

BLACHUCKI, M., ed., (2021)

*International Cooperation of Competition Authorities in Europe:
from Bilateral Agreements to Transgovernmental Networks.*

Warsaw: Publishing House of ILS PAS

DOI: 10.5281/zenodo.5011955

pp. 99–110.



TRENDS IN MERGER CONTROL IN SPAIN

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Abstract:

The aim of this article is to provide an overview of the trends and challenges that the Spanish Competition Authority (the CNMC) is facing in merger control. To achieve this, section one will introduce the main data and statistics of the merger control regime in Spain, as well as the main strengths of the CNMC in merger control. Section two will expand on the main lessons learnt during the substantial merger analysis carried out by the Spanish Competition Authority. Section three will review the challenges ahead for competition authorities and, particularly, the approach and priorities of the Spanish Competition Authority.

Keywords:

competition policy, digital economy, merger control, gun jumping, remedies, market share threshold, up-front buyer, and minority shareholder

THE SPANISH COMPETITION AUTHORITY: STRENGTHS AND OVERALL TREND

Over the last ten years, the Spanish Competition Authority has cleared more than 900 mergers, an average of 90 mergers per year.¹ Our system allows for the rapid clearance of operations that do not raise competition concerns. In fact, the average time for

1 908 mergers between 1 January 2010 and 31 December 2019.

clearance in 2019 was 24 days, and this average is even lower for those cases using short form notification (also known as abbreviated cases).

Achieving such short periods between the notification and clearance of these procedures begins with the informal contacts that the case team maintains with the notifying parties prior to the formal notification. This earlier informal communication with the case team allows the stakeholders to become aware of possible concerns that could arise while assessing concentrations, and thus to include all the required additional information in the notification form. Almost all notifications follow this informal process of pre-notification in Spain.

The percentage of concentrations eligible to use the short form has increased recently. The short form is less burdensome for the parties, as it may include fewer details about the markets than an ordinary one. It is limited to those transactions where no competition concerns are expected, since the activities of the parties do not overlap (or where any overlap is marginal), the JV will not be active in Spain, or the market shares are very small. In the last three years, around two-thirds of the filed mergers followed the abbreviated proceedings.

Even though the duration of proceedings has become shorter, the complexity of the assessment has increased. In fact, after three years with no second phase investigations, one in-depth investigation was opened in 2018 regarding the *Quirón / Clínica Santa Cristina* merger in the health sector (cleared in 2019 with remedies²). Two additional in-depth investigations have been opened since then: one in the cement production sector in 2019 (*Cimça / Cemex*³) and another in the funeral expenses insurance sector in 2020 (*Santa Lucía / Funespaña*⁴). These last two mergers are still under assessment. In addition, more than 15 mergers have been cleared subject to remedies in the last five years, where it was not necessary to open an in-depth investigation, since the parties offered adequate remedies from the very beginning.

The Spanish Competition Authority shows two main differential features that become clear strengths in the merger analysis in comparison with the majority of the European competition authorities. First, CNMC gathers the competition authority and sector regulators into a single institution. Second, Spanish competition law provides for a notification threshold based on the market share, in addition to the usual one based on turnover.⁵

2 CNMC (2018) C/0966/18: *Quirón / Clínica Santa Cristina. Adquisición control exclusivo*. Available from: <https://www.cnmc.es/expedientes/c096618> [Accessed September, 12 2020].

3 CNMC (2019) C/1052/19: *Çimsa / Activos Cemex. Adquisición control exclusivo*. Available from: <https://www.cnmc.es/en/node/375908> [Accessed September, 12 2020].

4 CNMC (2019-2020) C/1086/19: *Santa Lucía / Funespaña. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/expedientes/c108619> [Accessed September, 12 2020].

