Spain

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INTRODUCTION

In the event that as a consequence of a concentration the competition within the market or markets where the parties to the concentration are active may be significantly hindered or reduced, the Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia*, the "CNMC") is entitled to subject its clearance to the fulfillment of certain commitments or remedies by the acquiring entity.

These commitments or remedies are aimed at maintaining or restoring the effective competition in the market or markets affected by the concentration, and in the absence of which such effective competition would be hindered, distorted or eliminated.

COMMITMENTS' PROPOSALS AND POSSIBILITIES TO NEGOTIATE THEM WITH THE CNMC

According to Article 59 of the Spanish Competition Act (*Ley de Defensa de la Competencia*, the "LDC"), commitments may be offered by either the parties to the concentration on its own initiative or upon the request of the CNMC.

Commitments may be proposed either in first phase or in second phase. Under the LDC, the CNMC has a maximum period of one month from the notification date to resolve on the concentration in case of first phase and of two months in case of second phase from the formal initiation of such phase two. In the event of proposing commitments, the said maximum deadlines to resolve on the concentration are extended in ten or fifteen additional working days in case of phase one or two, respectively.

Commitments in first phase are only accepted by the CNMC when the potential competition concern deriving from the concentration can be clearly identified and easily fixed. If this is not the case, the CNMC will likely initiate second phase in order to have more time to assess the concentration and in particular the potential commitments offered by the parties.

Once commitments have been submitted by the parties, the CNMC shall examine the commitments proposed and it is entitled to request an amendment of the same if it deems that the initial proposal is insufficient to eliminate the potential obstacles to competition that may derive from the concentration, either as a consequence of its own assessment or as a consequence of the results obtained from a market test.

It is common that the parties submit several different commitments proposals to the CNMC along the clearance process until the CNMC concludes that the commitments offered by the parties are suitable, sufficient and proportionate in order to resolve the potential obstacles for the maintenance of the effective competition arising from the concentration.

MONITORING PROCESS

When the CNMC clears a concentration subject to the fulfillment of certain commitments, the Competition Directorate of the CNMC is entitled to carry out any necessary actions in order to monitor the execution and compliance of such commitments approved by the CNMC. To this regard, the Competition Directorate of the CNMC will open a monitoring file to assess the compliance of all the commitments or conditions imposed.

A breach of the obligation to comply with the commitments approved by the CNMC is considered a very severe infringement which could lead in fines up to the 10% of the total turnover of the parties to the concentration in the previous financial year.

For instance, on February 2013 the former CNC (currently the CNMC) imposed a EUR 15.6 million fine to Mediaset due to a breach of the obligation to comply with the commitments that were approved by the CNC when authorising the concentration between Telecinco (owned by Mediaset) and Cuatro[1].

On 28 October 2010 the CNC cleared the concentration between Telecinco and Cuatro subject to the fulfilment of certain commitments voluntarily submitted by Mediaset. The monitoring process to ensure the execution and compliance of such commitments was entrusted to the Competition Directorate of the CNMC. In the framework of this monitoring process, the CNC stated that Mediaset infringed some of the commitments to which the authorized concentration was subject and, as a consequence, Mediaset was obliged to pay a EUR 15.6 million fine.

Recently, on 24 March 2015, the CNMC has stated that Mediaset has breached another of the commitments approved by the CNC to clear the merger between Telecinco and Cuatro[2]. This infringement can lead to the opening of another disciplinary proceeding and, if appropriate, to the imposition of a new fine. Similarly, on 26 May 2015, the CNMC launched an antitrust proceeding against Atresmedia for a potential breach of certain commitments to which the acquisition of La Sexta by Antena 3 was subject[3].

TYPES OF REMEDIES

Commitments or conditions may be structural or behavioral. Structural commitments would typically include divestments or assignment of certain industrial or intellectual property rights, whereas behavioral commitments may be very diverse.

