



2ª CONFERENCIA LUSO-ESPAÑOLA DE  
DERECHO DE LA COMPETENCIA

**MERGER CONTROL**


Current issues in merger control in Spain

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## Article 8(1)(a) LDC

...Que como consecuencia de la concentración se adquiere o se incrementa una cuota igual o superior al 30 por ciento del mercado relevante de producto o servicio en el ámbito nacional o en un mercado geográfico definido dentro del mismo. ...



## Importance of the market share threshold

- 63% of transactions met the market share threshold
- 27% met the turnover threshold
- 10% met both

On the other hand

- 53% notified on short form
- 47% notified on ordinary form



## Article 8(1)(a) LDC - *de minimis* exemption

... Quedan exentas del procedimiento de control todas aquellas concentraciones económicas en las que, aun cumpliendo lo establecido en esta letra a), el volumen de negocios global en España de la sociedad adquirida o de los activos adquiridos en el último ejercicio contable no supere la cantidad de 10 millones de euros, siempre y cuando los participes no tengan una cuota individual o conjunta igual o superior al 50 por ciento en cualquiera de los mercados afectados, en el ámbito nacional o en un mercado geográfico definido dentro del mismo.



## Drawbacks remain

- Still based on market share
- Unequal treatment of buyer and target
- Lack of definition of “affected markets”?



## Risk of Article 22 referral

- ABF/GBI (2008)
  - joined by Portugal and France
  - 2nd phase conditions
- Arsenal/DSP (2009)
  - joined by Germany
  - 2nd phase conditions – transaction abandoned
- Syngenta/Monsanto (2010)
  - joined by Hungary
  - 2nd phase conditions
- SCJ/Sara Lee (2010)
  - joined by Belgium, Greece, France, the Czech Republic and Italy
  - transaction abandoned in 2nd phase



## Concerns related to the use of Article 22

- Significant delays to the transaction
- Possibility of referrals by Member States that would not otherwise have jurisdiction

No longer the “Dutch clause” - of the last 10 full referrals under Article 22:

- 4 referrals lead by Spain (2 others joined by Spain)
- 4 referrals lead by Germany (1 other joined by Germany)
- 2 referrals from the UK (on its own)



## Risks when not notifying

- Recent trend of fines being imposed for failure to notify in market share cases
  - 4 recent cases of fines – Abertis, Consenur, Bergé and Tompla
  - Notification obligation in each case due to market shares
  - 3 of the transactions were authorized without conditions in first phase





## Procedural bar to market definition arguments

- In fines proceedings for failure to notify the CNC has refused to accept arguments based on market definition, since this would “reopen” the findings of the previous “administrative decision” (*i.e.*, first phase merger clearance)
- In each of *Consenur*, *Bergé* and *Tompla*, fines decision adopted more than two months after the authorization
- Since more than two months had passed, there was no possibility of appealing the authorization decision



## This outcome is extremely unfortunate

- Policy implications: Parties might be better served appealing authorization decisions despite legal uncertainty for the transaction
- Doubts as to the possibility of appealing the market definition in an authorization decision
- Doubts as to fairness: significant differences in procedural rights in merger control (particularly first phase) and fines cases, respectively

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