Competition Authorities

A New Implementing Regulation for Competition Law in Spain: The Birth of an Immunity/Leniency Programme and Other Meaningful Innovations

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This article provides an introduction to, and an overview of, Royal Decree 261/2008, of 22 February (Implementing Regulation), implementing Law 15/2007 of 3 July, on Competition (Competition Act), which entered into force in Spain in September 2007. The Implementing Regulation was approved by the Council of Ministers on 22 February 2008 and published on 27 February 2008 and entering into force on 28 February. Additionally, the Spanish National Competition Commission (NCC) has published a set of

provisional guidelines on the procedure to be followed regarding leniency applications.

It is important to note that, not only does the Implementing Regulation now in force implement several detailed procedures broadly regulated under the Competition Act; but also the Implementing Regulation is essential to some key policies put in place by the Competition Act, which had deferred their application until the Implementing Regulation entered into force. That is the case, for instance, with the much-awaited leniency policy, which only now (*i.e.*, since 28 February 2008) is available to companies wishing to "blow the whistle."

The Implementing Regulation is divided into two titles. Title I is drafted in a fairly straightforward manner (nine articles in total) and contains a number of detailed substantive rules referring to behavioural matters; mergers; State aid; and the promotion of competition. Title II deals with the antitrust rules of procedure for merger control, restrictive practices and regulates leniency and immunity applications and policy.

Below, is an outline of the Implementing Regulation, which focuses on the aspects the author deems more important to the international reader in the following areas: (i) merger control; (ii) characterisation of anticompetitive agreements and introduction of a leniency/immunity policy; (iii) developments in the rules on procedure.

Merger Control

Acquisition of Control and Notification Thresholds

In many respects, the new Competition Act brings the Spanish merger control system in line with the European merger control system. Such is the case, for instance, with acquisitions of joint control, where only full-function joint ventures qualify as concentrations for merger control purposes; the new law eliminates the reference to the coordinated effects in joint ventures, so the drafting is now similar to that of Article 3.4 of Regulation 139/2004, on the control of concentrations between undertakings[1] (ECMR). The same is true with the exceptions of internal restructurings or temporary holdings, identical to those under Article 3 ECMR. However, the Competition Act, not without controversy, has kept the market-share threshold, which can be a source of considerable uncertainty in many cases as to whether or not a transaction must be notified.[2]

The Implementing Regulation introduces a series of turnover accounting rules that generally follow the indications in the Commission's Consolidated Jurisdictional Notice of 10 July 2007 and the EC merger control regime. This is so, for instance, in connection with the regulation of what entities are considered to be the relevant parties to a merger. The Implementing Regulation also introduces a few rules for market-share accounting for the purposes of threshold verification which are specific to the Spanish regime: market-shares of the parties to the transaction are added up for each relevant market; a market-share is considered to be acquired when there is a change in the nature of the control; and there is acquisition of market-share whenever a joint venture takes place and the parent companies bring all or part of their business under the umbrella of the newly-created joint venture. With respect to the notification procedure, the Implementing Regulation regulates a number of points, and, unfortunately, insists on the need to produce a notarial deed for representation.

Reduced Notification Form and Consultation

Under the pre-existing legal competition regime in Spain, notifications had to be completed in full, regardless of whether or not there were serious overlaps or competition concerns. This, again, was a major drawback for a competition lawyer involved in M&A transaction work, and imposed a major burden of information gathering, even in the simplest of cases. As ordered by the Competition Act, there is now a reduced notification form which should lower the burden for simple transactions in the following cases:

- When there are no horizontal or vertical overlaps;
- When there is a change of control from joint to sole control;
- When (in the case of a joint venture), the activities in Spain are inexistent or marginal; and
- When the share of the parties in the market is of minor importance (*i.e.*, fifteen percent horizontal overlap and, in the case of vertical relationships, when the merged entity reaches twenty-five percent in a market vertically-related to another market relevant to the transaction).

The Implementing Regulation contains an annex containing the standard and reduced notification forms. The (new) reduced notification form omits one section on general questions and reduces the extent of some of the other sections, in some cases substantially (*e.g.*, section 6 referring to information on the relevant markets in its reduced form should result in considerable cost and time savings to the process of drafting notifications).

