

The International Comparative Legal Guide to: Merger Control 2006

A practical insight to cross-border merger control issues



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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

Merger control rules in Spain are enforced by the following authorities:

- The “*Servicio de Defensa de la Competencia*” (“SDC”), a general directorate within the Ministry of Economy which conducts the investigation during the First Phase proceedings. The SDC is the authority to which notifications should be addressed.
- The Minister of Economy, which has the power to refer a case to an in-depth Second Phase investigation, upon proposal by the SDC, as well as the power to authorise an operation if the undertakings proposed by the parties during the First Phase proceedings are deemed sufficient. The Minister of Economy also has the power to lift the suspension obligation imposed on the execution of concentrations before clearance is obtained.
- The “*Tribunal de Defensa de la Competencia*” (“TDC”), an autonomous body which exercises its functions in a fully independent way. The TDC plays an advisory role by issuing a non-binding report at the request of the Minister of Economy.
- The Council of Ministers (or the Government), which has the power to approve or block a transaction at the end of the Second Phase proceedings.

1.2 What is the merger legislation?

The Spanish merger control regime is set out in Articles 14 to 18 of the Spanish Competition Act (Law 16/1989, of 17 July, on the Defence of Competition) and in Royal Decree 1443/2001, of 21 December.

Merger control rules in Spain have been substantially amended in recent years, changing from a system of voluntary notification to mandatory notification, and introducing an obligation to suspend the implementation of concentration operations until clearance is obtained.

Furthermore, Royal Decree 1197/1991, of 26 July, provides special rules for concentrations which are materialised through a takeover bid for securities listed on a stock exchange in Spain.

In January 2005, the Minister of Economy presented a White

Paper in order to start a public debate on the reform of the Spanish Competition Act, which may also cover Spanish merger control rules. The reform proposes merging the SDC with the TDC in one entity, the National Commission for the Defence of Competition, which will have the power to adopt a final decision approving or blocking a transaction. Nevertheless, the Council of Ministers will have the ability to veto or amend the decision of the National Commission for the Defence of Competition in exceptional cases (i.e., involving public safety, plurality in the media, the protection of the environment or competitiveness of national industries).

The White Paper also suggests treating all full-function joint ventures (concentrative and cooperative) as concentrations, adopting the same definition of “concentration” contained in Article 3 of the EU Merger Regulation (139/2004/EC) (see below question 2.2). The White Paper also questions whether the 25% market share threshold should be maintained as a triggering event for notification (see below question 2.3). In addition, it proposes amending the “remedies” system, allowing the parties to submit undertakings to the authorities during the First Phase and Second Phase proceedings (see below question 5.2).

1.3 Is there any other relevant legislation for foreign mergers?

Foreign investments in Spain follow a rule of complete freedom, without prejudice to specific sector legislation, such as the defence sector, where the general rule of freedom does not apply. In general, Spanish legislation provides only for an “ex post” declaration, unless the investment source is considered a tax haven, in which case a prior declaration would also be required.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Apart from the approval of the Spanish competition authorities, mergers in certain sectors (i.e., banking, insurance, etc.) may also require the authorisation of other relevant authorities (i.e., the Bank of Spain, etc.). In addition, there are other sectors (i.e., energy, telecommunications, etc.) where the Spanish competition authorities shall request a mandatory non-binding report from the relevant national regulatory authorities (National Energy Commission, Telecommunications Market

Commission, etc.).

Furthermore, limitations are imposed with respect to the direct or indirect acquisition of more than 3% of the shares of two or more of the five main operators in certain energy and telecommunications markets. Similarly, Spanish legislation imposes restrictions as regards the possibility of certain operators to increase their current market share, in particular in the hydrocarbons and electric energy sectors.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The Spanish Competition Act defines a concentration as a transaction that implies a stable change in the control structure of the undertakings concerned, by means of:

1. a merger of two or more previously independent undertakings;
2. takeover of all or part of an undertaking or undertakings by any legal means or business; and
3. the creation of a joint venture and, in general, the acquisition of joint control over an undertaking when the latter permanently carries out the functions of an independent economic entity and does not have the fundamental objective or effect of co-ordinating the competitive behaviour of undertakings that continue to be independent.

