READY FOR CHANGE

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It is already more than two years that the Ministry of Finance launched a White Paper on Competition Reform proposing important changes on Spanish competition law and opened a process of public consultation. Later than expected, on August 25, 2006, the Government sent to Parliament the draft of the new Law on Competition Defence. The Draft Law is currently being debated in Congress so that likely the it will be passed during the current calendar semester.

Following Law 16/1989 currently in force, the Draft Law takes in the entire body of Spanish competition law: restrictive agreements and practices, abuses of a dominant position and control of concentrations. Decentralised enforcement as regards anticompetitive practices affecting only a region is however regulated by Law 1/2002 under which some Autonomous Communities have created their own competition enforcing bodies. While the Draft Law does not envisage to amend the decentralised institutional framework set up by above cited Law 1/2002, some amendments aimed at increasing the enforcing competences of the Autonomous Communities will be most likely brought to the debate by the regional political parties represented in Congress, notably from the Basques and Catalonians. These are particularly pushing to gain competences as regards merger control and the application of Articles 81 and 82 of the EC Treaty on restrictive agreement and practices and abuse of dominance, respectively. Whatever the outcome of the debate is on decentralised enforcement, it is hoped that the improvement in the overall competition enforcing system is not finally undermined by seeding potential new conflicts.

In order to outline the most prominent legislative reforms introduced by the Draft Law, these could be gathered in three main groups: (i) the reforms aimed at bringing Spanish competition law in line with the latest EC competition developments, (ii) the institutional reforms and (iii) the reforms on merger control.

Within the first group, main reforms are envisaged in the Draft Law in order to push forward the harmonization of Spanish competition law with EC modernization regime. In particular, as regards restrictive agreements, the Draft law abolishes the notification and individual authorisation system. Instead, a legal exemption system will apply whereby restrictive agreements with tested net positive effects shall be deemed legally valid and enforceable.

In addition, it is expected that the new regime clearly states the inapplicability of the prohibition to restrictive agreements and practices of minor importance. In so doing, the Draft Law supports the legality of minor agreements in line with the relevant EC "De Minimis" Notice and to that effect provides for establishing the criteria to define minor agreements with particular attention to market shares.

Regarding private enforcement, jurisdiction is given to commercial courts to hear private actions and award damages on infringements of Spanish competition law even while administrative proceedings are ongoing. Currently, while Spanish courts are competent to hear private actions pursuant to Articles 81 and 82 EC Treaty, they cannot hear cases under the relevant Spanish competition law until such infringements have been fully considered by the Spanish competition authorities. This administrative process can take several years before a private party can seek compensation for damages in the Spanish courts, particularly if the

relevant decision by the Competition Court is appealed before the High Administrative Court (*Audiencia Nacional*).

As regards specific competition law infringements, the Draft Law provides for the elimination of the abuse of a situation of economic dependence, a type of abuse which is unknown to EC competition law. On the other hand, the Draft Law opts to maintain as an specific infringement the distortion of market conditions through unfair competition acts when they affect the general interest. This despite the White Paper and a large part of commentators advocating for its removal. Unfair competition acts affecting the general interest are not caught under EC competition law.

Finally, the Draft Law introduces a leniency system to provide incentives to cartel participants to defect and report hardcore cartel cases. Closely modelled on EC enforcement of prohibition of cartels, this leniency system will provide for immunity from fines and reduction of fines in exchange for co-operation to prosecute cartels.

On the institutional side, national competition enforcement authorities will undergo a major restructuring. The Draft law envisages the integration of the existing Competition Service and the Competition Court in a single autonomous and independent body: the National Competition Commission (*Comisión Nacional de Competencia*). This new body will integrate two separated units, the Council and the Investigation Directorate, both under the President's supervision and consultation. The Council, with powers similar to those of the existing Competition Court, will likely be made of six members, the President and five counsellors to be appointed for a non-renewable term of six years. While the Draft Law provides for their appointment by Government, the current state of the debate in Congress suggests that the appointment of the members of the Council will have to be finally ratified by Parliament at the Government's proposal. On its part, it is also likely that the appointment of the Head of the Investigation Directorate by the Ministry of Finance will have to be finally ratified by a majority of the Council.

This major institutional reform is accompanied by procedural changes aimed at simplifying and speeding up procedures. The Draft Law maintains the separation between the instruction and investigation activities by the Investigation Directorate from the decision making activity by the Council. However, the Draft Law envisages a material shortening of the maximum procedural periods to prosecute anticompetitive practices providing for a maximum term of 18 months from the opening of formal investigations until the Council's decision. At present, each of the investigation and decision making procedures enjoys from a maximum 12 month term.

On merger control, the most prominent reform relates to decision making. While at present, decisions on major mergers correspond to the Council of Ministers (Spanish Cabinet), the Draft Law gives exclusive competence to the National Competition Commission but when major mergers are prohibited or conditioned by the Commission. In such cases, the Spanish Cabinet retains the power to decide on such mergers on public interest grounds other than competition defence such as national security and defence, public health, free circulation of goods and services, regional balance, environmental protection, social policies, plurality of media, R&D promotion and the need to preserve sectoral objectives.

Decision making on mergers is expected to be one of the most debated issues in passing the new law. So far, the solution provided in the Draft Law is being hotly contested by commentators. The main objection raised against giving the Spanish Cabinet the power to

decide on some major mergers on grounds other than competition defence is that the political dimension already existing in merger control will be substantially broadened.

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