Between the entering into force of the Competition Act and the Implementing Regulation, the Competition Authority issued provisional interpretative guidelines back in August. These allowed for negotiation of a reduction of information to be submitted under the existing notification form, where the transaction being notified fulfilled any of the qualifying criteria set out under the Competition Act for a reduced form notification. Reduced form notifications benefit from a reduced filing fee of €1,500.

Similarly to the pre-existing regime, the Competition Act provides for the possibility of filing a consultation with the authorities regarding whether or not a given transaction qualifies as a concentration and whether or not the thresholds triggering the duty to file are met. The

Implementing Regulation provides a short description of the information that needs to be provided to the Competition Authority to deal with the consultation. Although this should facilitate the assessment of whether or not a transaction must be notified, this consultation system is not likely to be used often, as it leads to further delays in getting approval. In particular, there are no time limits to the consultation procedure, but it may be anticipated that at least one or two weeks must be added to the statutory time limits for securing a decision under the merger control laws.

Innovations on Merger Control Procedure

The fact of the notification (*i.e.*, the names of the parties, the form of the transaction and the date of notification) continues to be public (by means of publication on the NCC's website) and, in the same way as under the pre-existing law; third parties may appear as interested parties and access the file in Phase 2 proceedings. In line with the EC regime, the NCC should now issue a statement of objections setting out its concerns, when an in-depth, Phase 2 investigation is opened.

The parties may now request a derogation from the waiting period (*i.e.*, derogation from the obligation to stay the merger until clearance has been gained). This means that the parties may, in case the derogation is granted, go ahead with the merger and do not need to wait for clearance in order to implement the transaction at any point during the procedure. Under the past regime derogation had to be requested with the notification and it could only be granted once the transaction had been referred for Phase 2 review.

Regarding commitments, the parties are now entitled to submit commitments addressing the NCC's competitive concerns at any moment during the procedure. Under the former regime, the Competition Authority directed the parties to this end on conclusion of Phase 1. The Implementing Regulation states in this regard that commitments are to be submitted during the first twenty days after notification in Phase 1 and, in Phase 2, during the first thirty-five days following the referral of the case to Phase 2. The Implementing Regulation also states that commitments in Phase 1 may be accepted only when the competition problem can be clearly identified and easily remedied.

On the other hand, the procedure for final merger decisions in Phase 2 varies substantially. Under the previous Competition Act, it was the Government (Cabinet) that issued the final decision on the merger. According to the new Competition Act, it is the NCC that now makes the final decision. However, in cases where the NCC decides to block a proposed merger or subjects it to conditions, the Minister of Economy has the power to refer the transaction to the Cabinet, which may either confirm the NCC's decision, or order that approval be granted contrary to the decision of the NCC. This power to overrule the NCC's conditional or prohibition decisions is justified by public interest reasons (unrelated to the protection of competition), namely: (i) national security and defence; (ii) protection of security or public health; (iii) free circulation of goods and services within the national territory; (iv) protection of the environment; (v) promotion of research and technological development; and (vi) maintenance of the objectives of sector policies.

The Implementing Regulation states the general rule that it will be for the NCC to monitor compliance with merger remedies. Nonetheless, in cases where the final arbiter was the Council of Ministers, the latter may decide that another administrative agency must monitor those commitments. This was the case for instance, in the key case of the merger between *Sogecable* and *Vía Digital*, owner of digital pay-TV platforms, where the organ in charge of monitoring the merger conditions set out in the merger Decision C-74/02 of 29 November 2002 was the CMT (National Telecommunications Commission).

Regarding referrals from the European Commission pursuant to Article 9 ECMR, the Implementing Regulation requires a new notification to the NCC pursuant to the national rules, once the referral from the Commission has taken place.

Characterisation of Anticompetitive Conduct and the Introduction of a Leniency Regime for Cartels

Regulation of a De Minimis *Rule Applying to Restrictive Practices*

Conduct which would otherwise qualify as anticompetitive is not caught by the prohibition rules if it does not appreciably affect competition. The specific criteria to ascertain which conduct is *de minimis* are contained in the Implementing Regulation and are directly inspired by the Commission's *de minimis* criteria, *i.e.*, conduct between competitors is regarded as *de minimis* if the joint market share does not exceed ten percent; conduct between non-competitors is regarded as *de minimis* if joint market share of the parties does not exceed fifteen percent. A number of naked restraints are excluded from the benefit of the *de minimis* rules in the same way as under Community law.

