

## THE SPANISH GOVERNMENT REFORMS THE COMPETITION ACT TO IMPLEMENT THE ECN+ DIRECTIVE

The Spanish Government has passed Royal Decree-law 7/2021 (available [here](#) in Spanish) dated 27 April, which reforms the Spanish Competition Act and implements into Spanish law the ECN+ Directive. This reform:

- Smooths cooperation between Spanish and other EU competition authorities.
- Strengthens the investigation powers of the Spanish Competition Authority by giving it the power to conduct interviews and clarifying the scope of its powers in relation to digital information.
- Increases the maximum fines that may be imposed on infringing companies.
- Gives the Spanish Competition Authority the power to reject complaints on the basis of its enforcement priorities.
- Clarifies that leniency applicants may avoid disqualification from public tenders.

### 1. THE ECN+ DIRECTIVE AND THE BACKGROUND TO THE REFORM

In 2019, the Council and the European Parliament adopted Directive 1/2019 (known as the ECN+ Directive; ECN+ refers to the European competition authorities collectively known as the European Competition Network). The aim of the ECN+ Directive was to even out the differences in the regulations applicable to national competition authorities in the EU, which in addition to enforcing their own antitrust rules can also apply Articles 101 and 102 TFEU. It introduced a set of minimum standards and powers for these authorities, largely imitating the model of the European Commission.

In the summer of 2020, the Ministry of Economic Affairs and Digital Transformation published a draft bill amending the 2007 Spanish Competition Act (the “SCA”) that encompassed more ambitious reforms than those strictly required by the ECN+ Directive. The draft would have introduced into Spanish law the settlement procedure and amended some of the merger notification thresholds. However, as the deadline for the transposition of the Directive has now lapsed, the Government has opted to solely amend the SCA as required by the ECN+ Directive.

## 2. MAIN AMENDMENTS

### 2.1 COOPERATION BETWEEN EU AUTHORITIES

- **Investigations:** EU national competition authorities can now exchange information and may assist each other in carrying out interviews and inspections outside their jurisdictions.
- **Notification and enforcement of acts:** national competition authorities can also now assist each other in notifying in their respective national territories the acts (requests for information, statements of objections, final decisions) of other Member States' authorities. The Spanish Competition Authority (CNMC) can also enforce the decisions of other competition authorities, and vice versa.

### 2.2 CNMC'S INVESTIGATION POWERS

- **Interviews:** the CNMC can summon any person with relevant information to an interview, under threat of a penalty if they fail to appear. The interviewee, who can have their lawyer present, has the duty to answer fully, accurately and truthfully. Interviews may be conducted by videoconference and the CNMC can record them, in which case it must provide a copy to the interviewee.
- **Information in digital formats:** the reform clarifies that the CNMC may request all information that is "accessible" to companies, regardless of the medium on which it is held and including information stored on the cloud or on third-party owned servers.
- **Inspections:** the reform introduces a complete regulation of the inspections that the CNMC may carry out at the headquarters of companies and even at the homes of their staff. Inspections may also now be carried out virtually from the CNMC's headquarters. As with requests for information, the CNMC may gather all information accessible to the company under inspection, regardless of the technical medium on which the information is stored and even if it is hosted on third-party servers. Furthermore, the obligation to submit to an inspection extends to all companies in the corporate group.

### 2.3 FINES

- **Calculation:** the SCA now uses "**worldwide** turnover" to determine maximum fines, meaning that a company's turnover outside Spain is included in the calculation of the upper limit. This change could have a significant impact, although in recent years the CNMC had already begun to consider overseas turnover when calculating this maximum limit, as the wording of the SCA was, until now, ambiguous.
- **Periodic penalties:** in the case of periodic penalties, the previous upper limit (EUR 12,000 per day) is replaced by a ceiling of 5% of the company's total daily turnover.
- **Stricter infringement classes:**

