops the provisions of Law 15/2007 in respect of notification thresholds, calculation of market share and turnover, evaluation of economic efficiencies following a merger operation and certain procedural aspects.

Moreover, it is worth mentioning the existence of the following relevant legislation: (i) Law 6/2007 and Royal Decree 1066/2007 of 27 July, which set out specific rules for mergers that are implemented through takeover bids; (ii) Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations; (iii) Royal Decree 2295/2004, of 10 December, on the application in Spain of EC competition law, which is relevant for the application of Articles 4, 9 and 22 of the EUMR in Spain; and (iv) the new guidelines of November 2015 on the abbreviated procedure for notification of mergers under Article 56 of the LDC which replace the guidelines of September 2011.

In July 2019 an open consultation was opened by the Ministry of Economy and Business to start the transposition of the Directive (EU) 2019/1 (ECN+) to national law. Since most of the legal provisions required by the Directive are already included in the Competition Act, no major amendments will be needed, particularly regarding merger control (see question 3.6).

1.3 Is there any other relevant legislation for foreign mergers?

Foreign mergers are subject to the same rules as Spanish mergers. Royal Decree 664/1999 of 23 April on Foreign Investments lays down some specific rules, including an obligation to declare foreign investments in Spain (which can be done before or after the investment is made, depending on the origin of the investor) and special rules in the case of activities directly related to national defence.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Chamber of the Council which deals with regulatory matters must issue non-binding reports in the event that a concentration involves any of the regulatory sectors of its jurisdiction, such as energy.

After the non-binding report is issued, in the event of a discrepancy between the Council's chambers for competition and for regulatory matters, the matter will be discussed and decided during a plenary session of the Council. The submission of this non-binding report does not suspend the maximum time limit for obtaining a clearance.

In turn, in the event that the concentration involves a regulated sector managed by a supervisory regulator not integrated in the CNMC (for instance, regarding banking or gambling issues), the submission of the non-binding report does suspend the time limit for obtaining clearance.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The concept of concentration was slightly amended by Law 15/2007, in particular with regard to the definition of joint ventures that are subject to merger control (see the answer to question 2.2). A concentration occurs when there is a change in control on a lasting basis in all or part of an undertaking or undertakings, as a result of:

a) the merger of two or more previously independent undertakings;
b) the acquisition by one undertaking of control over all or part of one or more other undertakings; or
c) the creation of a joint venture and, in general, the acquisition of joint control over one or more undertakings that perform all the functions of an autonomous economic entity on a lasting basis.

As also the case before the European Commission, parties involved in a transaction may submit a formal consultation to the CNMC in order to confirm that the transaction is deemed to be a concentration.

Control shall be constituted by contracts, rights, or any other means that confer the possibility of exercising decisive influence on an undertaking; in particular, by:

a) ownership or the right to use all or part of an undertaking's assets; and
b) contracts, rights or any other means that confer decisive influence over the composition, voting or decisions of an undertaking's bodies.

In addition, a company is presumed to be controlled by another when the latter: (i) owns more than half of the voting rights; (ii) has the power to appoint or dismiss more than half of the members of the administrative board; (iii) owns more than half of the voting rights through shareholders' agreements; and (iv) has appointed more than half of the members of the administration during the last two financial years.

The mere redistribution of securities or assets among undertakings belonging to the same group, and situations similar to those described in paragraph 5 of Article 3 of the EUMR, are not deemed to be concentrations.

By way of example, the Spanish Competition Authority dismissed case C/0830/17 *HYTERA/SEPURA* as it found that the Transaction was not caught by Merger Control legislation and, therefore, it was not subject to notification, since the thresholds were not met.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Minority shareholder/s may acquire sole or joint control of one undertaking or several undertakings through different means.

On a positive basis, a minority shareholding amounts to a merger when the acquisition leads to a situation which confers the possibility of determining the strategic commercial behaviour of an undertaking:

- where specific rights are attached to this shareholding (i.e. preferential shares granting the right to appoint a majority of the board or conferring a majority of votes of the board);
- minority shareholders have a practical majority at shareholders' meetings or of the board (i.e. where remaining shares are widely fragmented and dispersed); and/or
- where several minority shareholders agree to act in the same way (linked either by strong common interests or by binding agreements).

On a negative basis, a minority shareholding amounts to a merger when certain veto rights are granted, making it possible to block certain strategic decisions (i.e. the appointment of management personnel, business plans, budget) or where a supermajority is required for strategic decisions.

2.3 Are joint ventures subject to merger control?

As explained in the answer to question 2.1, Law 15/2007 is aligned with the EUMR. Hence, only full-function joint ventures that meet the relevant thresholds are subject to merger control provisions. Nowadays, both cooperative and concentrative joint ventures are subject to the merger control provisions, provided that the joint venture is a full-function operating entity.

2.4 What are the jurisdictional thresholds for application of merger control?

It is important to note that there are two jurisdictional thresholds under Spanish law: (1) a market share threshold; and (2) a turnover threshold. A concentration shall be notified before the CNMC provided that: (1) the thresholds established by the EUMR are not met; and (2) any of the market share or turnover threshold is met.

As such, a concentration shall be notified whenever one of the two following thresholds is met:

a) a market share of 30% or more in Spain (or if a narrower geographic market) is acquired or increases as a result of the concentration; or

b) the aggregate turnover of the companies with activities in Spain exceeded €240 million during the last financial year, provided that the turnover of each of at least two entities in Spain exceeded €60 million.

According to the Spanish Competition Authority's most recent report, the number of notified transactions is taking a decrescent trend. In 2018, 83 operations were notified, against 94 in 2017 and the 106 in 2016. In fact, this change has shown that figures in this field are close to those in 2014 when 82 transactions were notified. At the time this chapter was being prepared, there has been 70 notifications in 2019, according to publicly available information.