Interestingly, the Competition Act states that the Implementing Regulation would set out the *de minimis* rules for all of the behavioural matters (including abuse of dominance). The rules set out in the Implementing Regulation clearly appear to be oriented towards agreements only though, (to the exclusion of unilateral conduct), in view of the designated market share levels.

Leniency Policy

The Implementing Regulation is key to the introduction of a leniency policy because firstly it develops the main aspects of the policy and secondly because the Competition Act states that the exemption/leniency regime is not to enter into force until the Implementing Regulation is in force.

The introduction of a leniency policy in Spain is one of the most remarkable innovations of the new competition legal framework. The leniency regime is clearly inspired by the leniency policy enforced by the European Commission as a tool to fight cartels. According to the Competition Act, companies that "blow the whistle" may benefit from an exemption from fines or a reduction of fines.

In any event, publication of the Implementing Regulation (and therefore entry into force) in the Official Gazette is likely to be imminent at this stage. Additionally, the NCC has published a set of provisional guidelines on the procedure to be followed regarding leniency applications. A reduced notification is foreseen for cases where simultaneous leniency applications are filed with the NCC in parallel with the European Commission.

Benefits for a Cartel Member

Exemption from fines is granted to the company that, according to the NCC, (i) is the first to provide evidence that is good enough to give rise to an inspection under the Competition Act or (ii) is the first to bring forward evidence that enables the NCC to prove an infringement of Section 1 of the Competition Act (Cartels), provided that, at the moment of submitting the evidence, the NCC does not yet have enough evidence to prove the Section 1 infringement and provided that an exemption has not yet been granted to another party under (i).

Furthermore, the following conditions must be fulfilled for an exemption to be granted, a party must:

- Cooperate fully with the NCC throughout the entire administrative procedure;
- End its participation in the cartel, unless otherwise instructed by the NCC with a view to maintaining the effectiveness of an inspection;
- Not destroy any evidence related to the exemption request, nor give any third parties other than the Commission or another national competition authority notice that it intends to request the exemption; and
- Not adopt any measures to force other companies to participate in the cartel.

A reduction of fine is granted by the NCC where a company or natural person, without qualifying for an exemption, contributes evidence that amounts to a substantial addition to the evidence already held by the NCC. "Substantial," according to the Implementing Regulation, is evidence which, due to its nature or its level of detail, enables the Competition Authority to increase its capacity to prove the facts.

According to the Competition Act, the first company to bring in the evidence will benefit from a thirty to fifty percent exemption from the total amount of the fine; the second one will benefit from a twenty to thirty percent reduction; and successive contributors will benefit from a reduction of up to twenty percent of the amount of the fine.

The Implementing Regulation sets out the information items that must be submitted with the application for leniency:

- Name or company name of applicant (including identification details and details on the activities of the company). In the case that the leniency application is filed by a representative of the company, it is necessary to provide a power of attorney.
- Names and addresses of all the natural persons taking part/having taken part in the cartel (including details on the activities of these companies and details on the participation of these companies in the cartel).
- A detailed description of the facts (goals, working methods, affected territory, duration) of the cartel.
- Evidence of the cartel that is in the hands of the applicant, or that it can obtain within a reasonable amount of time.
- Relation of the applications for exemption or reduction of the amount of the fine submitted to the competition authorities.
- Statements from the applicant, that (i) it has not communicated to any third party, other than the Commission or other competition authorities, its intention to apply for leniency; (ii) it has not destroyed any piece of evidence; and (iii) it has not induced other companies to participate in the cartel (if applying for exemption).

The order of reception of the applications for exemption or reduction shall be fixed according to the time and date of entry in the registry of the NCC. The applicant shall receive notification of receipt from the NCC. Applications are examined following the order of reception and the outcome regarding exemption/reduction of fines is communicated to the applicant companies at the end of the administrative procedure.

