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I. BACKGROUND: BUSINESS AND REGULATORY ENVIRONMENT

Spain is the fourth largest Euro zone economy with a domestic market of 47 million people. The recent recession has hit Spain hard, more than many other national economies in Europe. The telecommunications industry has weathered the crisis by competing fiercely in costs and consumer-oriented offers. One feature of the national market is the omnipresence of a historic incumbent, Telefónica, which is also one of the world's largest operators and number three in Europe by turnover.

Notwithstanding the presence of this giant, the market is considerably dynamic and it offers opportunities for international players, with various companies having gained a foothold in recent years. There have been a number of important mergers and acquisitions lately, as well as purely financial transactions and IPOs, with companies attempting to gain scale, better profitability levels, and access to finance.

A key event in Spain from the regulatory standpoint was the creation a couple of years ago of a new regulatory Authority, the National Competition and Markets Commission ("NMCC"), by the NMCC Act. The NMCC gathers the role of national regulatory Authority in various network industries (including the telecommunications), as well as the role of national competition Authority. This means that, at least in theory, decision making at both the regulatory and competition enforcement levels should be better coordinated, with some cross-consultation procedures having been eliminated (*e.g.*, the report from the regulatory Authority previously required prior to a merger control decision in the telecommunications sector) and most importantly with competition and regulatory decisions emanating from a single Authority. Reality is more complex than that though, and it is perhaps fair to say that the current catch-all structure is not unanimously applauded by the legal and business community.²

An additional important regulatory development specific to the telecommunications market was the approval of a new Telecommunications Act a year ago. The Telecommunications Act is the main piece of sector legislation in Spain, dealing with the granting of licenses and authorizations, access to network, spectrum policy, and enforcement. In overview, an attempt has been made to cut red tape and costs. For instance, not all operators are required to fund universal service obligations (only those which gross income exceeds the Euro 100 million benchmark). Market definition for the purposes of establishing *ex ante* obligations to operators with significant market power is entrusted to the NMCC.

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² For more information on these matters, see a short study on regulatory convergence available at <http://callolcoca.com/wp-content/uploads/2013/09/Ever-doubted.pdf>.

The telecommunications market is a priority for the NMCC, as will be seen below. Some key questions remain on future regulation, which will likely influence the future of the industry. For instance, it is worthwhile mentioning the current controversy surrounding prospective regulation by the NMCC of the new generation fibre networks. The NMCC is considering maintaining compulsory network sharing of new generation fibre to the home in most of the territory (with the exception of the cities where there are three or more suppliers, which happens only in very few instances) with Telefonica having threatened to interrupt investment in next-generation networks should this regulatory model prevail. This discussion is likely to be solved this year and it could have a dramatic impact on the shape adopted by investment in new networks.

In this short article we would like to touch briefly on three points: (i) the increasing importance of media content as a key component of the retail offerings of bundled telecommunications services, (ii) prominent competition matters in the sector in Spain, and (iii) mergers and acquisitions. In order to keep the conversation limited, we are not discussing other issues that have been hot, such as the recent spectrum allocation for digital television.

II. MEDIA CONTENT AS KEY DRIVER OF COMPETITION IN THE TELECOMMUNICATIONS SECTOR; IN PARTICULAR, THE ISSUE OF FOOTBALL BROADCASTING RIGHTS

Soccer or football is extremely popular in Spain. The revenues generated by the television broadcasting of prime football events in Spain may reach up to Euro 1.4 billion according to some estimates; nearly 1 million people are official members of the football Federation. And it suffices to only see the national television news to understand that football is widely regarded as having premier social interest and is the object of media, society, and government attention and regulatory agency scrutiny.

By the time of the merger to monopoly of the two existing pay-TV platforms in 2002, the Competition Authority had recognized that football and premium movie content were key assets to enable competition in the pay-TV market.³ As a result of that merger, the duration of exclusivity agreements for the distribution of premier football and movie rights through the merged entity was limited to three years. But such limitations in the form of merger remedies were restricted in scope to agreements not yet in force at the time of the merger clearance (since neither the Hollywood majors nor the football clubs were parties to the 2002 merger review procedure and, therefore, the at the time existing agreements could not be affected by the merger decision).

To achieve required additional scope, two investigations followed suit a few years after 2002. One investigation was against Sogecable and the Hollywood majors based on a complaint brought by ONO, the cable operator, which argued that the output deals between the majors and Sogecable amounted to a bundle of long-term exclusivities, which made competition unfeasible for new entrants.

The second investigation took place against the first division football clubs on the one hand, and Sogecable and Mediapro (a later entrant who succeeded in accumulating substantial

³ NCA merger Decision of 29 November 2002, case N-280.

football broadcasting rights) among others, on the other hand. This latter investigation dealt with the (also) long-term exclusivities granted in the upstream market for commercialization of football rights by football clubs to Sogecable and Mediapro. The Competition Authority limited future (post-2010) football rights commercialization agreements between football clubs and pay-TV platforms to three seasons.⁴

The latter investigation and ensuing antitrust decision against football clubs and pay-TV operators was hotly contested (among other things, on the grounds that the 2010 Media Act allowed content exclusivities for up to four, not three, years) and litigation ensued. Nobody was really happy and it became increasingly apparent that the existing model of individual marketing of football rights and the litigious environment surrounding it had to pave the way for a commonly agreed self-regulation or regulation enabling a centralized marketing system in line with that of other EU countries.