In particular, certain behavioral commitments might aim at enabling horizontal rivalry and might consist in an obligation to modify the relationships of the parties with final customers, to reduce vertical restrictions or to change the conduct of buyers. Others intend to control certain results, for instance by forbidding an increase of prices, by obliging not to use a registered trademark for a certain period of time, by making available part of the production capacity to a third party, by eliminating certain clause or provisions of a contract, or by obliging to offer market supply conditions to third parties.

In case of doubt, the CNMC might prefer structural commitments rather than behavioral commitments, since the former are *prima facie* more effective to the extent that they resolve the competition concern consisting in the disappearance of a competitor as a consequence of the concentration, and that they require less supervision by the monitoring body (the Competition Directorate of the CNMC).

In the event of vertical concentrations, commitments granting access to third parties or avoiding the exclusion of competitors in the upstream or downstream markets affected by the concentration may be more effective.

However, notwithstanding all the above, behavioral commitments may be also fully effective, valid and appropriate depending on the circumstances of each concentration.

In this regard, it must be highlighted the recent concentration between Schibsted and Milanuncios[4], that was cleared by the CNMC on 20 November 2014 subject to the compliance of a certain behavioral commitment. This commitment basically consists in

1 Decision of the CNC dated 28 October 2010 in the case C/0230/10 – Telecinco/Cuatro.
2 Please visit the following kink to access the CNMC press release: http://www.cnmc.es/CNMC/Prensa/TabId/254/ArtMID/6629/ArticleID/1169/La-CNMC-incoa-expediente-sancionador-contra-Mediaset-por-incumplir-la-resoluci243n-que-autorizaba-con-compromisos-la-operaci243n-de-concentraci243n-TelecincoCuatro.aspx
3 Please visit the following link to access the CNMC press release: http://www.cnmc.es/CNMC/Prensa/TabId/254/ArtMID/6629/ArticleID/1265/La-CNMC-abre-un-sancionador-a-Atresmedia-por-incumplir-las-condiciones-de-la-fusi243n-de-Antena-3-y-La-Sexta.aspx
4 Decision of the CNMC dated 20 November 2014 in the case C/0573/14 – Schibsted/Milanuncios.

a license that grants an exclusive right to the licensee, a third competitor, over the motor section of *milanuncios.com*. As a result, the licensee will become a significant market player and will be able to exercise competitive pressure on the merged entity, thereby eliminating the competition concerns identified during the procedure.

POSSIBILITY OF MARKET TEST

In the same line than European competition rules, the LDC entitles the CNMC to ask third parties about the suitability of the commitments proposed by the parties. This market test can be carried out with competitors, clients or suppliers, which may be a party to the file or not.

In addition, the Spanish Supreme Court (*Tribunal Supremo*) has clarified that, to the extent the commitments or conditions imposed by the public administration (the CNMC) to undertakings may limit their commercial freedom, such commitments or conditions shall comply with the proportionality test (suitability, necessity and proportionality under strict terms), in a sense that if the objective of maintaining the competition could achieved by imposing less severe commitments or conditions, these should be the ones to be adopted. In particular, the Spanish Supreme Court (*Tribunal Supremo*) states that the commitments or conditions consisting of a limitation of the freedom to set up prices must be specially justified to the extent they affect the essence of the commercial freedom of an undertaking.

For example, in the case dealing with the concentration between Vía Digital and Sogecable, the Spanish Supreme Court[5] set out that the commitments that were approved to clear such concentration were proportionate. In particular, the Supreme Court stated that the commitments' main effect was the avoidance of an increase of Sogecable's and Telefónica's power in detriment of their competitors' and that therefore there should be considered proportionate and beneficial for the market, although in some aspects they could imply a disadvantage for the merger parties.

RECENT ACTIVITY OF THE CNMC IN CONNECTION WITH COMMITMENTS

In the last three years, the CNMC has assessed various concentrations which clearance has been subject to the compliance of several different commitments or conditions. In particular, the CNMC has cleared four concentrations resulting in commitments in phase one, and five additional concentrations resulting in commitments in phase two.