The Implementing Regulation provides for a reduced application procedure for processing exemption applications whenever the company has submitted, or intends to submit, an application for exemption with the Commission, due to the fact that this is the authority best placed to deal with the cartel. Reduced applications follow the European Competition Network (ECN) Model Leniency Program. The Commission is understood to be the authority best placed to deal with the cartel if the cartel has effects on competition over three or more Member States. The reduced form reduces the amount of information that a party has to submit, and in particular it excludes the need to submit evidence. Information required in a reduced submission for immunity is the following:

- Name and indication of the corporate headquarters of the applicant company;
- Name and indication of the corporate headquarters of the other company's participants in the cartel;
- Products and territories affected by the cartel;
- Estimated duration and nature of the cartel;
- Member States in which territories evidence of the cartel may be found; and
- Information on the exemption or reduction applications filed (or which are going to be filed) by the applicant with other competition authorities regarding the same cartel.

The NCC may accept verbal applications in a specific format, which will be recorded within the NCC premises. Verbal declarations may be of use in circumstances where the applicant does not want to leave any written trace, not even at the authority's premises – action which may sometimes make sense in view of document production duties and discovery rules for other jurisdictions where the applicant may be involved in litigation.

The above risk is well-identified by the ECN model leniency programme,[3] which states that, although ECN members are happy for civil damages to be sought from cartel participants, the ECN does not want to see discovery rules becoming a disincentive to leniency applicants. Leniency applicants should not be dissuaded from applying for immunity/leniency for fear that their statements will have to be produced in court litigation.[4]

As an additional remark regarding verbal applications, it must be noted that both reduced and full applications can be made verbally. Although this might seem obvious, it is not in view of the guidelines issued by the NCC. But the NCC has admitted this possibility in light of the ECN Model Leniency Programme.[5] Applications are of course afforded confidential treatment.

Once the immunity/leniency application has been filed with the NCC, applicants are under a cooperation obligation with the NCC, which includes: (i) to deliver promptly any information and evidence of the alleged cartel; (ii) to respond promptly to any information requested; (iii) to facilitate interviews with current and former employees and directors of the company; (iv) to refrain from destroying, forging or hiding any information or evidence on the cartel; (v) to refrain from communicating the leniency application until the statement of objections is issued or it is agreed with the NCC.

Finally, the Implementing Regulation contains a straightforward system for coordination of competences of the national (central) Competition Authority and the existing regional (Autonomous Community) competition authorities in this matter of leniency applications, *i.e.*, mutual notification of applications. The provisional guidelines provide a form to be attached to immunity/leniency applications, as well as the address and contact details of the NCC for leniency purposes. According to the guidelines, applicants may ask for guidance from the recently created NCC special unit for leniency purposes (the Cartels and Leniency Unit).

The past experiences of leniency policies in the EU and the U.S. have generally been acclaimed as positive, and the leniency policy is widely regarded as a major tool in the fight against cartels. In Spain, however, the outlook is not as clear as one might expect in view of other countries' experiences; in particular, some commentators cast doubts over the legality and practicability of leniency policies in Spain on a number of grounds, namely:

- Regarding the compatibility in Spain of the leniency system with the legal principles of equity and equality of treatment.
- Spanish law does not generally foresee leniency policies in other fields of the law (*e.g.*, criminal law) save for crimes of particular seriousness, such as drug trafficking and terrorism and, even in those cases, there is never exemption from penalties but, rather, a reduction thereof.
- The fact that the member of a cartel may walk clean and unpunished after participating in a cartel is unfair towards clients and/or consumers who have suffered the effects of the cartel.
- Leniency can be seen as morally dubious as it rewards someone who, in the end, has also been responsible for the cartel. Furthermore, the leniency policy condones whistle-blowing as a social value.
- Its effectiveness is also called into question because participants may have incentives to make an inappropriate use of the leniency policy to start with; and, from the standpoint of courts, it may be that courts are reluctant to accept evidence coming from a member of the cartel (*i.e.*, the member of the cartel applying for immunity/reduction) on the grounds that this is evidence coming from an entity with direct interest in the procedure.
- Other reasons may reduce the incentives of the cartel members to participate in the leniency policies: reluctance to confess to having taken part in a cartel; risks of criminal sanctions for the directors and/or executives of the company.[6]

Some of those reasons may have some weight; overall, however, most objections are likely to be contradicted with the passing of time. For instance, it may seem *prima facie* unfair that members of a cartel that have extracted benefits from the cartel are unpunished. However, it is also true that as a result of whistle-blowing, an action for damages against a cartel that was previously hidden may now be available to those injured by the cartel.

In the first day the leniency policy was in force (29 February 2008), six applications were reportedly filed with the NCC.

