

# A White Book for the Reform of the Spanish Competition Law System

Héctor Armengod\*

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On January 20, 2005, the Spanish Ministry of Economy presented to the public the White Book for the reform of the Spanish Competition Law System<sup>1</sup> (“White Book”).

The White Book is the result of 15 years of experience enforcing competition law since the Spanish Law for the Defence of Competition of 1989 was passed (“Law 16/1989” or the “Spanish Competition Law”).<sup>2</sup> This has helped Madrid identify the gaps and shortcomings in the current legal and institutional framework.

The White Book seeks to quick-start a legal reform procedure that will result in a new and more efficient competition law.

It also aims at adjusting the Spanish competition law system to the newly modernised competition rules of the European Union (“EU”)<sup>3</sup> and aims to adapt it to the augmented complexity of the current national and international markets.<sup>4</sup>

\* Héctor Armengod is an Associate in the law firm of Hogan and Hartson L.L.P., Brussels, Belgium.

1 *Libro Blanco para la reforma del sistema español de Defensa de la Competencia*. The White Book is available at [http://www.mineco.es/dgdc/sdc/Libro\\_Blanco%20\\_Reforma\\_Def\\_Competencia.pdf](http://www.mineco.es/dgdc/sdc/Libro_Blanco%20_Reforma_Def_Competencia.pdf).

2 *Ley 16/1989, de 17 de julio, de Defensa de la Competencia*, B.O.E. núm. 170, de 18 de julio. Formally, Spain had a Competition Law as early as 1963, *Ley 110/63, de 20 de Julio, de Represión de Practicas Restrictivas de la Competencia*, but this law never became truly effective partly due to the lack of resources devoted to its enforceability.

3 The modernisation of the EU rules has been conducted through the adoption of the so-called “modernisation package” the cornerstone of which is Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, O.J. 2003, L1/1.

4 According to the White Book the new competition law system must face the challenges resulting from new commercial strategies in highly integrated markets, the liberalisation and privatisation procedures of various sectors and the increased integration of the national economies.

In order to achieve these objectives the White Book proposes a series of reforms in the following five areas:

- (1) structure of the institutions entrusted with the application of competition law;
- (2) the fight against restrictive practices (agreements between companies and abuses of a dominant position);
- (3) merger control;
- (4) state aid;
- (5) awareness of the competition law system by the public and private sectors.

## 1. Structure of the institutions entrusted with the application of competition law

Under the current regime, two different institutions are in charge of the enforcement of competition law in Spain: the Service for the Defence of Competition (“*Servicio de Defensa de la Competencia*” or “SDC”) and the Tribunal for the Defence of Competition (“*Tribunal de Defensa de la Competencia*” or “TDC”). Both the SDC and the TDC, despite the latter’s name, are administrative bodies.

The SDC forms part of the Ministry of Economy and mainly operates as the authority in charge of prosecution in antitrust cases. The SDC also conducts the first phase analysis of mergers.<sup>5</sup>

The TDC is attached to the Ministry of Economy and decides on the antitrust cases referred to it by the SDC with the power to impose fines. The TDC is also in charge of the second phase analysis of mergers.<sup>6</sup>

Among other things, the Spanish administration has observed that the existence of two separate prosecution and decision-making authorities can lead to the duplication of certain actions which unduly extends the proceedings in time. Furthermore, the right of appeal before the TDC against prosecution by the SDC can be abused by the investigated parties to hold up the procedure.

In order to solve this problem the White Book proposes the creation of a new National Competition Commission as a sole, independent authority in which the functions of both the SDC and the TDC will be integrated. Under the proposed system the prosecution

5 The functions of the SDC are in broad terms similar to those of the French *Direction générale de la Concurrence, de la Consommation et de la Répression des Fraudes*.

6 The functions of the TDC are in broad terms similar to those of the French *Conseil de la concurrence*.

and decision making functions will remain separated within the National Competition Commission.

