Competition Law and Digital Market: A European Union point of view useful for the ASEAN

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INTRODUCTION

1.-Competition Law and Market Unity

1.1.- Competition Law in a market economy

It is a basic economic principle that in a competitive market, the price of a good is determined by the equilibrium of the supply curve and the demand curve of such good. We have seen that economic graph where the supply curve and demand curve will meet will be the price that is supposed to be imposed as the price of such good. However, the equilibrium price will only be optimal if the market is a competitive one. There are a lot of times when the market is not a competitive one. These instances are situations where there is a monopoly or when there is an oligopoly. This means that there are only one or a few suppliers and therefore they can distort the market and dictate the prices since they have control over the supply side of the equation.
In a speech delivered by S. Depypere a well-known economist, he explained why there is a need for competition law. He said that, “The essence of the market place is competitive effort of suppliers to make the best offer and of buyers to make the best purchase. An efficient market will only emerge when there are many players, when there are no barriers to entry, when the information flows freely.” Therefore, to insure that there are no factors that will affect the competitiveness of the products, a competent competition law should be in place. This is to prevent the emergence of monopolies, oligopolies or when their existence is really inevitable, to prevent them abusing their power.

1.2.- Legal foundations of Spanish competition Law

Competition law stems from the Constitution law that recognises the freedom of enterprise within the framework of a market economy and the guarantee and protection of it by the public authorities, in accordance with the demands of the economy in general and, as the case may be, with the planning.
Competition Law is the name that this kind of law takes in Europe, however in other parts of the world it is called Antitrust. However, we will use both terms as synonyms. It is important to note that Competition Law is a different field of law than Unfair Competition Law.
The ultimate aim of Antitrust Law/Competition Law is to promote or maintain competition in the market by regulating anticompetitive conducts and by supervising those business transactions likely to distort or damage the competitive structure of markets.

1.3.- Economic landscapes of a dysfunctional competition and the kinds of markets

The economic base of Competition Law/Antitrust Law is the functioning of the market under competitive conditions. It is common knowledge that markets at least in theory tend to work under a system of perfect competition, which means that the market self-regulates in order to reach the best assignment of goods and services.
However, the perfect functioning of the markets under a situation of perfect competition according to this theoretical construction, hardly ever takes place. This way we may find different kind of markets or imperfect markets depending on the number of buyers or sellers that we may find. This allows us to distinguish among perfect competition, oligopolies and monopolies, so as (seller monopoly) and monopsonies.
In conclusion, there are different combinations about the number of sellers or buyers we may find in the market. However, Competition Law deals with situations that can be provoked in the market because the number of agents that intervene in it.
There is not a general prohibition of the monopoly. A monopoly in a situation in which there is only one offer or one buyer for a certain product or service, is perfectly legal. What is forbidden under European systems and competition law is the abuse of this dominant position the monopolies may have.
But competition law is also applied under normal situations of the market, as there may be some cases in which we have a situation of a market that theoretically works under a system of perfect competition, but the buyers or sellers in the market put themselves together in order to distort the competitive situation of the market.

2.- Legal protection of competition

Competition law stems from the Constitution law that recognises the freedom of enterprise within the framework of a market economy and the guarantee and protection of it by the public authorities, in accordance with the demands of the economy in general and, as the case may be, with the planning.
Competition is the economic framework, under the European legal system and the mixed economic markets in the world, where businesses must carry out their activity. In the interest of customers, other undertakings and also the interest of the general economy.

2.1.- European foundations

The regulation of free competition is based on the European legal system. Spain had to make a profound reform of its competition law regulation when it entered into the

European community. This regulation can now be found in arts. 101 and following of the Treaty of the Functioning of the European Union (TFEU). The most important one of them are arts. 101 and arts. 102.
According to all the principles of European law, there is a relationship of supremacy of the European competition rules over the national ones. Even when there is not really any kind of contradiction among the European regulation of competition law and the Spanish law, since the Spanish regulation is only an implementation or adaptation of the general rule of the European system for our legal framework.
The only grave difference that we are going to find is that the Spanish regulation (considered in art. 3 of the competition act) includes the regulation of the unfair practices that prevent free competition.

