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Reflections upon the past and the future of merger control

Spanish experience

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Merger control in recession time: Introduction

- **No justification for more lenient competition law enforcement in the current context of economic downturn**

- **In merger control:**
  - strict substantive standards are maintained

BUT

  - more flexibility regarding procedure
  - changes in the design of remedies
  - adaptation to the consequences of the financial crisis: the bank restructuring process

Merger control in recession time: Procedures

- **Guidelines on short-form notification of mergers**
  - Soft law but increases clarity and legal certainty
  - Reduces the administrative burden of non-complex mergers
- **Reducing the average decision-making period**
- **The benefits of the encouraged prenotification system**

Merger control in recession time: Remedies design (1/4)

1) The Gas Natural/Unión Fenosa Case

GN	UF
▪ Leader in supply, transmission, distribution and retail in the gas markets ▪ Active also in electricity wholesale power production (generation) and supply ▪ 5% stake in Enagás (Gas System Operator) ▪ Controlled by REPSOL	▪ Active in electricity wholesale (generation), distribution and supply ▪ New entrant in gas: supply as well as distribution and retail through JV with ENI (50%-50%) ▪ 5% stake in CEPSA (1 member of the council) ▪ 1% stake in REE (Electricity System Operator)

Phase I. The transaction may prevent the maintenance of effective competition in:

- The supply of gas into Spain since it buttresses GN's leadership through UF's disappearance as an independent vertically integrated competitor
- The retail supply to end consumers strengthening GN's top position in CCGT and domestic consumers and SME
- Simultaneous presence in gas and electricity networks with effect on retail supply in gas and electricity to domestic consumers and SME
- The electricity sector as a whole, given that GN had been the most successful and sustainable entry in recent years, with divergent incentives from incumbents

Unilateral effects

Coordinated effects

Merger control in recession time: Remedies design (2/4)

Phase II decision. Clearance subject to remedies:

- Disposal of 600,000 gas distribution points and business (customers) associated (aprox 600,000), primarily in the provinces where there is overlap between GN (gas) and UF (electricity) networks. Gas supply by GN in market conditions to buyers (if needed) during 2 years.
- Disposal of 2,000 MW CCGT and gas supply to buyers if needed.
- Sale of GN's stake in ENAGAS and waivers in naming representatives in ENGAS and CEPSA
- Behavioural remedies concerning JV with ENI

- Divestment of electricity generation and gas supply assets to encourage the entrance or strengthening of competitors with a minimum efficient scale
- Reduction of structural links with competitors

Monitorisation of remedies:

- No exemption granted BUT
- Period extensions if talks with potential buyers are in an advanced stage.
- Changes in assets: trade off between suitability and effective implementation on time

Compliance but some flexibility under economic and financial circumstances

Merger control in recession time: Remedies design (3/4)

2) The Ebro/Sos (rice business) Case

EBRO

- Market leader
  - In wide market for transformation and sale of rice under manufacturers' brand
  - And most narrow markets under manufacturers' brand (long rice, parboiled, specialties)

SOS-Rice business

- Closest competitor in wide market and most narow markets of manufacturers' brand, at a great distance from other competitors
- Market leader in the only narrow market in which EBRO is not (round rice)
- Also present in distribution for Private Brands

Phase I: identified risks

- Risks
  - Horizontal effects→ the disappearance of EBRO´s main competitor (no real alternative since they are "must stock" products) entails risk of price increase and reduction in R+D
  - Vertical effects→ strengthens EBRO´s buyer power in the national market for the supply of unhulled rice, thus enabling imposing unfair conditions and restricting access to competitors
  - Alignment of interests between the resulting entity and large retailers
    - ✓ Ultimately increase in price of Private Brands and Manufacturers' Brands
    - ✓ Reduction of intra-brand competition

Unilateral effects

Coordinated effects

Merger control in recession time: Remedies design (4/4)

Phase I: risks tackled with commitments presented by the parties

- **Remedies**
  - Sale of four small regional brands ("La Parrilla", "La Cazuela", "Nobleza", "Pavo Real").
  - Sale of exclusive license of the strong "Nomen" brand, with national penetration and present in all relevant markets for a period of 10 years, plus a call option excisable during the 10 year period.

