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According to the legend, while accomplishing his 12 labours, Hercules marked the westward extent of his travels with the two pillars that now bear his name. Located respectively on the coasts of modern Spain and Morocco, for centuries the Pillars of Hercules marked not only the threshold to the Mediterranean Sea, but most importantly, the outward limits of the world as conceived in ancient times. The pillars were also marked with the Latin phrase “*non plus ultra*,” a warning for sailors and navigators not to dare cross to the other side, leaving the known world to enter a forbidden zone – or to use a modern legal metaphor, to cross the threshold from lawfulness to illegality.

A new frontier in the Spanish merger control regime

On 15 February this year, the Spanish Parliament moved the Pillars of Hercules of merger control a little further, extending the safe zone for companies to operate by approving the Act on Sustainable Economy (*Ley de Economía Sostenible*, ASE), which entered into force on 5 March, after its publication in the Spanish Official Gazette. The ASE comprises several provisions intended to, in theory, limit the effects of the current economic crisis deeply affecting the Spanish economy. The ASE includes an amendment to the pre-merger notification thresholds set forth in the Spanish Competition Act (*Ley de Defensa de la Competencia*, SCA), giving rise to a new *de minimis* rule.

Unlike many European merger control regimes, Spanish merger control legislation provides for two different sets of thresholds in order to determine whether or not a transaction is subject to prior notification to the Spanish Competition Commission (*Comisión Nacional de la Competencia*, CNC). Article 8 of the SCA states that pre-merger control notification is mandatory whenever one of the following thresholds is met: (i) global turnover in Spain for all the concentration participants in the last financial year exceeds 240 million euros, provided at least two of the participants reach a turnover in Spain exceeding 60 million euros (*turnover threshold*), or (ii) as a result of the concentration, one of the parties acquires or increases its control by acquiring a share equal to or greater than 30 percent

of the relevant product or service market at a national level or in a geographic market defined within the national territory (*market share threshold*).

In Spain, the market share threshold has always been the subject of intense debate. In this regard, although in the White Paper prepared as a kick-off document for the adoption of the new SCA in 2007 (*Libro Blanco para la Reforma del Sistema Español de Defensa de la Competencia*)¹ the CNC advocated leaving the market share threshold untouched (considering that it was a better indicator of an undertaking's market power as opposed to turnover information), most responses to the consultation asked for it to be removed, motivated by the need to align Spain's legislation with that of other developed countries. The same debate resurfaced during the Parliamentary Debate on the adoption of the ASE.

The ASE amends the market share threshold by adding the following *de minimis* rule: whenever the target company's turnover in the preceding financial year does not exceed 10 million euros, and provided the parties to the transaction do not hold or increase their joint or individual market share above 50 percent in any of the affected markets, the transaction shall be exempt from a merger control notification duty.

In light of the new *de minimis* rule, even if a transaction triggers the 30 percent threshold, it will not be caught by the merger control notification duty if the target's turnover is minimal and the parties' presence in the market is not excessive.

Although no effort has been made by Spanish legislators to justify the adoption of the new *de minimis* rule, it is well known that it is based on the need to put an end to two main problems that affect the CNC's ability to function efficiently – namely its excessive workload, and the unnecessary administrative constraints for undertakings wishing to invest in Spain.

In this regard, the *de minimis* rule is intended to somewhat reduce the current pressure on the CNC, a result of insufficient resources at its disposal, and to convert it into the most active

and effective antitrust authority in Europe. In addition, the economic downturn has made seeking investment a government priority. Easing the administrative burden that merging entities must face when dealing with a notification could be an effective measure to encourage investment in Spain, particularly by foreign companies.

Despite the above, the driving force behind the *de minimis* rule is undoubtedly the new economic approach that the CNC has been trying to promote since the adoption of the new SCA in 2007. In this regard, in 2008 the CNC incorporated a new financial advice division (“*Asesoría Económica*”), led by a chief economist, with the aim of strengthening its traditional legal assessment with more in-depth financial analysis, statistics and advanced econometrics. The result of the work carried out by the chief economist is already visible, in particular in decisions concerning competition and vertical relations, which demonstrate an underlying economic reasoning.² Therefore, it appears that the CNC considers that mergers involving companies with minimal connection with Spain (e.g. no physical presence or residual business activity) are unlikely to have any significant effect on competition.

Impact of the new measure, real benefits or merely formal changes?

With regard to the immediate impact of the new *de minimis* rule, a preliminary analysis indicates that many transactions will no longer have to pass the scrutiny of the CNC. The amendments introduced by the ASE mainly affect two different sets of transactions.

The new rule firstly affects transactions which, although of minor relevance, give rise to a clear impact on a very specific market. Such is the case, for instance, of “declining” markets, which are being phased out due to technological evolution (e.g. conventional light bulbs),³ “niche” markets whose main feature is a limited number of players with high market shares, and finally markets whose geographic scope has been defined very narrowly, thus allowing companies to achieve high market shares.

