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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SPAIN

-- 2007 --

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SPAIN

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1. 2007 has been a milestone year in the Spanish competition system. The entry into force of the new Competition Act on 1 September 2007 has brought into operation the new Comisión Nacional de Competencia (CNC), combining the former Competition Service and Competition Tribunal so that the CNC comes into being as the only competition authority covering the whole of the Spanish State its mission being that of preserving, safeguarding and advocating effective competition in the markets, and ensuring coherent application of competition legislation.

2. In this context, the Act attributes more and stronger functions to the CNC, in particular, the nvestigation and resolution of cases involving anti-competitive practices and merger control; consultative functions on competition matters at the request of other institutions and organizations; advocacy; arbitration functions; the representation of Spain in international competition forums; and cooperation and coordination with other competition authorities, regional and of the European Commission, with sector regulators and with the judiciary, all of which have been called to play a role in the Spanish competition system.

3. Specifically, the Act has targeted more effective combating of the practices most harmful to competition in the markets using novel measures such as setting up a leniency programme and a system of statutory exemptions to replace the individual authorisation system.

4. As well as the institutional reform represented by creation of the CNC, 2007 has been a year of intense activity, and not only as regards the commencement of proceedings. Activities to represent the Spanish competition authorities in various international forums have continued and there has been ongoing collaboration both with the Comunidades Autónomas (the Regions) and with the sector regulators.

5. Collaboration with the judiciary will also be intensified as far as the new Act has introduced private application of competition law, meaning that the mercantile courts will be able to apply the rules on restrictive practices directly and rule on damages in the same proceedings.

6. Competition advocacy work has also moved to a priority position amongst the CNC's activities, and by the end of 2007 specific resources to support that work have been granted.

7. In summary, a series of decisive steps have been taken in the course of 2007 towards a stronger and more independent, socially responsible, effective, transparent and proactive competition system.

1. CHANGES TO COMPETITION LAWS AND POLICIES, ADOPTED OR PROPOSED

1.1 Summary of new legal provisions of competition law and related legislation

1.1.1 The new Spanish Competition Act

8. The new Spanish Competition Act 15/2007, of July 3, unanimously approved by the Parliament and published on July 4 (State Official Journal, nº 159), entered into force last September 1. This Act replaced the previous Competition Act 16/1989, of July 17.

9. The new Act is the outcome of a comprehensive public hearing procedure and benefits from the experience accrued over the past fifteen years. The main objectives of the reform were to modernise the Spanish legislation on competition in order to harmonise the available toolkit to the EU recent developments, on one side, and, on the other side, to increase the Spanish competition authority's effectiveness on the fight against hard core cartels. Thus, the new Act strengthens existing instruments and incorporates some new ones and also provides for the optimal institutional structure to protect effective competition in the market, taking into account the new EU set of regulations and the jurisdiction of the Regions (the *Comunidades Autónomas*) to apply legal provisions relating to anticompetitive practices in accordance with Act 1/2002, of February 21, 2002.

10. The Act is guided by five clear principles:

- Legal certainty for economic operators.
- Independence of the competition authority.
- Transparency and accountability of the competition authority.
- Efficacy in the fight against anticompetitive behaviours.
- Consistency in the application of the Act.

11. One of the key elements of the new Act is the creation of the *Comisión Nacional de la Competencia (CNC)*, a new Competition Authority with national scope which results of the merger of the previous two Competition Authorities, the *Servicio de Defensa de la Competencia (SDC)* and the *Tribunal de Defensa de la Competencia (TDC)*. This new institution is independent from the Government and will be responsible for the enforcement of Act 15/2007 and so, for promotion and protection of effective competition in all economic sectors and throughout the national territory.

12. Two fundamental principles advise the design of the new institution: its independence from the government and the preservation of one of the most valuable virtues of the old Spanish system, the separation of the investigation and the decision-making phases. In this situation, coordination by the President of the actions of the Investigation Division, responsible for the investigation phase, and the Council, responsible for the decision-making phase, is needed.

13. The system of appointment and dismissal of the CNC's management bodies has been designed to ensure their independence and adequacy. First, once appointed by the Government new members of the Council, including its President, will attend a public hearing in Parliament, which will gauge its suitability on their technical merits and knowledge. Second, the Head of the Investigation Division will be appointed by the Government with the Council's approval.

14. The CNC is responsible for the adoption of all decisions regarding prosecution of anticompetitive practices: opening of investigations, interim measures, rejection of complaints, sanctioning, etc. Also, it is responsible for the whole merger procedure, whereas before, it used to be a competence of the Government. Nevertheless, Act 15/2007 still reserves a minor role for the Government, which might revise, on grounds of public interests different from competition defence, conditional or prohibition CNC's second-phase merger decisions.

15. Other main legal changes include:

- The introduction of a leniency programme: A company having been part of a cartel may denounce its existence and provide the CNC with substantial evidence so as to be exonerated from payment of the eventual fine, except in the case it has been the instigator of the cartel.

- The renewal of the sanctioning regime in order to increase the predictability of fines and their deterrence effect: Act 15/2007 makes a graduation of infringements and states a maximum level of the fine for each type.

- The introduction of a legal exception system for national law: Mirroring the EU system, the procedure for individual authorisation has been substituted for a self-evaluation system where firms are responsible for evaluation of their own agreements' legal fit.

- The introduction of a *de minimis* rule for exemption of those conducts not liable to affect competition significantly.

- The introduction of private enforcement of the Spanish competition legislation: Civil judges are now empowered to apply articles 1 and 2 of Act 15/2007 (they were already empowered to apply articles 81 and 82 of the EU Treaty). Some mechanisms have been established for cooperation between the CNC and jurisdictional bodies for the sake of consistency in the application of competition rules in Spain. Also, the necessary amendments on certain jurisdictional and procedural civil rules have been provided for.

- Finally, the advocacy role of the competition authority has been strengthened: The CNC will play a more important role in the examination of State aids and has been empowered to challenge before the judge any decision by any public institution which is considered to have an anticompetitive effect[1].

1.2 Government proposals for new legislation

1.2.1 Regulation on Competition

16. The Regulation addresses several substantive and procedural issues required for implementation of Competition Act 15/2007, with the leniency programme being of particular note.

17. This leniency programme allows companies or natural persons participating in a cartel to apply for an exemption from the payment of the fine where they produce evidence that allows the CNC to order an inspection to be carried out in relation to the cartel in question or to prove that there has indeed been an infringement of the Competition Act, or allows them to apply for a reduction in the amount of the fine if they provide evidence that gives significant added value to the evidence already held by the CNC. The Regulation provides for confidentiality even about the fact that an application has been made. The

[1] See *http://www.cncompetencia.es/PDFs/legislacion/47ing.pdf*

applicant has to provide the necessary cooperation to the CNC from the time when the application is submitted and throughout the whole procedure. This cooperation consists on providing all the information and evidence in its possession and refraining from destroying, falsifying or concealing pertinent information or evidence relating to the cartel. In addition, the applicant must end its involvement in the cartel immediately after submitting its application, except in those cases where the CNC deems it necessary for such involvement to continue in order to preserve the effectiveness of an inspection.

18. Cartels are very damaging for competition and are amongst the infringements classified as very serious in Competition Act 15/2007. They are punishable with fines of up to 10% of the turnover of the infringing company in the financial year immediately prior to the year in which the fine is imposed.

19. Other worth mentioning matters implemented by the Regulation relate to conducts of minor importance, to substantive questions regarding merger control, to the CNC's functions in relation to state aid and competition advocacy, to the CNC's powers of inspection, which have also been strengthened, and to the mechanisms for collaboration in investigation matters with the Competition Authorities of the Regions, the European Commission and the Competition Authorities of the Member States of the European Union.

20. Finally, the Regulation includes three annexes relating to the content of complaints and to notification of merger operations.

21. The Draft Regulation was finally approved on 22 February 2008 (Royal Decree 261/2008, of 22 February). It is worth mentioning that on 29 February 2008[2], when the Regulation entered into force, the CNC received six leniency applications.

1.2.2 CNC Statute

22. The new Competition Act foresees the passing of a new CNC Statute aimed at endowing the CNC with a structure according to the new Competition system's institutional design and with the necessary resources to carry out the functions defined in the Act.

