

SPAIN: NEW DEVELOPMENTS IN THE TIME LIMITS FOR COMPETITION LAW PROCEEDINGS AND THE ROLE OF THE CNMC IN THE APPLICATION OF THE DIGITAL MARKETS ACT

CONTEXT OF THE REFORM

On Thursday, 29 June 2023, Royal Decree-Law 5/2023 ("RDL 5/2023")¹ was published in the Official State Gazette ("BOE"), which includes, among other things, the reform of certain articles of the Spanish Competition Act (*Ley 15/2007 de Defensa de la Competencia*, "LDC").

These amendments apply to infringement and merger control proceedings initiated after 30 June 2023 and do not affect those already in progress.

The reform flourishes in the form of a Royal Decree-Law after two unsuccessful attempts,² the last one having failed due to the dissolution of Parliament as a consequence of the snap election called for 23 July 2023.

INFRINGEMENT PROCEEDINGS

- **Longer time limits in infringement proceedings, both for the Spanish Markets and Competition Commission ("CNMC") and for the undertakings under investigation**
 - **The reform of Article 36 LDC extends the maximum time limit for the resolution of infringement proceedings from 18 to 24 months**

The modification of the maximum time limit for resolving may find its inspiration in European practice, since, according to the preamble of RDL 5/2023, the European Commission ("EC") does not have a formal time limit for the resolution of infringement proceedings. In this respect, despite Portugal setting a maximum time limit of 18 months for resolving, the Competition Authorities of the main European countries (France, Germany, Italy and the United Kingdom) do not have maximum time limits for resolving them.

Key issues

- The amendments apply to merger control and infringement proceedings initiated from 30 June 2023.
- In infringement proceedings, (i) the maximum time limit for resolution is extended from 18 to 24 months and (ii) the time limit for making allegations to the statement of objections and to the proposed resolution is extended (from 15 business days to one month; extendable by half of that term).
- In merger control: (i) the time limit for resolving transactions using the short form is reduced from 1 month to 15 business days (+ pre-notification); (ii) the time limit for resolving prior consultations is reduced from 3 months to one month and (iii) the time limit for resolving second phase procedures is extended from 2 months to 3 months.
- The role of the CNMC in the implementation of the DMA is clarified: the CNMC may investigate conduct that violates the DMA, but it must previously inform the EC, the latter being the only competent body to decide.
- Other reforms that were underway, such as the settlement procedure, are pending.

¹ Royal Decree-Law 5/2023, of 28 June, adopting and extending certain measures to respond to the socio-economic consequences of the war in Ukraine, to support the reconstruction of the island of La Palma, and to respond to other situations of vulnerability; transposing European Union Directives on structural amendments to businesses the work-life balance of parents and carers; and enforcement of and compliance with European Union law.

² The first due to the transposition of the ECN+ Directive, and the second provided for by the Bill establishing the Independent Management Authority for the Defence of Financial Customers for the out-of-court resolution of disputes between financial institutions and their customers.

De facto, the CNMC's infringement proceedings begin with the preliminary investigative phase (*i.e.*, from the time the CNMC begins to investigate until the formal opening of the procedure). During this preliminary investigative phase, the CNMC does not have a legal maximum time limit to decide whether to open infringement proceedings. In this regard, it should be pointed out that, as the Spanish Supreme Court has indicated, "*the concept of a limitation period is not applicable to the preliminary phase of investigation, as the procedures prior to the opening of formal infringement proceedings are not subject to the maximum time limits applicable to the infringement proceedings*",³ although the CNMC cannot extend the confidential information phase *sine die*.

Moreover, it was already common to encounter proceedings which once the formal procedure had been initiated, lasted beyond 18 calendar months from the moment of their initiation. Suspensions have been extended in practice, whether due to requests for information, appeals to the CNMC's Council, or the referral of the draft resolution to the EC, provided for in the LDC.

However, sanctioned undertakings tend, in appeals before the National Court ("AN"), to question the suspensions of the maximum period of the proceedings and, in many cases, the AN has declared the expiry of the procedure, thus annulling the fines imposed by the CNMC.⁴

So far, the reform of the maximum term has not been accompanied by an amendment to Article 28 of Royal Decree 261/2008, of 22 February, approving the Competition Law Regulation ("RDC"). This Article provides that, of the 18-month maximum period of the infringement proceedings, 12 months were to be devoted to the examination of the casefile by the Competition Directorate and 6 months to the decision by the Council. In practice, the Competition Directorate had been extending the 12-month deadline, preventing the Council from having enough time to analyse the cases with the level of detail that many sanctioned companies would like. In this respect, it would be desirable if, along with the extension of the maximum time limit for resolving, a longer time limit was given to the CNMC's Council to analyse the cases so that oral hearings could become more frequent, in order for the parties to be able to claim their arguments, both legal and economic. In this regard, although the CNMC has issued its communication on oral hearings,⁵ the truth is that, despite the request made by the parties to the casefiles, the practical application has been extremely limited.⁶