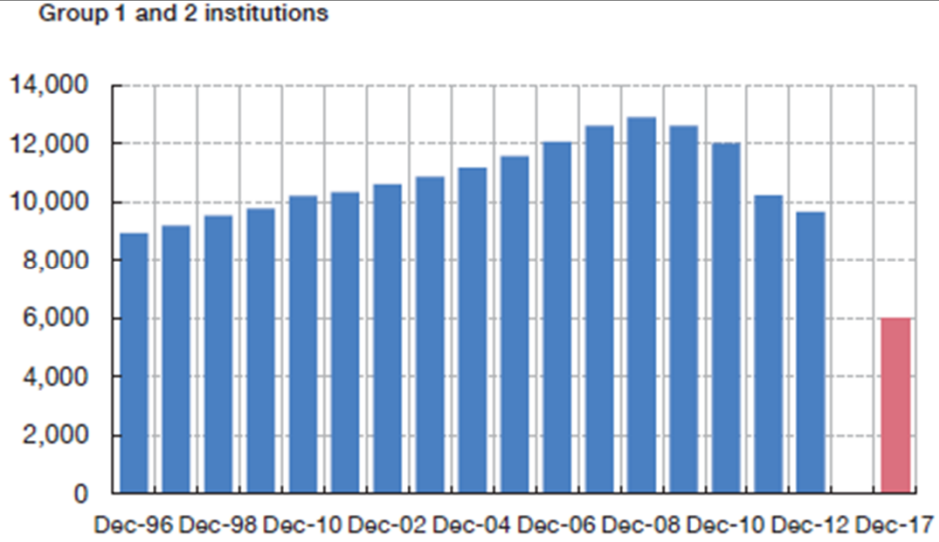
- **Flexibility in design:**
  - License vs divestment→10 years structural effect:
    - strengthens competitor
    - allows for rebranding strategies
    - includes call option which incentivizes developing the "Nomen" brand
  - Monitoring Trustee
    - To manage the assets concerned by the remedies until an adequate buyer is found
    - The Monitoring Trustee will also be named Divestment Trustee, if the remedies are not implemented within the agreed time frame

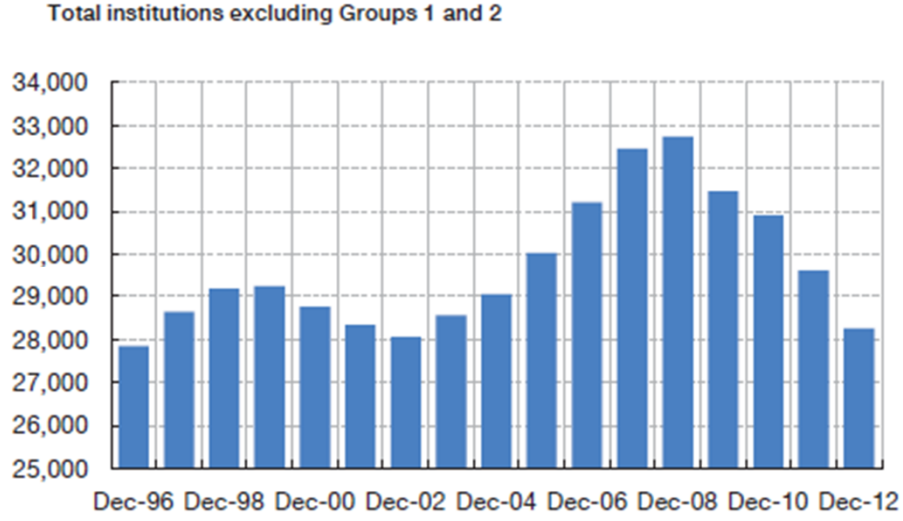
Merger control in recession time: Bank restructuring in Spain (1/3)

➢ The Spanish Banking Sector:

- ❑ Restructuring of the Spanish banking sector under way since 2010:
- ✓ Transformation of savings banks into commercial banks
- ✓ Significant reduction in the number of former banks and savings banks:
  - Banks: In 2009 there were 50 banks. Currently there are 15
  - Savings Banks: In 2010 there were 45. Currently only 2
- ✓ The reduction in capacity is observable in the reduction in the number of branches and employees from their peak in mid-2008

