

**Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE**

**Annual Report on Competition Policy Developments in Spain**

-- 2016 --

**21-23 June 2017**

*This report is submitted by Spain to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 21-23 June 2017.*

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## *Executive Summary*

1. During the year 2016 the competition enforcement record of the CNMC has been satisfactory. The results show that the long term Spanish strategy to fight anticompetitive behaviour works, that changes in institutional architecture have not modified this strategy – on the contrary, CNMC has strengthen it – and that the institution is drilling new fields of action that adapt to the new needs of society.
2. Cartel enforcement continues to be the top priority of the CNMC in the field of anticompetitive conduct, since cartels constitute the most harmful anticompetitive practices to the economy, both for consumers and undertakings. In 2016, 9 infringement decisions regarding cartels were issued, 3 involving anticompetitive conduct not related to cartels and 2 decisions on non-compliance, which brings a total of 14 decisions.
3. As a result, total fines reached € 227 million, of which € 218 million (96%) correspond to cartels, € 7 million to other type of infringements and the remaining amount to non-compliance. Total sanctions were lower than in 2015, but it is necessary to bear in mind that 2015 was a record year in terms of fines (550M€) as well as in the number of cartels uncovered.
4. In 2016, cartel prosecution and public procurement have continued to be a priority. Fighting cartels implies making an intensive and coordinated use of diverse tools: leniency programs, dawn raids, IT forensics, training courses, communication and public relations and so on. Some of these cartels were also engaged in bid rigging, causing a direct negative effect on public procurement and public finances. For that reason during 2016, the Competition Directorate of the CNMC took the strategic decision to boost its fight against bid rigging creating a working group inside the Competition Directorate in order to collect information to detect bid rigging cases, conduct screening tests with this information in order to detect such cases, provide training to tendering bodies in order to detect indicia of bid rigging, etc.
5. As mergers and acquisitions are concerned, in 2016, 104 mergers were notified, as compared to 91 in 2015 and 84 in 2014, thus consolidating the growing trend in the notification of these transactions.
6. The Advocacy area in the CNMC continues to build a strong body of analysis that focuses on how regulation should be designed to avoid restricting unfairly and unwisely competition in the markets. The CNMC has continued acting as a consultative body on new draft legislation issuing 13 reports that cover legislative proposals in a variety of areas, including public procurement, transports, etc. The annual report on public aid should also be underscored, as well as other sectorial studies referred to the methodology for market studies and a report concerning the regulation of the market for retail distribution of road fuels through unmanned petrol stations. Two public consultations were also launched one on the preliminary results of the study of new models of service delivery and the sharing economy and another on the Spanish university system.
7. Furthermore, the CNMC has continued contributing to the enhancement of competition by challenging in courts those acts of public administrations that include non-justified restrictions to competition. In particular, local regulation related to taxi services (as in year 2015) and regional or local regulations establishing barriers to the construction of new large shopping areas were challenged in 2016.
8. The CNMC has also maintained an intense institutional activity in 2016, particularly in the international sphere. The aim of this activity is to contribute to mutual

learning through the exchange of experiences and the identification of best practices, as well as to enhance coherence in the application of competition policies. Although collaboration with European Union member countries' authorities, as well as the European Commission is an overarching goal, reinforcing cooperation with Latin America countries, as well as in international and global fora, are also high priorities for the CNMC.

## 1. Changes to competition laws and policies, proposed or adopted

9. In 2016, neither changes on competition laws and policies have been adopted, nor have new proposals been launched.

## 2. Enforcement of competition laws and policies

### 2.1. Cartels

10. Competition law has been applied to agreements which were clearly damaging the functioning of the Spanish markets. As already mentioned, in 2016, 9 cartels have been dismantled by the CNMC, with fines totalling €218 million. After deducting exemptions and reductions applied to leniency applicants (€68.8 million), total fines have been €150 million.

11. The 9 decisions issued on the cartel front concerned secret agreements between undertakings no to compete, which entailed price fixing, sharing of markets and customers, and the exchange of commercially sensitive information, among others.

12. The case with the highest sanctions (a total €130 million) involved several manufacturers of absorbent products for incontinence targeting adults (adult diapers), including individual fines imposed on 4 executives who directly participated in the cartel. A €68 million fine was waived for the leniency applicant.