The Government may amend these thresholds by Royal Decree. Furthermore, Law 15/2007 provides that the CNMC will review the thresholds every three years and may put forward a draft amendment.

In line with the above, the Sustainable Economy Act 2/2011 modifying Law 15/2007 introduced a *de minimis* exemption for the 30% market share criteria. Notification is exempted for those concentrations in which the total Spanish turnover of the acquired company or assets did not exceed €10 million in the last accounting year and the undertakings involved do not have an individual or joint market share higher than 50% on any of the affected markets.

As explained above, the parties to the merger can also submit a formal consultation prior to the notification to the CNMC in order to confirm that these thresholds are met.

It is worth noting that it is possible for the market share threshold to be exclusively met by the target company, thus benefiting from a simplified notification procedure (see the answer to question 3.9). In this regard, the sole acquisition of a 30% or higher market share is sufficient; for instance, when investment funds acquire sole or joint control over companies active in a market where they were not previously involved. By way of example, in case C-0212/10, an investment fund managed by the Morgan Stanley Group acquired several gas distribution assets of Gas Natural in the Madrid region. Even though neither the fund nor Morgan Stanley were present in the same market as the target, this concentration fell under the jurisdiction of the Spanish Authority.

In a 2016 case (case C/0751/16), the Hengtong Group was due to notify its acquisition of Cables de Comunicaciones Zaragoza, even though the Hengtong Group was not present in Spain and had only a very limited presence in the EEA. However, the Hengtong Group was considered to have acquired Cables de Comunicaciones Zaragoza's market share, which was higher than 30%.

When defining the relevant product market for the purpose of calculating the market share, attention should be paid to previous CNMC and/or European Commission decisions.

Aggregate turnover in Spain comprises the amounts earned by the undertakings involved during the previous financial year from the sale of products and the provisions of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value-added tax and other taxes directly related to turnover.

Furthermore, the aggregate turnover of an undertaking shall be calculated by adding up the turnover of its group companies. However, intra-group transactions or those carried out outside of Spain shall not be taken into account for turnover calculation purposes.

As provided by the Royal Decree and in line with EU Merger practice, in the case of an investment fund acquiring control, its turnover will be determined as the sum of the turnover; not only of its management companies, but also the turnover of the different investment funds – including all the controlled companies – managed by those investment companies.

In the case of joint control, the turnover of the latter will be allocated in equal parts to the controlling parents.

When the merger consists of the acquisition of an activity, business unit, establishment or a part of one or more companies, only the turnover of the party being acquired will be taken into account, irrespective of whether it is an independent legal entity.

Finally, financial entities and insurance companies are subject to rules which are similar to those contained in the EUMR.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, any concentration that falls within any of the thresholds set out in the answer to question 2.4 must be notified, even if there is no substantive overlap or any overlap at all (see the answer to question 2.4). Nevertheless, Law 15/2007 provides that transactions without any substantive overlap are candidates for analysis under a simplified procedure (see the answer to question 3.9). In fact in 2018 more than half of the notifications were presented using the short notification form. Particularly, 58 Transactions out of 83 followed the simplified procedure.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

There are no specific rules laid down for "foreign-to-foreign" transactions, and it could be found to be irrelevant if one or both of the parties does not have a subsidiary, a branch or any assets in Spain. Thresholds can be achieved simply on the basis of local sales. Consequently, and on this basis, where a transaction is deemed a concentration and where any of the thresholds are met, it is caught by merger control legislation. By way of example, a merger between the French banks in case C-0153/09 (*French Banque Fédérale des Banques Populares/Caisse d'Epargne*) was caught by the Spanish merger regime, since both companies had a joint venture in Spain. In the same regard, in case C-0219/10 *Procter & Gamble/Sara Lee*, the acquisition of the Sara Lee Air Care business by Procter & Gamble (both of the US) was caught by the Spanish merger regime, since both companies had business activities in Spain.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Pursuant to the one-stop shop principle, Spanish merger control does not apply to concentrations that have a European dimension under the EUMR. In the same regard, EUMR control does not apply to concentrations which meet the Spanish merger thresholds but not the EUMR thresholds.

However, the CNMC may refer to the European Commission a concentration which does not have a European dimension

either before notification at the request of the merging parties (on the basis of Article 4.5 of the EUMR) if it falls within the CNMC's jurisdiction and within the jurisdiction of at least two other Member States, or after notification at the request of the CNMC and/or the competition authorities of the other relevant Member States (Article 22 of the EUMR), provided that the concentration affects trade between Member States and threatens to significantly affect competition within the territory of Spain or the other States making the request. As an example of a pre-notification referral, one can mention the European Commission's decision in case M.6873 *Intercontinental Exchange/NYSE Euronext* and, as an example of a post-notification referral, the CNMC's decision in case C-0524/13, *Cemex España/Activos Holcim* on 24 October 2013.

Conversely, some concentrations which have a European dimension but affect competition in a market within Spain which presents all the characteristics of a distinct market may be referred back to the CNMC on a pre-notification basis at the request of the merging parties (Article 4.4 of the EUMR), on a post-notification basis at the request of the CNMC, or upon an invitation by the European Commission (Article 9 of the EUMR). Examples of referral made prior to notification at the request of the merging parties include the European Commission's decisions in cases M.7347 *DIA/GRUPO EL ARBOL*, M.7313 *Telefónica/DTS*, and M.5743 *Enagás/BBG* on 3 February 2010 and case M.6749 *Dia/Schlecker* on 27 November 2012. An example of a post-notification referral is the European Commission's decision in case *Shell España/Cepsa/Sis JV* on 23 November 2004. In 2018, in four transactions the merging parties requested to the CNMC the referral to the European Commission, as they considered the latter was a better placed authority to evaluate the cases, to which the CNMC agreed in every case.

