New Spanish Competition Policy

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The Spanish competition policy has been reformed by Law 15/2007, dated 3 July, (hereinafter the "Law") which entered into force on September 1, and further developed by Royal Decree 261/2008, dated 22 February, (hereinafter the "Regulation") in order to adapt it to EU Competency regulations, to strengthen the existing mechanisms, and to provide it with the instruments and the optimum institutional structure to ensure effective competition in the markets.

Substantive aspects

Regarding the substantive aspects of the three types of principal instruments of this policy, (a) the regime applicable to conduct which restrains competition, (b) the principles of merger control, and (c) the system for monitoring and proposal in matters of state aid, the Law features:

(a) As regards **conduct which restrains competition**,

1. The different types of infringement are clarified and simplified. Agreements between undertakings, abuse of a dominant position, and misrepresentation of free competition through unfair acts continue to be prohibited under the new Law, whereas the specific reference to the abuse of economic dependence is removed, since it is already regulated in the Unfair Competition Law 3/1991 and may, therefore, be included in the misrepresentation of free competition through unfair acts. Also, the wording of this last type of infringement, regarding unfair acts, has been clarified.

2. The system of individual authorisation of prohibited agreements is replaced by a system of legal exemption in line with the EU model. The Law excludes agreements that meet certain requirements from the prohibition, in line with those set out in the EU rules. In essence, the prohibitions affected are those that are not 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.

   The change of system is completed with the repeal of the individual authorisations by the competition authority, and under the new Law the undertakings must self evaluate the legality of their own agreements.

   The Law refers expressly to the role of the EC block exemption Regulations in the application of the new legal exemption in the national scope and maintains the possibility of the government approving this type of exemption for agreements that do not affect trade between Member States.

   Likewise, the Law foresees a system in line with the EU system for the declaration of inapplicability of prohibitions to a specific conduct.

3. The effects of the legal exemption and the treatment of *de minimis* conduct are clarified. A *de minimis* conduct is defined as one that, due to its minor importance, is not liable to affect competition significantly, the characteristics of said conduct has been specified by means of the developing regulation analyzed below.

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The Regulation develops *de minimis* conduct and provides that the following are not deemed to be capable of affecting competition:

a) Conduct between competitors, real or potential, where their joint market share does not exceed 10% in any of the relevant markets affected.
b) Conduct between non-competitors where the market share of each company does not exceed 15% in such markets.
c) In cases when it is not possible to determine whether the conduct involves competitors or non- competitors, the percentage of 10% will be applied to each one in the relevant markets affected.

(b) Regarding **economic concentrations**, the Law

1. Clarifies and widens the concept of concentration for the purposes of control, establishing an *abridged* procedure for operations less likely to affect competition;

   In terms of the concept of concentration, the Law focuses its definition on the existence of a stable change in the control structure, de jure or de facto, of an undertaking, and includes all of the joint ventures with "full functions", unifying the treatment of those of a concentrative and cooperative nature. The Law revises the market share threshold upwards, from 25% to 30%, and foresees a mechanism for the update of turnover. Also, an *abridged* notification system is introduced for operations less likely to prevent the maintenance of effective competition in markets, with a reduced fee.

2. Softens the system of compulsory notification with suspensive effect until a favourable resolution is issued by the Administration.

   In relation to the relaxation of the procedure, the Law maintains the system of mandatory notification with suspensive effect but envisages the possibility of lifting the obligation of suspending the execution of the concentration at any time in the course of the procedure. Also, the treatment of share takeover bids is aligned with EU treatment so that the obligation of suspension shall only affect the exercise of the voting rights inherent in the titles and not the possibility of launching the bid, providing the notification deadlines foreseen in the Law are fulfilled.

3. Strengthens the participation of the National Competition Commission in the control of concentrations, limits the Government's role in it, and specifies the criteria of substantive assessment that will guide the decisions of both bodies.

(c) Regarding **state aid**, the Law completes the competence of the National Competition Commission, which may analyze, from a competition point of view, the criteria of awarding aid with the aim of issuing reports and addressing recommendations to public authorities.