5 See Article 8 of the Spanish Competition Act 15/2007 of 3 July, OSG 2007, No. 159 (In English available from: <https://www.cnmc.es/file/64176/download> [Accessed September, 12 2020]). In addition, in order to provide certainty to undertakings, prior to submitting the notification, they can formulate a consultation about whether the thresholds for mandatory notification are met

The former national competition authority (the CNC) was integrated with the pre-existing sector regulators in 2013, creating the current CNMC. Currently, CNMC has 4 investigative divisions: Competition Directorate, Energy Directorate, Telecommunications and Audiovisual Sector Directorate and Transport and Postal Directorate. Although the integration was very challenging initially, and the model received criticism from some sectors, the experience of more than six years has shown that synergies are possible, particularly for merger assessments. The analysis of mergers in energy, telecommunications or the transport sector can benefit from a deeper knowledge of the markets and from a wide range of market data. Thus, the joint work of the various directorates in merger control can be more effective than a simple coordination between regulators. The recent mergers in the fuel sector are a good example of successful merger control, as proven by the in-depth analyses carried out. In fact, since 2017, four mergers have been cleared in the fuel sector (C/1032/19: *Kuwait Petroleum / Saras Red*,⁶ cleared in 2019, C/0980/18: *BP / Petrocorner*,⁷ cleared in 2018 in the first phase, subject to remedies and C/0890/17: *Disa / Gesa*⁸ and C/0835/17: *Cepsa / Villanueva / Paz*,⁹ both in 2017 and subject to remedies in the first phase).

All these mergers were assessed mostly on the basis of the data gathered by the CNMC's Directorate for Energy. The sectoral regulation obliges service stations to provide data about final prices and sales volumes to the Directorate for Energy, allowing the merger analysis to be enriched by this input. In fact, the Energy and Competition directorates together with the CNMC's IT team, have been able to design a new tool to define the relevant markets based on isochrones, using the data provided by the petrol stations themselves. This means that merger decisions are not only more solid, but are also consistent with the sector-specific decisions.

Regarding the notification thresholds, the Spanish Competition Authority has the advantage of having a market share threshold, in addition to the usual one based on the turnover of the parties. When the merger represents an acquisition or increase of more than 30% in a relevant market, the merger must be notified to the CNMC, unless the turnover of the acquired entity or business is less than €10M, in which case the market share threshold increases to 50%.

(Article 55.2 of the Spanish Competition Act). This consultation will be solved within three months. In addition, there is extensive case law regarding the market definition as all decisions are published.

6 CNMC (2019) C/1032/19: *Kuwait Petroleum / Saras Red. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/node/374933> [Accessed September 12, 2020].

7 CNMC (2018) C/0980/18: *BP / Petrocorner. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/node/371755> [Accessed September, 12 2020].

8 CNMC (2017) C/0890/17: *Disa / Gesa. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/node/364906> [Accessed September, 12 2020].

9 CNMC (2017) C/0835/17: *Cepsa / Villanueva / Paz. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/expedientes/c083517> [Accessed September, 12 2020]

More than 50% of the mergers notified in 2019 met the market share threshold. Experience has demonstrated that this threshold is suitable to catch relevant mergers that would otherwise go unnoticed. This is due to the fact that the significance of an economic transaction can be measured not only through its monetary value or the economic value of the enterprises involved, but also through its relevance in the affected markets. In fact, all the mergers that were cleared in 2019 subject to remedies, in both the first and second phase, met the market share threshold.

It has also become a very valuable tool to address many of the challenges posed by digitalisation. Indeed, our market share threshold has allowed the CNMC to catch up to eight digital mergers in Spain in 2019 alone, as well as several other cases that were referred to the European Commission, including the well-known *Facebook / Whatsapp* merger back in 2014, which had to be notified only in Spain, the UK and Cyprus within the EU. In some instances, these referrals resulted in Phase II investigations, such as in the *Apple / Shazam* transaction cleared in 2018.¹⁰

WHAT EXPERIENCE HAS TAUGHT US

One of the hot topics in discussions surrounding competition enforcement is whether or not it is necessary to adapt current antitrust regulations to address the dynamism of the markets. Although this matter will be fully discussed below in relation to digital markets, it is possible to state here that, indeed, markets evolve and assessments must adapt to them. However, it does not necessarily mean that the legislation must be changed.