Number of branches





Source: Bank of Spain, FINANCIAL STABILITY REPORT, May 2013

Merger control in recession time: Bank restructuring in Spain (2/3)

- In the framework of these **structural measures adopted** regarding the Spanish banking sector, there has been a clear consequence for merger control:

- Large number of savings bank mergers ➡ Financial intermediation at the top of the sectors in which CNC has analysed the largest number of concentrations
- Most of them cleared in Phase 1 without commitments due to atomization of the national market
- Only remedies regarding structural links between competitors in other markets (i.e. CAIXABANK/BANCO DE VALENCIA)

Mergers in the Bank Sector 2010-2013

YEAR	PHASE 1	PHASE 1 WITH COMMITMENTS	PHASE 2	CASE FILED	DECISION PENDING
2010	14	-	-	1	-
2011	4	-	-	-	-
2012	8	1	-	1	-
2013	2	-	-	-	2

Merger control in recession time: Bank restructuring in Spain (3/3)

RESULTING ENTITIES	INTEGRATED ENTITIES	DATE
BBVA	BBVA, UNNIM (Caixa Sabadell)	March 2010
BANKINTER		
CAIXABANK	• CAIXABANK: La Caixa+Caixa Girona • BANCA CÍVICA: Caja Navarra, Caja Canarias • Caja Sol+ Caja Guadalajara • Banco de Valencia	March 2012 • October 2010 • April 2010 • December 2010, April 2013 • May/December 2012
KUTXABANK	BBK-Cajasur Caja Vital/Kutxa	December 2011 • July 2010
SABADELL	Sabadell, CAM	December 2011
GRUPO SANTANDER		
UNICAJA	Unicaja, Caja Jaén	April 2010
BANCO POPULAR	Banco Popular, Banco Pastor	2011
IBERCAJA	Ibercaja Caja 3: CAI, Círculo de Burgos, Caja Badajoz	Currently underway • December 2011
BANCO CEISS	Caja España, Caja Duero	March 2010
BANCO MARE NOSTRUM/BMN	Caja Murcia, Caixa Penedés, Sa Nostra, Caja Granada	June 2010
LIBERBANK	Cajastur-CCM Caja Cantabria, Caja Extremadura	April 2011 • November 2009
BANKIA-BFA	Caja Madrid, Bancaja, Caja Ávila, Caja segovia, Caja Rioja, Caixa Laietana, Caja Insular de Canarias	June 2010
CATALUNYA BANC	Caixa Catalunya, Caixa Tarragona, Caixa Manresa	March 2010
NCG BANCO NOVACAIXAGALICIA	Caixa Galicia, Caixanova	June 2010

