

## SEMINAR: “REGULATION OF COMPETITION AND DIGITAL PLATFORMS IN EUROPE AND LATIN AMERICA”

### THE DIGITAL MARKETS ACT: A REGULATION TO STRENGTHEN COMPETITION IN DIGITAL MARKETS.

### A NOTE FOR AN EFFECTIVE INTERACTION OF THE DMA WITH COMPETITION LAW AND THE ROLE OF NATIONAL COMPETITION AUTHORITIES

*Wednesday, June 14*

*3:10 pm – 3:30 pm*

*En Chile: 9:10 am –  
9:30 am*

*Online*

**Good morning.** Thank you very much to Luis Villarroel for the organization and the kind invitation.

#### 1. THE DIGITAL MARKETS ACT (DMA): A NEW TOOL TO DEAL WITH COMPETITION CHALLENGES IN THE DIGITAL MARKETS

- Competition issues in digital markets have captured a **large share of the attention** of the antitrust community over the last three years.
- I believe **competition is usually the best mechanism to ensure maximum efficiency and consumer welfare**. Regulation can also pursue legitimate goals, such as the correction of market failures in a competitive market or other reasons of general interest. However, **regulation should always be the last resort**

**and be applied only when these market failures and bottlenecks cannot be solved by the dynamics of the market.**

- **The Google Shopping case** is a perfect example. It has taken 12 years – since November 2009, when the first complaints were lodged with the European Commission, until the ruling issued by the GC in 2021 – to receive the views of the European General Court. And the decision is not even final, as it has already been appealed before the European Court of Justice (Case C-48/22 P). This situation illustrates perfectly the **lengthy and complicated process required for competition authorities to apply article 102 TFEU to unfair commercial practices performed by gatekeepers.**
- That is why regulators across the world and, specifically in the European Union, have been calling for **additional tools to deal with competitive challenges in the digital arena.** In the EU this new tool is the DMA, an *ex-ante* regulation in digital markets.
- As you may know, **the DMA will not prevent the application of competition law to digital markets.** It declares itself ‘**complementary**’ to the competition rules and indicates that it ‘**aims at protecting a different legal interest**’ from those rules. Therefore, **both instruments will coexist** and remain at the disposal of enforcers to address competition challenges in digital markets: *ex-ante* instructions to gatekeepers under the DMA, and *ex-post* enforcement of competition law.
- As the CNMC, we welcome the approval of the **DMA** given its **potential to improve fairness and contestability** of digital markets. We see the DMA as a key milestone to strengthen the EU

single market, for the specific case of digital services. We have said so in **different official documents**, since the discussions on the DMA started:

- First, in the **public consultation in 2020** on the DSA and the New Competition Tool (NCT), which finally ended in the DMA.
- Second, in our **market study on online advertising** in July 2021.
- Furthermore, as a National Competition Authority in the EU, we endorsed **the joint paper with EU NCAs** (in June 2021) on “How national competition agencies can strengthen the DMA”.
- From the **very perspective of a National Competition Authority**, we value especially two features of the final version of the DMA:
  - First, **the fact that the DMA is without prejudice to the application of competition policy**, also to digital gatekeepers.
  - Second, **the fact that NCAs are to play a role in the DMA implementation**, even if the European Commission is the “sole enforcer”.
- Let me further develop these two issues.

### **1.1. Competition policy and the DMA**

- In theory, the life of an NCA in the EU does not change much after the DMA.
- The DMA<sup>1</sup> states that its application is **without prejudice to the enforcement of competition law**. The DMA specifies **that it**

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<sup>1</sup> Article 1.6

**pursues an objective<sup>2</sup>** (to ensure that markets where gatekeepers are present are and remain contestable and fair) which is **different** from the goals of competition policy (protecting undistorted competition on any given market).

- Therefore, there is not “unity of the legal interest protected” and the **same conduct can be an infringement of both sectoral (digital) regulation and competition law**.
- This can give to **non-bis-in-idem issues**, although some recent rulings (**C-151/20, Nordzucker and C-117/20, Bpost**) have **shed some light** on the conditions for Courts to admit two different penalties on the same conduct.
- One of these conditions is the **consistency** and the **coordination** of these complementary responses: sectoral (digital) regulation and competition law.