Procedural questions

The Law regulates different procedures for (a) prohibited conduct and for (b) merger control. In this field, the aim of the new Law is to find a balance between the principles of legal certainty and administrative efficacy. Consequently, procedures are considerably simplified and the handling of the procedure and the pure resolution of the latter are clearly separated, thus avoiding the possible duplication of actions, and administrative appeals against acts ending a procedure.

(a) Regarding the **sanctioning procedure for restrictive conduct**, the Law reduces the maximum duration of the procedures to 18 months and softens the system of conventional termination, focused on the proposal of compromises by the alleged offender, negotiation with the Directorate of Investigation, and the referral of a proposal for resolution to the Council.

The Law relaxes and streamlines the system for adopting interim measures at any time during the course of the proceedings, and without a maximum duration period.

(b) With regards to **merger control procedure**, the Law maintains the two phases of the procedure and the shortened periods that have characterised the Spanish system, but allocates the competence for its handling and resolution to the National Competition Commission. In the first phase, which shall have a maximum duration of one month, operations that do not raise competition problems will be analysed and approved. In the second phase, a more detailed analysis of the operation will be made, with the participation of interested third parties, in order for the National Competition Commission's Council to adopt a final resolution.

The procedure before the National Competition Commission foresees the imposition of conditions, the presentation of compromises by the notifying parties to solve the possible problems of competition derived from the concentration, and the possible consultation of interested third parties about them.

In the case that the Council issues a resolution prohibiting or subordinating the authorization to commitments or conditions, the Minister of Economy and Finance will have a fifteen-day period to raise the matter of the concentration to the Council of Ministers for its intervention. The final decision of the Council of Ministers, duly justified, that may authorise the concentration with or without conditions, must be adopted within a month of the proceedings being raised, and a report may be requested from the National Competition Commission.

The Regulation develops the merger notification procedure, including two model notification forms, one regular and the other abridged.

The new regular notification form requests more information than its predecessor, being closer to the European Commission's form used for concentrations with EU dimensions.

The abridged form relieves the parties of the need to submit a substantial amount of information, thus simplifying considerably the notification process for operations that do not contain elements capable of affecting competition, which is understood to occur in the following scenarios:

(i) when none of the parties to the concentration operate in the same geographic and product market, or in related upstream, downstream or neighboring markets in which any of the other parties to the operation is active; or
(ii) when the presence of the parties in the market, due to its reduced importance, is not capable of significantly affecting competition.

Sanctioning system

The Law implies a significant improvement in legal certainty, wherein a graduation of the various infringements set out in the Law is made, and the maximum penalties of each type, now consisting of a percentage of the total turnover of the offenders, are clarified. In addition, the criteria that shall determine the specific fine in each case are specified, in line with current trends in the European field. It also foresees publicising all the penalties imposed in application of the Law, which will strengthen the deterrent and exemplary power of the resolutions that are adopted.

Leniency procedure

The Law introduces a leniency procedure, similar to the one in effect in the EU, whereby undertakings that, having been part of a cartel, report its existence and provide substantial evidence for the investigation, shall be exonerated from payment of the fine, provided they cease their conduct of infringement and have not been the instigators of the prohibited agreement. Likewise, the amount of the fine may be reduced for undertakings that collaborate but do not meet the requirements for complete exemption.

The Leniency procedure is developed by the Regulation, which states the confidentiality of the procedure and the obligation of the requestor of leniency to cooperate with the Antitrust Authorities throughout the procedure. According to the Regulation, only the first requestor of leniency will be given full immunity, provided that it supplies the Antitrust Authorities with information allowing them to carry out an investigation that it would not have been able to start by itself, and that proves the existence of a cartel.

Companies that have already received the statement of objections and ring-leaders cannot claim immunity. They can, however, request a reduced fine if they produce evidence that significantly helps the investigation.

Institutional Structure

The Law also modifies institutional aspects and creates the National Competition Commission which substitutes the two former authorities, the Service for Protection of Competition and the Court for Protection of Competition. The creation of a new authority, with the aim of strengthening the independence of the Competition Authorities towards Government was one of the fundamental objectives of the new Law.