For the purpose of application of the Spanish Competition Act, "control" exists whenever there is a possibility of exercising decisive influence on a company's activities. In particular "control" exists when a decisive influence is exercised over the composition, discussions or decisions adopted by the company's bodies.

2.2 Are joint ventures subject to merger control?

Joint ventures are subject to merger control in Spain as far as they amount to full-function companies which have a concentrative nature (i.e., the main objective or effect of which is not to coordinate the activities of other companies which remain independent in the market). Therefore, the Spanish Competition Act still retains the distinction between "concentrative" and "co-operative" joint ventures. "Co-operative" full-function joint ventures shall be analysed under the provisions contained in the Spanish Competition Act for restrictive agreements.

2.3 What are the jurisdictional thresholds for application of merger control?

The Spanish Competition Act applies to any concentration provided that either of the following two alternative thresholds is reached (unless the operation falls under the scope of the EU Merger Regulation):

- a) a market share equal to or higher than 25% in any relevant Spanish product market is attained or exceeded as a result of the transaction; or
- b) the combined turnover in Spain of all the companies taking part in the transaction exceeds the amount of

€240.4 million (approximately \$299 million) in the last accounting year, as long as at least two of the participant companies have an individual turnover in Spain of more than €60.1 million (approximately \$74.7 million).

With regard to the market share threshold, the relevant market may be defined according to the practice of the Spanish competition authorities in previous cases. Nevertheless, the Spanish competition authorities may also refer to the practice of the European Commission. A formal consultation to the Spanish competition authorities on the thresholds above (including market definition and the calculation of market shares) is foreseen by the Spanish Competition Act.

For the purpose of calculating the turnover in Spain of the companies involved in the transaction, the aggregate turnover of all the undertakings belonging to the same group of companies should be taken into account. Furthermore, in the event of joint control of a company, the volume of the company's turnover shall be allocated in equal parts to the controlling parties.

The Spanish Competition Act provides for special rules regarding the turnover of credit and other financial institutions, as well as insurance companies.

2.4 Does merger control apply in the absence of a substantive overlap?

The Spanish merger control regime applies whenever either of the thresholds listed under question 2.3 above are met. In fact, the market share threshold can be fulfilled exclusively by the company or part of the company to be acquired. Therefore, no overlap is required for a concentration to be caught by the Spanish Competition Act.

2.5 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

Transactions between companies outside Spain may also be caught by the Spanish Competition Act provided that either of the thresholds listed under question 2.3 above are met. Indeed, no local presence is required (such as a subsidiary, branch or assets within Spain). It is sufficient if the target company makes sales in Spain with a market share amounting to 25% of any relevant product market. Up to now, no "foreign to foreign" transaction has been blocked by the Spanish competition authorities.

2.6 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The Spanish merger control regime applies in the absence of a "Community dimension". Should the transaction reach the thresholds provided in the EU Merger Regulation, the operation shall be notified to the European Commission, regardless of whether the thresholds provided in the Spanish Competition Act are also met.

Furthermore, the authorities may refer a case to the European Commission if they think that the European Commission is the best-placed authority to examine the

case. Referrals to the European Commission have taken place on at least three occasions during the last few years (in this regard, see *Promatech/Sulzer* 2001, *General Electric Engine Services/Unison Industries Incorporated* 2002 and *General Electric/Agfa* 2003).

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Notification to the Spanish competition authorities prior to the execution of a merger is compulsory where either of the thresholds listed under question 2.3 above are met. The Spanish Competition Act does not provide a specific deadline for filing, although it is in the parties' best interest not to delay the filing due to the obligation imposed on the parties to suspend implementation of the operation until clearance is obtained (unless an exemption from the suspension obligation is obtained in the Second Phase investigation).

Nevertheless, when the concentration is materialised through a takeover bid for securities listed on a stock exchange in Spain, it should be notified within five days following approval by the Spanish Securities and Exchange Market Commission ("*Comisión Nacional del Mercado de Valores*"), as set out in Royal Decree 1197/1991.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The Spanish Competition Act does not provide for any exceptions in this regard. If the thresholds listed under question 2.3 above are exceeded, the operation should be notified and authorised.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

A fine of up to €30,000 (approximately \$37,317) may be imposed on the parties if they fail to notify a concentration subject to mandatory filing. Furthermore, the SDC may request them to notify the transaction, in which case the notification should be filed within 20 days. Periodic penalty payments of up to €12,020 (approximately \$14,951) may then be imposed for each day of delay in filing the concentration after the 20 day-period granted by the SDC. In recent years, the SDC has used this power on several occasions (in at least seven cases), requesting the parties to notify a concentration.