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*This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of:*

*(a) national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions;*

*(b) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers; and*

*(c) Council Regulation (EC) No 139/2004 and national rules concerning merger control.*

<sup>2</sup> Recital 11

*Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application.*

- That is why the DMA involves a lot of coordination and that is the main change for NCAs after the DMA. National Competition Authorities will exchange information with the European Commission when applying competition policy to gatekeepers. The NCAs and the European Commission already have a **strong and solid coordination through the European Competition Network (ECN)** and we all agree that this cooperation should be strengthened in the post DMA framework. The exchange of information will be bidirectional, also from the European Commission to NCAs.
- All **this** to the **benefit** not only of **consistency** (to avoid ne-bis-in-idem issues) but also of **efficiency**, making sure that the resources of the ECN are used in the most productive way.
- Finally, it is worth recalling that, regardless of the fact that the DMA is without prejudice to the application of competition policy to digital gatekeepers (including conducts and core platform services considered in the DMA), there are some conducts and services of digital gatekeepers which will not be tackled by the DMA. **Competition policy will be the only tool to address them.**
- In my opinion, it is essential that **competition policy goes on being applied vigorously to digital markets and gatekeepers**, both by the DGCOMP and the NCAs. This is the best way to **ensure that the DMA is future-proof.**
- Competition policy offers a **flexible framework** to assess **potentially problematic conducts or market contexts** (that could in the future be included in the scope of the DMA if warranted). As the June 2021 Joint paper of the National Competition Authorities

suggested, **without that application of competition law to digital markets (both by the DGCOMP and national authorities) the DMA would not exist**, since we would not have grasped digital services from the perspective of market definition or remedies design. **Therefore, the best way to make the DMA future - proofing is by ensuring that competition policy is applied to digital markets, including by National Competition Authorities.**

## 1.2. The role of National Competition Authorities in the DMA

- As I have said, NCAs will go on having a role in digital markets through the application of competition policy. But what about their **specific role** in the DMA?
- In our view, the **most important mechanism for the NCAs** involvement in the DMA<sup>3</sup> is the possibility of national authorities in charge of competition rules (which is our case as an NCA) to **initiate their own investigations of non-compliance with articles 5, 6 and 7 of the DMA** within its territory.
- To do so, in our case, **we first must be empowered by national law**. I hope that our **Spanish Parliament** does not take long to do so, as we feel that this can be a very powerful instrument for the NCAs, and the ***time is of essence***. In any case, as **general elections** were called two weeks ago, we will have to wait for the **next legislature** term.

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<sup>3</sup> Article 38.7

*Where it has the competence and investigative powers to do so under national law, a national competent authority of the Member States enforcing the rules referred to in Article 1(6) may, on its own initiative, conduct an investigation into a case of possible non-compliance with Articles 5, 6 and 7 of this Regulation on its territory.*

- The DMA itself states<sup>4</sup> that such NCA's led investigations of non-compliance with Articles 5, 6 and 7 of the DMA are very **useful for cases where it cannot be determined from the outset whether a gatekeeper's behavior is infringing the DMA**, competition rules or both. Having the two tools at reach (DMA investigation and competition policy) allows a more thorough scrutiny on gatekeepers by NCAs.
- **The NCAs will have a more comprehensive view** of how to tackle some challenges of digital markets, even if eventually it is for the European Commission to enforce. This process will indeed **enhance the learning** by doing process, ensuring that the **DMA increases its future-proofing**.
- For the European Commission this **mechanism is also very positive. It will leverage** as much as possible **the resources of the NCAs to start its own investigations** within its national territory. And, again, **coordination mechanisms will ensure that there are no overlaps** in the actions of the European Commission and the NCAs.
- Finally, there are also **other ways of involving NCAs in the DMA**. The European Commission **may ask the NCAs to support its market investigations**. Specifically, the European Commission

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<sup>4</sup> Recital 91

*The Commission is the sole authority empowered to enforce this Regulation. In order to support the Commission, it should be possible for Member States to empower their national competent authorities enforcing competition rules to conduct investigations into possible non-compliance by gatekeepers with certain obligations under this Regulation. This could in particular be relevant for cases where it cannot be determined from the outset whether a gatekeeper's behavior is capable of infringing this Regulation, the competition rules which the national competent authority is empowered to enforce, or both.*

can leverage the resources of NCAs for **requests for information, interviews, dawn raids, the collection of information** provided by third parties, and for the **monitoring of remedies and obligations.**