In situations where the Spanish thresholds are met and in the absence of EU dimension thresholds being met, the case may be referred to the European Commission, provided that the concentration is reviewed under the national competition laws of three Member States; for instance, in case M.7217 *Facebook/WhatsApp*.

It is worth mentioning that within the internal structure of the CNMC, the Council's Chamber for Competition Matters is in charge of deciding on post-notification referrals, while the Directorate for Competition decides on pre-notification referrals.

The Council's Chamber for Competition may freely decide whether to request a post-notification referral or not. For instance, in June 2014, the CNMC did not request the European Commission for the referral of the transaction *Vodafone/Ono*; on the contrary, it requested twice (unsuccessfully) the referral of the transaction *Orange/Jazztel*, which was finally cleared by the EU Commission with conditions and obligations in May 2015.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

In line with the EUMR, when dealing with turnover calculations, Royal Decree 261/2008 states that when the same buyers and sellers participate in two or more mergers within a period of two years, those mergers will be considered as one, carried out at the time when the latest operation took place. By way of example, at the request of the notifying party, the Spanish Competition Authority decided to accumulate two transactions (case C-0084/08 *Tradia/Teledifusión Madrid* and C/0110/08 *Abertis/Axion*) into a single concentration procedure based on the close link between them.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

A concentration in terms of Law 15/2007 (see the answer to question 2.1) that falls within either of the two thresholds described in the answer to question 2.3 above must be notified before its execution/completion. Spanish law does not have a specific deadline for notification. Nevertheless, the CNMC may request that the parties notify within a particular deadline (see the answer to question 3.3).

An exception to this general rule is a concentration implemented through a takeover bid under Spanish takeover law. At the latest, the notification must be filed within five days of the submission of an authorisation request to the National Securities Commission, or *Comisión Nacional del Mercado de Valores* ("CNMV"), although it can be notified before. If this deadline is not respected, a fine of up to 1% of the turnover may be imposed.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Whenever a concentration falls within any of the thresholds set out in the answer to question 2.3 it must be notified, unless: (i) the concentration has a European dimension; or (ii) the CNMC decides to refer the case to the European Commission on the basis of the EUMR provisions (see the answer to question 2.7).

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Risks for failure to notify are:

- In the event that a concentration meeting the jurisdictional thresholds is not filed, the CNMC may request the parties to notify within 20 days of its request. In this case, the parties will not benefit from tacit authorisation (see the answer to question 3.6). If the parties do not notify pursuant to the CNMC request: (i) the Directorate for Competition may initiate an investigation of its own accord; (ii) a periodic penalty of up to €12,000 for each day the filing has been delayed may be imposed; and (iii) a fine of up to 1% of the turnover of the preceding year to the fine of the responsible undertaking may be imposed. If the parties notify after the deadline for notification imposed by the CNMC, an additional fine of up to 1% of the turnover can also be imposed on top of the periodic penalty.
- In the event that the parties have already implemented a concentration that fulfilled the merger thresholds, which was not notified, therefore infringing the obligation of suspension before clearance, the CNMC may impose a fine of up to 5% of the turnover.

In calculating fines which are based on a percentage of turnover, the following criteria are taken into account: dimension and characteristics of the affected market; the market share of the undertaking responsible for the breach; the scope and duration of the infringement; the effect of the infringement on consumers or other operators; the illegal benefits obtained as a result of the infringement; and any other aggravating or mitigating circumstances that may exist.

In 2015, the CNMC conducted 10 investigations against transactions that were implemented without notification. As an example, those fines have been imposed as a result of not filing a transaction:

- On 10 April 2012, the Spanish Competition Authority fined Grupo Isolux €89,700 for breaching its duty to notify its acquisition of Grupo T-Solar Global.
- On 24 October 2012, the Spanish Competition Authority fined Verifone €286,000 for completing its merger with Hypercom before its notification to the Spanish Competition Authority.
- On 5 November 2015, the Spanish Authority fined Masmovil €39,578 in case *SNC/DC/0038/15 Masmovil* for the failure to file prior to implementation of its acquisition of Xtra Telecom, Tecnologías Integrales and The Phone House.
- On 14 March 2017, the CNMC imposed a €20,000 fine over Consensur for implementing a merger prior to notification in the case SNC/DC/0074/16 *Consenur*. Consenur alleged that the transaction by which it had acquired exclusive control over Cathisa Medioambiente did not reach the thresholds and did not need to be notified.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

As a general rule, the concentration must not enter into effect until it has been cleared. In order to avoid delaying global completion, the parties may complete the transaction outside of Spain. The transaction will be completed in Spain once clearance has been obtained or the CNMC has granted a derogation from the obligation to suspend the operation pending clearance. Nevertheless, it is advisable to consult the authorities about this possibility.

In this respect, Law 15/2007 is more flexible, since a derogation from the obligation to suspend the operation may be granted by the Council at any time during the procedure. A reasoned request can be submitted at any time, including on the occasion of the presentation of the form.

By way of example, the CNMC agreed in the Case C/0802/16 *Daimler/Hailo/Mytaxi/Negocio Hailo* to lift partial suspension of the implementation of the Transaction, subject to the parties' commitment that Hailo's subsidiary in Spain would keep its commercial autonomy until the CNMC authorised the concentration.