The SDC may also initiate the procedure "ex officio", in which case the transaction may not benefit from tacit authorisation (see *Intur/Euro Stewart*, 2004).

Even if there are no assets or subsidiaries in Spain, the risk relating to the non filing remains applicable.

In addition, the implementation of a concentration before approval is obtained, thus infringing the suspension obligation, may imply the imposition of fines up to 10% of the turnover in Spain of the undertaking concerned (see

below question 3.7).

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

The suspension obligation also applies to transactions which take place outside Spain. Nevertheless, the competence of the Spanish competition authorities may be considered limited in blocking such a transaction to the extent that it has effects in Spain. In this sense, the parties may complete the transaction outside Spain introducing the necessary safeguards with respect to the Spanish market (i.e., excluding from the transfer or control the assets or subsidiaries in Spain which carry out the activities in Spain).

However, Spanish competition authorities are not favourable to partial completion outside Spain and usually prefer the parties to request a derogation from the suspension obligation, which is frequently granted by the Minister of Economy (see below question 3.7).

3.5 At what stage in the transaction timetable can the notification be filed?

Notifications may be filed from the moment a "project" of concentration (i.e., a memorandum of understanding) or an agreement comes to existence and shall be submitted to the SDC before its implementation. For these purposes, a "project" of concentration or an agreement exists from the moment the undertakings concerned agree to carry out a merger, set up a joint venture or a transaction enabling a takeover, and specify the terms and conditions under which it shall be executed.

Whenever the parties to a concentration are companies, an agreement exists whenever it is adopted by the management body, even if it must be subsequently adopted or ratified by another company body.

When the concentration is materialised through a takeover bid for securities listed on a stock exchange, it may be notified to the SDC from the announcement of an intention to make an offer. In any event, once the offer has been notified to the SDC, the corresponding formal announcements shall not be published and the term for acceptance of the takeover bid shall not begin until clearance is obtained (see below question 3.7).

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

The entire procedure for analysing a concentration, which may comprise two investigation phases, can take a maximum period of four months:

(i) *First Phase investigation*

The First Phase investigation starts with the notification to the SDC, which has one month to study the case and make a proposal to the Minister of Economy.

If the information contained in the notification is deemed incomplete, the SDC may send the parties either an informal request for information (that will not imply a suspension of the said one-month period) or a formal request, which should be answered within ten days and will imply suspension of the one-month period until the information is

provided.

Upon proposal by the SDC, the Minister of Economy shall decide whether to refer the case to the TDC for an in-depth Second Phase investigation. If the case has not been referred to the TDC within the said one-month period, the operation shall be deemed tacitly authorised. In practice, approximately 80% of the concentrations subject to mandatory filing benefit from tacit authorisation within the First Phase investigation.

The Spanish Competition Act also provides for the possibility of clearing a transaction through a negotiated procedure during the First Phase. This will only be possible if the SDC believes that the operation's hindrance of competition can be easily remedied (see below question 5.3).

(ii) *Second Phase investigation*

The Second Phase investigation starts with the referral of the case to the TDC, which shall issue a non-binding report and address it to the Minister of Economy within two months.

The Minister of Economy, upon receiving the non-binding report issued by the TDC, shall submit a proposal to the Council of Ministers, which must adopt a final decision within one additional month, either approving the transaction (possibly subject to conditions) or prohibiting it. The transaction shall be deemed tacitly cleared if the Council of Ministers does not adopt a decision within the one-month deadline. The Council of Ministers may also order any measure intended to establish effective competition in the market, including divestiture.

No extension of the timeframe or accelerated procedure are foreseen.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?

The Spanish Competition Act establishes an obligation to suspend a concentration subject to mandatory filing until clearance by the Spanish competition authorities is obtained. In the event that the concentration is materialised through a take-over bid over securities listed on a stock exchange, the suspension obligation implies that, once the offer is approved by the Spanish Securities and Exchange Market Commission, the corresponding announcements shall not be published and the term for acceptance should not begin until clearance is obtained.