### 1.3. The High Level Group

- Regarding the **High-Level Group for the DMA** (created by its **article 40**), I would like to point out that it is a forum where NCAs are represented through the ECN. And **regulators** of telecom, media, data protection and consumer protection are also present.
- It is a very **relevant forum to increase consistency** in the DMA implementation. Not only vis-à-vis **competition policy** but also regarding **sectoral regulation** (in telecom and media) and **consumer and data protection.**
- In fact, **I am one of the representatives** of the European Competition Network (ECN) in this High-Level Group. With my fellow representatives of the ECN, we will **raise all the issues that might improve consistency and synergies** between instruments, specifically with competition policy. The ECN contribution is paramount to ensure a harmonic implementation of the DMA together with competition policy.
- We have already met once and I feel that the task of the high-level group is **especially relevant** at this moment, when the DMA is at the **outset of its implementation.**
- The **mandate** of the high-level group **includes reporting to the European Parliament and the Council.**



## 2. COMPETITION POLICY IN DIGITAL MARKETS: THE SPANISH EXPERIENCE

- Now, I would like to say a few words **about our experience in digital markets.**

### 2.1. Merger control in digital markets

- **With or without gatekeepers involved**, national authorities and the European Commission have recently dealt with **mergers**, especially digital ones, which are truly significant but could have **escaped merger control by not hitting the thresholds.**
- **This does not seem to be a problem in Spain, thanks to our market share threshold for merger notification**, which applies in addition or as an alternative to the classic turnover threshold<sup>5</sup>. Thus, a low level of turnover of the parties involved does not prevent us from looking into mergers that could lead to a **significant increase in the market share** or involve a **killer acquisition.**
- **Do you know that over 60% of the merger deals we review are triggered by our market share threshold?**

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<sup>5</sup> The provisions in the Spanish Competition Act establish the obligation to notify to the CNMC transactions that trigger 2 types of thresholds: one based on the turnover of the companies (over a combined 240 million euro turnover and at least 2 companies with a turnover in Spain of equal or over 60 million) and another threshold based on the market share of the companies involved: when, as a result of the transaction, the acquiring companies obtains or increases a market share equal or over 30%.

- **Well, in digital markets, this figure amounts to 75%** (3 out of 4 mergers in digital markets is notified through the market share criterion). This threshold has proven **particularly useful to capture digital transactions or problematic acquisitions** when the target does not yet have a large business volume.
- **In 2022, 100% of all merger cases cleared with remedies (whether digital or not) was detected thanks to the market share threshold.** Consequently, it is key for detection of problematic mergers.
- However, **don't you wonder how a market share threshold can capture killer acquisitions** (since the targets do not yet have important market share in terms of turnover)? This is where I explain that the success is not only due to our market threshold, but also to the practical, **realistic way in which it has been applied by the CNMC.**
- In particular in zero-pricing business models in **digital markets** the assessment of market power and the market share proxy for it may be challenging. The **CNMC has established a practice of calculating the market shares** in terms appropriate to the market at stake: it could be in terms of **visits** to a platform or, in terms of **users**, of **devices**, ... when we knew that free products and preinstalled solutions in devices exerted competitive pressure.
- Our market share threshold and the way we apply it, enabled us **to refer to the European Commission** mergers that had gone under their thresholds radar, such as **Facebook-WhatsApp**, **Apple-Shazam** or, last year, the acquisition of **Inmarsat by**

**Viasat** in the supply of broadband in-flight connectivity services to commercial airlines.

- In fact, the **CNMC has analyzed 24 digital mergers** in the past 4 years. 17 out of them were notified due to the market share threshold: they would have gone under the radar otherwise. 3 out of them involved commitments, which means that they were relevant from the standpoint of competition.
- Two of these mergers which involved commitments were **authorized in 2022**:
  - WEDDING PLANNER online platform's acquisition of its main competitor, ZANKYOU (platforms for wedding organizations specialized services)
  - And the acquisition of THOMSON REUTERS ESPAÑA, WOLTERS KLUWER ESPAÑA Y WOLTERS KLUWER FRANCIA by KARNOV (legal software, solutions and publications).
  - In both operations **commitments** were directed at allowing multi-homing by banning de facto and de iure exclusivity clauses. All that in order to avoid lock-in effects and to allow competitors exploiting scale, scope, learning, and network economies.
- **Other recent relevant mergers** which were unconditionally cleared in phase I were:
  - TURNITIN/OURIGINAL in antiplagiarism software.
  - NORTON /AVAST in cybersecurity.