The CNMC has subjected the clearance of the concentrations to the fulfillment of either behavioral or structural commitments. As regards behavioral commitments, some of the obligations imposed by the CNMC have been, for instance, to terminate a certain agreement, to delete a certain clause or provision of an agreement, to keep the conditions in force for the suppliers during a certain period of time, to limit the duration of a certain agreement by eliminating tacit renewals or penalties in case of not renewing, or to avoid maintaining any direct or indirect contractual link with a certain entity.

In relation with structural commitments, the CNMC has imposed obligations such as divesting a certain radio frequency license, granting an operation license to a third operator to exclusively operate certain advertisements published in the website of one of the parties, or granting rivals access to 50% of certain contents such as premium films and sports channels.

As regards the duration of the commitments approved by the CNMC, there is not an established certain period of duration, and the CNMC could extend the same until it deems that the structure or regulation of the market or markets affected by the concentration is relevantly modified so as to justify the elimination of the commitments or conditions imposed to the parties.

5 Ruling of the Supreme Court (Third Chamber) of 7 November 2005 (LA LEY 1936/2005).

Ukraine

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INTRODUCTION

In comparison to other jurisdictions, both remedies regulation and the practice of its application are rather undeveloped in Ukraine. This can be explained by the specifically known formalistic approach of Ukrainian antitrust authority – the Antimonopoly Committee of Ukraine (the "AMCU") applied for quite a long period of time. The whole merger control sector lacks effective and clear legislation which could address up-to-date issues properly. The effective laws are obsolete and give too much discretion to the AMCU in most issues. The remedies issue is not an exception and requires being modified in order to serve its purpose.

GENERAL OVERVIEW ON REMEDIES IN UKRAINE

The applicable merger control rules provide for obligatory pre-notification of transactions for parties that met specific thresholds as of the end of the year preceding the transaction. They are cumulatively Euro 12 million worldwide for all the merging parties, Euro 1 million worldwide for each of least two of them and Euro 1 million in Ukraine for at least one merging party, either in assets or in turnover.

In other words, when the merging parties' activities generate a worldwide turnover over Euro 12 million (which is a regular situation for European, US and other developed markets) and (i) should one of the parties, either the purchaser or the seller/target, have an entity with assets/turnover of Euro 1 million in Ukraine (even if it lacks any activity on the market where the merger takes place; or even if such entity is dormant - has no turnover yet has respective assets); or (ii) should both parties have entities or direct sales in Ukraine - however their activities do not overlap in Ukraine - the transaction would require obligatory prior approval of the AMCU.

Moreover, neither local nor foreign-to-foreign transactions lacking effect on Ukrainian markets can be reviewed within the simplified procedure as there is none. Thus, for all the transactions the merger control procedure is typical: it starts with 15 calendar-day Preview period when the AMCU reviews the application of the parties in regard to its completeness in accordance with the Merger Regulation requirements; then, if the authority finds it acceptable, the Phase I period of review on the merits lasts for up to 30 calendar days after which the decision is granted.

At the same time, upon finding some reasons to launch an in-depth investigation (Phase II) the review of the application timing may be extended for an additional 3 months. The countdown starts from the day when the parties respond to the authority's first information request within Phase II. The respective reasons for Phase II launch shall be (i) availability of grounds for transaction prohibition, i.e. market monopolization signs or sufficient harm to competition; or (ii) the necessity to conduct an in-depth investigation. Normally, the latter should mean availability of concerns as to the transaction effects; however as a matter of practice the AMCU may interpret this law provision in a broader meaning. Thus, sometimes Phase II investigation can also be applied to transactions with no antitrust concerns.

Given the above, it is common knowledge that Ukrainian merger control is well-known for the extremely low thresholds catching almost each and every foreign-to-foreign transaction most of which lack any nexus to Ukrainian markets. Thus, the large amount of the notified transactions which make Ukrainian antitrust authority busy, have nothing to do with real antitrust concerns and with necessity to seek remedies.

