April 2021 Competition Act Reform

Royal Decree-Law 7/2021, of 27 April, has implemented into Spanish law EU Directive 2019/1 of 11 December 2018 empowering the competition authorities of Member States (OJ L11/3, 14.1.2019) (**ECN+ Directive**). In summary:

(1) Antitrust fines and liability.

a. *The reform reinforces the fining powers of the national Competition and Markets Commission (**CNMC**).* The CNMC has in the past typically (though not always, the uncertainty stemming from the fact that prior to this reform there was silence regarding the geographic scope of turnover) calculated antitrust fines on the basis of national turnover. Subsequent to the reform, maximum fines can run up to 10% of worldwide turnover. This reform is likely to lead to increased fines.

b. *Increase of the upper limits of fines for RPM and general horizontal and abuse of dominance cases.* All breaches of Articles 101 and 102 TFEU and national law equivalents are subject to fines of up to 10% of turnover (hitherto the 10% upper limit was reserved to cartels and abuse of dominance in monopoly or liberalized markets).

c. The notions of *group liability* and *economic continuity* are reinforced in connection with *(i) dawn raids*, where it is now made clear that an inspection order addressed to a single company is deemed to have been addressed to the entire group of companies, provided the latter are connected with the investigated facts; and *(ii) antitrust liability* which is now expressly extended to company successors.

(2) Interim measures. The CNMC has very rarely made use of interim measures in antitrust matters. The reform inserts a paragraph in the relevant provision which does not seem to add much of substance (it requires international coordination in Article 101, 102 TFEU matters; and requires that interim measures are limited in time and should not lead to irreparable harm). Hopefully this will be a signal to the CNMC to use its powers to issue interim measures when required.

(3) Leniency. The reform clarifies that *(i)* leniency applicants also benefit from an *exemption to the ban of cartel members from public procurement tenders*; *(ii) leniency applications and corporate statements are confidential* and may only be accessed by the accused parties without right to a copy and solely for defense in antitrust administrative proceedings (damages claims not included); and *(iii)* a *marker system* is now put in place in Spain.

(4) Investigation toolbox and key procedural principles.

a. *Investigation powers of the CNMC are clarified regarding areas such as executive or company staff interviews.* The CNMC is now given express power to summon individuals to interviews under threat of penalty. Lawyers may assist interviewees and interviews can be recorded.

b. *The CNMC is empowered to reject complaints based on priority criteria*. This has been a much debated issue since under the pre-existing law the CNMC was obliged to (at least) give weight to any complaint submitted to it, even if to reject it, which of course has been a source of busyness sometimes viewed as unnecessary or detrimental to the efficient work of the CNMC. Difficulty to prove the facts in a complaint, likely limited impact or the possibility to remedy the issue through other legal means are cited as criteria to determine priority.

c. *Fundamental rights*: antitrust proceedings must abide by the general principles of EU law and the EU Charter of Fundamental Rights.

The reform approved is less ambitious than anticipated by the preparatory works. No settlement procedure is introduced (as was hoped) in line with that under EU law; neither is an also expected extension of the legal duration of antitrust proceedings (limited to 18 months, which is perceived as sometimes too short); a reform of the merger control thresholds to reduce the number of reportable mergers (in spite of the fact that Spain gets roughly 100 notifications per year, substantially less than other European countries of comparable or smaller size) is also ignored; finally, fines on individual directors are left untouched at a maximum of €60,000, widely perceived as low.