23. The Draft includes five chapters on:

1. The CNC's legal nature, goals and functions.
2. The CNC's internal structure[3].
3. The regime for appointment and dismissal of the members of the Council.
4. Management of human resources.
5. General aspects of the CNC, as personal recruiting, patrimony, budgeting, economic and financial controlling, etc.

24. In organisational terms there is a series of noteworthy innovations. In relation to the Investigations Division, this becomes structured as a sector-based organisation, with subdivisions investigating both enforcement proceedings and procedures relating to mergers, to make better use of the specific sector knowledge of the competition inspectors and to roll out the practice of setting up

2 See *http://www.cncompetencia.es/PDFs/legislac*

3 See http://www.cncompetencia.es/organigrama_ENG.pdf

investigation teams for complex cases. In addition, a new specialised body is set up within this division, the Cartels and Leniency Unit, with the aim of implementing the leniency programme.

25. The creation of the Advocacy Division reflects for its part the importance given to this area by the new Act, increasing the CNC's ability to perform advocacy functions, hailed as one of the pillars of the work of the new institution. There is also increased incorporation of analysis and advanced economic techniques in the various areas of the work of the Commission, by means of the creation of a Chief Economist Unit.

26. The General Secretariat is the unit which ensures smooth operation of all the Commission bodies, through its shared departments. Lastly, the Statute governs the Secretary of the Council as the unit ensuring that the procedures and decisions of the Council comply with the law, and providing legal advice to the various bodies comprising the Commission, for which it can call on the Legal Office.

27. The Draft Statute was finally passed last 29 February 2008 (Royal Decree 331/2008, of 29 February) and published on 3 March 2008[4].

2. Action against anticompetitive practices

2.1 CNC's activities

28. 92 cases were subject to consideration of the Competition Authorities in 2007, of which 73 emanated from complaints, 13 were *ex officio* and 6 were individual authorisation cases.

29. The SDC/Investigation Division formally opened 26 actions against anticompetitive practices, of which 16 were on alleged prohibited agreements, 9 on alleged abuses of dominance and 1 on unfair acts affecting competition.

30. Most cases have arisen in the services sector: transport and communications; production and distribution of electricity, gas and water, oil and fuels, hotel industry, wholesale and retail distribution, financial services and social assistance.

31. During 2007, 16 down-raids were carried out in the premises of different companies of the food, building materials, insurance and real state sectors.

32. In 2007, 64 cases were completed, of which 42 were shelved or dismissed and 22 were passed on to the TDC/Council after the investigation phase. Of these 22, 9 were about individual authorisations and 13 about prohibited practices. On 31 December 2007, 95 cases remained open.

33. The TDC/Council issued 95 decisions in 2007, of which 17 corresponded to sanctioning cases, 15 to individual authorisations, 33 to appeals against decisions issued by the SDC/Investigation Division, and 30 to incidental issues.

34. 36 pre-judicial questions and 105 appeals before the Court of First Instance and/or the European Court of Justice were submitted to the Competition Authorities.

[4] See *http://www.cncompetencia.es/PDFs/legislacion/96.pdf*

SUMMARY OF A SELECTION OF RESOLUTIONS

CONCERTED PRACTICES

Resolution of 21 June 2007, 612/06, Aceites 2

The TDC, in accordance with the assessment by the SDC, found Koipe S.A. and the group which it controlled, Sos-Cuétara, and the other respondents – Centros Comerciales Carrefour S.A., Caprabo S.A., Alcampo S.A., Erosmer Ibérica S.A., Mercadona S.A., Distribuidora Internacional de Alimentación S.A. (DIASA), Grupo El Árbol Distribución y Supermercados S.A. and El Corte Inglés S.A. – liable for infringements of Article 1 CA, consisting of Koipe S.A. fixing a minimum retail price for its Carbonell 0.4º and Koipesol brands olive and sunflower oils, and on the grounds that the other respondents followed that price fixed by the supplier. It therefore imposed a fine of 2 million euros, (€ 2,000,000) on Grupo Sos Cuétara, a fine of only € 112,750 on Centros Comerciales Carrefour S.A., for which there was a mitigating circumstance, a fine of € 214,000 on Caprabo S.A., a fine of € 145,500 on Alcampo, S.A., a fine of € 317,200 on Erosmer Ibérica S.A., a fine of € 413, 800 on Mercadona S.A., a fine of € 338,250 on Distribuidora Internacional de Alimentación S.A. (DIASA), a fine of € 85,900 on Grupo El Árbol Distribución y Supermercados S.A. and a fine of € 147, 200 on El Corte Inglés S.A.

Resolution of 18 October 2007, Cajas Vascas y Navarra

The SDC, having completed preliminary proceedings to ascertain the veracity of certain information appearing in the press relating to a possible geographical market-sharing agreement between Caja de Ahorros de Vitoria y Álava (Caja Vital), Bilbao Bizcaia Kutxa (BBK) and Caja de Ahorros y Monte de Piedad de Guipúzcoa y San Sebastián (KUTXA), ex officio commenced proceedings against those three banks on the grounds of presumed prohibited practices under Article 1 CA, consisting of agreeing to maintain the "territorial status quo". Then the SDC amended the proceedings to include Caja de Ahorros de Navarra (CAN) and the Federación de Cajas de Ahorro Vasco-Navarras. On 19 October 2006 the SDC issued its report and proposal for the TDC. The SDC based the allegation of infringement of Article 1 CA on the documentary evidence in the case file, consisting of the minutes of meetings of the Federation from 1990 to 2005, and other evidence including the evolution of the openings and closures of branches by each of the four respondent savings banks in each of the Spanish provinces with the result that none of the four savings banks had opened a branch in any of the three provinces in which it had not operated traditionally.

The CNC Council held that, as the TDC had stated on other occasions that "[w]hen associations issue guidelines to harmonise behaviour, not to say prices and commercial terms and conditions, there is a serious breach of that principle of independent behaviour which is indispensable if each and every economic operator is to operate with competitive efficiency in the markets. Issuing corporate indications is an attempt, and it is in fact always to a greater or lesser extent successful, to in some way curb the personal freedom in economic behaviour of individual agents by in short restricting the exclusive rights freely to dispose of their own assets which is what property is. […] Concerted practices and collective guidelines for the behaviour of agents undermine those basic principles of sound and independent conduct necessary for the effective development of competition". The Council found that this was a cartel agreement and an enduring one, lasting at least 15 years, and it should therefore impose a penalty of a high percentage of turnover. It accordingly imposed fines of € 7 million on BBK, € 7 million on KUTXA, € 4 million on VITAL and € 6 million on NAVARRA.

ABUSE OF DOMINANT POSITION

Resolution of 12 March 2007, 614/06 Cervezas Canarias 2

Cervezas Anaga S.A. brought a complaint against Compañía Cervecera de Canarias S.A. (CERCASA), alleging anti-competitive practices contrary to CA, consisting of abuse of a dominant position in the Canaries beer market by means of various contractual practices in relation to retailers intended to prevent other locally manufactured brands from entering the market. After investigations, the SDC issued a report and proposal for the TDC, recommending that it find that there was an anti-competitive practice under Article 1 of CA consisting of the conclusion of distribution agreements with terms relating to exclusivity of supply and advertising (an obligation to purchase minimum amounts, and the obligation to conform to exclusive advertising in the Canary Islands), which were liable to impede the entry into the market of other undertakings.

The TDC upheld the SDC's assessment, found CERCASA responsible of the anticompetitive practices imposing on it a fine of € 400,000. The retail distributors were not be penalised, since they were compelled to be parties to the agreements proposed to them by dominant CERCASA and had no ability whatsoever to change those proposed contractual terms.

Resolution of 8 March 2007, 601/05 Iberdrola Castellón

The proceedings were commenced ex officio by the SDC following a submission received from the President of the Comisión Nacional de la Energía (Energy Regulator) reporting on a series of facts which could constitute anti-competitive conduct under Article 6 of CA by Iberdrola Generación and its Castellón generating plant. The SDC set out that during the periods investigated: 1) the average weighted daily prices of offers on the daily market relating to the generating plants investigated belonging to Iberdrola Generación were above the average weighted daily prices on the daily market, 2) the prices on the daily market were, on average, lower than those in the respective immediately preceding periods, 3) during the period under investigation, there was a low degree of uncertainty as to the possibility of being required to resolve technical constraints, since forecasts of demand nationally, which are published by Red Eléctrica de España, Spanish Grid, prior to the submission of offers, had a very low margin of error. On the days on which the Iberdrola Generación generating plants were scheduled to resolve technical constraints, the average weighted daily prices of its offers (AWP) were, on average, much higher than its respective revealed variable costs and, on some days in particular, the difference was unusually great. That difference was not explained by increases in the cost of fuel.