13. This case originated from the application for leniency of one undertaking involved in the cartel, which led to the detection of this cartel by the CNMC. The Board of the CNMC reached the conclusion that several manufacturers, grouped together as Grupo de Trabajo de Absorbentes of FENIN (A&A -now P&G ESPAÑA-, INDAS, SCA, HARTMANN, ONTEX -now ONTEX ID-, TEXPOL/ALBASA and BARNA IMPORT), had engaged in cartel activity by fixing selling prices of the adult diapers funded by the Spanish National Health Service, with the collaboration of the trade association FENIN. In particular, these undertakings took concerted steps aimed at supplying exclusively in the pharmacy market, at the expense of the public market, from December 1996 to -- at least -- January 2004, according to evidence gathered during the investigation. Mention should be made to the fact that urinary incontinence constitutes a serious health problem in Spain due to its severity, impact, rate and scale, for it affects 2.5 million people. To sum up, this case stands out not only for the amount of the sanctions, but also for the long duration of the cartel, its sophisticated organisation and its direct effect on the public coffers.

14. The CNMC also imposed fines totalling €46 million on PROSEGUR and LOOMIS (and two of its executives) for anticompetitive practices in the market of transport and handling services of valuable goods, in particular, cash (notes and coins). This infringement was orchestrated through (i) the sharing between both companies of the transport and handling services of cash provided to certain customers who were deemed

strategic by the undertakings (this sharing of the services provided to such customers was carried out according to the type of service or by geographical area), as well as of (ii) the sharing of other customers who requested the aforementioned services. The main effects of these practices were the exclusion of competitors, price rises and the respect of both companies' market shares. The primary victims were large retail commercial distribution companies and national or local financial entities, which require a national coverage of these services. Other relevant customers affected by these anticompetitive practices were public concession managers or publicly owned entities that handle vast amounts of cash, especially collective passenger transport entities.

15. Similarly, 23 companies active in the manufacturing and supply of cement and concrete were sanctioned a total of €29.17 million for cartel activity. In the concrete market, the Board of the CNMC found evidence of three infringements that affected three regions of Spain (Northeast, Centre and South). The sanctioned undertakings engaged in the exchange of commercially sensitive information, market sharing and price agreements between 1999 and 2014. As regards the cement market, the investigation found evidence of the existence of a market sharing agreement and information exchange between four competitors, involving prices, strategies, customers and production volumes between 2013 and 2014.

16. In the area of public tenders, the CNMC sanctioned 4 companies and several executives of these firms for agreements and concerted practices consisting of market sharing, the fixing of prices and other commercial terms, and the exchange of commercially sensitive information, in relation to the supply of railroad switches to ADIF, the state-owned company charged with the management of most of Spain's railway infrastructure. In order to implement these agreements, the 4 undertakings jointly bid for tenders as temporary joint ventures (or UTES, under Spanish law), even though they could have bided for tenders in isolation and competitively.

17. Also in the area of public procurement, 15 companies specialised in international removal services were fined €4 million. The Board of the CNMC found evidence that these removal companies had put in place a so-called "removal agreement" for more than 15 years. Accordingly, they regularly met at lunches and dinners in which the companies agreed to fix prices, carve up the market and exchange sensitive information. The cartel prevented competition between companies regarding international removals services for employees of several Ministries.

18. A cartel of the dealers of CHEVROLET cars (€1.7 million) and another one involving dealers of the brand VOLVO (€1.2 million) were also fined.

## 2.2. Inspections

19. The CNMC's inspection record continued unabated during 2016: in the framework of 6 investigations, 20 companies from different sectors were inspected, with the participation of more than 100 investigators. This reflects the CNMC's commitment to fight cartels and ensures a continuous flow of cases in this key area of competition enforcement.

## 2.3. Fighting bid-rigging in public procurement

20. In 2016, the Competition Directorate of the CNMC took the strategic decision to boost its fight against bid rigging (that is, restrictive agreements between competitors who bid for contracts –competition for the market–), a project started some months before in

2015. To this end, a working group inside the Competition Directorate was created to collect information in order to detect bid rigging cases conduct screening tests with this information in order to detect such cases, provide training to tendering bodies in order to detect indicia of bid rigging, etc.

21. In this context, in 2016:

- The working group has provided 14 training sessions, with the participation of over 750 civil servants actively involved in public tenders with the aim of training them on how to detect indicia of potential bid rigging.
- A check list has been released to disseminate bid-rigging detection tools among bidding bodies and to encourage their collaboration with the CNMC.
- Screening: the working group has strived for gathering data on public tenders from several public institutions in order to develop screening and data analysis techniques which could help in detecting such prohibited agreements. The ultimate goal is to develop automated detection tools that show anomalies in the bidding patterns of firms that could lead to the identification of anticompetitive behaviour. The working group has gained access to information on public tenders stored in the electronic Procurement Platform of the Spanish public sector. With the help of data analysis and visualization tools this information has been processed to allow detection of bid rigging.