3.5 At what stage in the transaction timetable can the notification be filed?

Notifications may be filed at any stage from the moment when there is a draft or agreement. A draft or agreement is deemed to exist where: (i) the parties agree on the operation, the form and the terms and conditions for its implementation (when the parties are undertakings, an agreement is deemed to exist when it has been adopted by the management body); (ii) in the case of public bids, as soon the Board of Directors has decided to launch a public bid and this has been publicly announced; or (iii) in the case of mergers, when the operation is accomplished in accordance with corporate legislation.

However, the Council of Competition is reluctant to clear a merger decision without receiving a signed copy of the agreements such as SPA, etc.

For the first time, the Royal Decree and the Provisional Guidelines formally recognise pre-notification contacts with the CNMC. The notifying party may submit a confidential draft form in order to clarify the formal or substantive aspects of the concentration, without it incurring the payment of any tax. According to the Royal Decree, the notifying parties should give "*a description of the concentration and of the parties involved, the turnover of the participant companies and information about the relevant markets including market shares*".

During these contacts, the notifying party may obtain a waiver for certain parts of the form and also a waiver for submission of non-confidential versions of certain documents. In addition to these informal pre-notification contacts, Law 15/2007 provides for the parties to submit a formal pre-notification consultation to the CNMC in order to confirm that: (i) the operation is considered to be a concentration; and (ii) the thresholds are met (see the answers to questions 2.1 and 2.3). According to the CNMC, in 2018, only nine notifications did not submit a pre-notification draft form before the official submission, against 74 which did.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Submitting a draft form of a notification and/or holding pre-notification discussions are not obligatory under the current law, although the relevant competition authorities encourage these practices as they may facilitate the progress of the procedure. The formal procedure will start with the notification. Deadlines will only start to run from the notification day if: (i) the form is delivered at the CNMC register; and (ii) all the sections of the form are completed and all the supporting documents are annexed (otherwise, the case-handler is entitled to adopt an inadmissibility decision). If the notification is incomplete, the notifying parties will be granted 10 days to submit the missing information. Failure to comply with this deadline will imply that the notifying party is deemed to have desisted from the notification, and the CNMC will thereby be entitled to terminate the procedure. Once a concentration is duly notified, the Directorate for Competition will prepare a report and a draft decision for the Council's chamber for competition matters. The Council may, on the basis of these documents, adopt a decision: (i) authorising the transaction (with or without conditions); (ii) referring the matter to the European Commission under Article 22 of the EUMR; (iii) declaring that the operation does not fall within Law 15/2007; or (iv) opening an in-depth investigation.

Phase I is one month long (subject to any extension of deadlines, see below), and if a Phase I decision is not adopted within the one-month period, the transaction is deemed authorised (tacit authorisation). However, an undertaking cannot benefit from tacit authorisation if it has not complied with the requests for information, it has not respected the deadline or the transaction has been notified at the CNMC's request.

In cases where the CNMC decides to open an in-depth investigation (Phase II), the Directorate for Competition must prepare a background note on the concentration, which will be notified to any natural or legal person that may be affected by the concentration, as well as the National Consumers Board, so that they can submit their observations within a 10-day period. As explained above, Law 15/2007 seeks to increase the intervention of regional authorities in merger control (see the answer to question 1.1). For this purpose, in Phase II cases with a significant impact on a particular region, the competition authorities from the affected region must issue a non-binding report within 20 days. Regional authorities will have access to a non-confidential version of the notification form and a briefing note drafted by the Directorate for Competition.

In addition, the Directorate for Competition will prepare a Statement of Objections that will be notified to the interested parties so that they may also submit observations within 10 days. An oral hearing must take place before the Council's chamber for competition matters, if the notifying parties so request. The

Council will make a decision within two months of the opening of proceedings (subject to any extension of deadlines, see below) (unless the transaction has been notified pursuant to the CNMC request or where the notifying parties have not submitted information within the prescribed time limit). The CNMC may, with or without conditions, prohibit the transaction. If the two-month deadline is not met by the Council, the transaction is deemed to be tacitly authorised.

It is worth mentioning that the transposition of the ECN+ Directive to national Law may have an impact on these statuary deadlines. Since other countries do not count with such provisions, the harmonisation may see the CNMC's time limits extended. However, how it is actually developed in Spain is yet to be seen, probably with an extension of the deadlines for particularly complex cases.

The Government may intervene in the case of a Phase II negative or conditional decision (please see the answer to question 5.1).

The one- and two-month deadlines of Phase I and II, respectively, can be suspended if:

- there are requests for information to any interested party; there is a request for information from third parties or any other public authority; or where cooperation with the European Commission or any other National Competition Authority is necessary;
- if remedies are offered in Phase I, the one-month period is extended by 10 days; if remedies are offered in Phase II, the two-month period is extended by 15 days; or
- exceptionally, this deadline can be extended under certain circumstances, provided that the original time limit is not exceeded.

According to the CNMC's latest annual memo, out of 83 notifications in 2018, 74 used the pre-notification and 58 were notified using the short-form procedure; 81 were cleared in Phase I without commitments, while four were with commitments. The CNMC did not open any Phase II proceedings in 2018.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

As a general rule, the concentration must not enter into effect until it has been cleared. Completion can only take place once clearance has been obtained or once the CNMC has granted a derogation from the obligation to suspend (see the answer to question 3.4). Furthermore, treatment of public bids is now aligned with the EUMR. Under Law 15/2007, the obligation to suspend does not prevent the implementation of a public bid, provided that: (i) the concentration is notified to the CNMC within five days of the request for authorisation being filed with the CNMV; and (ii) the acquirer does not exercise the voting rights attached to the securities, or does so only to maintain the full value of its investments based on a derogation granted by the CNMC.

As already explained in question 3.3, a fine of up to 5% of the turnover may be imposed by the CNMC when the parties implement a concentration that should have been previously notified if the merger thresholds would have been met, and therefore the parties have infringed the obligation to suspend completion before obtaining clearance by the CNMC.