Furthermore, the second type of transaction likely to qualify for the new *de minimis* rule are foreign-to-foreign transactions – in other words, the acquisition of companies or assets whose main business activity is performed outside Spain, but which nevertheless have some imports in Spain. These transactions were traditionally subject to merger control notification even if the additional market share is insignificant (e.g. one percent), but the acquiring undertaking happened to trigger the 30 percent market share threshold.

It is our understanding that it is precisely this second type of transaction that is intended to be the real beneficiary of the new *de minimis* rule. In particular, as recently pointed out by Competition Commissioner Joaquín Almunia, the EU shall closely monitor national legislation in order to tackle national protectionism in cross-border merger scenarios. In this regard, Almunia stated that “*one priority for EU merger control is also about ensuring that markets remain open within the EU. When it comes to cross-border transactions, we see that we must prevent protectionist temptations in the internal market.*”⁴

EU merger control is seen as the key to achieving an internal market. Despite the possibility for Member States to take into account legitimate public policy such as media plurality, public security and reasonable rules to prevent transactions, the

European Commission has the power to ensure that Member States do not put forward unjustified obstacles to cross-border mergers with EU implications.

It is clear that cross-border transactions⁵ are perceived by the European Union as the perfect instrument against the economic downturn that Europe is currently suffering. In this regard, national merger control legislation

that favours rather than discourages foreign investments, thus keeping the internal market open and competitive and not raising protectionist barriers, will be well received by European institutions.

Market share: an ambiguous threshold

It is beyond doubt that the new *de minimis* rule will improve Spanish merger control, by eliminating significant costs in time and money required to notify transactions, as well as to suspend its implementation. It is worth noting that since the new SCA was passed, 104 out of 175 cases were notified to the CNC on the basis of the 30 percent market share threshold.

Notwithstanding the above, it is significant that the ASE only amends such a controversial threshold, rather than abolishing it. In fact, Spain is one of the few countries in the European Union (together with Latvia, Portugal and Slovenia) that still applies a market share threshold, as opposed to the general recommendations of international institutions, which advise that thresholds must be easy to implement. In this regard, it is clear that the amendment contravenes the guidelines provided by the Organisation for Economic Co-operation and Development (OECD) on the matter. In particular, the OECD recommends that countries “*assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction.*”⁶ The International Competition Network (ICN) focuses further on this concept and highlights that notifications should be required

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only if at least two parties to a transaction have significant local activities in the jurisdiction.⁷

Due to the legal uncertainty characterising the calculation of market shares, both institutions recommend that notification thresholds be defined on the sole basis of objective criteria determined, for example, by reference to the company's financial statements or other similar data and information. In particular, the ICN strongly recommends avoiding the use of market share thresholds since, although necessary to carry out a competitive assessment of a transaction and its impact on a given market, market shares are not reliable as notification thresholds due to the underlying subjective nature of market definition in general.

Will the new *de minimis* work? The example of Germany

Aside from Spain, other jurisdictions have recently amended the *de minimis* rules applicable to their respective merger control regimes. On 25 March 2009, the German Parliament introduced a second domestic turnover threshold aimed at reducing bureaucracy and regulatory burdens for small and medium-sized enterprises.

Before that date, transactions were subject to merger control notification to the Federal Cartel Office (FCO) before their completion, if the following thresholds were met: (i) the combined aggregate worldwide turnover of all participating undertakings was more than 500 million euros in the last financial year, and (ii) at least one participating undertaking (i.e. either the acquiring undertaking or the target company) achieved a turnover in Germany of more than 25 million euros. The new law included the requirement that another participating undertaking must achieve domestic sales exceeding five million euros.

In this regard, Section 35(2) of the Act against Restraints of Competition (ARC) provides for two additional exemptions (which remained unchanged after the legislative amendment), pursuant to which no notification before the FCO is required (i) if an undertaking which is not controlled and had a worldwide turnover of less than 10 million euros in the last financial year merges with another undertaking (the '*de minimis* rule'), or (ii) where the concentration affects a market in which goods or commercial services have been offered for at least five years, and which had a sales volume of less than 15 million euros in the last calendar year (the '*minor market clause*'). Furthermore, Section 130(2) of the ARC states that German merger control notification duty only applies to competitive restraints having an appreciable effect within national territory.

The introduction of the *de minimis* rule reflects the CNC's goal to become the most efficient competition authority in Europe

Pursuant to the broad interpretation of the provision by the German authorities, a transaction generally required pre-merger notification whenever the target company had any domestic turnover, which gave rise to the common practice that many transactions of lesser magnitude and in particular those involving foreign companies had to be notified to the FCO, despite posing no real problem under the perspective of competition principles. The second domestic turnover threshold now clarifies that where one of the participating companies achieves domestic sales below five million euros, there is no domestic effect in Germany.

As a result of the amendment, a transaction will not fall under the ARC and thus not have to be notified before the FCO, if the additional threshold is not met and consequently the other participating undertaking (namely, the target company) did not achieve a turnover in Germany of more than five million euros.

More similar than they seem

Although not entirely alike, the similarities between the German and the Spanish *de minimis* regimes stem from the fact that both systems are triggered by two conditions based, respectively, on turnover figures and market definition.