#### 2.4. Leniency program review

22. In 2016, after eight years of practical experience operating the leniency program, the CNMC undertook an assessment effort of this program.

23. To this end, a questionnaire was sent to the law firms that have submitted a greater number of leniency applications, both at the national and European level. Issues covered in this questionnaire were the identification of the key elements that determine whether to submit a leniency application, the analysis of the actual working of the submission of applications, the processing and analysis of applications, general assessment of the program and possible improvements that could be introduced.

24. After receiving the answers to this questionnaire, on 19 December 2016, a conference was held at the CNMC to assess the results of these responses and to exchange views on potential refinements of the program that may improve its effectiveness.

#### 2.5. Other type of sanctions in the fight against cartels

25. Sanctions to managers for breaching the law, pursuant to Article 63.2 of the Competition Act.

Even though this legal provision entered into force in 2007, its use as a deterrent in the fight against cartels gained momentum in 2016.

In particular, 3 decisions were issued during 2016 that involved 15 sanctions to managers pursuant to article 63.2 Competition Act totalling €147,150 in fines.

One of these executives benefited from the leniency program and was exempted from paying a fine of €15,000.

26. The disqualification from public tenders for the infringement of the Competition Act, was included in the Spanish Public Procurement Act (Ley de Contratos del Sector Público) in October 2015.

Although the possibility of using this ban entered into force in 2015, the CNMC has adopted a rather cautious approach in its application until a clear legal framework is developed.

Finally in 2016, an explanatory note on how the CNMC conducts its inspections was published to let undertakings know in advance what to expect from CNMC inspectors if they are obliged to submit to an inspection, thus making more predictable how inspections are conducted for all parties concerned.

## 2.6. Other anticompetitive actions

### 2.6.1. Prohibited practices

27. Apart from cartels, the CNMC has sanctioned other prohibited practices under the Spanish Competition Act.

28. Among these, it should be noted that 6 companies active in the market for typical Spanish nougat products (*turrón*) were penalized for reaching agreements on the exchange of information on prices, customers and other commercially sensitive data. The 6 companies, which represent 58% of the total production, agreed to share the supply of nougats to distribution companies by granting quotas from April 2011 until November 2013. The total sanction imposed on companies exceeds €6 million.

29. In intellectual property, the CNMC fined the Spanish Commercial Broadcasting Association (AERC) €190,000 for having carried out anti-competitive practices. This association tried to put pressure on intellectual property management rights entities (AGEDI and IEA) by promoting the boycott of the effective payment of invoices for the broadcasting rights. In addition, AERC sought to distort the negotiation of a new agreement with these companies, which collected the fees for the commercial broadcasting of phonograms to be paid by its associates. Thus, as of April 2011, in compliance with the recommendations of AERC, a large part of its associates stopped paying for several months to the management entities, with the consequent loss of revenue by AGEDI and AIE.

30. In 2016, only one case of abuse of the dominant position was decided; automatic washing machines maintenance. Istobal's refusal to supply spare parts and technical information to independent technical assistance services (SAT) which were not part of its authorized network without justification, was sanctioned. In addition, the market for repair and maintenance services of machinery for car wash centres was geographically shared.

### 2.6.2. Penalties for non-compliance

31. In 2016, the CNMC issued 2 sanctioning decisions in the framework of the 30/92 Act (SCN) for non-compliance with obligations in the Competition Act (LDC).

32. Urban Science was fined €53,597 for providing incomplete, incorrect, misleading and false information in the course of the investigation in the case S/0482/13 Fabricantes de automóviles.

33. The other decision sanctioned Viajes Halcón, S.A. and Viajes Barceló, S.L. undertakings for breaching a previous decision of the Competition Authority in the case 476/99 AGENCIAS DE VIAJE, for breaching stand still obligations and creating UTE Mundosenior.