2.2.- Basic Spanish regulation on competition Law

- Spanish Competition Act (act 15/2007, 3 July): In the national realm, this act disciplines the action of businesses and reallocates the productive resources in favor of the most efficient operators or techniques. It is the main instrument for the implementation of competition law in the Spanish system.
- Act 3/2013, 4 June, on the Spanish Commission on Markets and Competition: This is an administrative act by means of which the Spanish commission of markets and competition is created, and its functioning is regulated. This Spanish Commission of Markets and Competition is the legal body in charge of implementing the Spanish Competition Act. At the European level the relevant administrative body is going to be the European commission.
- Royal Decree 261/2008, 22 February, Regulations implementing the Competition Act: This is in regards to the regulation of antitrust in Spain.
- Act 3/1991, 10 January, on Unfair Competition: If we pass into the regulation of unfair competition in Spain, we are going to study this act as well as the General Advertising Act (act 34/1988, 11 November).

There are relevant articles in the Spanish Constitution. In particular, these are the relevant articles which urge competition in the market.

Article 33
1. The right to private property and inheritance is recognized.
2. The content of these rights shall be determined by the social function which they fulfil, in accordance with the law.
3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the provisions of the law.

Article 38

Free enterprise is recognized within the framework of a market economy. The public authorities shall guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the economy in general and, as the case may be, of its planning.

Article 128

1. The entire wealth of the country in its different forms, irrespective of its ownership, is subordinate to the general interest.
2. Public initiative in economic activity is recognized. Essential resources or services may be restricted by law to the public sector, especially in the case of monopolies. Likewise, intervention in companies may be decided upon when the public interest so demands.

Article 131

1. The State, through the law, shall be able to plan general economic activity in order to meet collective needs, balance and harmonize regional and sectorial development and stimulate the growth of income and wealth and its more equitable distribution.
2. The Government shall draft planning projects in accordance with the forecasts supplied by the Autonomous Communities and the advice and collaboration of trade unions and other professional, business and financial organizations. A council shall be set up for this purpose, whose composition and duties shall be established by law.

The Spanish Constitution specifically provides the need for free enterprise. It is only apt that to prevent anti-competitive practices, certain acts should be prohibited and that some situations should be regulated.

3.- Situations and content of Competition Law

Under the Spanish legal system, the sanctioning and prevention of the practices against free competition are enforced by the National Commission of Markets and Competition (CNMC: Comisión Nacional de los Mercados y la Competencia).

The Competition Act for the fight against practices restrictive of competition and the control of economic concentrations mainly deals with three kinds of situations:

a) Conducts restrictive of competition, or forbidden practices. These are situations that consider practices that are forbidden in all cases. They are the agreements against free competition (among them we may find the cartels) and the practices of abuse of a dominant position.

b) Authorized behaviors. These are cases in which the competition may be affected but the relevant authority (National Commission of Markets and Competition or the European Commission) considers that they do not produce a relevant effect on the competitive working of the market.

c) Situations that must be under the administrative control, as they potentially may affect the functioning of the markets under a situation of competition. This is the case of the Mergers control or the State Aid rules.

4.- Prohibited conducts

Prohibited conducts are those that are forbidden under competition law. The two main prohibitions considered under the treaty of the functioning of the European Union are (arts. 101 and 102 TFUE):

- Agreements against competition, including cartels. It is important to note that all agreements against competition are not cartels, but all cartels are an agreement against competition. Any agreement that prevents, distorts or reviews competition in a certain market is forbidden by European competition law.
- Abuse of a dominant position.

The Spanish Competition Act (art.3) also provides a third prohibited conduct:

- The distortion of free competition by unfair acting. This is a prohibited conduct that creates a connection between the part of free competition and the acts against unfair competition, since the acts of unfair competitions may distort or affect the competitive functioning of the market.

4.1.- Anticompetitive agreements

Competition law declares as collusive conduct the agreements between undertakings in the terms defined in the law. The law states that all agreements, collective decisions or recommendations, or concerted or consciously parallel practices are prohibited, if they have as their object, produce or may produce the effect of prevention, restriction or distortion of competition in all or part of the national market.

Art. 101 TFUE and art. 1 Spanish Competition Act have a similar regulation on this conduct.

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development, or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties,
e) thereby placing them at a competitive disadvantage;

f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The prohibition in this article can be structured in different aspects:

The following agreements are considered as anti-competitive:

(1) Any agreement between undertakings

This happens when entities in the same market talk to each other and they have an outright agreement on what they will do with the market. They may agree on the price they will impose or the amount of products they will supply the market. For instance, all the cellphone network providers convene and they agree that they will impose a fixed price which is higher than the equilibrium price. The consumers have no choice since they need such service and can't do anything but to buy from the network providers even though they are imposing a higher price.

