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Important modifications to the Spanish Competition Rules (the ECN + Directive implemented in Spain)

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On 27April 2020, the Spanish Council of Ministers approved Royal Decree Law 7/2021[1] (**the Omnibus RDL**) transposing several directives of the European Union into the Spanish legal system, including the ECN + Directive[2] (**the ECN + Directive**). The ECN+ Directive is intended to provide national competition authorities, in the case of Spain, the National Competition and Markets Commission (the **CNMC**) and the Spanish regional authorities, with the necessary means to apply competition rules more effectively.

The Omnibus RDL amends the Spanish Competition Act 15/2007 of 3 July, (the **LDC**), Act 3/2013, of 4 June, on the Creation of the CNMC (the **LCCNMC**) and Royal Decree 261/2008 of 22 February 2008, approving the Spanish Implementing Regulation (the **RDC**) introducing important new features, which have been in force since 29 April.

As indicated in the explanatory statement to the Omnibus RDL, on 18 March 2021 the European Commission sent the Kingdom of Spain a formal notice letter initiating an infringement procedure due to its failure to transpose the ECN + Directive on time. This probably led to a good number of the proposals foreseen in a draft proposal of an Act modifying Spanish Competition (the **APL**)[3] – published in July 2020 by the Spanish Economic Affairs Ministry – not finally making it to the Omnibus RDL. Consequently, the modifications provided in the Omnibus RDL strictly refer to those aspects necessary to implement the ECN + Directive, while other aspects that the APL proposed to modify, but which did not arise from the implementation of the ECN+ Directive, were dropped.

In the following sections, we will briefly summarise, first, the most relevant amendments that, in our opinion, the Omnibus RDL has brought about (section 1 below). Secondly, we will list those aspects provided in the APL that the Omnibus RDL does not contemplate, but could make it into the Spanish legal regime after the Parliamentary validation of the Omnibus RDL (section 2 below).

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1 Royal Decree-Law 7/2021, of April 27, on the transposition of European Union directives in matters of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage, displacement of workers in the provision of transnational services and defence of consumers (BOE n.101 of 28 April 2021)

2 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

3 The aforementioned draft of APL is available **here**.

Most relevant modifications brought about by the Omnibus RDL

Amendments to the investigative powers of the CNMC

The first major area of amendments brought about by the Omnibus RDL refers to the investigative powers of the CNMC. The amendments introduced by the Omnibus RDL have significantly strengthened the investigative powers of the CNMC.

Powers of the CNMC in relation to inspections

- Dawn raids may now be carried out at any premises or place (whether or not it belongs to the company or person being investigated), when there is a reasonable suspicion that there may be evidence or relevant documentation related to the facts subject to investigation.
- Inspections can be carried out at/from the CNMC headquarters when elements that can be examined therewith are involved, or copies or extracts of documents seized in the course of a dawn raid can be analysed, examined and selected.
- The CNMC may require, during the inspection, the appearance of the personnel of the companies or associations inspected or of the individuals investigated. They may also be required to provide any documentation in their possession or any electronic device they have used.
- The CNMC may designate, in addition to its personnel, authorised attendants in order to provide support and assistance to inspectors during the dawn raids.
- Parent companies, subsidiaries and companies that are part of the same business group will be obliged to be submit to the inspection ordered by the Director of Competition at the CNMC.
- Refusal to submit to an inspection carried out on the basis of an investigation order issued by the Director of Competition of the CNMC will lead to the initiation of an independent infringement proceeding, without prejudice, to consider such a refusal also as an aggravating circumstance when estimating the amount of a potential fine. As will be explained later, fines for obstructing the investigative functions of the CNMC have increased substantially.

Interviews

Through a prior motivated request, the CNMC may interview company representatives and any individual who may be in possession of data and information that may be necessary for the CNMC's investigation. The rights of the interviewee not to self-incriminate and to have legal advice during the interview are recognised. The interview may be carried out in person (at the headquarters of the CNMC or at the company's premises, provided that the company allows so) or through digital means. The interviews may be recorded by the CNMC, but not by the companies or the interviewees.

Amendments to sanctioning matters

The second area of amendments brought about by the Omnibus RDL refers to sanctioning matters. On the one hand, the CNMC might impose higher fines (if it deems it appropriate), since several minor infringements are now considered serious infringements, and some serious infringements have been upgraded to very serious infringements. On the other hand, one of the amendments tries to encourage leniency by guaranteeing the applicant exemption from debarment.