INFRINGEMENT DECISIONS 2016								
Case	Decision date		Exemption or reduction	Cartel	Other horizontal conduct	Abuse of dominant position	Breach of conditions imposed by decisions	Providing misleading or false information
S/0455/12	GRUPOS DE GESTIÓN	12/05/2016	324,13.,00 €		X			
S/DC/0504/14	AIO	26/05/2016	128,854,152.00 ,	68,562,575€	X			
S/DC/0505/14	CONCESIONARIOS CHEVROLET	28/04/2016	1,722,467.00 €		X			
S/DC/0506/14	CONCESIONARIOS VOLVO	12/07/2016	1,280,409.00 €		X			
S/DC/0519/14	INFRAESTRUCTURAS FERROVIARIAS	30/06/2016	5,650,483.00 €		X			
S/DC/0525/14	CEMENTOS	05/09/2016	29,316,755.00 €		X			
S/DC/0538/14	SERVICIOS FOTOGRÁFICOS	15/12/2016	14,433.00 €	2,083.00 €	X			
S/DC/0544/14	MUDANZAS INTERNACIONALES	06/09/2016	4.394.390	297,388.00 €	X			
S/DC/0555/15	PROSEGUR - LOOMIS	10/11/2016	46,501,016.00 €		X			
Total of cartels			218,058,238.00 €					
S/DC/0503/14	FABRICANTES DE TURRON	07/04/2016	6,123,590.00 €			X		
S/DC/0518/14	AERC	07/04/2016	190,000.,00 €				X	
S/DC/0540/14	ISTOBAL	30/06/2016	638,770.00 €			X	X	
Other antitrust infringements			6,952,360.00 €					
SNC/007/16	AGENCIAS DE VIAJES	29/09/2016	1,838,424.00 €				X	
SNC/008/16	URBAN	07/04/2016	53,597.00 €					X
Total antitrust infringement cases			1,892,021.00 €					
Total			226,902,619.00 €	68,862,046.00 €				
Total after deducting exemptions and reductions			158,040,573.00 €					

## 2.7. Mergers

### 2.7.1. Notifications

34. In 2016, 104 mergers were notified, as compared to 91 in 2015 and 84 in 2014, thus consolidating the growing trend in the notification of these transactions.

35. The pre-notification procedure was used in 94 of the 104 operations, a fact that demonstrates the usefulness of this instrument for both the notifying companies and the CNMC. Moreover, 54 transactions were notified using the simplified procedure, thus reducing the workload and the reporting requirements for the notifying parties and speeding the approval of these mergers.

### 2.7.2. Decisions

36. The CNMC reviewed a total of 102 concentrations in 2016, 96 of which were cleared within the first phase of merger control proceedings without commitments and 5 with commitments. One notification was shelved due to its withdrawal by the notifying parties. None of the notified mergers led to a second phase of proceedings.

37. In what follows a brief of the description of the transactions that were cleared subject to commitments is provided.

### 2.7.3. Approved with commitments

#### *JUST EAT/LA NEVERA ROJA*

38. This transaction consisted in the acquisition of the sole control of LA NEVERA ROJA by JUST EAT, through the purchase of its whole share capital.

39. Both undertakings provide food delivery management services on the internet and therefore this concentration affects a two-sided market with two sources of demand: restaurants and consumers wishing to order food delivered to their homes/workplaces.

40. Both operators were close competitors and the operation strengthened the network economies enjoyed by the new undertaking, which could be difficult to replicate by third parties. However, the CNMC took into account that food orders managed by the merging parties represent a very small part of the market for food delivery in Spain given the significant importance of phone orders.

41. In any case, in order to reduce the barriers for other competitors, the resulting entity submitted commitments in the first phase of the merger proceedings, which made it possible for the CNMC to approve the concentration. In particular, the new undertaking renounced imposing exclusivity clauses with restaurants and committed not to link the commissions applied to restaurants to possible situations of exclusivity and not to penalize those restaurants that join third platforms.

#### *BIMBO/PANRICO II*

42. The acquisition of the whole share capital of PANRICO by BIMBO entailed significant horizontal overlaps in the market for bread production, where BIMBO was the leading operator and PANRICO the second one. This operation had been previously raised before the CNMC, although on the previous occasion the owner of PANRICO, the investment fund OAKTREE, proposed to keep the sliced bread business, in order to avoid

competition concerns arising from the overlap in that market. However, the solution was considered inadequate given the owner's limited experience in this business segment.

43. On this second occasion the parties suggested as a remedy the sale of the sliced bread to a third party with market experience. To this end, ADAM FOODS, a leading company in the Spanish biscuit market, was selected as a candidate to supply the bread and bread substitutes business with the manufacturer's brand.