In recent years, we have witnessed relevant changes in the way markets work, which we have been able to include in our analyses in merger control, just as it has been equally necessary to integrate the experience from our previous assessments in order to enhance the quality of our output. In essence, the merger control analysis progresses as time goes by, under the same regulatory framework, to accommodate to the evolution of the markets and previous experiences.

We will show hereunder, some of the main experiences that the CNMC has learned during the recent years of merger control, which have influenced the way that assessments are carried out nowadays.

Upfront buyers

In 2009, the CNMC cleared a merger in the energy sector that included, as a remedy, the divestment of several thermal power plants in a short period.¹¹ The situation of the market changed drastically some months later, so the sale of assets became incredibly

10 EC decision of September, 6 2018 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.8788 *Apple / Shazam*). Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf [Accessed: September, 12 2020].

11 CNMC(2008-2010)C/0098/08: *Gas Natural / Unión Fenosa. Adquisición control exclusiva*. Available from: <https://www.cnmec.es/expedientes/c009808> [Accessed September, 12 2020].

complicated. Finally, the CNMC had to accept a long-term purchase option as an alternative remedy, so monitoring remained active for ten years, although in the merger decision it was expected to be closed some months after the clearance.

In light of experiences such as this, we have demanded upfront buyers when structural remedies have been included in our decisions, thereby ensuring that the buyer approval process occurs at an earlier point in time. Indeed, a merger was cleared in 2018 with a divestiture commitment of a petrol station to a buyer that was approved together with the merger itself.¹² The effectiveness of this remedy is undoubtedly an improvement on the solution previously adopted in 2009.

Minority shareholding

In recent years, we have observed that international investment funds are acquiring stakes in the capital of European firms. Most of these mergers are usually cleared through abbreviated proceedings, since there are regularly no overlaps among the activities of the parties. However, intense debate may arise when the same investment funds already have minority shareholdings in several companies operating in related markets or, in the most extreme case, in competitors on a single relevant market. Even when the fund is a minority shareholder, the likelihood of gaining access to confidential and sensible information about the activity of the company may be high. Under these circumstances, there is a risk of coordinated effects, since commercial information from one company can be used by a fund when participating in its competitor.

This was the case in a merger cleared with remedies in 2019 in Spain in the food delivery sector. In this case, we analysed the implications of having an indirect minority shareholding in a competitor.¹³ The acquiring company had a minority shareholding in a company, which, in turn, also had a minority shareholding in the target's closest competitor on the Spanish market for online food delivery platforms, where both companies had significant market shares.

This would lead to the resulting entity being present on the board of directors of competing companies. There was a risk of exchanging sensitive information, which created an incentive for the acquirer to prevent the expansion of this competitor's business.

The merger was finally cleared, subject to commitments aimed at preventing the flow of sensitive information between both companies and limiting the participation of the acquirer in decision-making that may influence the strategy of the company with a minority share.

Internal company documentation

Finally, we have learned how relevant internal company documentation is to achieving a true understanding of the purpose, effects and scope of a given merger. There is no doubt about the asymmetry of information that competition authorities face when assessing mergers. With few exceptions, the knowledge of the competition authority about the

12 CNMC (2017) C/0835/17: *Cepsa / Villanueva / Paz*.

13 CNMC (2019) C/1072/19: *MIH Food Delivery Holdings / Just Eat. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/expedientes/c107219> [Accessed September, 12 2020].

affected markets in a concentration is lower than that of the stakeholders. This is precisely why market tests are so necessary in order to correctly assess many cases. Experience has shown us that, when a merger raises concerns regarding the maintenance of effective competition on the relevant markets, in addition to the market tests, the internal company documentation about the operation can give the authority valuable clues.

In 2017, the analysis of a merger in the fuel sector raised competition concerns regarding the area of influence of a specific petrol station.¹⁴ The case team decided to ask the parties for the due diligence investigation of the acquisition. Information about the price policy that the acquirer intended to apply after the acquisition confirmed the competition concerns, leading to the merger being cleared subject to the disinvestment of this petrol station.