(2) Decisions or collective recommendations of associations

This happens when certain services or producers who are part of an association agree on how they will affect the market. For example, those who are part of the bar association in a certain city may agree that all of them will impose a certain price per hour. The price might not be the equilibrium price but the bar association members agree to this certain price. This is considered to be an infringement of free competition.

(3) Concerted activities consciously parallel even if the act is without previous agreement

These are activities though the players in the market did not agree, all of them did something to distort the market which results to the prejudice of the consumers. An example of this is when sugar producers though they did not agree, one seeing that another has increased price, others followed suit, eventually creating a domino effect of everyone in the market increasing their price even though there is no basis for it. So even though there is no outright agreement among all the players, since all of them followed suit and increased their selling price and in result distorting the true equilibrium price, then they will be liable for infringement of the competition act.

The general rule is that if the agreement is under any of the agreements considered as anticompetitive, then they are prohibited. If the agreement is deemed to be anti-competitive then the agreement is considered to be void and ineffective. The agreement is not binding to parties and no one can claim compliance to such agreement.

There are however two (2) exceptions to the general rule, and they are:

(1) Agreement covered by a block exemption regulation and

(2) Agreement covered by the exceptions mentioned in Art 1.3 of the Spanish Competition Act.

An example of this is when restaurants by the beachfront all agree that they will clean the part of the sea that they are nearest to. Though they have an agreement this does not in any way distort the equilibrium price but instead they are actually doing good for the society as a whole.

Following this, article 101 enumerates those which consist of: a) The direct or indirect fixing of prices or any other trading or service conditions; b) The limitation or control of production, distribution, technical development or investment; c) The share-out of the market or sources of supply; d) The application, in trading or service relationships, of dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others; e) The subordination of the conclusion of contracts to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of these contracts.

However, the prohibition shall not apply to agreements, decisions, recommendations and practices that contribute to improving the production of the commercialization and distribution of goods and services or to promoting technical or economic progress.

The act embraces a system of legal exemption, which excludes from the prohibition agreements that meet certain requirements, in line with the ones set out in the Community rules. In essence, it concerns the prohibitions not being applicable to those restrictions of competition proportional to the benefits that they generate in terms of efficiency in the allocation of resources and, therefore, of general welfare. Likewise, it declares the exemption of the conduct that results from the application of the rule de minimis conduct.

The general rule of prohibition of these agreements finds two different exceptions: The case in which these agreements may be covered by a block exemption regulation and agreements covered by the exception of recital 3.
It is also important to note that art. 101 indicates that the kind of forbidden agreements must have as their object or effect the prevention, restriction or distortion of competition. Which implies that the prohibition has two different dimensions.

4.2.- Abuse of a dominant position

The abuse of a dominant position is regulated in art. 102 TFUE and Art. 2 LDC. Competition Law prohibits the abuse by one or more undertakings of their dominant position in all or part of the national market. The law prohibits abuse of a dominant position, but not its existence or creation.

Article 102
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

With regards to these prohibitions of the acts of abuse of a dominant position we have to take into account that there is no prohibition of the existence de iure or de facto of monopolies or oligopolies. Only the abuse of such a position is forbidden.

The elements to determine the existence of a dominant position are:

- The market shares that a company has in a market, as it will determine the dominance it has in the market.
- The control of a relevant resource or facility, that is a requirement to access a certain market.
- The existence of important barriers to enter into the market.

The two main kinds of acts of abuse of dominance are:

- Exploitative abuses: These are the ones in which a company with a dominant position uses this strong position it has in the market in order to exploit the situation creating damages among all to the customers or the undertakings in the market. Some particular cases are:
  - Excessive prices.
  - Imposition of non-equitative conditions.
  - Discrimination among customer.

- Abuses of exclusion: An abuse of dominant position by exclusion implies that the company with a dominant position uses its strong market position to exclude the rivals from the market. Some particular cases are:
  - Predatory pricing.
  - Single branding agreements.
  - Exclusive discounts.
  - Tying agreements.
  - Refusal to contract.
  - Margin squeeze.

These conducts may be performed individually, by the single company with the dominant position, or performed a long with other companies, facing a collective dominance position. They also need to take place in the relevant market, as stated in regards to anticompetitive agreements. For this prohibition of art.2 there is no exemption and no way to escape the implementation of the prohibition.

