

## **GUIDELINES ON SHORT-FORM NOTIFICATION OF MERGERS UNDER ARTICLE 56 OF THE LDC**

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### **I. SCOPE OF THE GUIDELINES**

- (1) Article 56 of the Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia – LDC) introduced for the first time in Spain the possibility that companies obliged to seek authorisation for a concentration could make the prescribed notification in a short form if, *a priori* and without the need for analysis of the specific case, the operation is not expected to pose competition problems.
- (2) The official short form and the cases in which it could be used was developed with the entry into force of the Competition Regulation (RDC) which, in article 57 and Annex III, establishes the events where the short form can be used and the model form itself, respectively.
- (3) In the more than three years the LDC has been in effect, the practice of Spain's antitrust authority, the Comisión Nacional de la Competencia (CNC), regarding mergers notified using the short form has greatly simplified and streamlined the notification process in comparison with mergers notified using the ordinary full form regulated in the LDC.
- (4) The Third additional provision of the LDC provides that the CNC may issue Guidelines clarifying the principles that guide its action in applying the Act.
- (5) In issuing these Guidelines on Short-Form Notification of Mergers, the CNC seeks to contribute to improving transparency and objectivity in relation to the operations that fulfil the eligibility conditions for short-form notification.
- (6) These Guidelines apply to the proceedings for controlling mergers that meet the requirements provided in article 56 of the LDC and article 57 of the RDC.
- (7) In light of the experience acquired during their application, the CNC may revise these Guidelines once two years have passed after they were implemented.

### **II. USE OF SHORT AND FULL-FORM NOTIFICATION**

- (8) The rationale for short-form notification is the negligible implications that certain mergers have for effective competition in markets and the relative simplicity of their analysis by the CNC. This lack of analytical complexity also means that the report proposed by the Investigations Division will be more succinct.
- (9) For qualifying mergers, Annex III of the RDC contains a model short form that exempts the notifying party from having to submit certain information that is obligatory in the ordinary full-form notification of Annex II, because those data are

considered unnecessary due to the lack of complexity posed by the operations for analysis or administrative processing.

- (10) Although neither the LDC nor RDC establish differences between the processing of short-form and full-form mergers, the CNC's experience in investigating and resolving on mergers does indicate that in practice differences may exist in how mergers are processed depending on the notification method used.
- (11) Thus, since introducing the new form, the CNC has maintained the objective of shortening the time it takes to handle cases opened by a short-form notification in comparison with those that arise from a full-form notification.
- (12) This reduction of the time frame for issuing an authorisation is reinforced by the decision not to stop the clock on the time limit for resolving on short-form mergers.
- (13) Therefore, in cases involving control of mergers notified in short form, it is not normally expected that the CNC will instruct the notifying party to correct the filing or submit additional information under articles 55.4 and 55.5 of the LDC, respectively.
- (14) In fact, when such requests for correction or additional information are needed, and the clock therefore stopped, the Investigations Division may make a reasoned request that the full form be used, if that information is essential for continuing and concluding its control of mergers work.

### III. MERGERS ELIGIBLE FOR SHORT-FORM NOTIFICATION

- (15) The CNC interprets article 56.1<sup>1</sup> of the LDC and article 57<sup>2</sup> of the RDC to mean that neither the LDC nor the RDC provide a closed and complete list of mergers that qualify for short-form notification, and that eligibility for such notification depends on the specific characteristics of each operation.
- (16) As a result, the CNC's practice in this regard has allowed the scope of application of the short form to be extended to other cases that are consistent with the purpose of the short form, namely, to reduce the costs of preparing the full form and thus favour a shortening of the time it takes to decide on authorisations for mergers with very limited effect on the market.<sup>3</sup>
- (17) Now then, when the short form is used to notify mergers not expressly contemplated in article 56 of the LDC, the suitability of using that form must be justified, and the competition authority has discretion to assess the circumstances

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<sup>1</sup> Which provides: "A short-form notification that will be established by regulation may be submitted for use, *inter alia*, in the following cases...",

<sup>2</sup> "According to what is provided in article 56 of Act 15/2007 of 3 July 2007, the short-form notification will be used for notifying concentrations when one of the following circumstances, *inter alia*, applies..."

<sup>3</sup> See, for example cases C/0059/08, C/0210/10 and C/0216/10.

in which clearance of a concentration operation can be processed with the short form.

- (18) Accordingly, whenever a concentration qualifies for short-form notification but is not captured by one of the events specifically provided for in the LDC and the RDC, the application to be able to use the short form must be reasoned by the notifying party and its acceptance must be justified in the report of the Investigations Division.