The experience with the aforementioned merger in the healthcare sector, which was cleared with remedies in 2019, was similar. It concerned a private hospitals Group acquiring the only private clinic in the affected area (the province of Albacete).¹⁵ The assessment raised concerns about the maintenance of some of the medical services after the merger, so the case team asked the company for the internal report to their parent company regarding the acquisition. The concerns were fully confirmed through these internal documents, meaning that the vast majority of the commitments presented were aimed at avoiding a reduction in services and in service quality.

WHAT'S NEXT? NATIONAL AND GLOBAL CHALLENGES

This section provides a brief overview of some hot topics that merger control rules are facing globally, and that competition authorities, including the Spanish Competition Authority, are dealing with. In particular, it deals with how the Spanish Competition Authority is reacting to these trends, and how Spanish merger control rules continue to be suitable for what lies ahead.

Digital Economy

As explained in Section 1, the Spanish merger control rules set out two alternative thresholds: the first one regarding the market share acquired as a result of the merger, and the second one dealing with the aggregate turnover of the parties participating in the transaction. Although these types of alternative thresholds do exist in some other jurisdictions, most jurisdictions only have a merger notification threshold based on the annual turnover of the undertakings involved in the merger. Such a turnover threshold efficiently catches relevant transactions in many sectors. However, when dealing with digital markets, many nascent firms or start-ups do not yet generate enough turnover to trigger those thresholds, meaning that some potentially problematic transactions cannot be investigated or analysed by the relevant competition authorities.¹⁶ The solutions that

¹⁴ CNMC (2017) C/0835/17: *Cepsa / Villanueva / Paz*.

¹⁵ CNMC (2018-2019) C/0966/18.

¹⁶ See written contribution from Spain to the OCDE Roundtable on ‘Start-ups, Killer Acquisitions and Merger Control’. Start-ups, Killer Acquisitions and Merger Control – Note by Spain (June, 11 2020)

have been proposed as ways of avoiding this outcome and ensuring that all relevant transactions are caught, mainly suggest either lowering the existing turnover thresholds, and/or (ii) creating additional thresholds based on transaction value. In fact, jurisdictions such as Germany or Austria have amended their rules to introduce transaction value-based thresholds.

In Spain, the latter was also discussed, but it was generally considered that, due to the additional threshold (the market share threshold), the conclusions differ from those jurisdictions where the merger rules only include a turnover threshold. The Spanish Competition Authority takes the opinion that its current notification threshold efficiently captures relevant mergers in the digital economy, including killer acquisitions, and that there is no need to amend the notification system in this regard.

This conclusion rests on the fact that the Spanish Competition Authority has been able to analyse several mergers in digital markets, a context where the transactions would not have been reviewed if the Spanish Competition Authority did not have the market share threshold in place. In particular, during 2019, six mergers concerning the digital sector¹⁷ were reviewed by the Spanish Competition Authority thanks to the market share thresholds. Without this threshold, these mergers would have not been notified to CNMC for assessment.

Furthermore, this threshold has been useful not only to capture relevant transactions in digital markets in Spain, but also to refer to the European Commission significant transactions that were caught under the Spanish notification system, and that of some other Member States, but did not meet the European Commission thresholds and therefore did not have a community dimension. This was the case of the already mentioned mergers of *Facebook / Whatsapp* (referred under Article 4(5) of the Merger Regulation) and *Apple / Shazam* (referred to under Article 22 of the Merger Regulation).

It is worth mentioning in more detail the *Just Eat / Canary* case¹⁸ among those six digital mergers that were analysed by the Spanish Competition Authority in 2019. The interest in this merger, which was preceded by another merger involving the company Just Eat, also cleared by CNMC in 2016,¹⁹ lies in the analysis of the innovative capacity

JT03461710 [DAF/COMP/WD(2020)22]. Available from: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)22/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)22/en/pdf) [Accessed September, 12 2020].