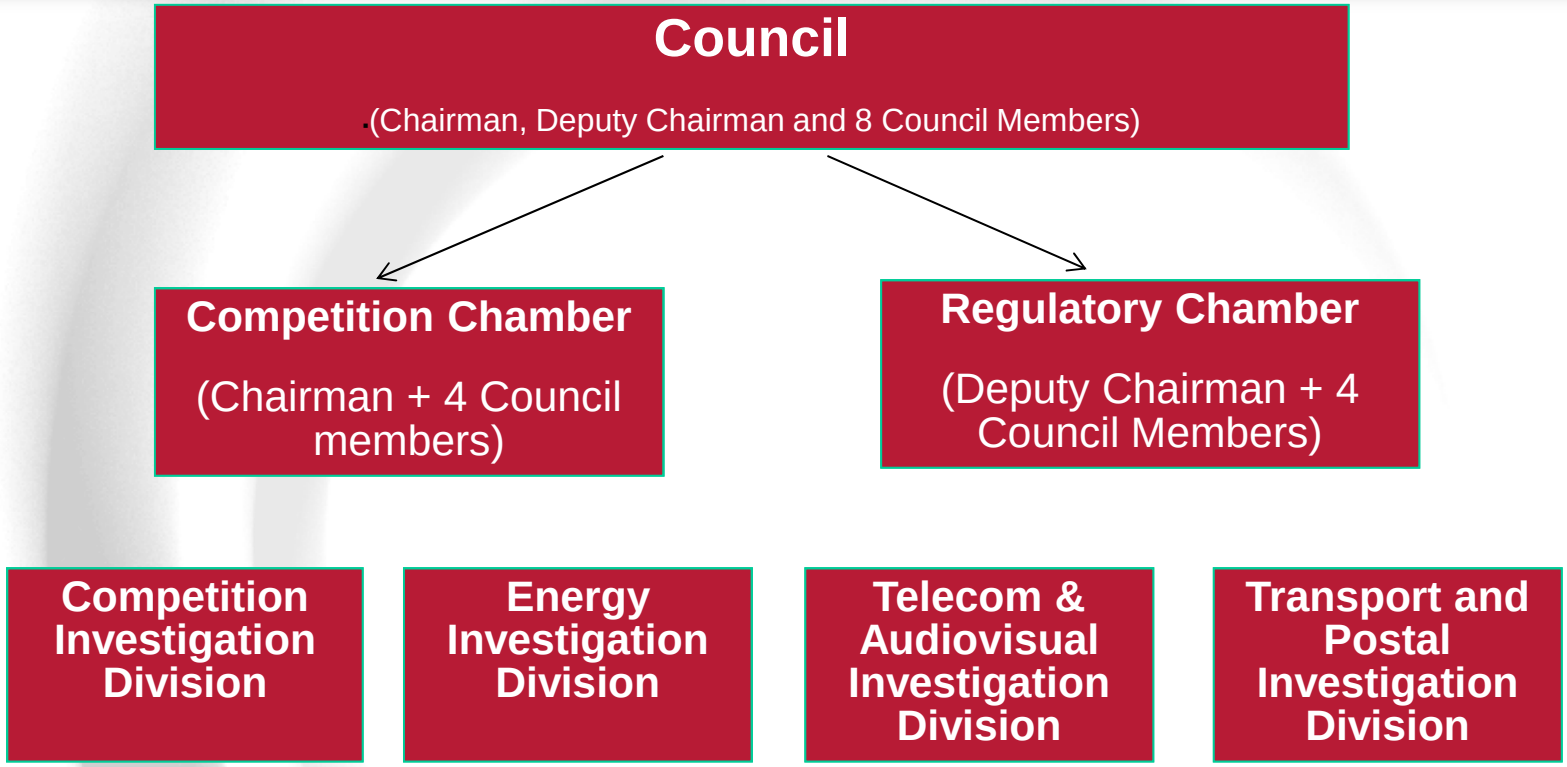
Source: Bank of Spain

The new Spanish antitrust and regulatory agency: The CNMC (1/2)

- **Newly published Act 3/2013 :**
  - **creates** new agency: **CNMC**
  - **eliminates** 8 agencies: antitrust (CNC) and seven sectorial regulators (energy, telecoms, postal, airports, railway, gambling, audiovisual)

- The CNMC retains **most of the powers of the merged agencies** (some regulators tasks have been transferred to sectorial Ministries)
- **2007 Competition Act is fully valid**
- Due observance of the criteria and limits imposed by **EC Directives**
- The CNMC must be effectively acting by **6th October 2013**

The new Spanish antitrust and regulatory agency: The CNMC (2/2)



- The CNMC will be supported financially mainly by **State Budget** assignments and:
  - ✓ Fees paid by companies subject to regulation: telecoms and energy (managed by the government)
  - ✓ Fees paid for the analysis of mergers (Competition)

EU Public consultation Referrals (1/3)

EU PUBLIC CONSULTATION (June 19th – September 12th)

"Towards a more effective EU Merger control"

REFERRALS

MINORITY SHAREHOLDINGS

Art. 4.5 (pre-notification) and art. 22 (post-notification)

- **Rationale for art. 22 has evolved**:
  - Initially: DUTCH CLAUSE→ provided Member States lacking national merger control laws with a legal basis to review mergers.
  - Since 1998→best placed authority
  - Since 2004→corrective instrument of the one shop rule

- **Specificities of the Spanish regime: rationale for market share thresholds**

EU Public consultation Referrals (2/3)

- **Alleged risks and inconveniences**
- **Legal uncertainty:**
  - Artificial extension of jurisdiction via art. 22.
  - Lack of transparency in decisions to accept or reject referrals.
- **No unified enforcement in certain cases (partial referrals)**
- **Timing**
  - adds significant delay to the merger review process (Twice as much as own jurisdiction cases according to 2009 Report).
- **Additional administrative burden,**
  - high cost of multiple filings, re-notifications
- **Confidentiality and language issues**
- **Forum shopping**
- **Active complainants**

EU Public consultation Referrals (3/3)

- **Tackling the risks**

1. Commission Notice on Case Referral in respect of concentrations (2005/C 56/02)

2. Communication from the Commission: Report from the Commission to the Council on the operation of Regulation No 139/2004, COM (2009).