Particular cases of Abuse of Dominant position

The following are examples of abuses of dominant position of exploitive abuses:

(1) Excessive prices
This happens when the company knowing that it has captured the market imposes price which is not actually the equilibrium price

(2) Non-equal conditions
This happens when conditions are imposed to some customers while others are not given such conditions.

(3) Discrimination among customers
This happens when the dominant entity only favors specific customers and without giving other customers a bat in the eye.

On the other hand, the following are examples for exclusionary abuses:

(1) Predatory Pricing

This happens when a dominant player is ready to lower its prices and take some losses just to drive out competition in the market. Since other players cannot afford to lose every sale, they will eventually give up since they cannot compete in the market.

(2) Single Branding Agreements

It is where the buyer is restricted to placing all or most of its order with one particular supplier

(3) Exclusive Discounts

The entity gives big discounts and lesser prices than its competitors so that the company will be favored by the market and will eventually result to kicking out of other competitors outside the market.

(4) Tying Agreements

This happens when a customer who wants to buy a product cannot by a product on its own since the product is already bundled to be bought with another product.

(5) Refusal to contract

This is when the entity for example a supplier of a raw material knowing it has dominance over the market, refuses to contract with customers therefore the customers who needs such raw materials cannot do its production since it lacks raw materials. This refusal to contract will eventually lead to the exiting of the entity out of the market.

(6) Margin Squeeze

This happens when a monopolist who has a control over an input product of another company sells such input product as such a high price so that the entity although viable to afford the input product will have a hard time doing so. An example of this is when an electric company who owns an electric post will allow the sharing of such electric post to other service providers but the cost will be too high that no profit cannot be generated by the entity who will rent such electric post.

Difference between Anti-Competitive agreements and Abuse of Dominant Position

In Anti-Competitive agreements, the parties involved will always be more than one entity. Since it is an agreement, it will therefore always include two (2) or more parties agreeing to such uncompetitive behavior. On the other hand, for the infringement of abuse of dominant position, it is usually done by an entity but it can be performed by more than one agent and this can be called a collective dominant position. Also, another

difference is that unlike, anti-competitive agreements, there is no exception for prohibition for infringement of the abuse of dominant position.

4.3.- Examples of forbidden conducts

These examples of forbidden conducts are valid for anticompetitive agreements and for acts of abuse of dominant position.

- Imposing unfair purchase or selling prices, or other unfair trading conditions. Ex: A sale at loss can be considered an aggressive conduct in the market that may be an abuse of a dominant position.
- Limiting production, markets or technical development to the prejudice of consumers. Ex: When a company in the pharmaceutical sector decides not to foster the creation of a new medicine because they will earn more money by the existing treatment for the disease.
- Unjustified denial to satisfy buy requests, or the cases of market sharing. Ex: When companies decide to share or divide among themselves a certain market.
- The imposition of dissimilar conditions in the market for the same goods and services.
- Tying agreements.

4.4.- Cartels

Cartels are a secret anticompetitive agreement concluded between two or more undertakings against competition rules, mainly consisting in the fixation of prices, market sharing, limitation of production…

A cartel is considered the most relevant infringement of competition law, and is just a special kind of anticompetitive agreements, but not all anticompetitive agreements are cartels.

They are characterized by their secretive nature, as no one knows the content of this anticompetitive agreement because it is made in secret by the directors of the different companies involved in this illegal agreement. The main harming effects of these cartels are the difficulty to uncover them, and thus it is very difficult for authorities to discover the existence of these agreements and sanction them.

They imply the most serious infringement of competition law and they are infringements of competition by its object. This implies that they produce an objective limitation of competition in the market, it is not needed to prove under competition proceeding that the agreement produces an effect of restricting or limiting competition because they are limited by themselves.

Because of all these facts, there is a need to promote certain mechanisms to help uncover these agreements. Among the mechanisms that are normally used by competition authorities we have to mention the leniency instrument (clemencia). It is a

kind of agreement between the competition authority and the undertakings involved in the cartel.
By means of this agreement the competition authority gives a prize to the member of a cartel that goes to the competition authority and reveals the existence of the cartels and accuses the other undertakings of being a member of that infringement, providing the competition authority with enough evidence to prove its existence.