The implementation of a concentration before clearance is obtained may imply the imposition of significant fines, up to 10% of the turnover in Spain of the companies involved. In recent years, fines of up to €1 million (approximately \$1.2 million) have been imposed (i.e., see the *ACS/Drágon* case in the year 2002).

Notwithstanding the above, the parties may execute a concentration if they obtain derogation from the suspension obligation, which should be requested at the time of filing. The Minister of Economy shall adopt a decision in this respect at the end of the First Phase investigation (i.e., one month from the filing date). In practice, the request for derogation is frequently granted, since the Spanish competition authorities are of the opinion that it is up to the parties to assume the risk of implementing an operation which may be prohibited or authorised subject to conditions.

3.8 Where notification is required, is there a prescribed format?

The notification should be filed using the official form attached to Royal Decree 1443/2001 (<http://www.mineco.es/dgdc/sdc>), which requires a considerable amount of information concerning the parties, details of the operation, turnover figures, control structure, and relevant markets. The notification shall provide all the information requested in the form, without the possibility of waiving this obligation.

Notification shall be made in Spanish and any additional information provided (i.e., copies of the concentration agreements) shall be drafted in (or translated into) Spanish (or any other official language used in Spain, such as Catalan, Basque or Galician).

3.9 Who is responsible for making the notification and are there any filing fees?

Notification shall be filed by the party or parties that acquire either exclusive or joint control.

The Spanish Competition Act provides for a filing fee, which ranges from €3,005 (approximately \$3,737) to €60,000 (approximately \$74,634), depending on the total Spanish sales of the parties involved in the concentration. Payment of the fee shall be made at the time of filing and receipt of payment must be submitted to the SDC together with the notification.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

A concentration should be blocked when it may hinder the maintenance of effective competition in the Spanish market. The substantive test provided in the Spanish Competition Act is, therefore, similar to the "substantial impediment to effective competition" test adopted by the new EU Merger Regulation.

When analysing a concentration, the first element taken into account by the Spanish competition authorities is the position of the parties in the relevant market and its evolution over the last three years. Nevertheless, a high market share does not automatically imply a substantial impediment to effective competition. In fact, a number of cases with substantial market shares (exceeding 50%) have been cleared (see *IER/Thales (ATB)* 2002), even during the First Phase (see *CHC Helicopter/Schreiner aviation*, 2004 or the recent report on the *Ercros/Grupo Aragonesas* case adopted in 2005).

There are other factors which may be taken into account in order to evaluate the effects of a concentration, such as the capacity of competitors to discipline the entity resulting from the concentration, the barriers to entry into the market for new operators and the countervailing power of the demand (or the offer).

In addition, the authorities may consider other elements, such as the operation's contribution to the improvement of production and marketing systems, the promotion of

technical or economic progress, the international competitiveness of national industry or the interest of consumers.

The above substantive test applies as regards horizontal, vertical or conglomerate effects. In addition, it may allow the Spanish competition authorities to challenge a concentration which leads to the creation of collective dominance if a change of the market's structure may substantially impede effective competition (see *Unión Eléctrica Fenosa/Hidroeléctrica del Cantábrico* in the year 2000).

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The proceedings before the SDC are confidential until the Minister of Economy adopts the decision to refer the case to the TDC. Therefore, third parties do not have the right to access key submissions and other relevant documents, or even to be heard, during the First Phase. However, in practice third parties may forward their view to the SDC.

On the other hand, the Spanish Competition Act expressly provides for the right of third parties who have a legitimate interest to be heard during the Second Phase, having access to the file (except to confidential information) and making observations to the TDC.

Furthermore, in order to draft its report, the TDC shall consult any third party that may be affected by the transaction. To this end, the TDC shall draft a brief note on the main points of the proceedings and the features of the transaction, and communicate it to any affected party so that it may express its opinion.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The investigative powers of the Spanish competition authorities are as broad as those in proceedings concerning restrictive practices and abuse. In fact, the SDC may request as many details and information as it deems necessary from the notifying parties or any other individual or legal entity. Failure to provide the SDC with the requested information in due time may be sanctioned with fines between €60.10 (approximately \$74.70) and €3,005 (approximately \$3,737) per day of delay.