3. Best Practices on Cooperation between EU National Competition Authorities in Merger Review (8 November 2011)

New!

4. EU Public Consultation on possible improvements to EU merger control in certain areas (June 2013)

Streamline the process

(effectiveness and smoothness)

- **Avoid delays**
- **Avoid partial referrals**
- **one-stop-shop rule**

BUT respecting MS veto right

EU Public consultation
Minority Shareholdings (1/5)

➢ Is there an enforcement gap?

In the longer term, there is also room for improvement on one substantive point. The transactions that lead to the acquisition of non-controlling minority stakes currently escape our scrutiny even though they may sometimes cause significant harm to competition (Almunia's speech 2/11/2012)

➢ **Inconsistency between jurisdictions**. The Ryanair/Aer lingus Case

- The European Commission and most member countries only review cases of acquisition of minority shareholdings when the acquired stakes allows the buyer to exercise a decisive influence on the target.
- However, other member countries can review the acquisition of minority shareholdings that would escape the Commission´s merger review system (UK, Germany, Austria)

➢ Which is the best design?

- Discretionary control
- Compulsory notification subject to thresholds

EU Public consultation
Minority Shareholdings (2/5)

- **EU Public consultation (June 2013)**

✓ Recognises it is a **widespread phenomenon** in many industries

✓ Identifies potential harm on competition and consumers

< anti-competitive effects but also **< potential efficiencies**

↓

Significant impediment of effective competition?