The Government finally agreed it was time to regulate and, in May 2015, the Government passed Royal Decree-Law 5/2015, of urgent measures in relation to the distribution of the exploitation rights of audiovisual contents of professional football competitions (“REAC”). The REAC puts an end to long and complex negotiations among stakeholders and aims to redistribute income from the sale of broadcasting rights by establishing and regulating the collective sale of broadcasting rights by Spanish professional football competitions.

Under the REAC, football clubs must, going forward, assign their broadcasting rights to a pool managed by an organizing entity (*i.e.* the Football League or the Spanish Football Federation depending on the competition). The organizing entity will implement: (i) joint selling (through licensing agreements not lasting longer than three years, following the NCA practice in this area as explained above); and (ii) distribution, pursuant to the regulated criteria contained in the REAC, of the income generated by the joint selling of rights. According to the income distribution criteria of the REAC, the difference between the club that receives the least and the club that receives the most income shall not be greater than 4.5 times.

The REAC may produce, as a result, a reduction of the differences of income between the most popular football clubs (Real Madrid and FC Barcelona) and the least popular. But a more orderly system of exploitation is also expected to increase the total revenue generated by the football rights.

III. COMPETITION ENFORCEMENT IN THE TELECOMMUNICATIONS SECTOR

The telecommunications industry, with its strategic and consumer-oriented character, and by displaying network effects and a trend towards concentration is an obvious candidate for competition enforcement and this is confirmed by the case of Spain.

On March 6, 2014 the NMCC decided to end proceedings against Telefonica, Vodafone, and Orange for allegedly abusing a collective dominant position. Subsequent to a complaint by British Telecommunications (“BT”), the NMCC had initiated disciplinary proceedings against Telefonica, Vodafone, and Orange for an alleged collective margin squeeze in the market for wholesale voice call origination services. In particular, BT claimed that Telefonica, Vodafone,

⁴ NCA Decision of 23 April 2010, case S/0006/07.

and Orange had consistently narrowed the operating margins for Mobile Virtual Network Operators (“MVNOs”) when setting the prices for (i) wholesale voice call origination services, (ii) call termination services in their national mobile telephone networks, and (iii) retail prices for mobile call services.

According to the NMCC, in order to determine the existence of a margin squeeze, the equally efficient operator test should be applied. The application of the test in this case resulted in negative margins; therefore, the NMCC initially concluded that an alleged margin squeeze had taken place. However, the NMCC considered that the equally efficient operator test was not applicable to abuse of collective dominant position cases unless it could be evidenced that, regardless of the wholesale offer adopted by the MVNO, the end result would invariably be a price squeeze. This conclusion was based on the fact that, in its assessment, the Investigation Directorate of the NMCC had omitted the fact that the MVNOs had the possibility of changing their host operator in order to configure a viable offer (in the reasoning of the NMCC, the operator could have configured a viable offer to compete with Telefonica by switching to Orange as wholesale supplier).

In other words, the individual price-squeeze test is not appropriate in collective dominance situations, where the reasonable test is one of “collective exclusion.” Given both that the MVNOs had viable offers at the upstream/wholesale level and that the reality of the market showed new entry by MVNOs at the time of the alleged abuse, no exclusionary effects produced by the margin squeeze were proved.

On December 19, 2012 the NMCC found that Telefonica, Vodafone, and Orange had infringed Articles 2 Competition Act and 102 TFUE through abusive conduct in the wholesale telephone short messaging (“SMS”) markets. According to the NMCC, each of these operators had a monopoly in the services for SMS termination in their own network, enabling the three mobile operators to fix higher prices freely in the termination of SMS. Given that termination is a cost that is passed on to consumers, it enabled operators to maintain higher retail prices in SMS. The NMCC condemned the operators involved for an exploitative abuse of dominant position, setting record fines totaling EUR 120 Million.

Another interesting case has been the more recent EUR 26 million fine on Telefonica for imposing permanence obligations (which, if breached, led to an increasing scale of penalties) on small and medium enterprises, acting as a sort of exclusivity banning clients’ mobility.

It is perhaps worthwhile mentioning—because of its Iberian dimension—the EUR 79 million fine imposed on Telefonica and Portugal Telecom by the European Commission for agreeing not to compete with each other on the Iberian telecommunication markets. In the context of the acquisition by Telefonica of the Brazilian mobile operator Vivo, which was until then jointly owned by Telefonica and Portugal Telecom, the parties had deliberately agreed to stay out of each other's home markets (*i.e.*, the parties inserted a clause in the contract indicating they would not compete in each other’s home market). This was regarded as contrary to Article 101 TFEU and confirmed by the Court of First Instance and the Court of Justice in Luxembourg.