Regulations provided that each generator had to make a single specific offer on the electricity generating market for each of its generating units. This offer had to contain a price and an available capacity for each hourly period, and within each hour it could propose various partitioned capacity offers. Accordingly, in a single hour, one amount could be offered at one price and additional amounts at higher prices. It was also necessary to distinguish between simple and complex offers. A simple offer contains a price at which the offeror is or is not willing to match offers (it does not include any additional term to be taken into account in the matching), whilst a complex offer, in addition to that price (the variable term), contains what is known as the "fixed term" which imposes the minimum financial or technical terms which, if not complied with, mean that it cannot participate in the daily programme.

In merger report C60/00 Endesa/Iberdrola the TDC had already defined the relevant product market: "(…) must be defined as the generation of electricity that is bought and sold through the pool or wholesale market. On the supply side in this market, electricity from the generator is in competition with that from the special over 50 MW scheme and imported electricity. On the demand side, there are the distributors, traders and eligible customers. It also includes the electricity sold via bilateral contracts, in so far as these contracts are agreed upon in a system of free competition". And "the constraints market should be treated as an affected market independent of the other markets defined above". And so the SDC concluded that: "(…) the relevant market in a context of the technical constraints can be defined as a sub-market within the organised market and related to it, but existing independently, since it contains all the elements of a market – supply, demand and prices". As regards the geographical market, the TDC adopted the definition proposed by the SDC, which in turn comes from the system operator, that is to say, the market associated with the Levante-Norte and Levante-Sur areas.

The TDC, having ascertained the effects of the practices under analysis, found an abuse of dominant position to have been proven, which impeded effective competition and reduced consumer welfare, since consumers would suffer an increase in the final price of energy, either directly in the case of an eligible consumer, that is to say, not subject to the tariff, or indirectly in the form of an increase in the "tariff deficit". Indeed, Iberdrola Generación had been offering

prices not directed at being matched on the daily market, but in order to generate in a situation of technical constraints in which it was the only possible offerer. The TDC therefore imposed a fine of € 38,710,349 on Iberdrola Generación according to the principle that the commission of an offence should not be more advantageous to the offender than complying with the rules which have been breached.

Resolution of 3 April 2007, 611/06 Excursiones Puerto de Sóller

Tramontana S.A. brought a complaint against Ferrocarril de Sóller S.A. and Excursiones Marítimas de Puerto de Sóller S.L. for anti-competitive practices consisting of putting pressure on certain travel agents, customers of the complainant, who were offering the "island tour" tourist product, to engage the Respondent shipping company for the seagoing part of that excursion if they wanted to guarantee being given spaces at preferential times for the stretch of the excursion on Sóller's railway. The SDC concluded that it had been proven that there was a concerted practice between the respondents intended to expel their only competitor from the market, which was prohibited by Article 1 CA. However, the TDC ruled that the respondent companies were under the same economic management and that, therefore, the prohibition under Article 1.1 CA was not applicable (the requisite of bilateral wills was missing), and went on to examine whether the practices alleged could fall within the prohibition under Article 6 CA. The TDC found that in the market for the inputs necessary for the supply of the unique "island tour" product Ferrocarril de Sóller had a legal monopoly on the non-replicable or non-substitutable public service train-tram input covering the Palma de Mallorca-Sóller-Puerto de Sóller stretch of the intermodal or combined excursion. Ferrocarril de Sóller's behaviour in making the obtaining of better timetables and spaces in the train stretch of the island tour excursion conditional on engaging its related services for the boat part of the intermodal excursion, was an abuse of its dominant position. And imposed on Ferrocarril de Sóller a fine of € 318,365. Also, a € 6,000 fine was imposed on an individual.

Individual authorisations[5]

Resolution of 2 August 2007, A 363/07 Tasas Intercambio/EURO 6000

EURO 6000, S.A. applied for individual authorisation under article 4 CA for an agreement establishing a multilateral interchange fee (MIF), applicable amongst EURO 6000's member banks in respect of cash withdrawals or other types of operation (in particular, balance enquiries, debit and credit enquiries, refused operations and user cancelled operations) performed using debit and credit cards at cash points forming part of the network run by EURO 6000.

The Consejo de Consumidores y Usuarios (Consumers and End Users Council) issued a report indicating that, notwithstanding the fact that the fee was established as a maximum, there was a high level of tacit (or express) agreement to keep the fee on those terms and to prevent competition. The organisation also thought that the existence of a MIF put limitation on the ability of customers to negotiate on an individual basis with their banks. It therefore concluded by expressing its caution about granting an individual authorisation.

The SDC took the view that the individual authorisation would be reasonable to the extent that the fee was cost-oriented. However, the proposed fee represented an increase of 21.5% over that currently charged between EURO 6000 banks for cash withdrawals. Also, it had to be taken into account that what was being submitted for authorisation was a "methodology" for calculating the MIF, as well as a specific MIF calculated using that methodology and that it could happen that the biannual reviews envisaged increased the MIF above the level laid down in the agreement. Thus, some form of threshold or margin should be established above which the MIF resulting from the biannual reviews would not be authorised, even when the methodology used in its calculation had been authorised. The board of directors of EURO 6000 subsequently agreed to modify the agreement.

The TDC did not authorise the increase in the interchange fee proposed by the applicant, taking the view that the notified agreement was an agreement prohibited by article 1 CA, and that it could not conclude from the information available that the MIF satisfied the requirements for authorisation under article 3 CA (similar to article 81.3 EC). The MIF proposed in the agreement could not be regarded as a maximum, but rather as a fixed fee which would be applied to all signatories of the agreement. However, the TDC did grant an individual authorisation to EURO 6000 for its participating banks to set a multilateral interchange fee for the withdrawal of cash using debit and credit cards at cash points belonging to the EURO 6000 network and for all the other services offered at cash points other than cash withdrawals, but just until the entry into force of the new CA (September 2007). The TDC made it clear that the

5 As mentioned, the procedure for individual authorisations no longer exists.

multilateral interchange fee must be understood as a maximum fee applicable by default, so that any lower fees resulting from bilateral agreements between the banks in the network could be charged. Also, it pointed out that, in the event of an acquirer setting charges or commission for users of its cash points for intra-system operations covered by the notified agreement, that bank would not receive the intra-system interchange fee.

Resolutions of 2 August 2007, A 364/07 Tasas Intercambio/ Sistema 4B and of 3 August 2007, A 368/07 Telebanco 4B were very similar to the latter.

Decisions on appeals before the TDC/Council

Resolution of 13 March 2007, r 689/06 Rotores Centrifugadoras

The TDC resolved to allow the appeal by Mantenimiento de Instrumentos de Laboratorio, S.L. (MIL) against the SDC's decision to dismiss its complaint on the unilateral and unjustified rescission by Fiberlite Centrifuge Inc. (FC) of the non-exclusive distribution agreement that it had with MIL for the marketing of Fiberlite carbon fibre rotors, and the subsequent exclusive award of the distribution rights for the said centrifuge rotors to Controltécnica Instrumentación Científica, S.L. (CIC). In the opinion of the complainant, this exclusive arrangement gave CIC a monopoly on sales of rotors for Sorvall centrifuges and on replacement carbon fibre rotors for Beckamn Coulter centrifuges, driving any possible competition out of the national market to the detriment of consumers, as the Sorvall and Beckamn centrifuges were the most prestigious centrifuges in the national market.

The SDC took the view that the exclusive distribution agreement was covered by EC Regulation 2790/1999 on vertical restraints, both because FC was far from reaching the 30% market share and because it did not include any of the restrictions prohibited by article 4 of the said Regulation; in particular, the incumbents did not prevent independent repairers (such as the complainant) from having access to replacement parts. The breach of article 6 CA was also rejected by the SDC due to the tiny market share of CIC, namely 0.5%.