Simultaneously, another local feature is the lack of effective remedies in some transactions which obviously require them, however are let go by the watchdog due to private business interests. The latest representative examples of such were spotted in DIY-retail and energy markets of Ukraine leading to their monopolization and a negative effect on competition.

Meanwhile, in some cases the AMCU did use its right to condition its approval with a number of obligations for the merging parties. For example, the most recent cases which ended in 2015 were the global worldwide known transactions of GlaxoSmithKline and Novartis and Whirlpool and Indesit.

TYPES OF REMEDIES

As regards the types of remedies applied in Ukraine, in most cases the AMCU sticks to behavioral rather than structural ones. At the same time, Ukrainian authority's practice has never been published in full and the limited information published regarding behavioral remedies on its official website has always been provided in a quite generalized way.

For instance, based on the AMCU official publication[1] the GlaxoSmithKline and Novartis transaction was cleared subject to a number of behavioral remedies, namely, "relating to supply volumes, prices, conditions of realization of antiviral products, antifungal products, oncological products and vaccines; other players' entry to the above markets; and information exchange which may have a negative impact on competition". Another major transaction cleared by the AMCU, the Whirpool and Indesit transaction, was also reported[2] to have been conditioned by a number of behavioral remedies, in particular "relating to supply volumes, average wholesale prices for goods manufactured by the parties to transaction". As one can see, official press-releases of the AMCU are not that informative and give few chances for in-depth analysis of its practice. Thus, lack of transparency leading to inability to make forecasts in terms of remedies happens to be among the main problems for the merging parties and lawyers.

As regards the structural remedies, the history of Ukrainian merger control has seen very few cases of their application, if not to say that it happened once. The case is rather old as it occurred more than 10 years ago. The AMCU obliged the Belgian Sun-Interbrew to sell 80% of shares of company owning Ukrainian brewery named "the Crimea" by end of 2001 as a remedy in Sun-Interbrew's transaction on the purchase of shares of another Ukrainian major player on the beer market, Rogan brewery[3]. Formally, this decision was the structural antitrust remedy; however it is worth saying that this decision had some strong political background at that time. The company that bought "the Crimea" plant as a result of the authority's decision tried to concentrate an even larger stake of the beer market by means of this purchase and some other actions, informally called a raider's attack on brewing business of another Ukrainian major beer market player Obolon. In this case, the AMCU "did not spot" any antitrust concerns approving the purchase, while the market was factually divided among the most famous and powerful politicians of the country.

REMEDIES' IMPLEMENTATION AND NEGOTIATION

Apart from putting the merging parties under the obligation to prevent themselves from anticompetitive practices, the Ukrainian authority's common practice has also been reflected in obliging the parties to submit certain information on a regular basis within

1 http://www.amc.gov.ua/amku/control/main/uk/publish/article/109860;jsessionid=5AB40298BC8205A8B6CF6337B8B5434B.app2

2 http://www.amc.gov.ua/amku/control/main/uk/publish/article/109835;jsessionid=B72C60003C6626E63CCFFE44BDB8504D.app1

3 http://www.pivnoe-delo.info/2001/08/11/v_pervom_polugodii_oao_pivobezalkogolnyij_kombinat_krym_simferopol_snizil_vypusk_piva_na_6_do_12_milliona_dal/

the period it deems necessary, usually 2-3 years. The classic examples of these kinds of remedies are transactions in socially sensitive markets, e.g. the pharma sector. One of the most famous transactions in this sector concerning a subsidiary of a global pharmaceutical producer raised antitrust concerns in Ukraine. It was cleared in 2011 after the AMCU obliged the parties to provide information on their prices and supply volumes on a quarterly basis. These remedies were set in one package with rather vague prescriptions for the parties "to prevent themselves from unsound pricing, from setting barriers to another potential market players' entry and from foreclosure."