3.8 Where notification is required, is there a prescribed format?

The form and supporting documents have to be submitted in Spanish. However, in some cases, with prior authorisation or upon request of the Directorate for Competition, a Spanish summary of some lengthy English documents may also be voluntarily presented. The Royal Decree contains a standard form in Annex I for ordinary notifications, and an abbreviated form in Annex II for a simplified procedure introduced by Law 15/2007 (see the answer to question 3.9). In the case of joint notification, one single form shall be submitted.

The following documents must also be submitted with the form: (i) a copy of the annual reports and management reports of the last financial year of all undertakings concerned; (ii) a copy of the contracts, agreements that related to the concentration including amendments introduced after the conclusion, and a copy of any authorisations filed with the Securities Commission in the case of a public bid; (iii) a copy of the receipt of payment of the fee; (iv) translation of documents in a foreign language or at least of the outstanding points; (v) a power of attorney if the notifying party(ies) are represented by lawyers; and (vi) a copy in electronic format of the formulary and all aforementioned documents. In line with EU practice, the power of attorney does not need to be notarised and/or apostilled if it has been executed abroad, but it has to be translated into Spanish and certified by a sworn translator if it is granted in a foreign language.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Law 15/2007 introduced a simplified procedure, which was used by 58 out of 83 mergers in 2018.

The following concentrations are candidates for analysis under the simplified procedure:

a) there are no product and geographical markets where the parties' activities overlap and they are not active in the same upstream or downstream market;
b) the concentration is *de minimis*. The Royal Decree establishes the criteria by which a concentration is deemed *de minimis*; this is understood to occur when: (i) the combined market share is below 15% in any market or if it is above 15% but below 30%, and the additional share resulting from the concentration is not higher than 2%; and (ii) the individual or combined market share is below 25% in any vertically related market;
c) a party is to acquire sole control of one or several undertakings over which it already has joint control; and
d) joint ventures carrying out only marginal activities in Spain (*with a turnover not higher than €6 million in Spain*) or where no actual or future activities are foreseen in Spain.

The CNMC is entitled to request that a concentration candidate for a simplified procedure is notified using the standard form. In such a case, deadlines will only start to run once the standard form is submitted.

In November 2015, the Spanish Competition Authority published new guidelines on the abbreviated procedure for notifying concentrations under Article 56 of Law 15/2007. These new guidelines allow transactions which need an approval by the regulatory authorities which have been merged into the CNMC to use a short form, provided that the concentration meets the requirements for the use of the short form.

Even if Law 15/2007 and the Royal Decree do not explicitly prescribe different one-month long Phase I clearance time limits for the ordinary and the simplified procedures, the guidelines point out that, in practice, the CNMC tends to reduce the time limit and thereby speeds up the one-month Phase I clearance in the case of simplified procedures. According to the guidelines, the reduction of the one-month deadline in the context

of simplified procedure concentrations is reinforced by the fact that the CNMC has made commitments against suspending the one-month deadline through requests of information or corrections in such cases.

Informal contact with the CNMC is recommended for informing the CNMC about the particularities of the transaction and the deadlines for completion. The CNMC is sensitive about certain transactions, for example, transactions involving failing companies, companies in critical situations involving dismissal programmes, etc.

3.10 Who is responsible for making the notification?

The undertakings under an obligation to notify are: (i) the parties involved in a merger, in the creation of a joint venture or in the acquisition of joint control over all or part of one or more undertakings; or (ii) the party that acquires sole control over all or part of one or more undertakings.

In Spain, a merger filing fee has to be paid at the time of notification. As a result of the enactment of Law 3/2013 which created the CNMC, the fee ranges are the following:

Short notification: €1545,45.

Full notification: €5,502.15 if the Spanish turnover of all parties to the concentration is lower or equal to €240 million; €11,004.31 if the Spanish turnover of all parties to the concentration is higher than €240 million but lower or equal to €400 million; €22,008.62 if the Spanish turnover of all parties to the concentration is higher than €400 million and lower or equal to €3 billion; a fixed fee of €43,944 when the Spanish turnover of all parties to the concentration is higher than €3 billion, plus an additional €11,004.31 for each extra band of €3 billion up to a maximum fee of €109,8006 (i.e. transactions involving a Spanish turnover exceeding €6 billion but less than €9 billion will be required to pay a fee of €43,944 + €11,004.31).

In a short-form scenario, in the event that the CNMC decides that a concentration has to be notified using the standard form (see the answer to question 3.8), the notifying party will have to pay the fee difference.

The filing fees may be reimbursed at the parties' initiative within Phase I when: a) the operation is not deemed to be a concentration; b) notification is not compulsory, if the thresholds are not met (see the answer to question 2.3); and c) the matter is referred to the European Commission under Article 22 of the EUMR.

It must be noted that in a judgment dated 20 October 2011, the Spanish Supreme Court decided that the turnover to be taken into account for the filing fees calculation must be that of the acquiring company (Unión Fenosa), and not the one which would also include the turnover of the controlling company (ACS, which only held a minority controlling shareholding over Unión Fenosa at that time), as this would not reflect the reality of the transaction.

3.11 Are there any fees in relation to merger control?

See question 3.10.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

As previously described, an economic concentration cannot be completed until express or tacit authorisation has been granted by the CNMC, or potentially by the Spanish Government in certain Phase II cases.