The TDC took the view that even assuming that FC's share of the Spanish market for the relevant product was not more than 30%, events subsequent to the SDC's investigation seemed to disclose the existence of practices on the part of FC of refusing passive sales. On the other hand, the complainant disagreed with the SDC's definition of the relevant product market as in its view it was not the Spanish market for centrifuge rotors, but rather the more limited market for replacement rotors. The TDC agreed with the SDC that generally a brand does not configure a market, but one could not ignore the fact that in relation to those products or goods characterised as spare or replacement parts that make up or form part of a complex item, it is possible to configure more limited markets that could coincide with the brand. The TDC therefore resolved to allow the appeal and ordered the SDC to further investigate whether there were practices prohibiting passive sales outside the exclusive territory, whether different brands of rotors are interchangeable, whether it was possible to differentiate between a market for original rotors or rotors marketed to centrifuge manufacturers and a market for replacement rotors or rotors marketed to the owners/users of the centrifuges and to maintenance companies, the market share of CF and its competitors on the relevant market, and whether the early termination by FC of the distribution agreement with MIL could constitute an act of unfair competition.

Resolution of 6 November 2007, r 720/07 AXIÓN/ABERTIS and joined cases R 721/07 and R 723/07

Red de Banda Ancha de Andalucía, S.A. (AXIÓN), SOGECABLE, S.A. (SOGECABLE) and Gestevisión Telecinco, S.A. (TELECINCO) filed appeals against the SDC's decision not to proceed about a complaint filed by AXIÓN against Abertis Telecom, S.A.U. (ABERTIS) for an alleged conduct prohibited by articles 6 of CA and 82 EC, consisting of engaging in restrictive practices with the aim of preventing the complainant from entering the national market for audiovisual signal-carrying services.

The SDC had taken the view in its Statement of Objections that that ABERTIS was responsible for an abuse of a dominant position consisting of demanding, without objective justification, heavy penalties from its customers in the event of the early termination of the agreements in order to prevent the entry of new competitors, agreeing with its customer VEO TV an unjustifiably long term for the agreement to provide services in return for a discount, with the effect of taking this customer away from the possible commercial action of competitors, and offering, without objective justification, discounts for contracting combined broadcasting in all the territories or regional areas into which they could be subdivided, with the effect of preventing entry of new competitors. However, after requesting additional information from AXIÓN about agreements entered into by it with SOGECABLE and TELECINCO, the SDC decided not to proceed.

The Council of the CNC, however, took the view that the signing of the two agreements by AXIÓN with TELECINCO and SOGECABLE did not *per se* constitute sufficient grounds for concluding that there was no abuse. The signing of the agreements showed the intention of AXIÓN to enter the national market in order to compete with the single national operator, ABERTIS, but did not necessarily imply that ABERTIS, by its conduct, had not hindered this entry, nor that the entry was going to be effective. In order to determine that there are exclusionary effects, it is not necessary that competitors have been driven out of the market or that they have been unable to enter; it is sufficient that they are prejudiced and that their ability to compete is impeded to the detriment of effective competition and the interest of consumers and users. So, the Council ordered the Investigation Division to further investigate on the case.

Resolution of 13 November 2007, r 704/06 Distribución Renault

Some vehicle repair workshops had filed a complaint against Renault España Comercial, S.A. (RECSA) and the Agrupación Nacional de Concesionarios Renault (ANCR, National Union of Renault Dealers) for engaging in conduct allegedly contrary to articles 1 CA and 81 EC by effectively preventing Renault dealers from acting as multi-brand dealers, and new after-sales operators from entering the Renault distribution network by means of the so-called "Transfer Policy and Promise to Reimburse Costs", discriminating against independent workshops in comparison with official workshops, and by fixing the ultimate retail prices to customers buying new cars. The SDC issued a decision not to proceed with the case on grounds that:

- The requirements contained in the agreements entered into between RECSA and its authorised dealers and repairers could not be said to represent a breach of EC Regulation 1400/2002. The complainants argued that the dealership agreement imposed an obligation to provide Renault with specific information on sales or repair and maintenance services of other brands of vehicles, but this was not evident from an examination of the relevant sections of the dealership agreement and so it was not found to represent an obstacle to exercising the multi-brand right.

- As regards the allegations of discrimination against independent workshops compared with the official workshops of the Renault network, the SDC concluded that there were major differences between the independent workshops and the Renault workshops, as the latter had to satisfy certain requirements in order to belong to the official network, having to meet certain qualitative criteria and certain commercial objectives that independent workshops did not have to meet, so that all operators coming within one or other of those situations would receive equal treatment from RECSA, which would be different according simply to whether or not the operator was a member of the official network.

- In relation to the allegation regarding the fixing of prices to end customers buying new Renault vehicles, the SDC took the view that there was no evidence of it.

In the Council's opinion, the evidence produced by the complainants (tape recordings of the General Meeting of the ANCR and executives of RECSA) pointed to the possible existence of a collusory agreement whose aim would have been to restrict intra-brand competition and to close the Renault network to new entrants. So, it ordered the Investigation Division of the CNC to further investigate on the existence of such collusory agreement.

Resolution of 27 November 2007, r 691/06 DISA

The SDC had decided not to proceed with the investigation on 38 agreements between fuel retailers and SHELL ESPAÑA S.A. (to whose position DISA PENÍNSULA S.L.U. had by then subrogated) on grounds that 13 were between principal and agent, or because exemption under EC Regulation 2.790/1999 was of application, or because even when the agreements exceeded the duration of five year or when they included tacit renewal clauses so that the relationship could be extended beyond five years, the agreements were not capable of having a material effect on the motor vehicle fuel distribution market because DISA Peninsula was below the 5% market share established in the EC *de minimis* Notice.

The Council agreed that the essential question here was whether the duration of the exclusive purchase obligation in the DISA agreements analysed had or could have the effect of restricting competition and so, it was necessary to examine the two cumulative requirements stated in the ruling of the Court of Justice of the European Communities in the Delimitis case as to determine the effects of an exclusive purchase agreement: whether the market was hard to access for competitors and the extent to which the agreement entered into by the operator concerned contributed to the cumulative effect produced by the combination of the similar agreements in the market. The information on the case file showed that the agreements analysed did not contribute significantly to the closure of the Spanish mainland

fuel distribution market. The Council therefore decided to dismiss all the appeals filed in relation to these proceedings.

2.2. Activities of the Courts of Appeal

35. The decisions of the TDC/Council are subject to revision by the Audiencia Nacional, a judicial body. Then, the rulings of the Audiencia can be appealed before the Tribunal Supremo.

36. In 2007 the Audiencia Nacional issued 42 judgements concerning substantive competition issues. Only in three of these judgements the Audiencia Nacional disagreed with the TDC's Resolutions. As for the Tribunal Supremo, it issued 19 judgements concerning substantive competition issues. Only in four of these judgements the Tribunal Supremo disagreed with the TDC's Resolutions.

37. These statistics clearly reflect the high degree of judicial confirmation of the decisions issued by the Spanish competition authority.

SUMMARY OF A SELECTION OF RULINGS

Judgment of 4 May 2007 of the Tribunal Supremo

The Tribunal Supremo allowed the appeal filed by the Confederación Española de Estaciones de Servicio (Spanish Confederation of Service Stations) against the judgment of the Audiencia Nacional on the TDC's resolution handed down in proceedings R 280/97 Repsol/BP/Cepsa. After referring a preliminary issue to the Court of Justice of the European Communities, the Tribunal Supremo took the view that the fact that the service stations assumed exclusive responsibility for the risks of the product from when it was supplied to them, and therefore assumed a significant risk, combined with the fact that the product had to be paid for in full within nine days, regardless of whether or not it was sold, and that the retail price established by the supplier had to be respected, was enough to enable it to conclude that the distribution agreements that were the subject of litigation could not benefit from the exemption provided for in EC Regulation 1984/83.

Judgment of 26 June 2007 of the Tribunal Supremo

The Tribunal Supremo allowed the appeal filed by the Attorney General against the judgment of the Audiencia Nacional in which it allowed the appeal filed by Repsol Petróleo S.A. against the TDC's resolution handed down in proceedings 499/00 IMT/Repsol, which ruled that there had been a breach of article 1 CA, consisting of entering into agreements with agents in order to give them official approval, which could have produced effects that restricted competition by preventing shipping companies from choosing other agents. The Tribunal Supremo stated the agreements should be treated as serious breaches of competition law.