4.5.- Distortion of free competition by unfair behaviours (art. 3 Spanish LDC)

The law also declares prohibited acts of unfair competition which affect the public interest by the distortion of free competition by unfair acts (Art.3 LDC). This is a prohibition that connects unfair competition and antitrust law that is only included by the Spanish Competition Act and not by European law.
The CNMC or the competent bodies of the Autonomous Communities shall hear under the terms that establishes the law for prohibited conduct the acts of unfair competition which affect the public interest by the distortion of free competition.
There may be several kinds of acts of unfair competition made by different kinds of undertakings in the market that even when they are not acts against free competition they distort free competition.

5.- Competition Law enforcement procedures

The different ways of enforcement of anticompetitive prohibitions are:
1º. The Criminal proceeding, by the use of a criminal sanction to deter or sanction the acts against competition. It is not used in Europe in general neither in Spain, but it is used under other different legal systems.
2º. Under the Spanish legal system there is a public enforcement of competition law. An administrative procedure is used to sanction the acts against free competition. This administrative procedure is issued by the CNMC in Spain, and by the European Commission for the anticompetitive behaviors that affect the internal markets of the European Union.
This enforcement proceeding consists in the public investigation of the existence of the infringement. We need to confirm the existence of the infringement, to prove the effects or consequences of it, and to prove the responsibility of the undertakings.
As a result of this administrative proceeding, it may be decided that the party has taken part in this anticompetitive agreement, abuse of dominant position or act of distortion of competition by unfair practices.
Moreover, we are going to decide in the decision the prohibition of the behavior, impose the parties the duty to remove the effect of the acts performed, and to impose different fines and sanctions to the parties because of that activity. Within this public

enforcement and only for the detection of cartels we may use the leniency policy already mentioned.
The regulation of this administrative procedure includes the possibility to reach settled decisions. They may be of two kinds:

- Commitments, which implies that the parties take active or positive measures to solve the situation of infringement or limitation of competition, and as a result from that the authority avoids any imposition of a sanctioning to the parties because they have cooperated to resolve the situation.
- Settlements, imply that the parties involved in a competition proceeding assume their liability for the acts, and as a result of the admission of guilt they receive a reduction of the sanction they suffer.

There is also under the Spanish and European legal system a possibility of the so called Private enforcement of competition law. It implies the enforcement of the antitrust prohibitions, not by an administrative authority but by a judicial process. It is based on the rights to a compensation of the damages suffered. The judge can declare:

- Nullity of the agreements or conducts in breach of art. 101 TFEU / 1 LDC
- To bring a claim to the Commercial Court (Juzgado de lo Mercantil) for the compensation of the damages suffered.
- The judge may also state the existence of the infringement, in the cases that had not been previously declared by the Competition Authority. Giving the possibility of:
- Follow-on damages actions. In which we may bring the judicial claims asking for a compensation of the damages suffered, after the situation has already been decided by an administrative body.
- Stand-alone actions. We may still also go to the tribunals without a previous administrative proceeding of the existence of the infringement.

6.- Authorised behaviours

The authorized behaviors are covered by Art. 4 LDC, that implies that these prohibitions will not be enforced in behaviors resulting from the implementation of the Laws.
Other authorized behaviors are:

- Situations covered by block exceptions are authorized behaviors.
- The cases of agreements that may enter the rule of art. 101.3.
- The minimis conduct, which cover those cases that due to their minor importance are not liable to affect competition significantly, the characteristics of which to be specified by means of the corresponding developing regulation.
- The possibility of administrative decisions of inapplicability of the prohibition (authorization) for a concrete behavior, regulated in art. 6.

7.- Conducts that have to be controlled by the Competition Authority

Concentrations are arrangements whereby one or more companies acquire control of the other companies and thus change the structure of the companies involved and of the market they operate in. Concentrations allow economies of largescale to be obtained, production and distribution costs to be reduced, profitability to be improved and technical progress to be speeded up.

7.1.- Merger control

It is any operation that implies a permanent modification of the control structure of the involved companies by means of any legal procedure. In some cases, they may consist in: Mergers, take-overs (acquisition of shares, appointment of managers...), and the creation of a company, invested companies or joint ventures.
The law on mergers does not prevent undertakings from entering into strategic alliances; it allows them to seek complementarities, acquire an international dimension, penetrate new markets and take advantage of the single market, without jeopardizing competition within it. Few concentration operations have actually been prohibited by the CNMC.
Mergers are not forbidden but need to be authorized by competition authorities beforehand. Under Spanish regulation we have the obligation of a compulsory notification to the CNMC of the future entrance of a merger agreement in the case that:

- The companies involved represent more than a 30% of the market share.
- In the cases the joint sales of the companies are over 240 million (60 million in Spain).
- And in the cases established under Regulation 139/2004 for the Spanish regulation.