Innovation? **Prices?**

Growth? **Offer?**

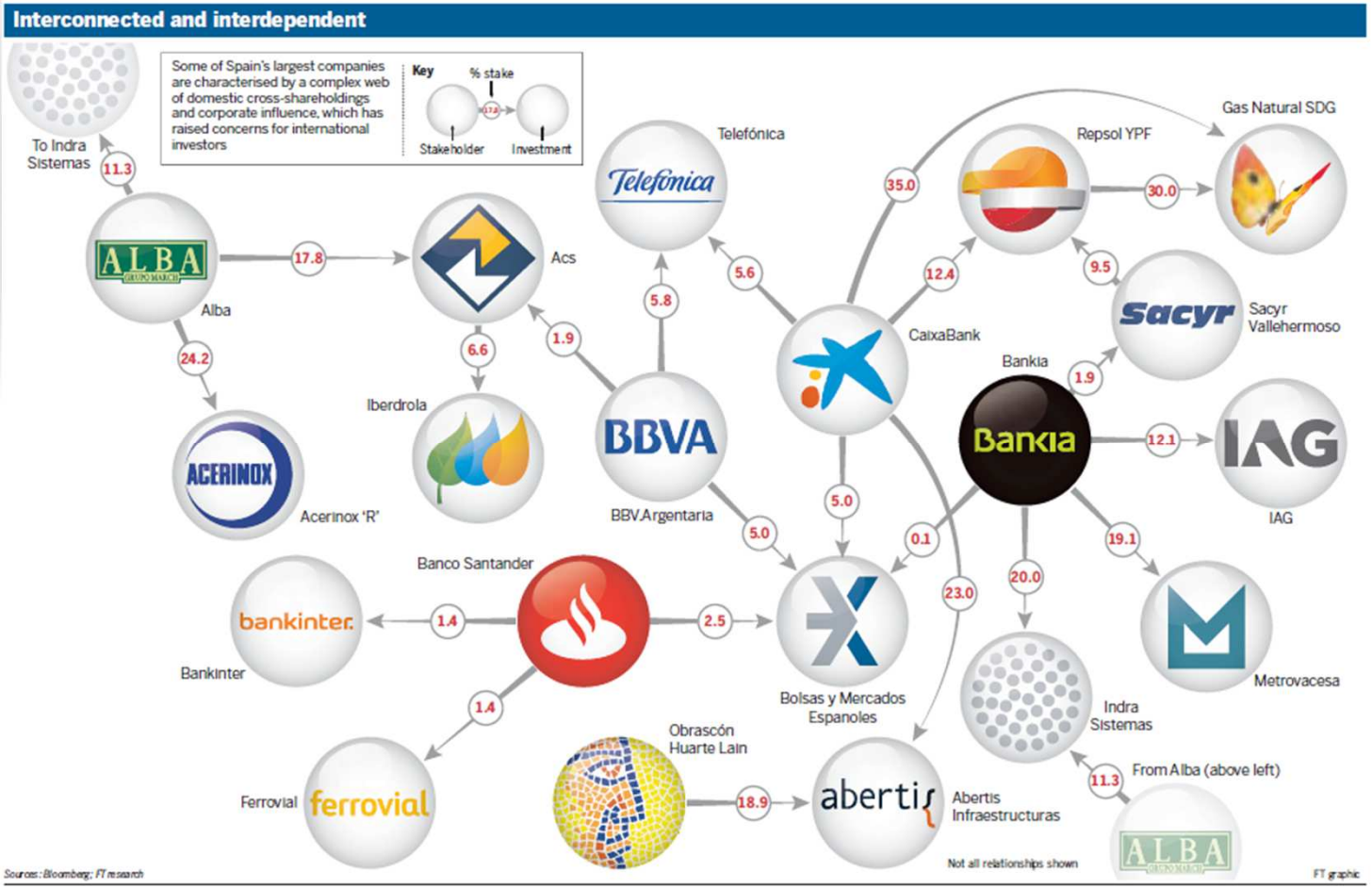
✓ **Main options:**

- Thresholds
- Discretion: “self assessment system” vs. “transparency system”

EU Public consultation
Minority Shareholdings (3/5)

- **Minority shareholdings in Spain**

"Spain´s cozy ownership web set to untangle"
(Financial Times, 10th June 2013)



EU Public consultation
Minority Shareholdings (4/5)

- **Some recent cases:**
  - ✓ **Deoleo/Hojiblanca**
    - o **Description**
      - Acquisition by DEOLEO, S.A. of the business of bottling and distribution of extra-virgin olive oil under the "Hojiblanca" brand of the company HOJIBLANCA SCA.
      - As a result, HOJIBLANCA increased its participation in DEOLEO from 0.69% to 10.32% and wouldl designate two members of the Board of Directors of DEOLEO (thus being the only members of the Board with product and market specific expertise).
    - o **Risks** from HOJIBLANCA SCA a´s presence in the Board→ coordinated effects
      - ❖ Sensitive information exchange between vertically connected competitors
      - ❖ Weakening of the competitive pressure from HOJIBLANCA SCA
    - o **Commitments**
      - ✓ Removing the non competition clause with penalty (loss of Board presence if a given market share is reached)
      - ✓ Banning exchange of sensitive information in horizontal and vertically affected markets
      - ✓ HOJIBLANCA SCA´s Board Members will not exercise voting rights in these issues
      - ✓ Confidentiality agreement by the Secretary of the Board

EU Public consultation
Minority Shareholdings (5/5)

- **Some recent cases:**
  - **Caixabanc/Banco de Valencia**
    - **Description**
      - CAIXABANK, S.A. acquires exclusive control of BANCO DE VALENCIA, S.A.
      - As a result, the merged group will acquire, through its minority interest in AGUAS DE BARCELONA S.A., an indirect stake in AGUAS DE VALENCIA, S.A., two companies which compete with each other in various markets in relation to integrated water management services.
    - **Risks regarding water management services**
      - The simultaneous presence of CAIXABANK on the management and decision-making bodies of the two competitors (AGUAS DE BARCELONA and AGUAS DE VALENCIA, S.A) could imply a risk to effective competition in that market, by:
        - facilitating the exchange of strategic information
        - coordination of competitive behaviour
    - **Commitment**
      - CAIXABANK committed itself to not be represented on the boards of directors of AGBAR and of AGUAS DE VALENCIA S.A. simultaneously.

Thank you!

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