- **The time limit for making allegations to the statement of objections ("SO") and to the second statement of objections ("Second SO") of the Competition Directorate is extended from 15 business days to one month (this can be extended to a total of one and a half months, pursuant to article 32 of Act 39/2015)⁷**

The previous time limit of 15 business days (which can be extended by a further 7 business days, pursuant to article 32 cited above) sometimes hindered the proper exercise by the undertaking of its right of defence. In this regard, RDL 5/2023 states that the purpose of this extension is to "*strengthen the guarantees given to the interested parties*". Let us hope that such extension of the initial time limit for responding to the CNMC's allegations does not imply a refusal to admit requests to extend the deadline for responding, since such extension should remain a right of the undertaking under investigation. This reform also coincides in time with the CNMC's recent Communication on the enforcement of the prohibition to participate in public tenders,⁸ which states that the Second SO will be the moment in which the parties under investigation will learn the proposed scope and duration of the ban on participating in public tenders and will be able to make allegations. Therefore, this longer time limit will be more than welcome for the parties under investigation (both individuals and legal entities).

For comparison purposes only, the EC has not set a formal time limit for this, whereas some of Spain's neighbouring countries that have a time limit, have a longer one. For example, in Portugal the period is of at

³ [Judgment of the Supreme Court of 20 September 2014](#), Appeal 4327/2011.

⁴ See, for example, [SAN 4210/2022](#), on the expiry of casefile [S/0299/10, Consejo colegios odontólogos y estomatólogos](#); [SAN 4674/2018](#), on the expiry of casefile [S/0469/13, Fabricantes de papel y cartón ondulado](#); and [SAN 716/2015](#), on the expiry of casefile [S/0316/10, Sobres de papel](#).

⁵ Communication 1/2022, of 24 May of the CNMC, on hearings held in proceedings, as established in the Spanish Competition Act.

⁶ According to the information available, no hearing has been held to date in the sanctioning procedures already resolved by the CNMC in 2023.

⁷ Act 39/2015, of 1 October, on Public Administration Standard Administrative Procedure (*Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas*) ("LPAC").

⁸ Communication 1/2023, of 13 June, of the Spanish Markets and Competition Commission, on criteria for determining the prohibition to participate in public tenders due to distortions of competition, by the CNMC. See, in this regard, our [Client Briefing](#) of 7 July 2023.

least 30 working days, in France of two months (which can be extended by an additional month) and in the United Kingdom of a maximum of 12 weeks.

- **Modification of stages**

One change involves dispensing the Competition Directorate from the requirement to send the report to the Council once the investigation phase has ended (now considered an unnecessary formality), while another change establishes the minimum content of the Second SO. The latter should include the proposed sanction and the assessment of the evidence taken. This legislative change merely reflects what the Competition Directorate has already been doing in practice.

MERGER CONTROL

- **New maximum term for issuing and notifying resolutions in merger control proceedings**

The main changes introduced by RDL 5/2023 in relation to merger control also relate to time limits. Article 36 LDC is again the target of these changes, as the CNMC's Council is given a new time limit for issuing and notifying resolutions in merger control proceedings:

- **Fifteen (15) business days, when the transaction has been notified using the short form (provided that the prior step of notifying the Competition Directorate has been completed).**

This reduces the time limit by one and a half weeks, as the previous deadline was one month.

This reinforces the use of the pre-notification step, which has actually been widely used in merger control operations in Spain (in 2021, 2020 and 2019, approximately 90% of all merger control proceedings already involved this step).

We will have to wait and see the real impact of this shorter time limit, since, in practice, the average time (as from notification) for processing casefiles notified using the short form was already less than 15 business days, specifically 11.3 business days.⁹ It will be interesting to see whether shortening resolution times for notifications made using the short Form has any real impact on the transaction's timing, as from the date pre-notification is made. This will depend on how long it takes the Competition Directorate to process the pre-notification step and whether this will actually take longer when the Council has less time to issue resolutions, or whether it will actually speed up the overall duration of the process.

- **Three months in the second phase, as from the date on which the Council decides to open phase two. Thus, what was previously a two-month time limit is now extended by one month.**

In practice, when proceedings are processed in phase two, the CNMC systematically suspends deadlines when requests for information are issued, whether to the notifying party, to the target business, or to third parties. In fact, in recent years, the average time for resolving these proceedings has been noticeably longer than 3 months - in fact, more like 8 months.¹⁰ Thus, if the CNMC continues to suspend deadlines and, in addition, has an extra month to decide, the parties –especially in very complex proceedings–, may find this somewhat exhausting, in terms of time and human and financial resources.

⁹ Approximately 12 business days for transactions notified in 2020; approximately 12 business days for transactions notified in 2021; and approximately 10 business days for transactions notified in 2022.