In comparison to the European Union merger control rules providing for a specific remedies regulation which enables the merging parties to suggest the structural and behavioral measures on their own and negotiate them with the European Commission within the set terms under specific form, Ukrainian antitrust laws neither provide for a particular procedure nor set the form for commitments submission to the AMCU. In Ukraine the remedies issue regulation is limited to provisions of Article 31 (decisions in merger control cases) and Article 52 (the fines for antitrust infringements) in the Law of Ukraine "On Protection of Economic Competition" and one clause in the Merger Regulation which is a specific document regulating the procedural issues of merger control. The Law entitles the AMCU to approve transactions subject to fulfilment of obligations by the merging parties and to impose sanctions in case of their non-fulfillment. The Merger Regulation states that should the transaction raise antitrust concerns, the merging parties may suggest undertaking some obligations, fulfillment of which would remove market monopolization or sufficient competition restriction on the market or in its substantial part.

Though, generally the laws provide that the merging parties make respective suggestions, the regulation is rather vague and such practice has not been widespread so far. In any case even in those few cases known to us the remedies were negotiated with the AMCU on a case-by-case basis.

It is also worth saying that the AMCU has lacked and continues to lack appropriate economic analysis in merger control cases in general and particularly in remedies issue. Thus, in order to have the positive and desirable outcome it is important that the parties act proactively and initiate the possible remedies consideration within the merger case. As a result, the parties shall have the chance to bring their own economic analysis in front of the AMCU and "help" it analyze the transaction in the most complete way.

JUDICIAL REVIEW

As regards appealing the AMCU decisions in courts, in most cases the merging parties are reported to have voluntarily obliged themselves to fulfill the authority's conditions. As the AMCU is not entitled by the laws to request the parties to suggest remedies, in those cases where the remedies would be required the AMCU may unofficially contact the merging parties in this regard. Thus, formally the remedies are imposed upon the parties' own will. Therefore, the practice of appealing AMCU merger control decisions in courts is still rather poor in Ukraine. Even if the parties further would not agree after negotiating the suggested remedies with the AMCU, appealing to the court would not make too much sense due to the following. The position of the courts has always shown their unwillingness to go deep into the analysis of cases on the merits. The courts tend to limit themselves in reviewing the AMCU decisions, including the decisions imposing obligations, to the examination of the authority's compliance with formal aspects of the decision-making process. Thus, there are very few chances to win any of these such cases and the merging parties prefer not to load themselves with burdensome and useless exercises.

In the meantime, the sanctions which can be imposed on the merging parties for failure to fulfill their obligations, subject to which the transaction was cleared, are rather severe - the AMCU may impose a fine of up to 5% of the parties' worldwide turnover. This

penalty amount is the same as for the breach of the stand still obligation and closing the transaction prior to the authority's decision. Still the laws lack a clear methodology for the fine amount calculation and the AMCU has much discretion in that regard.

Moreover, if one compares appealing the AMCU decision in court on the merits and appealing the fine amount, the second has even fewer chances or we should even say is merely impossible as the laws prevent courts from doing so. Therefore, suggesting the remedies on their own at the most early stage of the case consideration and putting as many efforts to convince the AMCU to accept them as initially suggested is of great importance to the parties and is highly recommended.

CONCLUDING REMARKS

To summarize, the remedies culture is currently not as developed in Ukraine as in other jurisdictions. Ukraine is currently seeking to improve the antitrust legislation. The legal society is working on several legislative projects of great importance in order to modify the system as soon as possible. Some of them are already being reviewed by the respective Parliament committees and may be adopted in the nearest time. The mentioned projects include the law introducing the methodology for the fine amount calculation, the law obliging the AMCU to publish its decisions, the law increasing notification thresholds and setting additional effect-based criteria in merger control.

However, it is very important that in addition to legislative changes the AMCU develops its approaches, to make it more open, clear and business-minded, in order to adopt effective decisions in this sphere. On May 19, 2015, the new head of the AMCU was appointed. This was a very long-awaited decision of the government which is expected to bring many positive changes to antitrust enforcement in Ukraine.