17 See cases CMNC (2019) C/1015/19: *Bauer / Clabere Negocios -Credimarket. Adquisición control exclusivo*. Available from: <https://www.cnmc.es/en/node/373964> [Accessed September, 12 2020]; CMNC (2019) C/1061/19: *Takeaway / Just Eat. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/en/node/376815> [Accessed September, 12 2020]; CMNC (2019) C/1046/19: *Just Eat / Canary. Adquisición control exclusivo*. Available from: <https://www.cnmc.es/expedientes/c104619> [Accessed September, 12 2020]; CMNC (2019) C/1072/19: *MIH Food Delivery Holdings / Just Eat*; CMNC (2019) C/1076/19: *Easypark / Negocio Sistemas Aparcamiento Ivia. Adquisición control exclusiva*. Available from: <https://www.cnmc.es/expedientes/c107619> [Accessed September, 12 2020]; CMNC (2019) C/1023/19: *Wishbone / Palladian. Adquisición control exclusivo*. Available from: <https://www.cnmc.es/en/node/374279> [Accessed September, 12 2020].

18 Case C/1046/19 *Just Eat / Canary*.

19 See, in this sense, the Preliminary Report and Draft Decision: CMNC (2016) C/0730/16: *Just Eat / La*

of the company that was being acquired (i.e. Canary). As the transaction would result in very high market shares and eliminated a competitor, it was necessary to determine whether it could fall under the so-called “killer acquisitions” category. However, the analysis performed by the Spanish Competition Authority concluded that Canary was neither an innovative nor an aggressive competitor. Therefore, the merger was cleared with no commitments.

Infringements: gun jumping and remedy violation

Gun jumping includes a number of serious infringements regarding merger control obligations, including (i) when merging parties fail to notify a reportable merger to the competition authority; (ii) the implementation of part or all of a merger during mandatory waiting periods (known as a violation of the standstill obligation); and (iii) the co-ordination of competitive behaviour before closing. Although this topic is not new, it has received a lot of attention recently, as competition authorities are devoting more enforcement resources to these violations and the amounts of fines for such infringements are increasing.²⁰ According to the OCDE Roundtable on the Suspensory Effects of Merger Notifications and Gun Jumping, enforcement against a failure to notify a transaction has increased significantly in the last decade, on a global scale.

The Spanish Competition Authority is no exception and has imposed 14 sanctions over the last decade regarding both violations of the obligation to notify and violations of the standstill obligation. However, the two most recent decisions adopted by the Spanish Competition Authority relate to violations to the obligation to notify.

In the *Grupo Nufri* case (2019),²¹ the notifying party was fined for failing to notify a merger that met the market share threshold. It was the notifying party who voluntarily approached the authority and acknowledged that it had committed an infringement. Therefore, although the board of the Spanish Competition Authority qualified the infringement as a serious one,²² it also reduced the fine in view of the company’s cooperation, in line with the possibilities foreseen in the Spanish Competition Act.²³

Nevera Roja. Adquisición control exclusiva. Available from: <https://www.cnmc.es/expedientes/c073016> [Accessed September, 12 2020] and GARCÍA GARCIA, J.M., IBÁÑEZ COLOMO, P. (2020) *Competition Law and Policy in the Digital Economy: Report From Spain (28 January 2020)*. [Proceedings of the XXIX FIDE Congress (The Hague, 20-23 May 2020)]. Available from: <https://ssrn.com/abstract=3527032> [Accessed September, 12 2020].

20 See OECD (2018) Executive Summary of the Roundtable on Suspensory Effects of Merger Notifications and Gun Jumping. Available from: <https://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.html> [Accessed September, 12 2020].

21 CMNC (2019) SNC/DC/093/19: *Grupo Nufri DC - SNC*. Available from: <https://www.cnmc.es/expedientes/sncdc09319> [Accessed September, 12 2020].

22 Following Article 62.3.d of the Spanish Competition Act.

23 See Article 64.3 of the Spanish Competition Act.

In the *Consenur / Cathisa* case (2017),²⁴ the notifying party was also fined for failing to notify a merger that met the market share threshold. In this case it was the Spanish Competition Authority that, following a number of requests for information, asked the parties to notify the transaction after its effective execution, which was subsequently cleared.²⁵

As for standstill obligations, it is worth mentioning the *Gestamp/ Essa Bonmor* case,²⁶ which illustrates the legal difficulties that these cases may highlight. In this case, the transaction was structured in two distinct stages. In stage one, a minority shareholding of 10% was acquired, along with veto rights over certain decisions, such as the approval of the Annual Accounts or of additional debt. In stage two, an additional 30% of the target was acquired. Only stage two was subject to the standstill obligation.