¹⁰ Approximately 9 months for the two transactions notified in 2020 analysed in phase two; nearly 10 months for the transaction notified in 2021 analysed in phase two; and 12 months for the two transactions notified in 2022 and analysed in phase two. Casefile [C/1052/19 Cimsa/Activos Cemex](#), notified in July 2019, was finally authorised, in phase two, with undertakings, in September 2020 (i.e., 14 months later). Similarly, casefile [C/1086/19. Santa Lucía/Funespaña](#) was notified on 20 December 2019 and authorised, in phase two, with conditions, on 7 September 2021 (i.e., more than 20 months later).

- **A maximum period of one month (from receipt of the consultation in due form) is also set for the CNMC's Council to respond to the prior consultation provided for in Article 55.2 LDC (i.e., formal consultation), formulated to determine whether an operation constitutes a merger and, where appropriate, whether it should be notified. The time limit used to be three months.**

The reduction of the time limit for resolving requests for information by two months (i.e., from three months to one month) seems to be designed to encourage the use of this consultation mechanism, which to date has often been ignored due to the delay it created in M&A transactions. Until now, where there was doubt as to the existence of a merger and, if so, regarding the jurisdiction/competence of the CNMC to analyse it, the parties – in order to mitigate the risk of *gun jumping* – have, despite the lack of legal certainty, made informal requests for information to the Competition Directorate. Once again, to assess the impact of the reform, we must wait to see how the CNMC puts it into practice: will the CNMC be free to suspend its time limit for resolution and effectively extend the legally established time limit or, on the contrary, will the parties have certainty within one month as to whether the transaction is notifiable in Spain?

DIGITAL MARKETS ACT ("DMA")

- **New article 18.3 LDC clarifies the role of the CNMC in the application of the DMA¹¹**

Accordingly, while the application of the DMA remains the exclusive competence of the EC¹², the amendment to the LDC provides that, by means of preliminary information proceedings, the CNMC can investigate conduct that may infringe the DMA, provided that it reports such investigation to the EC¹³ in writing. The CNMC will also have to report its findings, since the CNMC does not have the power to sanction companies for DMA violations.

The CNMC's investigative powers in relation to the conduct covered by the DMA include, for example, conducting private home dawn-raids, both in the undertaking's facilities and at the homes of the owners, directors and other staff members of the undertaking, sending requests for information and questioning persons who may have relevant information for the investigation.

In terms of procedure and the undertakings' guarantees, there should be no difference between such powers being exercised by the EC or the CNMC¹⁴ at the preliminary investigation phase. This notwithstanding, in practice, CNMC inspections are not always subject to the same procedural criteria as EC inspections. In any event, if the EC initiates an investigation on the same facts, the CNMC will have to halt its investigation and inform the EC of its preliminary findings. However, while the CNMC will not have the competence to continue the investigation and thus impose sanctions under the DMA, it could use the information collected to investigate LDC breaches.

The reform raises the following questions: how far will the CNMC investigate when there are indications that a DMA-subject entity may be violating said DMA? Is the CNMC truly prepared to investigate, even preliminarily, the breaches established in the DMA when they do not fall under competition law?

CONCLUSIONS

The LDC reform introduces longer time limits in sanctioning proceedings, both for the CNMC and the undertakings in its response to the First and Second SO, especially in view of the fact that the undertakings will now also have to respond to the proposed scope and duration of the ban on participating in public tenders in their response to the Second SO. Hopefully, the CNMC will use this extra time to allow the Council to analyse cases in greater detail and will agree to hold oral hearings as a rule and not as an exception.

Merger control reforms are intended to speed up the authorisation of transactions which, *a priori*, pose fewer substantive problems (those notified using the short form), to extend the time limit for further analysis of those that

¹¹ In line with article 38.7 DMA.

¹² Recital 91 DMA.

¹³ Pursuant to article 38.2 DMA.

¹⁴ Regulation (EC) No 1/2003 of 16 December 2002.

may pose fundamental problems, and to provide prompt legal certainty as to whether or not a transaction must be notified.

In addition, the LDC reform clarifies the CNMC's role in the application of the DMA, stressing that it will be able to conduct investigations *motu proprio* subject to first informing the EC, which will always have the final say as the only competent authority to apply the DMA.

We will have to wait for the introduction of more substantive reforms, including *inter alia* the introduction of the settlement (*transacción*) procedure, –equivalent to the European *settlement*–, and the planned increase to 400,000 euros of the fines for directors involved in a cartel.

CONTACTS



Miguel Odriozola
Partner

T +34 91 590 9460
E miguel.odriozola
@cliffordchance.com



Diego Domenech
Associate

T +34 91 590 4103
E diego.domenech
@cliffordchance.com



Paula Valenciano
Associate

T +34 91 590 9414
E paula.valenciano
@cliffordchance.com



Sara Selma
Associate

T +34 91 590 7559
E sara.selma
@cliffordchance.com



Luisa Morely
Paralegal

T +34 91 590 4186
E luisa.morely
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Paseo de la Castellana 110,
28046 Madrid, Spain

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