Infringements and fines

- Fines will be imposed on the total worldwide turnover of the infringing undertakings.
- All infringements of articles 1 LDC and 101 TFEU (regardless of whether they are of an horizontal or vertical nature) and infringements of articles 2 LDC and 102 TFEU are now considered very serious infringements and, therefore, sanctioned with fines of up to 10% of the total worldwide turnover of the infringing undertaking.
- Obstruction to CNMC's investigations are no longer a minor infringement but a serious one, which can result in fines of up to 5% of the total worldwide turnover of the infringement undertaking. Infringements included in this category comprise, among others, providing

incomplete, incorrect or misleading information to the CNMC (including in appearances or interviews) or failure to appear or refusing to answer questions during interviews.
- Periodic penalties go up to 5% of the total average daily turnover for each day of delay as from the date set in the previous requirement.

Leniency Programme

- As from the moment that a company is considering applying for leniency, no evidence can be destroyed and the company should refrain from communicating its intention to third parties
- The leniency applicant can request a marker that preserves his/her position, while being able to provide evidences of the infringement later on.
- It is expressly indicated that collaboration within the framework of the leniency programme will also include exemption from potential debarment.

Modifications of a procedural nature

A third area of amendments addresses procedural aspects in an attempt either to streamline the procedure or to rationalise the use of resources available to the CNMC. Probably the most relevant aspect is that the CNMC can prioritise whether or not to investigate the complaints submitted to it.

Prioritisation of cases

From now on, in the event of a complaint, the Directorate of Competition may agree (after consultation with the Competition Council) not to initiate proceedings if it considers that the investigation of the facts of the complaint is not a priority. It will not consider as a priority any complaints that: (a) provide little evidence or weak indications of an infringement; (b) refer to conduct whose potential scope is limited, or where the potential harm is low; or (c) refer to conduct whose prevention or eradication is feasible through other legal instruments.

Time limitation

From now on it is no longer required for the interested party to have knowledge of the Authority's activity aimed at investigating the facts, so that the time limitation period is interrupted. The time limitation period will also be interrupted because of infringement procedures in other EU Member States or before the European Commission regarding the same facts, which constitute an infringement of the LDC or by articles 101 or 102 of the TFEU.

Request for information by the CNMC

It is provided that:

- requests for information by the CNMC must be proportionate and carry no obligation to recognise wrongdoing; and
- there is an obligation to provide the CNMC with all information accessible to the obliged subject, regardless of the medium on which it is stored.

Confidential Information

A limitation has been introduced in relation to the use of the information contained in leniency applications. This may be used only either in the context of the infringement proceedings to respond to the accusations put forward by the CNMC, or in appeals before the national courts.

Respect of Fundamental Rights

The CNMC must guarantee respect for and compliance with the general principles of EU Law and the Charter of Fundamental Rights of the EU and national legislation.

Conditions

It is established that, if a CNMC decision putting an end to an infringement procedure is going to impose conditions, when choosing between structural or behavioural conditions of equivalent effectiveness, the one that is less burdensome for the company in question shall prevail.

Cooperation between competition authorities

The Omnibus RDL also brings about a number of amendments, provided in the ECN + Directive, aimed at strengthening cooperation between the different Competition Authorities of the EU Member States and between them and the European Commission.

Aspects provided in the APL that have not been accepted in the Omnibus RDL

If in the previous section we have summarised the most relevant novelties that the Omnibus RDL has introduced, in this section we briefly indicate those that were foreseen in the APL and, due to the haste in adopting the Omnibus RDL, have not been finally approved. The main amendments proposed in the APL that have not been passed by the Omnibus RDL are:

Regarding merger control

- the predicted modification of the Spanish turnover notification threshold;
- the elimination of distinction of treatment for the exception of implementation of transactions involving listed companies on the Spanish stock exchanges and on foreign stock exchanges;
- the introduction of a maximum deadline to decide on formal consultations on whether the CNMC can be notified of a transaction, the reduced deadline for approval in the first phase for transactions that benefit from a short notification form, and the extension of the review period in phase 2; and
- the exclusion of the tacit approval in the event that the CNMC is not informed within a five day deadline from the notification of the transaction in other Member States of the EU.

Regarding sanctioning proceedings

- the introduction of a settlement procedure;
- the extension of the current maximum deadline of 18 months to 24 months to decide (and notify the end of) the sanctioning procedures;
- the expansion of the circumstances leading to the suspension of the maximum deadline to decide the proceedings;
- the possibility of rejecting, without in-depth analysis, appeals before the Council against acts of the Directorate of Competition that are manifestly unfounded; and
- the increase of fines for individuals to EUR 400,000.

As was indicated, none of these measures has been passed as part of the Omnibus RDL. Nevertheless, during the Parliamentary recognition process it has been decided to handle the Omnibus RDL as a bill. Therefore, these and any other proposals that the different Parliamentary groups may have can be included, so that the modifications just approved are just a first step into a more far-reaching reform of Spanish Competition rules.

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