After the merger was cleared, the Council of the CNMC found the acquirer to have breached the standstill obligation, as control had been acquired not at stage two but at stage one. It therefore imposed a fine. However, the Spanish Court of First Instance annulled this decision on two grounds. Firstly, it questioned whether the scope of decisions covered by the veto rights actually affected the strategic decisions or commercial policy and thus amounted to control.²⁷ Secondly, according to the Court's view, there was no lasting change of control, as the agreement included in stage one only lasted 48 days and was linked to the second stage, which in fact included a standstill obligation. The ruling of the court sets a high standard for the interpretation of the concept of "lasting change".

Besides gun jumping cases, the Spanish Competition Authority is particularly vigilant on the fulfilment of the commitments that it imposes, and for that purpose there is a specific unit in charge of monitoring all the commitments imposed. In a jurisdiction such as the Spanish one, where behavioural commitments are not atypical, this monitoring role is of special relevance. Over the past decade, the CNMC has monitored more than 35 mergers that were cleared with commitments.

The monitoring of commitments has led to various sanctioning proceedings resulting from breaching or not fully complying with the commitments imposed. In its most recent case (2019), the CNMC imposed a fine of 1.5 million euros on *Telefónica de España, S.A.U.* for violating one of the commitments of a resolution from 22 April 2015 of the Council of the CNMC stemming from case C/0612/14 *Telefónica / DTS*.²⁸ The decision

24 CMNC (2016-2017) SNC/DC/074/16: *Consenur. DC - SNC*. Available from: <https://www.cnmc.es/expedientes/sncdc07416> [Accessed September, 12 2020].

25 This decision is currently under appeal.

26 See CNMC (2011-2012) SNC/0015/11: *Gestamp/ Essa Bonmor. DC - SNC*. Available from: <https://www.cnmc.es/en/node/344511> [Accessed September, 12 2020]; DE (2018) Executive Summary of the Roundtable on Suspensory Effects of Merger Notifications and Gun Jumping.

27 The meaning of control will be interpreted in the sense of the Commission consolidated jurisdictional notice under Council regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95, 16.04.2008, pp. 1–48.

28 The press release is available in English here: CNMC (2019) *The CNMC fines Telefónica 1.5 million*

was part of the monitoring work carried out by the CNMC to verify that Telefónica is complying with its commitments pursuant to its purchase of DTS, when it acquired the 56% stake in DTS owned by the Prisa Group. Further to this, more ongoing proceedings for violating commitments were opened in 2019.²⁹ These proceedings relate to case C-0550/14 *Repsol / Petrocat*, involving the acquisition by Repsol of a company active in the fuel distribution sector (Petrocat). This merger was cleared in 2014 with a variety of behavioural commitments. The ongoing proceedings analyse the potential violation of two of the remedies imposed.

The trends of 2019 reveal how important it is that the Spanish Competition Authority ensures, and will continue to ensure, compliance with the remedies imposed. In fact, the reinforcement of the monitoring is included as one of the priorities of the authority's work plan for 2020.³⁰

Merger control vs industrial policy

It seems obvious that, for Competition Authorities, being able to prevent certain transactions from evading the notification systems is fundamental. However, it is only the initial step of the process. For a notification system to be effective, it is of the utmost importance that the effects of the transaction in markets are adequately and effectively analysed, and that remedies, if required, are implemented correctly.

On this basis, there has been much discussion regarding the appropriate role of merger control and the role of competition authorities when intervening in markets. The present situation, often with globalised and interrelated markets, has proven to be extremely complex, in particular when weighing the right balance between public and economic interest. The ongoing pandemic will only stress the difficulties of this exercise, as certain transactions will, more than ever, be subject to various interests worth defending. As a result, prudent analysis is seen as the best alternative by CNMC.

The so-called “national champions” are at the centre of this discussion. In Europe, this debate has been ongoing over the last decade, as governments of Member States have opposed some of the decisions adopted by the Competition Directorate of the European Commission.³¹

euros for violating one of the conditions of its merger with DTS. Available from: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20191022_NP_VC_TELEFO%CC%81NICA-DTS_def.ENG.pdf [Accessed September, 12 2020].