The European commission for the European cases, and the Spanish national commission of markets and competition, will study the economic repercussions of the proposed operation and will decide its authorization. And in certain cases, there is a possibility of voluntary notifications.

The law provides the following situations which can be considered as economic concentrations. These situations if it reached a certain threshold shall be regulated and looked into by the State. Articles 7 and 8 of the Spanish Competition Law are the relevant provisions of law for this part.

Article 7. Definition of economic concentration.
1. For the purposes set out in this Act, an economic concentration shall be deemed to arise when a stable change takes place of the whole or part of one or more undertakings results from:

a) The merger of two or more previously independent undertakings, or

b) The acquisition by an undertaking of control of the whole or part of one or more undertakings.
c) The creation of a joint venture and, in general, the acquisition of the joint control of one or more undertakings, when they perform on a lasting basis the functions of an autonomous economic entity.

2. For the above purposes, control shall be constituted by contracts, rights or any other means which, having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking and, in particular by:

a) ownership or the right to use all or part of the assets of an undertaking,
b) contracts, rights or any other means which confer decisive influence on the composition, voting or decisions of the organs of the undertaking.

In any event, this control shall be considered to exist when the conditions set out in Article 4 of the Securities Market Act 24/1988, of 28 July, occur.

3. The following shall not be considered to be a concentration:

a) The simple redistribution of equities or assets between undertakings from the same group.
b) Holding on a temporary basis of securities which they have been acquired in an undertaking for resale by a credit institution or other financial institution or insurance company, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behavior of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition. Exceptionally, the National Competition Commission may extend that period on request where such institutions or companies can show that the disposal was not reasonably possible within the period set.
c) The operations carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC, of 25 July 1978, which acquire on a temporary basis securities in other undertakings, provided that the voting rights in respect of the holding are exercised only to maintain the full value of those investments and not to determine the competitive conduct of those undertakings.
d) The acquisition of control by an office-holder in accordance with insolvency regulations.

Article 8. Scope of application.

1. The control procedure set out in this Act shall apply to economic concentrations when at least one of the two following circumstances occurs:

a) That as a consequence of the concentration, a share equal or higher than 30 percent of the relevant product or service market at a national level or in a geographical market defined within the same, is acquired or increased.
b) That the global turnover in Spain for all the participants in the last accounting year exceeds the amount of 240 million euros, providing that at least two of the participants achieve an individual turnover in Spain of more than 60 million euros.

2. The obligations set out in this Act do not affect concentrations with a Community dimension as defined in Council Regulation (CE) No. 139/2004, of 20 January 2004, on the control of concentrations between undertakings, unless the concentration has been the object of a referral decision by the European Commission to Spain, in accordance with the provisions of the above Regulation.

7.2.- State Aids control

The regulation of the control of state aids is mainly made by arts. 107 and 108 TFUE, and art. 11 of the LDC. State Aids are any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

If these aids are granted without any legal justification they will be forbidden. However, there are some exceptions covered by European regulations in some cases in which there is a legal justification, for example: in the case that the aids are granted for research and development, in the cases of public financial support to foster or promote environmental and energy protection acting, etc.

The National Competition Commission, ex officio or at the instance of the Public Administrations, may analyze the criteria for awarding public aid in relation to its possible effects on the maintenance of effective competition in the markets.

8.- Institutional framework: The Spanish National Commission on Markets and Competition (CNMC)

The National Commission on Markets and Competition is the Spanish authority in charge of enforcing competition law. It is the sum of the previous Spanish National Competition Commission and different administrative bodies that regulated the so called regulated markets. For example: The regulator of the energy sector, the regulation of the telecommunication market, the regulator of air traffic or transport, the regulator of the postal service, etc.

