CARTEL REGULATION: UPCOMING NEW LAW IN SPAIN

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Current cartel regulation

Law 16/1989 on Competition Defence, of 17th July (the Competition Law), takes in the entire body of Spanish antitrust law, covering restrictive agreements and practices, abuses of a dominant position and merger control.

Enforcing bodies

The competition defence enforcing bodies are the Competition Court ("*Tribunal de Defensa de la Competencia"*) and the Competition Service (*"Servicio de Defensa de la Competencia"*).

The Competition Court is an autonomous body formed by one President and eight members, appointed by the Government, for a five year period, at the proposal of the Minister of Finance. The Competition Court has the authority to take decisions on whether or not prohibitions of restrictive practices have been infringed, imposing fines to the infringing party, and is entitled to grant individual exemptions at the request of the undertakings concerned.

The Competition Service is a unit within and directly dependent on the Ministry of Finance. It is responsible for detecting, monitoring and investigating the existence of restrictive practices as well as for enforcing any decisions of the Competition Court. The Competition Service may also put an end to an anticompetitive practice by means of a termination agreement.

Since May 2002, a decentralised institutional framework has been set up by Law 1/2002 by which the Autonomous Communities can create their own bodies to enforce Law 16/1986 as regards anticompetitive practices (agreements and abuse of dominance) with effects only in their respective territories. Thus, the State enforcing bodies remain competent for prosecuting practices with effects in the supra-autonomous sphere or in the entire national market. At present, 10 out of 17 Autonomous Communities have created their own antitrust enforcing bodies.

Finally, unlike under EC Regulation 1/2003 where parties injured by a cartel are entitled to seek damages by privately enforcing Article 81 EC before a Spanish court, Spanish cartel regulation remains a system of administrative enforcement and according to Article 13 of the Competition Law, private parties can only seek damages before a court provided there exists a final administrative decision declaring the existence of a prohibited agreement or practice. This introduces a strong deterrent to private actions, as victims have to wait for several years (more than ten in many cases where judicial review is triggered) to bring a suit before a civil court.

Substantive rules

In particular, restrictive agreements and practices are ruled in Article 1 of the Competition Law. Similarly but not identical to the wording contained in Article 81 EC, it prohibits any collective agreement, decision or recommendation or any concerted or consciously parallel

practice aimed at producing or enabling the effect of impeding, restricting or distorting competition in all or any part of the domestic market, in particular those which:

- directly or indirectly fix prices or other trading or service conditions;
- limit or control production, distribution, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions in commercial or service relations, thereby placing some competitors at a competitive disadvantage;
- make the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Apart from the penalties which can be imposed by the Competition Court (see below), prohibited agreements are deemed automatically void. However, under same Article 1 of the Competition Law, the competition defence enforcing bodies are entitled to decide not to initiate or to stay proceedings in case it is deemed that the relative unimportance of the relevant restrictive conduct prevents it from having a significant effect on competition. Unlike under EC Competition Law (cf. *de minimis* Notice), to the foregoing effects no clear guidance there exists as to when a conduct can be deemed to be of minor importance.

Further, modelled on pre-modernisation EC Competition Law, under Article 4 of the Competition Law, the parties to a restrictive agreement may obtain an individual authorisation, for a limited period of time, provided such agreement has positive effects on the production or distribution of goods and services and on the promotion of technical or economic progress, being this test almost identical to that provided for under Article 81.3 EC. In addition, individual authorisations may be granted on grounds of general economic and the public interest. Finally, also following the EC model, Article 5 of the Competition Law empowers the Government to regulate block exemptions. In this sense, Royal Decree 378/2003, of 28 March, has incorporated to the Spanish law the categories of agreements already exempted at EC level by means of the various EC block exemption regulations.

Procedure

The Competition Law provides for a biphasic procedure to prosecute a cartel: the so-called instruction or investigation phase followed before the Competition Service and the resolution phase before the Competition Court. Article 56 of the Competition Law establishes the maximum procedural periods for each phase. In both cases the maximum term is 12 months.

Proceedings are formally open by the Competition Service, following a third party complaint or *ex officio*. The Competition Service is in charge of conducting the necessary inquiries and investigations for which it is duly empowered under the Competition Law. Access to premises without the consent of the occupants requires the application of a court order.

Interim measures may be ordered by the Competition Court during the prosecution of a cartel. Their adoption may not exceed six months.