Judgment of 31 January 2007 of the Audiencia Nacional

This judgment allowed the appeal filed by Telefónica de España, S.A.U. against the TDC's resolution handed down in proceedings 557/03 Astel/Telefónica, which ruled that there was an abuse of a dominant position contrary to article 6 CA. The judgment took the view that it was not possible to subsume unfair acts under article 7 CA within conduct representing an abuse of a dominant position under article 6 CA, so that any act of unfair competition perpetrated by an undertaking in a dominant position represents an abuse of a dominant position. There is a need to prove that the conduct seriously distorts or falsifies competition on the market with prejudice to the public interest. This judgment has not been declared final and binding as an appeal has been issued.

Judgment of 13 March 2007 of the Audiencia Nacional

The Audiencia Nacional allowed the appeal filed by Gas Natural SDG, S.A., against the TDC's resolution handed down in proceedings 580/04 Gas Natural, which ruled that a conduct had been committed that was contrary to articles 6 CA and 82 EC, consisting of having imposed contractual barriers on the access of third parties to the regasification capacity. The Audiencia Nacional stated that the appellant had a dominant position in relation to both the supply and the distribution of liquefied or gaseous natural gas on the relevant market, namely the market for managing and exploiting the necessary infrastructure for importing natural gas. However, it found that the appellant's agreements did not lack reasonable justification and did not represent an entry barrier for competitors. This judgment is not final and binding, as an appeal has been issued.

2.3 Private enforcement

38. The Commercial Courts issued thirteen rulings on competition matters in 2007, of which two concerned the application of article 82 EC in the audiovisual sector and the rest referred to actions brought by petrol stations against oil companies. The matters disputed in these later cases were very similar in object, focusing mainly on the alleged nullity, under article 81 EC, of the exclusive supply clauses included in their agreements. None of them resulted in the award of damages.

SUMMARY OF A SELECTION OF RULINGS

Judgment of the Tribunal Supremo. 9 January 2007. Petrol Station Vivar del Cid SA against Repsol Petróleo SA & Repsol Comercial de Productos Petrolíferos SA

In the first instance, the claimant requested the judge to declare the nullity of the exclusive supply agreement. The Tribunal Supremo upheld the judgment handed down by the Court of Appeal. The petrol station claimed that Repsol had infringed article 81 EC and articles 10 and 11 of EC Regulation 1984/1983 of 22 June 1983 on the application of Article 85(3) of the EC Treaty to categories of exclusive purchasing agreements. Pursuant to this Regulation, these exclusive agreements are generally distinguished by the fact that, on one hand, the supplier confers special commercial or financial advantages on the reseller - by contributing to his financing, by granting him or obtaining for him a loan on favourable terms, by equipping him with a location or premises for conducting his business, by providing him with equipment or fittings, or by undertaking other investments for his benefit - and that, on the other hand, the reseller enters into a long-term exclusive purchasing obligation which in most cases is accompanied by a ban on dealing in competing products. The appellant claimed that Repsol had not provided any commercial or financial advantages so that only its image had been placed in the petrol station for its benefit. The Tribunal Supremo had accepted before the compatibility of these exclusive agreements in the sector of retail sale of automotive fuels with Regulation 1984/1983. Nevertheless the facts alleged by the appellant were not proved in the previous instance. Thus, the Tribunal Supremo dismissed the appeal.

Judgment of the Commercial Court nº2 of Bilbao. 22 February 2007. Bide Barri SL & Zesena SL against Repsol Comercial de Productos Petrolíferos SA.

The petrol station claimed, pursuant to article 81 EC the declaration of the nullity of the contract and damages, and, subsidiarily, the declaration of price-fixing by Repsol and damages.

Based on the Commission Decision of 12 April 2006 containing the commitments submitted by Repsol for its long-term exclusive supply contracts with petrol stations and Judgment C-217/05 of the European Court of Justice, the judge declared the nullity of the time clauses in the agreement, including the exclusive supply agreement. Price-fixing by Repsol resulted not proved and no damages were granted.

Judgments of the Court of Appeal of Madrid. 7 June 2007 and 14 June 2007. Petrol Station Talavera SA against Shell España SA & Disa Península SLU and Petropuerto SL & Petrogrado SL against Shell España SA & Disa Península SLU.

The Court of Appeal upheld the judgments of the Commercial Court nº1 of Madrid. Based on the documental evidence that the market share of Shell was below 5%, the Court ruled that the exclusive contract between the petrol stations and Shell signed in 1998 could be considered *de minimis* under the Commission Notice on agreements of minor importance of 2001, and therefore accepted in the sense of article 81 EC. No price-fixing by the supplier was found and so the appeal was dismissed.

Judgments of the Commercial Court nº2 of Madrid. 19 June and 3 September 2007. Euskaltel SA against Sogecable SA & Audiovisual Sport SL and Tenaria SA against Sogecable SA & Audiovisual Sport SL.

The object of the disputes was the audiovisual broadcasting rights for sport competitions. The judge ruled partially in favour of the plaintiffs and declared that Audiovisual Sport (Sogecable owned 80%) committed an abuse of dominant position pursuant to Article 82 EC by revoking its contracts with them, which were declared valid. The rest of claims were dismissed, under the assumption that Sogecable and AVS had not imposed non-equitative and discriminatory payment terms, as the plaintiffs were claiming. Damages were not awarded.

Judgment of the Commercial Court nº6 of Madrid. 19 July 2007. Carburantes Costa de la Luz SL against Repsol Comercial de Productos Petrolíferos SA.

The judge rejected the complaint of the plaintiff. The petrol station operator claimed that the exclusive contract with the supplier was not an agency agreement but a re-sale agreement and so the contract should be declared null and void under article 81 EC due to the imposition of the retail sale price of the fuel products. Based on the Judgment of 14 December 2006 C-217/05 of the European Court of Justice, the judge concluded that the exclusive contract was in fact a non-genuine agency agreement because some relevant financial risks were assumed by the station. However, the imposition of retail prices was not proved. Repsol gave maximum retail prices for the products, but no contract clause stipulated neither the imposition of such prices nor the prohibition to make sales below them.

Judgment of the Court of Appeal of Madrid. 18 December 2007. [Confidencial] against Cepsa Estaciones de Servicio SA.

The appellant operated the petrol station and the oil company was the owner. The contract, signed in 1992 was very complex and included an exclusive supply agreement. The appeal was dismissed: the Court was not clear about the supply contract not being a genuine agency agreement, no imposition of resale prices of fuel products resulted from the contract, and Cepsa issued a notice clarifying the appellant's right to fix a competitive price and to grant discounts.

3. Mergers and acquisitions

39. In the field of merger control, the entry into force of Competition Act 15/2007 has implied relevant reforms. As mentioned above, the Competition Act strengthens the role of the CNC, which now adopts the final decisions both in the first and second phases of the procedure. Under Law 16/1989, the SDC was in charge of investigations in the first phase. After such investigations, a report was issued which could end up in either an authorisation proposal to the Government, when the operation was found not to pose any competition problems or, in a submission of the case to the TDC, when the operation arouse competition concerns. The findings the TDC made during the second phase of investigations were object of a report which could propose to the Government either an authorisation, an authorisation submitted to conditions or a prohibition. And it was the Government making the final decision. As mentioned before, the new Act still reserves a minor role for the Government, which can revise, for reasons of general interest different from competition defence, second phase merger decisions of the CNC prohibiting an operation or submitting it to conditions.

40. In 2007, a total of 127 merger operations were notified, 40 of them under the new Competition Act 15/2007. 46 of the 127 operations were also notified in other EU member States. As for the types of transactions notified, 89% of them were of acquisitions, 8% on joint control and 2% were takeover bids.

41. In 2007, 121 operations were authorised in the first phase. The number of referrals to the TDC for in-depth analysis was just six. Upon proposal of the TDC, the Government authorised all these operations, three of them subject to conditions. Already under Act 15/2007, the Council of the CNC cleared an operation without conditions in the second phase (in this case, the Council decided to open a second phase investigation despite the Investigation Division's proposal to clear the operation in the first phase).

42. The number of prior consultations was ten, seven preliminary inquiries were made, and seven cases were shelved.

43. The sectors the most affected by merger operations subject to notifications were: the chemical and pharmacy, machinery, electricity material and equipment, and commercial distribution sectors. Also the transport, minerals and metallurgy, food and beverages, real state, services, and energy sectors were analyzed under such procedure.

SUMMARY OF A SELECTION OF CASES

C102/06 SOGECABLE/AVS

The operation consisted of the take-over by Sogecable of exclusive control over Audiovisual Sport, S.L. (AVS), an undertaking active in the markets for the acquisition and reselling of football rights.

