

# Spanish Legislation Introduces a De Minimis Exception to the Merger Notification Rules

## Introduction

Spain's Sustainable Economy Act ("LES"), which has just been adopted, will enter into force after its publication in the Official Journal ("BOE"). The LES includes a number of measures aimed at modernizing the Spanish economy primarily in the financial, business and environmental sectors.

Particularly relevant provisions included in the measures directed at the business sector are certain amendments to the Spanish Competition Act ("LDC") 15/2007 of 3 July 2007. These amendments not only affect the scope of merger transactions by introducing a de minimis exception to merger notification rules, but also the institutional dimension of the Spanish Competition Authority ("CNC") and its connections with other sectoral regulatory bodies.

## Analysis

### I. De Minimis rule

Article 8 of the LDC establishes the thresholds which must be met for a transaction to come under the merger notification rules of the Spanish competition authorities.

Prior to the passage of the LES, Article 8 set forth the following alternative thresholds:

- Under the turnover threshold, a concentration in which "the aggregate turnover in Spain of the companies involved in the transaction exceeded €240 million during the last financial year **and** the turnover in Spain of at least two of the parties exceeded €60 million" must be notified (**Art. 8(1)(b)** of the LDC).
- Under the market share threshold, a concentration must be notified where "a share of 30 per cent of the national market, or of a defined geographical market within it, for a given product or service is acquired or increased as a result of the transaction" (Art. 8(1)(a) of the LDC).

The existence of a market share threshold is a significant difference between the Spanish and EU merger notification rules as the latter only utilizes a notification threshold based on the turnover of the companies involved. In fact, Greece, Lithuania, Portugal, Slovenia and the United Kingdom are the only other EU Member States who use market share thresholds.

In Spain, the market share threshold has always been the subject of intense debate. In this respect, the white paper on the reform of the competition law system ("White Paper"), which initiated the process of adopting the current LDC, advocated maintaining the market share threshold because it was considered a better indicator of the companies' possible market power than

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turnover. Nevertheless, many of the observations on the White Paper made by businesses argued against the inclusion of the market share threshold.

This debate returned to the parliamentary arena during the LES proceedings when an amendment to completely eliminate the market share threshold arose in order to make Spanish legislation more similar to the majority of developed economies.

Despite the fact that those arguments did not succeed and legislators have kept the market share threshold on the books, the LES has introduced an exception to it which would exempt transactions of little economic relevance from the notification requirement.

Thus, the third final provision of the LES incorporates a new paragraph in Article 8(1)(a) of the LDC which establishes a de minimis threshold below which transactions will not be subject to the CNC's ex ante administrative control despite the fact that they acquire or increase a market share equal to or greater than 30%.

The new de minimis threshold combines elements of both market share and turnover since a concentration meeting the 30% market share threshold will not have to be notified if:

- The target's turnover in Spain or the value of the assets acquired in Spain **does not exceed €10 million in the preceding fiscal year**; and
- The resulting individual or combined market share of the parties to the transaction is **under 50%** in any of the affected markets.

The purpose of introducing the de minimis rule is to avoid unnecessary administrative intervention and its subsequent economic, operative and temporary impact on concentrations with little economic relevance.

## **II. Institutional Amendments**

In addition to introducing the de minimis threshold to merger notification rules, the LES also amends Articles 12, 17, 20, 28, 29, 30, 33 and 34 of the LDC and introduces a series of changes which affect the CNC's institutional dimension.

In this sense, as regards the **CNC's connections to regulatory bodies**, the LES insists that they respect limits on their competence in order to avoid related overlaps or conflicts. Likewise, it reinforces the obligation of the CNC and regulatory bodies to cooperate and hold meetings at least once a year (the conclusions of which will be made public). Additionally, it provides that the regulatory bodies and the CNC should agree upon and establish the necessary performance protocols in order to facilitate the collaboration envisaged by Article 17 of the LDC.

Specifically with respect to Article 17 of the LDC, the LES establishes that **reports issued by regulatory bodies** (especially the CMT and the CNE) within the framework of infringement and concentration investigations will now be considered "decisive". In contrast, the prior draft of the LDC referred to these reports as "non-binding". Additionally, it explicitly establishes an obligation on the part of the CNC to expressly provide reasoning when its decisions deviate from such reports. Moreover, the LES provides that the same procedure should be used when the CNC prepares reports within the framework of an investigation on the application of sectoral regulation.

In whatever case, is not clear whether these are purely semantic or truly substantive changes. Thus, despite not being expressly written in the LDC, the CNC's obligation to provide reasoning for deviating from such reports was not exempt from all obligation to provide reasoning in accordance with the Legal Framework for Public Administrations and Common Administrative Procedure Act 30/1992, of 26 November ("Act 30/1992")

Additionally, it introduces the possibility that, in certain situations, the regulatory body must issue "decisive" reports within the framework of the surveillance of infringement or concentration resolutions passed by the CNC.

Finally, with regard to parliamentary control of CNC activities, the LES provides that **the CNC must appear before parliament** every three years in order to debate the evaluation of its action plans as well as the results it has obtained.

## Conclusion

The passage of the LES has introduced relevant changes to Spanish competition law.

The principal and most remarkable change is the inclusion of the de minimis threshold in the merger notification rules, which is aimed at freeing certain transactions from unnecessary burdens in order to speed up commercial traffic.

The de minimis rule eliminates administrative obstacles that some concentration of little economic relevance found themselves up against. Up until now, those concentrations had to be notified and controlled by the competition authorities despite having only a minor impact on the market.

Finally, the changes related to the CNC's institutional dimension are also noteworthy, especially those which relate to the CNC's connection to sectoral regulatory bodies. Thus, the requirement that the CNC "expressly" provide reasoning in cases where its resolution deviates from "decisive" reports issued by regulatory bodies may suppose a higher standard of reasoning than that which derives from Act 30/1992. This procedure may equalise the balance of power and competences between the CNC and regulatory bodies. In any case, only once these changes are applied in practice can we confirm their true reach.

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