29 See CNMC (2019) *SNC/DC/044/19: Repsol / Petrocat DC – SNC*. Available from: <https://www.cnmc.es/en/node/377384> [Accessed September, 12 2020].

30 See 2020 CNMC's work plan: CNMC, Plan de Actuación (2020). Available from: <https://www.cnmc.es/sobre-la-cnmc/plan-de-actuacion> [Accessed September, 12 2020].

31 See MOTTA, M., RUTA, M. (2011) Mergers and National Champions. In: Falck, O., Gollier, C., Woessmann, L. (eds.) *Industrial Policy for National Champions*. Cambridge: MIT Press, pp. 91-117. Available from <http://doi.org/10.7551/mitpress/9780262016018.003.0005>.

In particular, the recent decision of the European Commission in the *Siemens / Alstom* case³² has once again brought this debate to the forefront. This is a consequence, among other things, not of the decision itself, but of the geopolitical context that we are currently facing, and which, as mentioned, will probably be even more complex as a result of the pandemic.

Nevertheless, we should not forget that industrial policy has its own effective tools to achieve its objectives, which include, among other things, a level playing field between companies. However, this does not include, and should be kept apart from, antitrust and merger control rules. Indeed, the very nature of merger control rules rests on the basis of an objective and rigorous assessment that must, above all, be impartial and not subject to policy interests. The success of the merger control systems applied by the European Commission results from its enforcement of the law and the absence of arbitrary or discretionary decisions.

The *Siemens / Alstom* case has been discussed at length internationally, and has been both criticised and supported. Some of the most significant critics came precisely from the Member States whose companies were involved in the merger, i.e. France and Germany. While the aim of achieving a strong European industry is understandable and desirable, it cannot come at the expense of perverting the merger control systems.

Against this backdrop, the CNMC issued a press release³³ defending the stance of the European Commission, seeing as its decision was exclusively based on technical reasons, and the commitments submitted by the parties were deemed to be insufficient to counteract the obstacles to competition identified during the course of the investigation. Furthermore, before the decision was adopted, the Spanish Competition Authority had already submitted a letter to the European Commission, together with the competition authorities of Belgium, the Netherlands and the United Kingdom, expressing concerns about the proposed merger of the mobility business of Siemens AG with Alstom SA.³⁴

Hence, the CNMC not only agrees with the need to keep competition policy separate from industrial policy, but also, in this particular case, took the view that, if approved, the transaction would have caused a significant loss of competition. This would have caused severe harm to Spanish markets and companies, as Spain has the largest high-speed railroad network in Europe, and would most likely have led to a substantial increase in the cost of installing and maintaining the extensive high-speed network, as well as to an increase in the retail prices charged to travellers using this railroad network.

32 EC (2019) Case M.8677 *Siemens / Alstom*. Available from: https://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=2_M_8677 [Accessed September, 12 2020]

33 See CNMC (2019) *La CNMC respalda la decisión técnica de la Comisión Europea de prohibir la adquisición de la entidad francesa Alstom, S.A. por parte de la alemana Siemens, A.G.* Available from: <https://www.cnmc.es/node/373389> [Accessed September, 12 2020].

34 See ACM (2019) *Correspondence: Letter from national competition authorities on the Siemens – Alstom merger (December, 21 2018)*. Available from: <https://www.acm.nl/en/publications/letter-national-competition-authorities-siemens-alstom-merger> [Accessed September, 12 2020].

It is worth mentioning the close collaboration between the European Commission and the competition authorities throughout the case. The CNMC considers this to be of the utmost value in ensuring the interests of consumers, not only in Spain, but across the EEA. Additionally, it provided further proof of the effectiveness and necessity of merger control systems. It is essential that international cooperation among competition authorities continues to strengthen, in order to understand economic structural changes, and how best to address together the new challenges in an effective way. It is also desirable to have a level playing field in terms of merger control regimes, which could and should be part of the requirements of reciprocity included in international trade negotiations.