However, Law 15/2007 sets out that this provision shall not prevent a public takeover bid for shares admitted on a stock market and authorised by the Spanish National Securities Commission to take place, which is an economic concentration subject to control in accordance with the provisions of this Act, providing that:

a) the concentration is notified to the National Competition Commission within a period of five days from the presentation of the application for authorisation of the bid to the CNMV, if it has not been notified beforehand; and
b) the buyer does not exercise the voting rights inherent to the affected equities or exercises them only to safeguard the integral value of the investment based on a dispensation awarded by the CNMV.

In the case of public bids, as soon as the Board of Directors of the acquiring company has decided to launch a public bid and this has been publicly announced, the notification can be filed (see the answer to question 3.5).

3.13 Will the notification be published?

Yes, the announcement of the notification (containing, *inter alia*, the name of the parties, the date of notification, the affected sector, a brief description of the transaction, etc.) is published on the official website of the CNMC after the notification.

However, the parties to the transaction may request the CNMC to hide some information considered to be confidential before the publication of the clearance decision. The CNMC will decide on the request for confidentiality of some information before publishing its decision (see the answer to question 4.6).

It will normally take a couple of months after the clearance for the CNMC to publish the decision.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

In line with EU merger practice, the Spanish substantive test corresponds to the "*Substantial Lessening of Competition*", which reflects an economic approach.

Therefore, Spanish law refers to those concentrations that "*significantly impede effective competition*" in Spain as a whole, or a substantial part of it, regardless of whether an obstacle to competition is the result of the creation or the strengthening of a dominant position. Contrary to the EUMR, the concept of dominance is not even mentioned in the Spanish substantive test, which emphasises the economic aspects of concentrations.

The factors that the CNMC will rely upon in assessing a concentration are, amongst others: the structure of the relevant market; the position of the parties in those markets and their financial and economic strength; the existence of actual or potential competitors inside or outside the national territory; the possible alternatives for suppliers and consumers and their access to supply sources; the existence of barriers to entry; the evolution of offer and demand; and bargaining power which may outweigh the position of the parties to the transaction in the market.

4.2 To what extent are efficiency considerations taken into account?

Efficiency factors are also considered by the CNMC as defined by Law 15/2007, as a contribution by the concentration to the

improvement of production or marketing systems and to the competitiveness of the industry. These efficiencies have to benefit clients and end consumers through a wider variety of choices and lower prices. In comparison with the old act, the new law sets out a more exhaustive list of relevant factors.

4.3 Are non-competition issues taken into account in assessing the merger?

Non-competition issues are only taken into consideration in Phase II cases in which the Council of Ministers decides to assess the concentration in light of criteria of general interest. Law 15/2007 sets out a non-exhaustive list of such general interest criteria, namely: a) defence and national security; b) protection of public security or public health; c) free movement of goods and services within the national territory; d) environmental protection; e) promotion of technological research and development; and f) guarantee of adequate maintenance of the objectives of sectorial regulation.

To date, there has been only one Phase II case (*Antena 3/La Sexta*) in which the Council of Ministers decided to intervene. In its decision of 24 August 2012, the Council of Ministers acted on the basis of "*circumstances of general interest essentially related to ensuring the proper maintenance of the objectives of the sector regulation, as well as the promotion of research and technological development*".

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The CNMC is entitled to ask third parties for any information it may consider necessary at any stage of the procedure (both in Phase I and II). Failure to comply with this request can result in a fine of up to 1% of the turnover and a periodic penalty of €12,000 for each day there is a delay in providing the information.

The intervention of complainants is not formally recognised during Phase I. Therefore, they do not have the right to have access to the file or to have any objections considered. However, competitors have been able to submit observations during Phase I on the basis of general administrative law. During Phase II, third party interventions are formally recognised in different ways:

- first, the Directorate for Competition must prepare a background note on the concentration which will be notified to any natural or legal person that may be affected by concentration ("affected parties"), as well as the National Consumers Board, so that they can submit their observations within a 10-day period; and
- secondly, the Directorate for Competition must draft or prepare a Statement of Objections that will be notified to any "interested parties" so that they can also submit observations within 10 days, and they will be granted access to the non-confidential documents contained in the file. However, before submitting any observations or having access to the file, the applicant has to submit an application for that condition within the 10-day period after the submission of the background note, so that it is formally recognised as an interested party.

In addition, and as explained in the answer to question 5.2, remedies are market-tested and third parties may submit their views on both Phase I and Phase II.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The CNMC may request any information it deems necessary from the undertakings involved in the transaction, any other third party or even any public authority. Failure to comply with these requests can result in a fine of up to 1% of turnover and a periodic penalty of €12,000 for each day on which there is a delay in providing the information (see the answer to question 4.4).

As explained in the answer to question 3.6, if the notification form is incomplete, the CNMC will give 10 days to the parties to submit the missing information. If they fail to comply with this request, the CNMC will be entitled to terminate the procedure. In addition, if the notifying parties do not submit the requested information within 10 days, they will not benefit from tacit authorisation (see the answer to question 3.6).

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The notification is public and the CNMC will publish a reference to the status of the notification on its webpage, as well as the name of the companies, the affected economic sector, and a brief description of the operation. The CNMC can declare that certain information or documents are confidential at any time of the procedure, either on its own initiative or at the parties' request. Confidential information will not be disclosed to third parties. For this purpose, any document which is submitted to the CNMC will be accompanied by a non-confidential version. The parties will have to justify why the extracted information is confidential. If a non-confidential version is sent, the CNMC may consider that all the information may be disclosed to third parties. Nevertheless, during pre-notification contacts, the parties may submit a confidential draft form in order to clarify the formal or substantive aspects of the concentration (see the answer to question 3.5).