In Spain, both conditions are accumulative: the transaction must not give rise to a market share of more than 50 percent and the target company must not achieve sales of more than 10 million euros. But in Germany, a transaction may finally be exempt either if the target company does not

meet the five million-euro threshold, or if the market affected and already in existence for at least five years did not generate more than 15 million euros in the previous calendar year.

The second domestic turnover threshold included under German merger control law has reduced the number of notifications before the FCO. Transactions involving a target company that earned only minor revenues in Germany, or a foreign acquirer with hardly any business in Germany, no longer require time-consuming regulatory filings to the FCO. The parties to these transactions may close the deal without having to wait for FCO clearance (notwithstanding any other merger control restraints in multijurisdictional deals).⁸

On the contrary, the '*minor market clause*' – based on market definition – still poses a problem with regard to its application because, in order to benefit from the exemption granted, the merging companies must assess substantive elements (namely the definition of the relevant market that may be affected by a proposed transaction) when considering whether or not the transaction must be notified to the FCO.⁹

As already mentioned, the definition of the relevant markets is highly discretionary and far from objective. In addition, the fact that the FCO, as opposed to the European Commission or the CNC, does not publish its clearance decisions in phase I, making it even harder to carry out an accurate market assessment. In such a situation, it could be possible to request clarification from the FCO as to the market definition, although this would give rise to a burdensome procedure, thus contravening the supposed benefits generated by the exemption.¹⁰

The German experience may provide a clue to whether or not new Spanish *de minimis* rule will indeed be able to reduce the number of notifications submitted to the CNC. It is obvious that market-based exemptions such as the ones briefly described above are still flawed instruments, since they are likely to give rise to additional uncertainty as to whether or not a transaction is safe-harboured.

Merger control in the UK – an alternative regime

Unlike Spanish and German merger control regimes, merger filings in the UK are voluntary. The UK Office of Fair Trading (OFT) has the duty to refer a completed or anticipated merger to the Competition Commission for in-depth review where it believes that a transaction may be expected to result in a substantial lessening of competition in the UK. Nevertheless, there are certain statutory exceptions to the OFT's duty to make a reference: where the market is not of sufficient importance to justify a merger (*de minimis*), where arrangements are insufficiently advanced, and where there are relevant customer benefits.

The UK government is currently consulting on the reform of the UK competition regime, including merger control. As well as contemplating a mandatory merger notification system, the

government is also proposing an exception for small mergers, which would replace the current *de minimis* exception to the duty to refer described above. The current proposal is to set the exemption where the target's UK turnover does not exceed five million pounds, and the acquirer's worldwide turnover does not exceed 10 million pounds.

Final remarks

Competition authorities in general – and in particular the CNC – are constantly struggling with the dilemma of choosing between either tackling all conducts that may hinder effective competition, or adopting a more pragmatic and flexible approach towards investments in their respective jurisdictions. The introduction of a new *de minimis* rule in the Spanish merger control regime comes at a time when encouraging foreign investment is a government priority, and reflects the CNC's goal to become the most efficient competition authority in Europe. With a less burdensome workload coming from merger control review, the CNC will be able to focus on cartel enforcement, its top priority since the adoption of the new SCA.

Although a pragmatic response (envisaged also in other countries, such as Germany and the UK), it is still unclear whether the new *de minimis* rule will be the most appropriate instrument to achieve the CNC's final goal, since it just dilutes, rather than eliminates, the principal obstruction in Spanish merger control legislation: the market share threshold. ■

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Footnotes

- 1 Libro Blanco para la Reforma del Sistema Español de Defensa de la Competencia, 20 January 2005, par 186 et seq.
- 2 See, inter alia, CNC decision dated 19 May 2009, in case No 646/08 *Axion/Abertis*.
- 3 See CNC decision dated 21 December 2010, in case C-0319/10, *LRM/Capricorn/Ducatt*.
- 4 Joaquín Almunia, "Recent developments and future priorities in EU competition policy," International Competition Law Forum, St. Gallen, 8 April 2011.
- 5 This is the case, for instance of the recent proposed acquisition of Parmalat by the French dairy conglomerate Lactalis, Case COMP/M.6242 – *Lactalis/Parmalat*.

- 6 OECD, "Recommendation Concerning Merger Review," 23 March 2005 – C(2005)34.
- 7 ICN "Recommended Practice" I-A.
- 8 See in this regard, FCO press release, "Competition control in 2010 – an eventful and successful year for the Bundeskartellamt," 22 December 2010.
- 9 The 'minor market' clause has only been used in limited cases. It is really an exception that can avoid notification of certain aspects of a transaction (e.g. product lines that belong to such a market), but will only bring the entire transaction outside German merger control law in very exceptional circumstances.
- 10 See "The application of the German and UK *de minimis* regimes in theory and in practice. A comparative analysis," Dr Andreas Boos, Dr Gordon Christian and Dr Thorsten Pries, European Competition Law Review, volume 31, issue 6/2010.