Sanctions

Provided the Competition Court finds an infringement has been committed, apart from ordering to stop the infringement, imposing specific conditions or obligations and ordering the removal of the distorting effects caused by the violation, it can impose pecuniary fines. No

specific criminal sanctions are available. However, some forms of hard core cartels could also be prosecuted as criminal offences under Spanish Criminal Code (e.g., Article 262 which criminalises certain forms of bid-rigging)

Article 10 of the Competition Law establishes fines of up to 901,518 euros, amount which may be increased up to 10 percent of the turnover corresponding to the financial year immediately prior to the Competition Court resolution.

The Competition Law does not provide enough guidance to follow in order to set the level of the fine. Violations of the Competition Law are not graded in terms of seriousness. Article 10 only provides the following factors to assess the importance or gravity of the relevant violation: a) the type and scope of the restriction on competition; b) the dimension of the market affected; c) the market share of the corresponding undertaking; d) the effect of the violation on the actual or potential competitors, the other parties in the economic process and the consumers and users; e) the duration of the violation; and f) the reiteration of the prohibited conduct.

Coercive fines of between 60.10 and 3,005.06 euros per day are also available with a view to effectively enforce a prohibition decision when the sanctioned undertaking does not comply voluntarily with its terms.

Finally, additionally to the sanctions on the offenders, in the case of a legal entity, its legal representatives or the members of the management bodies that have intervened in the violation may be fined up to 30.050,61 euros.

The Competition Court decisions are open to judicial review by the High National Court (*Audiencia Nacional*). It is to note that, although the Competition Court has never imposed the maximum fine (i.e. 10 per cent of turnover), it might be due to the lack of clear guidelines in the Competition Law itself that a material number of fining decisions rendered by the Competition Court so far have been partially reversed as to the amount of the fine due to lack of enough reasoning.

Recent enforcement activity

Despite de material increase in the budgetary resources of the Competition Court in the last five years - which have been multiplied by three -, the number of cartel cases prosecuted and sanctioned has been decreasing. According to the Competition Court's 2005 annual report, during said year, the Competition Court produced 91 decisions, of which 17 corresponded to punitive cases (as compared to 22 in the previous year), totalling fines for amount of 9.8 million euros (as compared to 78.7 million euros the previous year). 6 out of these 17 decisions corresponded to prohibited collusive agreements and practices, the rest concerning abuse of dominance.

Upcoming new Law: main expected changes.

On 25 August 2006, the Government sent to Congress the draft of the new Law on Competition Defence (the Draft Law). The Draft Law is the result of an unprecedented process of public consultation which started on January 20, 2005 with the publication of the *White Paper for the Reform of Spanish Competition Law* by the Ministry of Finance. Following the White Paper's recommendations the Draft Law introduces major legislative reforms in order to bring Spanish competition law in line with the latest EC competition reforms and as

regards competition enforcement institutions and related procedures. The Draft Law is expected to be debated in Parliament within the next months so that the new law is enacted during 2007.

The main changes envisaged in the Draft Law affecting cartel regulation and enforcement are summarised in the paragraphs below.

Main institutional and procedural changes

The Draft Law provides for a major restructuring of the Spanish competition enforcement authorities by integrating the Competition Service and the Competition Court in a single autonomous and independent body, the National Competition Commission (*Comisión Nacional de la Competencia*).

The National Competition Commission, standing on a pyramidal structure, is to integrate two separated units, the Council and the Investigation Directorate, both under the President's supervision and coordination. The Council, with powers similar to those of the existing Competition Court, is to be made of five members, the President of the National Competition Commission and four counsellors, all of them to be appointed for a non-renewable six year period by Government at the proposal of the Ministry of Finance after having appeared before the Congress' Economic Commission.

As regards procedural aspects, the Draft Law maintains the separation between the instruction and investigation activities - to be undertaken by the Investigation Directorate- from the decision-making activities -to be undertaken by the Council-. An important procedural aspect is the substantial shortening of the maximum procedural periods to prosecute cartels and other anticompetitive practices. The Draft Law provides for a maximum term of 18 months from the opening of formal investigations by the Investigation Directorate until the Council's decision.

Finally, in line with the EC competition law post-modernisation, the Draft Law endorses private enforcement of national competition giving Spanish commercial courts jurisdiction to hear private actions and award damages even while administrative proceedings are ongoing. In so doing, the Draft Law provides for some cooperation mechanisms to coordinate the activities of the various enforcing bodies.

Substantive rules

The Draft Law does not alter in any material aspect the definition of neither anticompetitive practices nor, in particular, that of collusive agreements and practices.