Sogecable was a quoted company which operated in the media sector and was present in the following sectors: pay-TV, free-TV, production and marketing of themed channels, film production and distribution, purchase and management of broadcasting rights, interactive television and new media. Its principal shareholders were Promotora de Informaciones, S.A. (PRISA) (43.4% of share capital) and Telefónica, S.A. (17.3%), PRISA holding exclusive control. AVS' shareholders were Sogecable (80%) and TVC Multimedia, S.L. (20%).

Until the end of the 2005/2006 season all media rights over Spanish football competitions were centralised in AVS. That situation was overturned when, in mid-2006, Mediaproducción, S.L. (MEDIAPRO) acquired La Liga and Copa del Rey rights from a number of first division teams. Sogecable, AVS, TVC and MEDIA-PRO entered into an agreement, dated 24 July 2006, containing a number of cooperation covenants, in addition to the exclusive take-over of AVS by Sogecable. Those terms did not amount to restraints on competition ancillary to the merger being examined, within the meaning of Article 15A.5 CA and so the TDC held that approval of the merger did not in any way imply approval of those cooperation covenants.

The TDC found that the product markets affected by the operation were the markets for the reselling of broadcasting rights for live football matches in competitions in the Spanish Liga and Copa del Rey, and the vertically related downstream markets of pay-TV (pay and pay-per-view platforms) and free-TV, in addition to the market for the exploitation of images of those matches on the Internet and UMTS in Spain. For all those product markets the relevant geographical market was the national market. In the pay-TV market, the TDC found that Sogecable could change the current terms for exploiting rights on the two pay-TV platforms, jointly controlling the exclusive pay and pay-per-view content and this market strength was reinforced by the notified operation. Those changes could fundamentally change the allocation of content between the two pay-TV platforms or the conditions for access by Sogecable's competitors to the content broadcast on pay per view. In the market for the exploitation of images of matches in Spanish Liga and Copa del Rey competitions on the Internet and by other media, once the 2002 agreement had expired, AVS/Sogecable could reduce or eliminate access to content important for developing those markets by downstream Internet, UMTS and other media market operators competing with undertakings in its own group.

In view of the above, the TDC suggested[6] making approval of the merger subject to a series of conditions:

– AVS should guarantee non-exclusive access to third parties on transparent, objective and non-discriminatory terms to images of football matches broadcast on the pay-per-view platform, so that those third parties could peaceably and fully exploit the rights acquired.

– If Sogecable/AVS decide to increase the number of matches broadcast on pay TV, it should do so on a non-exclusive basis, guaranteeing access to third parties on transparent, objective and non-discriminatory terms. In any event third parties should be able peaceably and fully to exploit the rights acquired.

– AVS should guarantee access to third parties on a non-exclusive basis and on transparent, objective and non-discriminatory terms to the images of football matches broadcast on the Internet, by mobile

6 Under CA 16/1989, the Council of Ministers made the decisions on mergers.

telephone and any other markets which could come into being, so that those third parties could peaceably and fully exploit the rights acquired.

– The Action Plan implementing these conditions should provide dispute resolution mechanisms enabling any differences of opinion to be resolved quickly and efficiently.

The Council of Ministers authorised the merger subject to compliance with certain conditions which extended and specified those set out by the TDC.

In addition, the TDC, by virtue of its powers under Article 26.2 CA, commissioned a study of the situation in the football media rights sector in Spain to assess whether the current regulatory framework was the most appropriate for effective competition[7].

C 104/07 BALEARIA/BUQUEBUS

The operation consisted of Gestión Naviera S.L., parent company of the Balearia Group, acquiring exclusive control of Buque Bus España, S.A.

The Balearia Group was active principally in the sector of maritime carriage of passengers, accompanied vehicles and goods on regular lines in the Mediterranean area (traffic between the peninsular and the Balearics and between the Balearic islands) and in the South–Strait area (traffic between the Iberian peninsula and North Africa). In the latter sector it operated the Algeciras-Tangiers (since June 2003) and Algeciras-Ceuta lines (since October 2006 for passengers only). It also performed road haulage activities via subsidiaries.

Buque Bus España, S.A. was a parent company of the Buquebus Group whose capital is held by a Uruguayan company. Its activity was centred on regular maritime passenger, vehicle and cargo transport in the Strait of Gibraltar area. It currently operated the Algeciras-Ceuta line. Buquebus had a network of travel agencies, through which it sold tickets, tourist packages, coach tickets, flights, hotels and similar.

The relevant product markets were the market for regular maritime transportation of general cargo and the regular maritime passenger transport market, including within the latter that of the accompanied vehicles. In relation to the relevant geographical market the TDC examined, first, the route comprising all the lines starting and ending in Morocco and the autonomous cities of Ceuta and Melilla and, additionally, for the regular maritime passenger transport market, the Algeciras-Ceuta line in isolation.

The TDC approved the concentration provided it was subject to the condition that Balearia and Buquebus did not enter into any no-compete agreement whatsoever and that the following terms included in the sale agreement giving rise to the concentration were treated as included within the operation, as ancillary restraints:

- The non-solicitation agreement binding the seller (Buquebus) vis-à-vis the purchaser (Balearia), provided its term did not exceed two years.

- The duty of confidentiality on the seller over the information relating to the transferred undertaking, provided its term did not exceed two years.

The Council Ministers, in a Decision of 14 September 2007, concurred with the view of the TDC.

C105/07 AIR BERLIN/LTU

The operation consisted of the acquisition by Air Berlín of exclusive control over LTU. Completion of the merger (which had no Community dimension) was conditional on its authorisation by the Spanish, German and Austrian competition authorities.

[7] The report was finally issued by the CNC in June 2008. See press release at http://www.cncompetencia.es/PDFs/novedades/102ing.pdf and the report at http://www.cncompetencia.es/PDFs/OtrosInf/11ing.pdf

AIR BERLIN was an airline which operated short and medium-haul flights in Europe and to nearby tourist cities. AIR BERLIN's strategy within Spain consisted of offering regular daily flights from 17 German airports to various Spanish cities, whether direct or indirect (principally via Palma de Mallorca). It also provided maintenance and technical assistance services for aircraft in its own fleet and to third parties, in all cases at German airports and Palma de Mallorca.

LTU was a German airline belonging to the holding company LoMa. It scheduled short and medium-haul routes in Europe and long-haul flights from German airports to North America, the Caribbean, Africa and Asia. In Spain LTU operated flights from 5 German airports to 13 Spanish cities, some of which were the same as those served by AIR BERLÍN. LOMA also provided cargo services and technical assistance and aircraft maintenance services.

The TDC found that two types of relevant market should be distinguished – that of seat sales to individual passengers and that of seat sales to tour operators. The market for the sale of seats to tour operators was national, in this case German, and therefore the TDC did not focus on that market. The markets for the sale of seats to individual passengers were defined route by route. Twenty-six markets comprising routes linking German airports with Spanish destinations were considered to be affected by the operation.

After investigating the likely effects of the merger on these markets the TDC found that it should not oppose. The Council of Ministers agreed with it.

C106/07 NATIONAL EXPRESS/CONTINENTAL AUTO/MOVELIA

The operation consisted of the acquisition, following an auction process in which National Express Group PLC (NEG) was the successful bidder, of exclusive control of CONTINENTAL AUTO, S.L.U. and its subsidiaries and investee companies. The operation also gave rise to an acquisition of control of MOVELIA Tecnologías, S.L. and of the following coach station licence holders: Terminal de Autobuses de Laredo, S.A., Terminal de Autobuses de Garellano, S.L. (Bilbao station) and Estación de Autobuses de Aguilar de Campoo, S.L.

NEG heads an international coach and rail transport group, based in the United Kingdom. It had 43,000 employees worldwide, and presence in the United Kingdom, United States, Canada and Spain. In Spain NEG was present through National Express Spanish Holdings Limited, which controled 100% of ALSA Group, the leading road transport operator. ALSA had over 3,500 employees and its principal activity was the provision of road passenger transport services throughout Spain with the exception of the Canaries. It also operated 65 international routes starting in Spain and a further 11 starting in Portugal with destinations in various European countries and Morocco, and urban transport concessions in Oporto and Marrakesh. It also owned interests in 39 coach station operating licensee companies, of which 10 were under its exclusive control.