At the end of Phase I, the CNMC will send the decision and report to the notifying party so that the latter can request the confidentiality of certain information within five working days. If no request is sent within the prescribed time limit, the CNMC may publish the decision and report on its integrity. Furthermore, Law 15/2007 introduces an obligation of professional secrecy by which the competent authorities, their officials, and any other staff or persons having worked or who are currently working under the supervision of these authorities shall not disclose confidential information. The infringement of this obligation is considered a serious disciplinary infringement and could be subject to criminal and/or civil liability.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Under Law 15/2007, the regulatory process may end in the following ways:

- Phase I: the Council will adopt a decision by which it: (i) authorises the transaction, with or without conditions; (ii) opens an in-depth investigation; (iii) refers the case to the European Commission on the basis of Article 22 of the EUMR; or (iv) considers that it does not fall within Law 15/2007. If a decision is not adopted within one month (or within the extended period), the Council will be deemed to have authorised the transaction (tacit authorisation). In the case of a conditional decision, the Government does not have the power to intervene as it would in Phase II. A Phase I decision will be immediately enforceable.
- Phase II: the Council will adopt a decision by which it: (i) authorises the transaction, with or without conditions; (ii) prohibits it; or (iii) considers that it does not fall

within Law 15/2007. If a decision is not adopted within two months (or during the extended period), the Council will be deemed to have authorised the transaction (tacit authorisation).

In the case of a negative or conditional Phase II decision, the Government may intervene. For that purpose, the Minister for Economy will have to decide whether to refer the case to the Council of Ministers within 15 days of hearing of the decision. The Council of Ministers will then decide within one month whether to confirm the Council decision, modify it or clear the concentration, with or without conditions, on public interest grounds other than competition. Law 15/2007 sets out a non-exhaustive list of public interest grounds such as: defence and national security; protection of public health and safety; free movement of goods and services within the national territory; protection of environment; promotion of technological R&D; and maintenance of sectoral regulation objectives. To date, the Government has only used this prerogative granted by Law 15/2007 once, namely in the merger case C/0432/12 *Antena 3/La Sexta*, by decision of the Council of Ministers on 27 August 2012. However, it did not use this prerogative in other controversial merger cases such as *Gas Natural/Union Fenosa* or *Telecinco/Cuatro*, which were cleared with remedies and the Minister for Economy at that time decided not to refer the case to the Government.

A Phase II clearance decision without conditions is immediately enforceable. On the contrary, a negative or conditional Phase II decision will only be enforceable once the deadlines for the Minister for Economy and Governmental intervention have lapsed.

We are not aware of any merger having been prohibited by the current CNMC or the former CNC. Moreover, in 2018 the CNMC did not open any Phase II proceedings.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The notifying parties are entitled to negotiate both structural and behavioural remedies to address the competition concerns identified by the CNMC at their own initiative or at the CNMC's request during Phase I (within 20 days after the notification) and Phase II (within 35 days after its initiation). The CNMC will carry out a market test of the proposed remedies both in Phase I and II. The remedies requested during Phase I may only be accepted when the competition concerns that have arisen are clearly identifiable and easily remediable.

An example of behavioural remedies presented during a Phase I is case C/0759/16 *Naturgas/GLP Repsol Butano-activos*. In that case the party committed to not bid nor supply in new signings for a stipulated period and to provide information to competitors and clients that their supply was going to shift to natural gas. These practices were further confirmed in February 2018 in the case *C/0911/17 Servired/Sistema 4b/Euro 6000*, where the CNMC considered that the behavioural commitments suggested by the parties were sufficient for the Transaction to not raise competition concerns. Particularly, the parties committed to grant access to the system and provide optional systems to those who requested it.

In a recent 2019 case C/0966/18 *QUIRÓN/CLÍNICA SANTA CRISTINA,* the CNMC considered that the notified concentration affected the effective competition in the markets for private provision of health services to private patients with hospitalisation, the market for private provision of health services to public patients and the market for the transfer of health spaces with internment. The operation was cleared in Phase II after several commitments were presented by the parties to seek to solve the problems related to a possible reduction in the quality of services. On the other hand, cases C/0600/14 *DIA/Grupo El Árbol*, C/0643/15 *Taminco/Cepsa química-activos* and C/0690/15 were cleared in Phase I after commitments to disinvest were offered. Finally, in June 2017 in the Case *C/0835/17 Cepsa/Villanueva/Paz,* the CNMC considered that there was a location where if the Transaction was implemented, no suitable competition would be left in place. Cepsa committed to leave the petrol station out of the operation.

According to the CNMC's statistics, in 2017, three transactions were cleared in Phase I with commitments: (1) *C/0835/17 Cepsa/Villanueva/Paz*; (2) *C-0865-17 Integra/Codman Neurosurgery Business*; and (3) *C/0890/17 Disa/Gesa*. By mid-October 2018, three transactions, out of 61 had been cleared with commitments in Phase I: the above-mentioned relating to Servired, C/0945/18 – *Talleres Alegria/Duro Felguera Rail* and *C/0922/18 - Naviera Armas/Trasmediterranea*.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

We are only aware of one decision of the CNMC, namely the Phase I decision subject to remedies in case C/0410/11 *Verifone/Hypercom*, whereby the CNMC imposed remedies in a pure foreign-to-foreign merger, by means of which foreign companies with no physical or commercial presence in Spain merged.

In that case, Hypercom decided to sell its Spanish subsidiary to a third company, Klein Partners, in order to avoid any merger competition issues in Spain. However, the Spanish Authority caught the transaction as it understood that it fell under its jurisdiction, and only cleared the transaction in Phase I after remedies were offered by Verifone.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

As explained in the answer to question 5.2, remedies can be offered in both Phase I within 20 days of the notification (introduced for the first time in Spain by Law 15/2007 and in line with the EU Merger Regime) and Phase II within 30 days of the decision of the CNMC's Council opening Phase II. In 2018, the CNMC cleared three transactions in Phase I with commitments, in Phase II no operation was cleared with commitments (see the answer to question 5.2 for examples).