Notwithstanding, for the purposes of grading the seriousness of the offence to impose and calculate the amount of fines (see below) as well as for the purposes of regulating a leniency system (see below), a distinction is drawn between vertical and horizontal agreements. In particular, in identical terms to the definition of hard core cartels in the EC Commission's leniency notice, the Draft Law provides a definition of a "*cartel*", as "*a secret agreement between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports*"

To further bring in line the Spanish antitrust system to EC competition post-modernisation, the Draft Law abolishes the notification and authorisation system and introduces a legal

exemption system whereby restrictive agreements with positive effects within the terms of a test identical to that provided in Article 81 (3) EC are legally valid and enforceable without the intervention of an administrative decision.

In addition, unlike under the existing Competition Law, the Draft Law expressly states the inapplicability of the prohibition to agreements and practices of minor importance. In this sense, the Draft Law empowers the Government to pass an implementing regulation to establish the criteria to define *de minimis* conduct with particular attention to market shares.

Like the Commission under Article 10 of EC Regulation 1/2006?, where required by the public interest, the Draft Law gives the National Competition Commission the power to decide on its own initiative that the prohibition of anticompetitive practices as defined in the Draft Law is not applicable because the conditions established therein are not fulfilled or because the test to benefit from the legal exemption is satisfied. Finally, no exemption whatsoever in the Draft Law is envisaged on grounds of general economic and the public interest as in the existing Competition Law.

Sanctions and Leniency

The Draft Law introduces two major changes in the Spanish cartel enforcing system: the grading of the infringements for the purposes of calculating fines and a leniency system.

The Draft Law creates a method of setting fines which, if endorsed by Parliament, will undoubtedly strengthen the efficiency in the enforcement of Spanish cartel regulation by reinforcing the predictability, transparency and impartiality of the authority's decisions, both in the eyes of the undertakings and of the High National Court in charge of judicial review. In this sense, the Draft Law distinguishes the following three categories of infringements: minor, serious and very serious infringements.

As regards restrictive agreements and practices, collusive conduct between non actual or potential competing undertakings is considered a serious infringement while cartels (as defined above) and other collusive conduct between actual or potential undertakings is considered a very serious infringement. The distinction provided by the Draft Law between cartels and other prohibited anticompetitive agreements or practices does not bring about any impact whatsoever (i.e., standard of proof) but for determining the level of any possible fine.

Following the above categorisation, the Draft Law provides for fines of up to 5% of the turnover corresponding to the financial year prior to the relevant decision for a serious infringement and of up to 10% of said turnover for a very serious infringement. In order to determine the level of the fine within each category, the Draft Law adheres to a set of criteria which apart from taking into account the factors already provided in the existing Competition Law (see above), incorporates a set of aggravating and attenuating circumstances in substantially the same terms as those contained in the EC Commission guidelines on the method of setting fines.

Furthermore, in case it is not possible either to determine the turnover of the relevant undertaking for the above purposes or the foregoing criteria, the Draft Law establishes fines of between 100,000 to 500,000 euros for minor infringements, of between 500,001 to 10 million euros for serious infringements and of more than 10 million euros for very serious infringements.

One of the main changes which Spanish cartel regulation is expected to undergo is the introduction of a leniency system. Immunity from fines and reduction of fines to be granted by the National Competition Commission is envisaged for co-operation to prosecute cartel cases, as this term is defined in the Draft Law (see above). The Draft Law refers the implementation of the leniency procedure to Government regulation. However, its main elements, closely modelled on the EC leniency system, are provided in the Draft Law as follows:

- Immunity from fines can be gained by an undertaking if it is the first to submit evidence which in the authority's view may enable it to carry out an investigation in connection with an alleged cartel or to find an infringement, provided the authority did not have, at the time of the submission, sufficient evidence to conduct the investigation or to establish the infringement.

- Reduction of fines can be available to an undertaking which does not meet the conditions for immunity if it provides the authority with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the authority's possession. To calculate the amount of the reduction, a reduction of 30 to 50% of the fine which would otherwise be imposed is available for the first undertaking providing evidence, a reduction of 20-30% for the second and of up to 20% for the subsequent ones.

In order to be eligible for either immunity or reduction, the relevant undertaking must cooperate fully with the authority, provide all available evidence, end its involvement in the suspected infringement no later than the time at which evidence is submitted, not have coerced other undertakings to participate in the cartel and must not have destroyed evidence or disclosed to any third party its intention to apply for immunity or reduction.

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