- In these operations different factors have been assessed, such as the role of ecosystems, zero pricing, Big Tech companies, innovation theories of harm, etc.
- It is worth mentioning our **activity in the food delivery platforms market**.
  - At least three new platforms entered in this market (DELIVEROO, UBER EATS and GLOVO), after JUST EAT removed the exclusivity that it formerly imposed on its affiliated restaurants in order to get clearance of its acquisition of la NEVERA ROJA by the CNMC. This proved the benefits of platform multihoming in this sector (competition in fees and quality of service for restaurants and customers, the two sides of the platform).
  - These operations have allowed the CNMC to gain experience in multi-sided markets and data-driven theories of harm.

## 2.2. Antitrust enforcement in digital markets

- Regarding the antitrust enforcement, we currently have **4 open investigations**:
  - AMAZON/APPLE BRANDGATING Case: a possible Article 101 (Article 1 of Spanish Competition Act) on an agreement that, among other things, restrict the merchants allowed to sell Apple products on Amazon's marketplace and restricts advertising on Amazon's website and marketing policies by Amazon.
  - BOOKING Case: a possible Article 102 (Article 2 of Spanish Competition Act) on the conditions imposed by Booking on hotels. Also, a possible infringement of Article 3 of Spanish

- Competition Act: unfair competition (through an abuse of economic dependence) creating a distortion of competition to the extent that it affects general interest.
- ELECTRONIC AUCTIONS PLATFORM Case: a possible Article 101 (Article 1 of Spanish Competition Act) and a possible infringement of Article 3 of Spanish Competition Act, due the rules used by legal representatives (*procuradores*) for extra-judiciary auctions and the way this platform is advertised.
  - And, in March 2023, the Competition Directorate initiated disciplinary proceedings against Google for possible anti-competitive practices affecting Spanish publishers of press publications and news agencies (GOOGLE NEIGHBOURING RIGHTS Case).
- These cases are in the investigative phase so I cannot share anything beyond what is already public in the press release.
  - On the other hand, in 2021, for instance, we had **one sanctioning decision** (PROPTECH Case). In which several companies were fined EUR 1.25 million in online real estate intermediation. It is a paradigmatic case on how IT can enable and facilitate collusive behavior in unprecedented ways (in this case in a very decentralized sector).
  - Other decisions have ended in **termination by commitments**:
    - ISDIN Case: the company committed not to engage in resale price maintenance and not limiting the freedom of resellers to set discounts, without discriminating the online channel.

- ADIDAS ESPAÑA Case: ADIDAS committed to eliminate restrictions on online sales and advertising.
- IMS Health Case: IMS committed to eliminate conducts which consisted in engaging in a network of data supply agreements having an effect akin to exclusive supply.

### 3. FINAL REMARKS:

- Overall, and with the several challenges in the forthcoming years, the **CNMC is committed to pursue vigorous competition enforcement** and an **effective competition advocacy**, responding to the challenges, grasping the enormous potential of digitalization, and accompanying the transformation of our economies into a greener and more sustainable model. This will contribute to a strong economic recovery reaching all parts of our society.
- As I said before, we have a **positive assessment of the how the DMA involves National Competition Authorities**:
  - Especially, regarding the possibility to launch their own **investigations of non-compliance** with Articles 5, 6 and 7 of the DMA within their national territory.
  - Also, by **strengthening the coordination** between the European Commission and the NCAs and between the DMA and competition policy.
  - And, by **ensuring that the application of the DMA is without prejudice to competition law**, so that NCAs will be able to go on applying competition law to digital markets and gatekeepers.

- In any case, the CNMC **keeps monitoring digital markets** and is prepared to **open more investigations in digital markets**, also in the post **DMA framework**.
- Thank you very much.