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There are no models for divestiture commitments or trustee mandates. Under the old act, after clearance by the Government subject to conditions, it was usual for the parties to submit an Action Plan within a certain deadline developing the remedies imposed by the Government, which had to be approved by Spanish Competition Authority.

It is worth noting that, as in the merger case *Gas Natural/Unión Fenosa*, decision of 3 February 2011, the CNMC may accept the proposal brought by the merging parties to modify some of the proposed commitments with the aim of faster completion of the envisaged divestments.

5.6 Can the parties complete the merger before the remedies have been complied with?

Yes, the parties may complete the merger before the remedies have been complied with, unless the CNMC decides otherwise and includes remedies which require an upfront buyer.

5.7 How are any negotiated remedies enforced?

The CNMC conducts an enforcement supervision and control procedure, e.g., the five-year one established by the CNMC in the acquisition by Telefónica of DTS (Canal+) in April 2015 (C/0612/14 *TELEFÓNICA/DTS*) or the supervision proceedings (CV/0230/10 *Telecinco/Cuatro*) regarding the commitments for the clearance of the acquisition of Cuatro by Mediaset.

For instance, in the Supervision Resolution of 12 April 2018, in the Case VC/0634/15, *DIA/Eroski*, the authority confirmed that Dia complied with the remedies agreed and declared the conclusion of the supervision proceedings.

Recently in June 2019, the CNMC started investigation proceedings against Telefonica, since it sees indications that the commitments under which the Telefonica/DTS operation was approved are not being fulfilled. However, it is possible that the CNMC may accept requests to cancel the commitments in case the circumstances of the market change and the commitments might hinder competition *per se*.

5.8 Will a clearance decision cover ancillary restrictions?

A clearance decision may cover ancillary restrictions if those are directly related and necessary to the implementation of the concentration. The parties shall request that these are covered in the decision in the notification form. The Spanish Competition Authority uses the Commission Notice on restrictions directly related and necessary to concentrations (*Official Journal* C 56, 5 March 2005, pp. 24–31). If the ancillary restrictions go beyond what is related and necessary for the implementation of the concentration, the CNMC may decide to leave aside those restrictions from its clearance decision and, therefore, leave open their further scrutiny under the behavioural rules. As an example, in the decision of 16 April 2015 in case C/0642/15 *MASMOVIL IBERCOM/NEO*, the CNMC cleared the transaction but expressly left aside from the clearance decision the period of an exclusive supply agreement lasting longer than five years.

5.9 Can a decision on merger clearance be appealed?

Yes. A merger clearance can be subject to an appeal by the notifying party or any other interested party. A merger decision by the Council can be challenged before the *Audiencia Nacional* within two months of notification of the decision. A further appeal can be brought before the Spanish Supreme Court.

As an example, Touax (a modular building operator) appealed the decision of the CNMC, clearing the merger case C-0006/07 *Wiron/Rentacabin*, and the *Audiencia Nacional* confirmed the clearance decision of the Spanish Authority.

On the other hand, a decision of the Government related to the CNMC's Phase II negative or conditional decision (see the answer to question 5.1) can be directly challenged before the Supreme Court. In addition, any other decision adopted during the procedure by the Directorate for Competition can be subject to an appeal by the parties before the Council within 10 days. An appeal before the *Audiencia Nacional/Supreme Court* will not suspend the process. However, interim relief can be requested. Interim relief is rarely granted, although an example is the Government authorisation of the acquisition of Endesa by Gas Natural in case N-05082 *Gas Natural/Endesa*. Even though the transaction was not completed despite being cleared after the submission of remedies, the suspension was granted – but only after Endesa had posted a €1 billion bank guarantee.

5.10 What is the time limit for any appeal?

The regular time limit for bringing any appeal against a decision of the CNMC's Council or of its President is two months as from the day following the publication of the decision or the day following the notification of the decision to the interested parties.

5.11 Is there a time limit for enforcement of merger control legislation?

The time limit to take action will vary depending on the breach.

- Failure to notify upon request of the CNMC; failure to notify within the prescribed time limit by the CNMC; and failure to notify within five days in case of takeover bids: up to one year.
- Failure to comply with the stand-still obligation: up to two years.
- Failure to comply with conditions imposed by the CNMC or the Government: up to four years.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Spanish Competition Authority cooperates with the European Commission and the National Competition Authorities from EU Member States through the European Commission Network. In addition, Spanish competition authorities are members of the International Competition Network.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

According to CNMC's latest annual memo, out of 83 notifications in 2018, 74 used the pre-notification and 58 were notified using the short-form procedure; 81 were cleared in Phase I without commitments, while four were cleared with commitments.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

Apart from the envisaged split of the *Comisión Nacional de los Mercados y la Competencia* (Markets and Competition National Commission) into two independent regulatory bodies, one of which would be devoted to competition law enforcement as mentioned in the answer to question 1.1, there are no such proposals for reform.

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as of 30 September 2019.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

The digital market in Spain is not as developed as in other countries. Therefore, the discussion is not focused in this topic and it is being left for the European level to be addressed.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

There has been no change to the legislation or guidance in relation to digital mergers.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

The fact that in Spain there is a market share threshold has allowed the assessment of cases that otherwise would not have been analysed. For instance, the *Facebook/WhatsApp* or *Apple/Shazam* mergers, were caught by the Spanish market share threshold, which allowed the CNMC to refer the case to the European Commission.

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Ramón regularly advises on mergers under Spanish and EU law, acting for either one of the merging parties or third parties such as complainants or investors.

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