It is formed by a president, and a council with 10 members (which is the decision body) and the direction of competition (which is the investigative body). The competences about the enforcement of competition law in Spain are divided within the national

commission and the autonomous communities. Different autonomous communities have a competition authority. The competence of these authorities is the implementation of the rules mentioned by the Spanish competition act and the European regulation.
Its decisions are appealable in the administrative court, in the case that we want to challenge a decision of the National commission on markets and competition, we are going to have the possibility to appeal the decision (Audiencia Nacional). The decisions produce binding effects to courts. And they cannot decide on the civil, criminal or labor aspects, as they can only decide on the existence of the infringement and in the case, impose the administrative sanctions.

9.- Competition in the Digital Market

Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [COM(2020) 842 final]

Reasons for and objectives of the proposal

Digital services have brought important innovative benefits for users and contributed to the internal market by opening new business opportunities and facilitating cross-border trading. Today, these digital services cover a wide range of daily activities including online intermediation services, such as online marketplaces, online social networking services, online search engines, operating systems or software application stores. They increase consumer choice, improve efficiency and competitiveness of industry and can enhance civil participation in society. However, whereas over 10 000 online platforms operate in Europe's digital economy, most of which are SMEs, a small number of large online platforms capture the biggest share of the overall value generated.
Large platforms have emerged benefitting from characteristics of the sector such as strong network effects, often embedded in their own platform ecosystems, and these platforms represent key structuring elements of today's digital economy, intermediating the majority of transactions between end users and business users. Many of these undertakings are also comprehensively tracking and profiling end users. 1 A few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers.
As such, these gatekeepers have a major impact on, have substantial control over the access to, and are entrenched in digital markets, leading to significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behaviour vis-à-vis these business users. It also leads to negative effects on the contestability of the core platform services concerned. Regulatory initiatives by Member

States cannot fully address these effects; without action at EU level, they could lead to a fragmentation of the Internal Market.

Unfair practices and lack of contestability lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers. Addressing these problems is of utmost importance in view of the size of the digital economy (estimated at between 4.5% to 15.5% of global GDP in 2019 with a growing trend) and the important role of online platforms in digital markets with its societal and economic implications. 2

Although some of these phenomena specific to the digital sector and to core platform services are also observed to some extent in other sectors and markets, the scope of the proposal is limited to the digital sector as there the problems are the most pressing from an internal market perspective.

Weak contestability and unfair practices in the digital sector are more frequent and pronounced in certain digital services than others. This is the case in particular for widespread and commonly used digital services and infrastructures that mostly directly intermediate between business users and end users. The enforcement experience under EU competition rules, numerous expert reports and studies and the results of the OPC show that there are a number of digital services that have the following features: (i) highly concentrated multi-sided platform services, where usually one or very few large digital platforms set the commercial conditions with considerable autonomy; (ii) a few large digital platforms act as gateways for business users to reach their customers and vice-versa; and (iii) gatekeeper power of these large digital platforms is often misused by means of unfair behaviour vis-à-vis economically dependent business users and customers. 3 The proposal is therefore further limited to a number of 'core platform services' where the identified problems are most evident and prominent and where the presence of a limited number of large online platforms that serve as gateways for business users and end users has led or is likely to lead to weak contestability of these services and of the markets in which these intervene. These core platform services include: (i) online intermediation services (incl. for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy) (ii) online search engines, (iii) social networking (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services mentioned above.

The fact that a digital service qualifies as a core platform service does not mean that issues of contestability and unfair practices arise in relation to every provider of these core platform services. Rather, these concerns appear to be particularly strong when the core platform service is operated by a gatekeeper. Providers of core platform providers can be deemed to be gatekeepers if they: (i) have a significant impact on the

internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations.

Such gatekeeper status can be determined either with reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of specific providers as a gatekeeper, or based on a case-by-case qualitative assessment by means of a market investigation.

Such gatekeeper status can be determined either with reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of specific providers as a gatekeeper, or based on a case-by-case qualitative assessment by means of a market investigation.

The identified gatekeeper-related problems are currently not (or not effectively) addressed by existing EU legislation or national laws of Member States. Although legislative initiatives have been taken or are under consideration in several Member States, these will not be sufficient to address the problems. Whilst such initiatives are limited to the national territory, gatekeepers typically operate cross-border, often at a global scale and also often deploy their business models globally. Without action at EU level, existing and pending national legislation has the potential to lead to increased regulatory fragmentation of the platform space.

The objective of the proposal is therefore to allow platforms to unlock their full potential by addressing at EU level the most salient incidences of unfair practices and weak contestability so as to allow end users and business users alike to reap the full benefits of the platform economy and the the digital economy at large, in a contestable and fair environment.