The National Competition Commission would be comprised of three bodies:

- (i) the Counsel or decision-making body;
- (ii) the Investigation Directorate or prosecution body; and
- (iii) the General Secretariat in charge of the internal administration and management of the institution. The General Secretariat will also be assisting the other two bodies in various ways such as by providing legal services and economic analysis or by representing the National Competition Commission before other national and international institutions.

To ensure the efficiency of the procedure and a proper work allocation a President of the National Competition Commission will be appointed to co-ordinate and manage the work of the three bodies.

To secure the independence of the National Competition Commission the White Book proposes that the President and the members of the Council should be appointed by the Spanish Parliament (the “*Congreso de Diputados*”) and that their term of office should be six years, so as not to coincide with the term of office of the Spanish Government (four years). In addition, to ensure the rotation of the President and Counsels of the National Competition Commission, the six-year term should be extended only once.

## 2. The fight against restrictive practices

In order to increase the efficiency of the Spanish anti-trust enforcement regime, the White Book proposes a series of measures, the most important of which are:

- (i) elimination or clarification of those provisions currently contained in the Spanish competition law that relate more to protection against unfair competition practices than to what is generally defined as the intrinsic area of competition law<sup>7</sup>;
- (ii) determination of what are to be considered agreements of minor importance (*de minimis*). Currently Art.3(1) of Law 16/1989 exempts from the

<sup>7</sup> These provisions are Art.6(1)(b) and Art.7 of Law 16/1989. Art.6 prohibits the abuse of a situation of economic dependence and Art.7 prohibits unfair commercial practices capable of severely distorting the conditions of competition in the market and of affecting the interests of the general public.

application of Spanish competition law those agreements which, due to their minor importance, are unable to restrict effectively competition in the market. The law does not, however, determine what are *de minimis* agreements. In order to determine the *de minimis* concept the White Book proposes referring to a market share threshold such as the one used by the Commission in its Notice on agreements of minor importance<sup>8</sup>;

(iii) the elimination or reform of the current system of individual exemption of agreements notified to the SDC. The White Book proposes, in order to adapt the Spanish system to the EU system, to eliminate the individual exemption mechanism or to replace it by a system of negative clearance for certain specific agreements notified voluntarily to the competition authorities;

(iv) the incorporation of a leniency programme into the Spanish system, similar to the one used by the European Commission or the competition authorities of other EU Member States. With the proposed introduction of a leniency program the White Book expects to increase the detection of cartels;

(v) to take a series of specific measures aimed at speeding up the current investigation and decision-making procedure. These measures include a proposal to reduce the deadline for deciding on cases that have already been prosecuted as well as other actions aimed at accelerating the procedure for the obtainment of preliminary measures.<sup>9</sup>

(vi) to grade infringements of competition law in three categories: very severe, severe and minor and to create a system that can be used as reference for calculating fines. This system would closely mirror the system used by the European Commission to calculate fines.<sup>10</sup>

## 3. Merger control

With regard to merger control, the Spanish Ministry of Economy seems to be rather satisfied with the results

<sup>8</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art.81(1) of the Treaty establishing the European Community (*de minimis*), O.J. 2001, C368/13.

<sup>9</sup> Under the current system preliminary measures are seldom granted. The possibility of appealing these preliminary measures internally and before the judicial courts in various instances makes them impractical.

<sup>10</sup> Guidelines on the method of setting fines imposed pursuant to Art.15(2) of Regulation No.17 and Art.65(5) of the ECSC Treaty, O.J. 1998, C9/3.

obtained by the current merger control system but proposes, nevertheless, a series of changes to make it more efficient.

Of all the proposed changes the following are perhaps the most relevant:

(i) the current system has two sets of alternative notification thresholds; one is based on market share and the other on revenue.<sup>11</sup> Market share thresholds are not very common in the merger control systems of the EU Member States<sup>12</sup> and have been criticised for being excessively all-inclusive requiring the notification of concentrations which have very limited effects on competition in the national market.