Furthermore, the SDC may investigate and search the premises of the undertakings concerned. SDC officials are entitled to copy and seize all kinds of documents and computer records (with the exception of attorney-client privileged correspondence) and ask the employees of the investigated companies any questions they consider relevant.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The SDC and the TDC may order, at any moment during the proceedings, either ex officio or at the request of an interested party, the documents or data deemed as confidential to be kept secret. Furthermore, the proceedings

before the SDC are confidential, except for the notice which is published on its website announcing that a notification has been filed. At the end of the First Phase, the SDC also makes its report public, but excludes business secrets or other confidential data identified by the parties. Similarly, a non-confidential version of the TDC report is published on the TDC's website, even before a final decision is adopted by the Council of Ministers. The content of the Government's decision, which shall be published in the Official Journal, is very limited and does not refer to confidential commercial information.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The inspection process may end either tacitly, when the Minister of Economy decides not to refer the case to the TDC or the Council of Ministers fails to adopt a decision in due time; or expressly, by an agreement of the Council of Ministers that shall be published in the Official Journal.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The Spanish Competition Act provides for the possibility of proposing undertakings, if requested by the Minister of Economy during the First Phase, and clearing the transaction through a negotiated decision. Nevertheless, such possibility has never been used (see below question 5.3).

On the contrary, a termination by agreement is not expressly foreseen in the Second Phase. Nevertheless, the parties may approach the TDC on an informal basis and persuade it to include certain remedies in its non-binding report. In any event, the Council of Ministers may not take into consideration the remedies proposed by the TDC and subject the approval of the transaction to the conditions it considers necessary. The remedies may include divestiture or any other structural condition, as well as behavioural conditions. The parties may withdraw the operation if they believe that the conditions imposed by the Council of Ministers are particularly cumbersome (for instance, see *Endesa/Iberdrola* 2001).

5.3 At what stage in the process can the negotiation of remedies be commenced?

At the end of the First Phase and upon proposal by the SDC, the Minister of Economy may urge the parties to propose undertakings or amendments to the operation within one month from the date on which such request is addressed to the parties. Once the undertakings have been proposed by the parties, the Minister of Economy may adopt a decision within 20 days, either approving the transaction, if the undertakings and amendments proposed by the parties are deemed sufficient, or referring the case to the TDC, opening the Second Phase. Such a procedure has not yet been successfully used and the Spanish competition authorities seem to be reluctant to resort to this possibility. During the Second Phase, the parties may propose to the TDC certain remedies, but as indicated in question 5.2 above, the proposal

of the TDC and the final decision of the Government may differ from what the parties proposed.

5.4 How are any negotiated remedies enforced?

If the parties fail to comply with the conditions imposed by the Council of Ministers, the SDC may advise the Government to sanction the parties with a fine of up to €12,020 (approximately, \$14,951) for each day of delay. Furthermore, failure to comply with the conditions imposed by the Council of Ministers may give rise to a fine up to 10% of the turnover in Spain of the undertakings involved in the transaction.

5.5 Will a clearance decision cover ancillary restrictions?

Yes, merger clearance covers restrictions which are directly related to the operation. In its assessment, Spanish competition authorities will follow the practice of the European Commission and the guidance provided by this Institution in its Notice on restrictions directly related and necessary to concentrations (OJ 2005 CJ6/24). Clearance is requested in the merger notification form, although no special section is foreseen for this purpose.

5.6 Can a decision on merger clearance be appealed?

The decision of the Minister of Economy not to refer the case to

the TDC may be subject to judicial review by the National Court (*Audicencia Nacional*). Judgments of the National Court may be appealed to the Supreme Court (*Tribunal Supremo*).

The decision of the Council of Ministers, either authorising or prohibiting a transaction, may be directly appealed to the Supreme Court. Up to now, at least three decisions of the Council of Ministers have been led to review by the Supreme Court, one of them by a third party (see the *Antena 3/SER* case).

5.7 Is there a time limit for enforcement of merger control legislation?

The time limit to take action against an operation of concentration caught by the Spanish Competition Act is 4 years since its execution.

6 Miscellaneous

6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

The SDC cooperates with antitrust agencies of other European Union Member States. Furthermore, Spanish competition authorities are members of the International Competition Network (ICN), an informal forum where competition authorities around the world discuss competition policy enforcement and other policy issues.

6.2 Please identify the date as at which your answers are up to date.

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