Although it is a good figure for one day, it is not such a high figure if one takes into account that it had been known for months that the leniency policy would soon enter into force. In other words, those six applications were the applications that had been piling up on the lawyers' desks for the last months. It therefore appears that in order to judge the effectiveness or lack of it of the leniency program in Spain and in order to carry out an appropriate regulatory assessment, some time will need to pass.

Declarations of Inapplicability and Exemption Withdrawal

The exemption system is terminated under the Competition Act. Nonetheless, the NCC may, if it deems it necessary, decide that a given anticompetitive agreement is not caught by the prohibition on restrictive agreements. Likewise, the Competition Act foresees the possibility that categories of exemptions may no longer be applicable. The Implementing Regulation contains detailed rules for the implementation of the above.

Developments Regarding the Procedure for Restrictive Practices

Under the new Competition Act, the maximum time-limit for a decision on forbidden practices is eighteen months, whereas under the preceding Competition Act it was two years. The period can nonetheless be interrupted under a number of circumstances (*e.g.*, information requests, initiation of proceedings by the Commission).

The Implementing Regulation sets out a phase of "reserved information," in terms similar to the pre-existing regulation, where the NCC may investigate conducts without communicating with the allegedly guilty party. This phase finishes when the procedure is formally started with an accusation set out in a statement of objections.

The new Competition Act allows settlement during the entire investigation phase, whereas under the former Competition Act the parties could only attempt to settle prior to notification of the statement of objections by the Competition Authorities. The Implementing Regulation provides detailed rules for the settlement procedure, including for the submission of remedies attached to the settlement. The settlement decision should identify the parties concerned by the commitments, and the nature, object and monitoring regime of those commitments.

The Implementing Regulation puts in place somewhat detailed rules of procedure for arbitration of competition-related controversies in cases where the parties have submitted to the arbitral jurisdiction of the NCC.

State Aid

The new Competition Act contains a number of rules attempting a degree of monitoring of State aid. This system does not impinge on the European Commission's powers in the State aid field, or on the national court's powers under Article 88.3 EC Treaty. To put this system in practice, the Implementing Regulation foresees the channelling of information related to State aid to the Competition Commission and the creation of a database related to State aid granted by any Public Administration.

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[1] Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-2.

[2] For a detailed discussion on this matter, with reference to the international reactions sparked by maintenance of the market share threshold, I refer to my study on the new draft Competition Act, where I discussed the different positions held by the authorised literature in connection with the market share threshold. Overall, it seems reasonable to state that the market share threshold introduces uncertainty in the assessment of whether or not a transaction should be notified; an assessment that should arguably be completely straightforward but which, due to the flexibility regarding the measurement of market shares (market shares depend on market definition, of which there can always be alternatives), compels companies to sometimes engage in complex market definition exercises solely for the purposes of deciding whether or not notification is required. On the other hand, it is also true that market share is a better proxy of market power than turnover. See The Genesis of a New Legal and Regulatory Framework for Competition Enforcement in Spain, Pedro Callol, (2007) 28(2) ECLR, at p. 78-79.

[3] The ECN model leniency programme may be downloaded from the European Commission Directorate General of Competition website at: http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf.

[4] At para. 47, the ECN document states that "the ECN members are strong opponents of effective civil proceedings for damages against cartel participants. However, they consider it inappropriate that undertakings which cooperate with them in revealing cartels should be placed in a worse position in respect of civil damage claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of statements which have been made specifically to a CA in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the CA's leniency programmes, could undermine the effectiveness of the CA's fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. The risk that an applicant becomes subject to a discovery order depends to some extent on the affected territories and the nature of the cartel in which it has participated. Experience has so far shown that it is more likely that discovery orders will be made in cases where the Commission is particularly well placed to deal with than in cartels that are limited to a certain region or a certain Member State."
"In order to limit any such negative consequences for the CA's leniency programmes, the ECN model programme allows for oral applications (summary, marker or full applications) in all cases where this would appear to be justified and proportionate. Oral applications are always justified and proportionate in cases where the Commission is particularly well placed to act [. . .]." (Points 47 and 48 of the ECN Model Leniency Programme).

[5] *Id. at* para. 48.

[6] La nueva Ley de Defensa de la Competencia, R Alonso Soto, Revista de Derecho de la Competencia y la Distribución, p. 33.