In order to counter this criticism, the White Book proposes the following two alternatives: (i) to reduce the revenue thresholds and to suppress all together the market share threshold; or (ii) to retain the market share threshold while introducing some form of criteria to enable certain mergers to go through a simplified notification and analysis procedure.

It is unfortunate that the White Book has not opted for proposing the complete elimination of the market share threshold. In general, the industry and legal practitioners consider that the market share threshold can sometimes lead to the notification of relatively small international transactions which have no bearing on the Spanish market. The obligation to submit these notifications results in an increase in the transaction cost and in substantial delays, in particular when one takes into account the amount of time necessary to complete the very comprehensive Spanish mandatory notification form.

(ii) Under the current regime, the final decision on whether to approve, prohibit or make a merger subject to conditions is taken by the Minister of Economy in the first phase, or by the Council of Ministers (Spanish Government) in the second phase. To ensure the independence of merger analysis, the White Book proposes that the National Competition Commission be in charge of the investigation of mergers in the first and second phase

11 Under the current system all mergers in which a share of 25 per cent of a given product market in Spain (which can either be national or limited to a given geographic area within Spain) is acquired or increased, or were the aggregate turnover of the companies involved in Spain exceeds approximately €240 million provided that the turnover in Spain of each of at least two parties exceeds approximately €60 million.

12 In the EU, the UK, Portugal, Greece, Latvia and Slovenia use market share related thresholds.

and have the power to take the final decision on the compatibility of the merger with Spanish competition law. The Council of Ministers could retain veto powers to overturn or modify the decision taken by the National Competition Commission. These powers should only be used exceptionally and based on general interest criteria not related to competition law such as plurality of the media, environmental grounds, productivity of the national industry, and so on.

The White Book seems to be proposing a system similar to the current German merger control system where a decision by the German Federal Cartel Office (“*Bundeskartellamt*“) to prohibit a merger can be overruled by the Federal Ministry of Economics (“*Bundeswirtschaftsministerium*“) based on public interest grounds. In this aspect the White Book, in spite of its much proclaimed objective to achieve a more independent system, appears to leave the door open to Government intervention in exceptional cases. This is, however, very much in line with the current merger control systems of other EU Member States.<sup>13</sup>

(iii) To introduce efficiencies in the analysis of mergers and to increase the participation of third parties in the second phase of the procedure.

#### 4. State aid

Under the current law the TDC has the power to examine *ex officio* the criteria for the granting of public aid and its effect on competition. The TDC can then submit a public report to the Spanish Government. On the basis of the report the Government can decide whether to retain, modify, call off or withdraw the aid. These powers have been rarely used by the TDC.

The White Book proposes to increase the intervention of the National Competition Commission on the Government’s aid policy by ensuring that it has access to information on all the aid granted by the different public administrations and by enabling the TDC to include precise recommendations on how the Government should react towards the analysed aid.

#### 5. Awareness of the competition law system by the public and private sectors

In order to promote a culture of competition and to encourage the respect of competition law by the public

13 Italy, Portugal and the Netherlands, to name a few, have somehow a similar system of exceptional government or ministerial approval.

and private sector, the White Book puts forward a series of proposals the most significant of which are:

- (i) to introduce a procedure by which the National Competition Commission can submit reports on all national legislative proposals and acts of the administration capable of affecting competition in the market;
- (ii) to grant the National Competition Commission powers to challenge any anti-competitive norm or act before the administrative courts; and

- (iii) to increase the number of publications and guidelines aimed at promoting and facilitating compliance with competition law.

Public consultation on the White Book closed on March 20, 2005. A large number of comments were received by the SDC from the industry and competition law practitioners. These comments will be taken into account by the Government when translating into legislative proposals the reforms advanced in the White Book. The author's comments are contained in this article.