CONTINENTAL AUTO was a wholly-owned subsidiary of ACS, Actividades de Construcción y Servicios, S.A., second regular road passenger transport operator in the Spanish market and head of a corporate conglomerate with 2,340 employees. It provided permanent regular general transport services, under government licence and, to a lesser extent, special use regular transport services and occasional services. It also operated two international routes (Barcelona-Andorra and Lérida-Andorra). As ALSA, it provided repair and maintenance services for coach fleets for companies in the group and very residually, to third parties.

MOVELIA was a company set up in 2001, whose activity was the Internet selling of tickets for public passenger transport on national, regional and international lines, and preparing schedules and IT systems for that purpose.

The Council of the CNC found the relevant product market to be that of access to licences for permanent regular general road passenger transport and that the relevant geographical market was peninsular Spain. And after investigating the likely effects of the merger, it held that the operation should be approved.

At the same time, the Council found that it was necessary to ensure that, from a regulatory point of view, the competitive processes for the award of future road passenger transport licences should eliminate all obstacles to effective competition, as might be the factors potentially liable unjustifiably to benefit the incumbent licence holders. Salient amongst those obstacles was the maintenance of the "pre-emption right", consisting of the greater weight given, on renewal of the licence, to the incumbent licence holder where its bid was similar to that assessed as the best (with that "similar assessment " quantified at 5%), and the grant of extensions to the licence by a number of authorities, at the request of the licence holders. The Council committed to issue a report including regulatory proposals intended to achieve greater competition in the sector[8].

The Council of Ministers Decision concurred with that of the Council.

C 107/07 EROSKI/CAPRABO

The operation was notified by the EROSKI Group, via its subsidiary CECOSA SUPERMERCADOS, S.L., and consisted of EROSKI Group's acquisition of exclusive control over CAPRABO, S.A.

CECOSA SUPERMERCADOS, S.L. was an undertaking belonging to the EROSKI Group, whose parent company, EROSKI, S. COOP., was a cooperative registered in Spain. The EROSKI Group was active primarily in the sector of the commercial retail distribution of self-service daily consumer goods, in the form of operation of large and medium-sized commercial outlets. It also operated in the daily consumer goods wholesale distribution sector through cash & carry outlets. EROSKI had 81 hypermarkets, 632 supermarkets (482 EROSKI Center and 150 EROSKI City supermarkets), 523 franchised self-service shops and 20 cash & carry outlets (under the CASH RECORD logo). In France it had 3 hypermarkets, 18 supermarkets and 28 franchised outlets. EROSKI Group also carried on other complimentary activities, including fuel distribution (operating 45 petrol stations in Spain and 17 in France), management of travel agencies (246 branches), sports shops (39 FORUM outlets), perfume shops (197 IF outlets) and leisure and culture shops (2 ABAC outlets). The EROSKI Group obtained supplies of the daily consumer products which it then sold via its own central purchasing agency, Grupo Eroski de Distribución S.A. (GREDISA), which formed part of the Alidis/Agenor international alliance for the supply of daily consumer goods, which also included the French Los Mosqueteros group and the German Edeka.

CAPRABO was a Spanish company controlled jointly by Central de Serveis Ciéncies, S.L. and the French-capital company Caixa Capital Desarrollo, S.C.R., S.A., belonging to the LA CAIXA Group. CAPRABO was active primarily in the sector of the retail distribution of self-service daily consumer goods, with 471 outlets, the majority in the supermarket format. In terms of its supply activities, CAPRABO was a member of IFA Española, S.A. central purchasing agency.

The Council found that the relevant product markets for the merger were the self-service daily consumer goods retail distribution market and the daily consumer goods supply market. The relevant geographical markets in retail distribution and the supply of daily consumer goods were local and national respectively.

In the retail distribution market the operation represented adding to the notifying group outlets in 43 municipalities in eight Autonomous Communities. Since in the operation the resulting market share of the notifying group would immediately or in the short term exceed 30% in 30 of those municipalities, and once it had ascertained in advance where competition problems could arise, the Council made a detailed study of some specific retail distribution markets, where significant market shares and restrictions on the entry of new operators could come about as a result of the operation.

The Council dismissed the possibility that the operation could involve significant unilateral or coordinated effects in the markets analysed, and took the view that factors such as the existence of competitors with a

[8] The report was finally issues by the CNC in September 2008. See press release at http://www.cncompetencia.es/PDFs/novedades/113ing.pdf and the report at http://www.cncompetencia.es/PDFs/OtrosInf/14.pdf (not available in English yet)

strong existing presence and future prospects could act as a counterweight in those geographical areas where there would be an increase in the market share of the notifying group. Accordingly, it held that there were no grounds to object to the notified operation. The Council of Ministers Decision shared the view of the Council.

C108/07 ORONA/ASCENSORES GASTEIZ

The operation consisted of the acquisition by Orona Sociedad Cooperativa (ORONA) of all the shares representing the share capital of Ascensores Gasteiz S.L.

ORONA was a cooperative belonging to Mondragón Corporación Cooperativa (MCC), and had a presence in 85 countries. As a group, it controlled 13 Spanish companies active in the manufacture, sale, installation, maintenance and repair of lifts. Significant amongst its companies was Electra Vitoria, a leading lift manufacturer, installer and repair undertaking in the province of Álava, which ORONA acquired in 2005. ORONA also sold escalators, an activity not carried on by the company taken over, Ascensores Gasteiz.

Ascensores Gasteiz was engaged in the sale, installation, maintenance and repair of lifts exclusively in the province of Álava. It did not manufacture lifts (manufacturing being understood as the production of the components which make up a lift), and in recent years it had been installing equipment manufactured by ORONA, although, it seemed, no exclusivity agreement or contract of any kind had been signed between the companies.

The relevant product markets were those for the sale and installation of lifts, on the one hand, and for lift maintenance and repair, on the other. The Council observed a close link between the two markets since the main and almost exclusive means of access to the maintenance and repair market is a presence on the installation market. The relevant geographical markets were the territory of Spain for lift sales and installation, and the province of Álava for lift maintenance and repair.

In the lift sale and installation market in Spain, the merger did not involve a significant change in the structure of supply. But in the lift maintenance and repair market in the province of Álava, the operation consolidated ORONA's position as outstanding leader, increasing its market share from [50-60%] to [70-80%] within the province. The Council also noted that there was little dynamism in competition in the lift maintenance and repair market, exacerbated by the geographical segmentation observed.

The Council found that the operation should be made subject to compliance with certain conditions which would contribute to re-establishing the conditions of competition existing prior to the operation: ORONA should give all customers of Ascensores Gasteiz with lift maintenance contracts in force at the date of the operation the right to terminate that contract for free and should inform them of that right, and ORONA should make certain information about the maintenance contracts of Ascensores Gasteiz then in force available to all lift maintenance and repair undertakings. The no-compete and confidentiality covenants binding on the seller for a period of three years, relating to the area of the province of Álava, were treated as included in the operation, as ancillary restraints.

By Decision of 28 December 2006 the Council of Ministers approved the concentration, subject to the conditions proposed by the Council.

4. The advocacy role of competition authorities

4.1 Reports

44. The Spanish Competition Authorities have focused much of their efforts on the preparation of reports. The SDC and thereafter the CNC have throughout 2007 continued, normally at the request of the Economy State Secretary, to issue reports on draft legislation, from any ministry although predominantly from the Ministry of Economy and Finance and the Ministry of Industry, Tourism and Trade. In total, reports were written in 2007 on 45 Government bills, in which there has been analysis of the actual or

potential effects of the different regulations on competition in the markets and economic efficiency. Salient have been the reports on professional associations and the energy, media, retail, transport, tax and State aid sectors and that on emission rights for greenhouse gases.

45. One of the areas in which work has been done was the regulation of the "orientative fee scales" of professional bodies. Article 5.ñ of the Professional Colleges Act (*Ley 2/1974 de Colegios Profesionales of 13 February*) gives those bodies the power to approve purely orientative fee scales. In the opinion of the European Commission those fee scales could amount to a prohibited practice under Article 81 EC as price recommendations agreed by a professional body. The SDC therefore, in 2006, requested reports from the colleges of lawyers, engineers and architects on initiatives taken in relation to those fee scales, the last replies to which were received in 2007, and in that year raised an enquiry of the European Commission itself.