#### **IV. MERGERS THAT MEET THE REQUIREMENTS FOR SHORT-FORM NOTIFICATION BUT FOR WHICH THE FULL FORM IS REQUIRED**

##### **IV.1 Operations which must always be notified using the ordinary full-form notification**

- (19) As already explained, the main reason justifying use of the short form is that the analysis to be performed of the concentration in question allows the CNC to waive certain information disclosure obligations for the parties. This occurs, as a general rule, in the cases that fulfil the requirements set out in article 56 of the LDC and article 57 of the RDC.
- (20) The CNC believes, however, that the analysis of any concentration operation that requires a report from the sector regulator does not meet the requirements established in the preceding section of these Guidelines on short-form notification, even if they satisfy the requirements of articles 56 of the LDC and 57 of the RDC. In these cases, the CNC must therefore obtain the information provided in a full-form notification.
- (21) The reason is that the concentration's authorisation is conditional on the regulator's assessment of the operation and, in turn, on the CNC's evaluation of the report issued by the competent regulator. At the procedural level this normally translates into administrative time frames that are on average longer than those of mergers notified using the full form. Therefore, neither the analytical nor processing complexity of the authorisation decision qualify these cases for the benefits of short-form notification.
- (22) Nor would the CNC waiving certain disclosure requirements for the parties seem to be consistent with the obligation established in article 63 of the RDC to forward to the competent regulator, together with the prescribed request to report, a copy of the notification presented by the notifying party to the competent authority.
- (23) The CNC also believes that those mergers for which the notifying party requests a lifting of the suspension of the concentration's execution under article 9.6 of the LDC do not qualify for short-form notification.
- (24) The assessment of the harm that lifting the suspension could cause to the parties to the concentration and to free competition, and the possibility of commitments being offered or of conditions being imposed for lifting the suspension of execution, cannot be done via the short-form procedure, because the CNC's analysis will require diverse elements that are not covered in that form.

- (25) Consequently, the CNC believes that whenever a notifying party requests that suspension of the concentration's execution be lifted before the first phase of the proceeding is concluded (that is, before one month has passed after the filing date of the notification), the concentration must be notified using the full form, regardless of whether it meets the requirements of articles 56 of the LDC and 57 of the RDC.
- (26) All of the cases discussed in this point may be evaluated by the notifying party before the notification is submitted to the CNC. So if any of the circumstances described in this section apply, the notifying party should use the full-form notification to initiate the control of mergers proceeding; otherwise it will be requested to correct the notification, with the immediate consequence that the proceeding will not begin until the full form is filed.

#### **IV.2 Request for full-form notification**

- (27) Article 56 provides the possibility that the Investigations Division may request the notifying party to submit a full-form notification if the concentration requires more exhaustive investigation, a series of examples of which are set out in article 57.2 of the RDC.
- (28) Just as its practice has allowed the CNC to extend the number of cases in which the short form may be used and continuously streamline the processing of the decision on those mergers, the existence of cases that require more detailed analysis of the concentration operation justifies that certain notifications will not qualify for short-form notification even though they meet the requirements of articles 56 of the LDC and 57 of the RDC.
- (29) The CNC's practice has allowed it to detect other cases in which a full-form notification may be requested, such as when there exist constraints on competition in the contracts that give rise to the concentration operation that require more in-depth analysis to determine whether those restrictions are ancillary or not.
- (30) The Investigations Division has only needed to employ this mechanism on five occasions.<sup>4</sup> The immediate consequence for the notifying party was the end of the control of mergers proceeding, and the beginning of the one month limit referred to by article 36.2 of the LDC as from the time the notifying party submits the requested full-form notification.
- (31) The request for full-form notification is made by means of a reasoned decision of the Investigations Division, setting out the reasons why a concentration that in principle meets the requirements for short-form filing must instead be processed using the full-form notification, and accompanied by complementary fee form provided for in article 60.4 of the RDC.

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<sup>4</sup> Case C/0066/08 MAPFRE/CAJA DUERO/DUERO VIDA/DUERO PENSIONES, under article 57.2e) of the RDC; C/0068/08 NEW EGARA/EISSL, under article 57.2 g) of the RDC; C/239/10 NORTHERN DIGITAL/ BRAINLAB, under article 57.2 a) of the RDC; C-0251/10 GRUPO BANCO SABADELL / BANCO GUIPUZCOANO, under article 57.2 c) of the RDC and C/0336/11 NMG/BDG, under article 56.2 of the LDC.

