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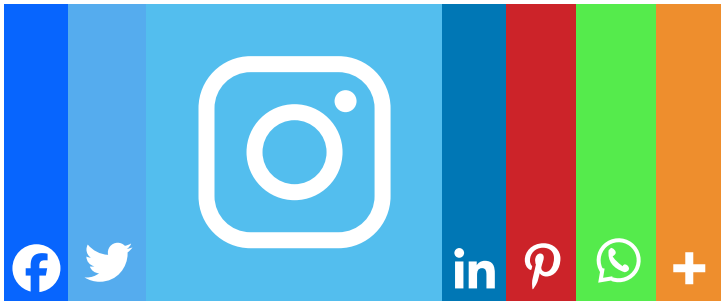

Lesson 3 (II). Free competition law. Concentrations (1.3)

Introduction to concentrations of companies/firms from the perspective of Free Competition Law

A ‘concentration’ is the legal combination of two or more firms/companies. It can be attained in different ways, ie: by merger or acquisition, by the implementation of a business strategy that results in a change of control on a lasting basis, etc. The following are ways to implement a concentration

- the **merger of 2 or more previously independent companies or parts** of companies;
- the **acquisition** by 1 or more persons (that already control at least 1 company) or by 1 or more companies **of direct or indirect control over 1 or more other companies.**
- **other multiple transactions that are conditional on one another** or are closely connected are **regarded as a single concentration.**

Although such operations may have a positive impact on the market, they may also appreciably restrict competition, if they create or strengthen a dominant market player. In order to preclude restrictions of competition, the **European Commission exercises control over planned concentrations with an EU dimension (i.e. when the operation extends beyond the borders of an EU country and exceeds certain worldwide and EU-wide turnover thresholds)**. It may authorise them; authorise subject to conditions; or forbid them.

EU rules for the control of concentrations are found in Regulation (EC) No 139/2004, which

entered into force on 1 May 2004. Regulation 139/2004/EC declares that **mergers that create significative obstacles to the effective and real competition in the Internal Market; or in a substantial part thereto must be declared non-compatible with the Internal European Market**. **This regulation is applicable to all concentrations with an EU dimension.**

EU rules can apply to all mergers no matter where in the world the merging companies have their registered office, headquarters, activities or production facilities, because even mergers between companies based outside the European Union may affect markets in the EU if the companies do business in the EU.

In determining whether a concentration is compatible with the common market, the Commission takes account on a *case-by-case basis of several factors, such as the concepts of 'EU dimension', 'dominant position', 'effective competition' and 'relevant market'.*

The basic criterion used to analyse concentrations is that of a '**dominant position**'

- One or more firms are said to hold a dominant position if they have the **economic power to influence the parameters of competition, especially prices, production, product quality, distribution and innovation, and to limit competition to an appreciable extent.**

EU dimension v National dimension

- **A concentration acquires an EU dimension, and therefore it must be notified to the EU Commission, where a number of thresholds related to these companies turnover are met:** If the *annual turnover* of the combined businesses exceeds *specified thresholds* in terms of global and European market, (etc)
- **Below such thresholds, the national competition authorities -NCA- may review the merger.**
- The **European Commission may also examine mergers which are referred to it from the NCA of the EU Member States.** This may take place on the basis of a request by the merging companies or by request by the NCA of an EU Member State,

or by the Commission own initiative.

- Under certain circumstances, the **European Commission may also refer a case to the NCA of an EU Member State.**

Notification procedures in the EU :

1. **As a general rule, concentrations with an EU dimension must be notified to the Commission *prior to their implementation*** (for instance: following the conclusion of the agreement and the announcement of the public bid or the acquisition of a controlling interest).
2. Regulation 139/2004/EC ***allows for formal notification before the conclusion of a binding agreement.***
3. It is also *possible to follow* ***pre-notification procedures****:*
    - this allows the parties to show to the Commission, for example, that the proposed merger, while resulting in a concentration having a cross-border dimension, affects competition on the market of only1 EU country. If that EU country does not express disagreement the Commission refer the case to the competent authorities of that EU country with a view to the application of that country's national competition law.
    - the same procedure applies where a person or an undertaking wishes to draw the Commission's attention to the **cross-border effects which a merger without an EU dimension** could have at European level.

EU Commission proceedings:

- The Commission is competent to initiate, at its own initiative proceedings: to carry out investigations and to impose fines.
- If the parties to the concentration act in accordance with Regulation 139/2004/EC, they notify to the Commission as explained above. When the EU Commission receives a notification, it determines by **Decision** (secondary legislation) whether the notified concentration comes under the regulation, whether it is compatible with the EU internal market; or whether it raises serious doubts as to its compatibility.
    - Concentrations with an EU dimension **cannot be implemented either before**

notification or for 3 weeks following notification.

- If a concentration has already been implemented and declared incompatible with the common market, **the Commission can order the companies to dissolve the concentration..**

- **The Commission examines notified concentrations to check if they significantly impede effective competition** in the EU.
  - **If they do not, they are approved unconditionally with a Commission Decision**.
  - If the EU Commission finds that a proposed merger could distort competition, **the parties may commit (agree) to taking action to try to correct this likely effect**. *For example, to* ***sell part of the combined business, to license technology*** *to another company, etc. If the European Commission is satisfied that the commitments would maintain or restore competition in the market, it gives* ***conditional clearance for the merger to go ahead*** **(Commission Decision).** *It then* ***monitors*** *whether the merging companies fulfil their commitments and* ***it intervenes if they do not***. ***If no compromise is proposed by the merging firms, the Project will be prohibited***
  - The Commission can prohibit the concentration (Commission Decision)
- To enforce compliance the Commission may impose the following sanctions:
  - **fines,** not exceeding 1% of the aggregate turnover of the company where:
    - intentionally or negligently, it supplies incorrect, incomplete or misleading information or does not supply information within the required time limit.
    - seals affixed during an inspection have been broken.
    - It can impose fines of up to 10% of the aggregate turnover of the company concerned where, either intentionally or negligently, it fails to notify a concentration prior to its implementation, implements a concentration in breach of the regulation or fails to comply with a Commission Decision.
  - **periodic penalty payments**: the Commission may impose periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the company for each working day of delay, from the date set by the Commission in its decision requiring information, ordering inspections, etc.

The European Court of Justice can abolish, reduce or increase any fines or periodic penalty payments imposed.

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Spain (not in 2019/20)

- **In Spain, our Law on Unfair Competition Ley de Defensa de la Competencia, Ley 15/2007, here-LDC- is based upon a complex definition of merger «concentración» related to the idea of change in the structure of control, either as a matter of fact or as a matter of Law** (in accordance with our Company Law applying its criteria to any type of company). The Spanish central idea in mergers policy is **that of change in the decision powers /control in a Group.** Such idea is compatible with Regulation 139/2004/EC. Spanish Law mentions as possible situations of merger «concentraciones»: Mergers, the acquisition of control by one company over other company, the incorporation of Joint Companies, etc (this is an open list).

LDC imposes upon companies the obligation to notify to *Comisión Nacional del Mercado de Valores* –CNMV- before the merger. It establishes time lapses for the CNMV to reply. If there is no reply the merger is authorised (*silencio positivo*) . However, until there is a decision or until the time limit has not elapsed, the merger cannot be implemented. LDC offers some 10 criteria to assess whether the merger must or must not be authorised. The main or core criteria is whether (or not) such merger can create obstacles to free competition in Spain