46. In particular, reports have been issued on the draft Public Procurement Act (*Ley de Contratos del Sector Público*), the draft Act on electronic access by citizens to public authorities (*Ley para el acceso electrónico de los ciudadanos a las Administraciones Públicas*), the draft Act setting up the National Postal Regulator (*Ley de creación de la Comisión Nacional del Sector Postal*), the draft Act on the Self-employed Workers' Statute (*Ley del Estatuto del trabajo autónomo*), the draft Act amending the Stock Market Act to modify the regime for public take-over bids and issuer transparency (*Ley de reforma del Mercado de Valores para la modificación del régimen de las ofertas públicas de adquisición y de la transparencia de los emisores*), the draft Act reforming the Hydrocarbons Sector Act to adapt it to Directive 2003/55/EC on common rules for the internal market in natural gas (*Ley de reforma of Act del Sector de Hidrocarburos con el fin de adaptarla a lo dispuesto en la Directiva 2003/55/CE sobre normas comunes para el mercado interior del gas natural*), and the draft Organic Act reforming the Autonomy Statute of the Canary Islands (*Ley Orgánica de reforma del Estatuto de Autonomía de Canarias*).

47. In the parliamentary context, the SDC and the CNC reported in 2007 on a total of 17 parliamentary questions, one motion and one request for information by a Member of Parliament.

4.2 State aid

48. In the field of State aid, 2007 has seen in the EU an increasing use of the categories of aid exempt from notification. This trend has been observed in the case of Spain likewise, although there are still many aid projects subject to mandatory prior notification to Brussels.

49. It is in those latter cases - where prior notification is compulsory - that the SDC/CNC has carried out an individual analysis of the applications. In 2007, the SDC/CNC examined 72 aid proposals, which were subsequently notified by the Ministry of Foreign Affairs and Cooperation to the European Commission for authorisation.

50. In 2007 the SDC/CNC also reviewed and analysed draft national legislation liable to affect the policy on State aid and which, therefore, could have repercussions in terms of competition. Internal memoranda were issued in 68 cases, relating to highly varied applications, e.g. enquiries of the competition authority relating to new draft legislation or regulations, the preparation of memoranda on specific issues and analysis of draft regulations for the grant of subsidies.

5. Relations with the competition authorities of the C*omunidades Autónomas* (the regions)

51. In the framework of the Act on the Coordination of the State and the Regions' Competences on Competition (Act 1/2002 of 21 February), the Regions have continued to set up their own competition bodies. As a result, the State Competition Authority has ceased to have jurisdiction on restrictive practices

whose effects are confined to one only of those Regions (Catalonia, Galicia, Madrid, Valencia, Aragon, the Basque country, Murcia Castilla y León, Extremadura and Andalusia).

52. The greater number of regional competition bodies in operation has meant a perceptible increase in the number of proceedings being heard under the mechanisms set out in Article 2 of Act 1/2002. Whereas a total of 38 applications were handled in 2006, that figure rose to 53 in 2007. Of the 53 sets of proceedings heard, on 15 occasions (28%) the allocation mechanism was initiated by the State and on the other 38 occasions (72%) by the Regions.

53. Article 3 of Act 1/2002 provides for the creation of the *Joint Consulting Committee on Conflicts* as a consultative body specialised in giving advice in the form of non-binding reports for the resolution of disputes regarding the allocation of competence in the application of competition rules. This Committee issued a report regarding the conflict of jurisdiction between the Region of Madrid and the State in relation to practices affecting the operation of one of the main bus stations in that city. In its report, the Committee stated that jurisdiction lays with the State administration because the scope of the case goes beyond the Region of Madrid.

54. The *Competition Council*, the body designed to facilitate participation and cooperation between the State and the Regions, met featuring consultation on the draft Royal Decree approving the implementing regulations of the new Competition Act. Approval was given organisation and operation rules of the Consultative Committee on Conflicts.

55. During 2007 the use of the *Network of Cooperation of the Spanish Competition Defence Bodies (REC)* was encouraged. REC is a tool permitting to find practical solutions in the shared sphere, in relation to proceedings already commenced, disseminating and sharing information between the competition authorities, and in the bilateral sphere, within the allocation mechanisms.

6. International Cooperation

The CNC promotes and participates in the activities of the Ibero-American Competition Forum, which comprises the competition authorities of many Ibero-American countries and Portugal and Spain. The Forum's annual meeting held in Mexico was devoted to discussing competition in the retail distribution sector. A new website, the *Red Iberoamericana de Autoridades de Competencia, http://www.redeiac.org*), enables the Forum to publicise its activities and the most important decisions of its members, to intensify its competition advocacy initiatives and to set up an internal mechanism for consultations between member authorities.

Regarding bilateral cooperation, the Iberian Competition Encounter (*Encuentro Ibérico de Defensa de la Competencia*) held in Portugal this time looked at the innovations introduced in the Spanish competition system by the Spanish Competition, at priority-setting mechanisms for competition authorities, and at competition issues regarding the Iberian electricity market.

7. Priorities and resources

7.1. Priorités

56. The First Action Plan of the CNC[9], issued in November 2007, states that the CNC's mission is that of enforcing competition rules in Spain, and translates this general objective into a series of more specific goals:

- Make the CNC a solid and well organised institution, endowed with modern resources and highly qualified personnel;
- Ensure the maximum compliance with the Competition Act, by effectively combating anticompetitive practices;
- Foster competition in sectors where it is restricted and promote the understanding and study of competition matters;
- Allocate resources efficiently so that the CNC can respond nimbly to society's demands in the competition area increasing the quantity and quality of our actions, and disseminate CNC activities as widely and transparently as possible in order to the benefits of competition be better understood by all;
- Pursue, at the national level, coordination and cooperation with all other authorities who play an active role in defending competition;
- Actively participate in international competition forums and contribute to strengthening the international competition system.

57. These specific goals are to be achieved through the implementation of actions also outlined in the Plan and grouped around the principal functions of the CNC stated in law.

58. In the past, both the SDC and the TDC's activities used to be more reactive than proactive. A vast majority of the interventions were driven by complaints or merger notifications. But the CNC aims to become more proactive. Some data may be of interest: during the first eight months of 2007, only 13% of the antitrust cases were initiated *ex-officio*. From September 2007 to February 2008, this percentage had climbed up to 46%. Also, the number of inspections has multiplied over the past few months.

59. The reform, through the merger of the two former competition authorities, the simplification of procedures, a new *de minimis* legal provision, higher merger notification thresholds, etc. will allow to use resources more efficiently in the sanctioning and merger control proceedings. Two important features of the new Competition Act, the extended role of competition advocacy and the commitment to fight hard core cartels through new instruments such as the leniency programme, have led CNC to devote more resources to these activities: two new Departments have been created within the organization, the Cartels and Leniency Unit and Advocacy Division, in charge of the development of such functions. Also, a new Chief Economist Unit has been set up.

60. No formal criteria for prioritization have been agreed upon yet. The CNC'S Action Plan for 2008 and 2009 sets priorities according to the importance of competition problems identified -damages to consumers or public interest aroused-.

In its initial stage, the CNC has decided to concentrate attention on the fight against hard-core cartels and, in the context of its advocacy role, on liberalised sectors of great weight in the

[9] See the CNC's Action Plan for 2008-2009 at *http://www.cncompetencia.es/PDFs/novedades/LaunchPlan.pdf*

Spanish economy such as energy and telecommunications, sale-purchase of certain types of audiovisual contents, liberal professions services, transport, public procurement and regional regulations on retail activities.

7.2 Resources (as of 31 december 2007)

Total staff: 155
No. of staff working on competition enforcement: 155
Non-administrative staff: 81
Percentage who are lawyers: 41%
Percentage who are economists: 30%
Percentage who are others: 29%
No. with PhDs in economics: 3 (plus 14 economists of the Public Administration, the highest economy-specialised body of Spain's Public Administration)
Average age of staff: 43,5
Average tenure: 5,5 years
Budget: €10 million
Amount spent on salary: € 7 million
No. of staff who left: 9
No. of staff who retired: 0
No. of staff who joined in 2007: 20
No. who have spent at least 5 years in private practice: 6
No. of staff working on mergers: 43
No. of staff working on cartels or dominance: 71
No. of staff working on other matters: 41
Percentage of staff working on mergers: 28%
Percentage of staff working on cartels or dominance: 45%
Percentage of staff working on other matters: 26%