- (i) Substantive infringements of competition rules (anti-competitive agreements and abuses of a dominant position) are placed at the higher end of the infringement scale, and are always regarded as very serious infringements and therefore subject to penalties of up to 10% of turnover. Previously, agreements between non-competitors (vertical agreements) and unqualified abuses of dominance were considered serious infringements subject to penalties of up to 5% of turnover.
  - (ii) Infringements of companies' duties to cooperate (e.g. to respond appropriately to requests for information or not to obstruct an inspection) are now considered serious infringements subject to a penalty of up to 5% of turnover. Prior to the reform, these infringements were considered minor infringements with a penalty of up to 1% of turnover.
- **Succession of liability:** the reform clarifies that the liability of the offending companies extends to their legal or economic successors.

## 2.4 LENIENCY

- **Disqualification from public tenders:** in the case of companies that apply for leniency and are fully exempt from the fine (normally the companies that are first to provide information on a cartel not yet known to the CNMC), the SCA now clarifies (in line with CNMC practice prior to the reform) that they are also exempt from disqualification from public tenders. In the case of companies which fine is reduced (either because they were not the first ones to apply for leniency or because the CNMC already had information on the cartel), the SCA indicates that the leniency “may include” not being disqualified from public tenders, but does not provide guidance on when this exemption will be granted.
- **Confidentiality:** the reform reinforces the duty of confidentiality attached to leniency statements. Only parties under investigation have access to these statements, and they may only do so to prepare their defence against accusations based on them or in judicial review proceedings relating to the file in which the leniency statement was submitted.

## 2.5 OTHER INTERESTING ASPECTS

- **Prioritisation of complaints:** the CNMC is given the power to reject complaints when they are not a priority (e.g. because the potential market impact of the notified conduct is low or because it is unlikely that the CNMC could prove the infringement even if it were to investigate). Prior to this reform, the CNMC had a duty to investigate every complaint to identify whether there was sufficient evidence of a possible infringement.
- **Limitation periods:** the reform introduces two additional grounds for interrupting the limitation period for administrative liability: (i) investigations by other EU competition authorities, and (ii) the judicial review of the infringement decision. This means that if the courts quash a CNMC decision on purely procedural grounds, the infringement will probably not be time-barred when the judgment is handed down and the CNMC could reopen the case.

### 3. WHAT TO EXPECT FROM THE REFORM

The reform of the SCA comes into force immediately in relation to new proceedings initiated by the CNMC (and by regional competition authorities). Some of the amendments could impact significantly the practices of the competition authorities, such as setting fines (which could rise substantially). The CNMC's use of the new interview tool should also be monitored carefully, while the provisions on accessing digital information (whether in an inspection or a request for information) bring the SCA up to date.

It remains to be seen whether the more far-reaching reforms proposed in the summer of 2020, which were generally welcomed, will be taken up by the Spanish Government in a new round of reforms. Alternatively, the Spanish Congress could take the opportunity to incorporate additional reforms in the parliamentary process of validating the Royal Decree-law, perhaps in line with last year's proposals.

In any case, there is no doubt that the amendments that have been made reinforce the CNMC's investigation powers and will increase the deterrent effect of fines for breaches of competition rules in Spain.

### 4. CONTACT LAWYERS



**Tomás Arranz**  
Partner  
+34 91 586 04 66  
tomas.arranz@uria.com



**Jokin Beltrán de Lubiano**  
Associate  
+34 91 586 06 57  
jokin.beltrandelubiano@uria.com



**Antonio Guerra**  
Partner  
+34 91 586 04 66  
antonio.guerra@uria.com



**Edurne Navarro**  
Partner  
+32 2 639 64 64  
edurne.navarro@uria.com



**Alfonso Gutiérrez**  
Partner  
+34 91 586 06 57  
alfonso.gutierrez@uria.com



**Patricia Vidal**  
Partner  
+34 91 586 01 61  
patricia.vidal@uria.com



**Jaime Folguera**  
Partner  
+34 91 586 04 26  
jaime.folguera@uria.com

BARCELONA  
BILBAO  
LISBOA  
MADRID  
PORTO  
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