IV. MERGERS AND ACQUISITIONS

As indicated above, intense activity in the mergers and acquisition market has occurred in Spain. Some of these mergers and acquisitions have been substantial corporate moves aimed to counter Telefonica's market power. Notably, Telefonica itself has carried out a strategic acquisition granting it access to premium content, which as anticipated is a key driver of competition in the world of multiple play bundled offerings in the telecommunication markets.

In April 2015 the NMCC approved the acquisition of Distribuidora de Televisión Digital S.A. ("DTS"), Spain's largest pay-TV operator (created the result of a prior merger-to-monopoly between Sogecable and Via Digital in 2002, see point 2 above) by Telefonica. The NMCC approved the transaction subject to commitments offered by Telefonica. Telefonica proposed a five-year duration commitment package (renewable for three additional years). The commitments may be summarized as follows:

1. Telefonica commits not to hinder the mobility of its current and future pay-TV customers by establishing any limitations to such mobility and to honor existing DTS contracts with other electronic communication operators for the distribution of the DTS television signal.
2. Telefonica will make available to other pay-TV operators the wholesale supply of a maximum of 50 percent of premium channels comprising Telefonica's supply (channels with exclusive rights over premium movie and football content) and at a price enabling the replicability of Telefonica's retail supply, preventing potential margin squeeze situations.

The exclusive exploitation of the premium media content acquired by Telefonica is limited to two years and to certain types of broadcasting windows, while other windows (such as movie video on demand and TV catalogue) are prevented from being acquired on an exclusivity basis. Moreover, the resulting entity will limit to three years the duration of its contracts for the acquisition of content and shall waive the preferential acquisition rights of contents (again, in line with CNMC precedents and policy since the 2002 Sogecable/Via Digital merger decision).

3. Telefonica will enable third pay-TV operators to access Telefonica's broadband client base in competitive conditions. Telefonica commits to providing third-party access to its internet network in Spain, with capacity and sufficient guarantees of quality and in FRAND terms, which is clearly relevant for OTTs.

The Telefonica/Digital+ merger is clearly a strategic bet by Telefonica relying on content as a key competition driver. The merger conditions have been criticized by operators as being too soft and it is no wonder that the merger is currently being contested in court.

In July 2014 the European Commission cleared unconditionally the acquisition of ONO, a national cable operator, by Vodafone. The European Commission concluded that the transaction would not raise competition concerns, as the parties' activities were largely complementary: ONO's main activity was related to fixed telecoms, whereas Vodafone was mainly active in mobile telecommunications. Vodafone and ONO's activities displayed some overlaps in a number of markets in the fixed and mobile telecommunications in Spain and the

merger gave rise to a number of vertical and conglomerate relationships in the fixed and mobile telecommunication markets in Spain, in particular in relation to the provision of bundled multiple play services. However, the European Commission found that the impact of the transaction on these markets was likely to be limited because of the availability of alternative operators (such as Telefonica, Orange, and Jazztel) and the regulatory obligations in relation to wholesale access on mobile and fixed services.

In May 2015, the European Commission approved the acquisition of Jazztel by rival Orange. The European Commission had concerns that the takeover could have led to higher prices of fixed internet access services for Spanish consumers. To address the Commission's concerns and enable the entrant of a fourth nationwide operator, Orange submitted commitments based on different technologies:

- Divestiture of an independent fibre-to-the-home network covering 700,000–800,000 building units located in five of the largest Spanish cities, which is similar to the size of Orange's existing FTTH network in Spain.
- Granting the purchaser of the FTTH network wholesale access to Jazztel's national ADSL network for up to eight years, for an unlimited number of subscribers, allowing the purchaser to compete immediately in the majority of the Spanish territory as aggressively as Orange and Jazztel do today.
- Granting to the purchaser of the FTTH network wholesale access to Orange's mobile network including 4G services, unless the purchaser already has access to a similar mobile network.

V. CONCLUSION

The telecommunications business is a dynamic part of the Spanish economy and has continued to attract attention of regulators, as illustrated by the intense activity in the enforcement, merger control, and regulatory arenas. The Spanish case is a good example of how regulatory decisions can impact business, leaving remaining open questions, for instance, on key areas such as the (prospective) regulation of new generation fibre networks.

On the mergers and acquisitions front, some consolidation has taken place in Spain as illustrated by the examples pointed out above (and some others such as the Ibercom/Masmovil and Orange/Symio mergers). The European Commission's concerns in the Jazztel transaction came as a bit of a surprise in view of the existence of powerful competitors such as Telefonica, and were justified, at least informally, by the *maverick* nature of Jazztel and perhaps the fact that there had been a prior acquisition increasing market concentration (Vodafone/ONO).

This case may have been the first powerful signal of a change of policy from the Almunia era, where the Commission had voiced clearly that it would favor consolidation in the European telecommunications industry. The new Vestager administration seems to be positioning itself as far less liberal (not only on merger matters, as it appears when viewing, for instance, the course taken by the ongoing Google investigation) and less prone to market concentration. It remains to be seen whether this apparently radical shift in industrial policy from the European Commission will cast its shadow on national markets such as Spain and also influence decisions at the local level.