44. This commitment was proposed as a 'fix it first' solution, with the aim of anticipating solutions to potential competition problems. To sum up, given the potential risks of the merger for effective competition in those markets, BIMBO offered, inter alia, the following commitments:

- -the sale to ADAM FOODS of two factories and a bread-production line, with the aim of providing this firm with sufficient productive capacity;
- -the signing of a manufacturing contract whereby BIMBO will supply ADAM FOODS with bread packaging in the initial stages of its entry into the business, granting it flexibility and production volumes in addition to its own production capacity.

45. At the same time, in order to reduce the possible dependence generated by this contract, it also included limits on the volumes of manufacture and a price evolution that discouraged this possible dependence.

46. After considering the commitments submitted as sufficient, the Board of the CNMC approved the concentration subject to the fulfilment of these conditions.

#### *GAS NATURAL FENOSA / GLP REPSOL BUTANO-ACTIVOS*

47. This transaction involved the acquisition by GAS NATURAL FENOSA of piped liquefied petroleum gas (LPG) supply points belonging to GLP REPSOL BUTANO used for the transformation of LPG into natural gas.

48. The bringing together of the distribution networks in the new natural gas discharges and the supply by the distributor under the same business group, led the CNMC to conclude that this concentration could pose a significant risk to effective competition in the market for the supply of natural gas to households and commercial customers. In particular, there was a potential risk to competition in new gas discharges in those areas where the acquiring group was also a commercial distributor (who operate under natural monopoly conditions following municipal administrative permits) or where it already owned a high market share in the retail market for gas supply. In order to mitigate this risk, GAS NATURAL FENOSA presented a number of commitments:

- -on the one hand, on the non-performance of offers or supplies in new registrations during a given period of time, and
- -on the other hand, on the prohibition of providing information to competitors about supply points processed and to customers whose supply was going to be switched to natural gas.

49. The CNMC cleared the proposed concentration subject to the fulfilment of these conditions.

50. Two similar operations were also cleared after REPSOL exited the LPG supply points business.

*Other relevant concentrations*

51. Other transactions that led to a comprehensive analysis by the CNMC, were
- -HELIOS/IDC, concerning the provision of private health care services,
  - -CONTINENTAL/VALEO, in the market for the manufacture of automotive components,
  - -DAIMLER/HAILO/MY TAXI/NEGOCIO DE HAILO, in the digital economy,
  - -HERALDO/PEASA, related to regional press advertising,
  - -DIEBOLD/WINCOR, involving the manufacture of ATM ,
  - -GLINTT/ACTIVOS ALLIANCE HEALTHCARE, dealing with computer software, and
  - -CONSEUR/ACTIVOS CATHISA, in the waste treatment sector.
52. As regards the two transactions dealing with online intermediation platforms (DAIMLER/HAILO/MY TAXI/NEGOCIO DE HAILO and JUST EAT/LA NEVERA ROJA), the merging parties alleged that there was no legal obligation to notify them to the CNMC according to market share thresholds. The CNMC concluded that the product markets were narrower than those advanced by the merging parties, taking into account the specificities of online intermediation services, such as limited substitutability with other traditional services. In any case, when assessing the effects of these mergers on effective competition, the CNMC took into account the competitive pressure exerted by traditional services, as well as the potential global growth of these new online intermediation markets.
53. It should also be pointed out that in two of the above mentioned mergers (DAIMLER/HAILO/MY TAXI/HAILO BUSINESS; CONSEUR/CATHISA ASSETS) the notifications of the transactions took place as a result of the ex officio request of the Competition Directorate. In fact, in the CONSEUR / ACTIVOS CATHISA case, the deal was executed prior to its notification and approval, contrary to what is required under the Competition Act, which led the CNMC to initiate proceedings for fining CONSEUR in this regard.
54. Lastly, regarding compliance with the duty of the merging parties to notify to the CNMC transactions that meet certain thresholds, the Competition Directorate opened 8 ex officio investigations in 2016 to verify whether such duty had been breached. For the moment being, only one proceeding is pending (the one already mentioned involving CONSEUR).

**2.8. Sectors and Market Monitoring**

55. In 2016, the Competition Directorate committed itself to a greater scrutiny of the following sectors:

*2.8.1. Telecommunications and pay television*

56. During 2016, the Telecommunications Directorate of the CNMC did not issue new ex ante regulation that had a significant impact on the dynamics of the market, making coordination with the Competition Directorate in this regard less necessary than in the previous year.

57. However, regarding Competition Directorate cases, coordination focused on the quantification and allocation of the costs of the football television channels that made up

the wholesale offer that TELEFÓNICA committed to offer competitors, in the context of the monitoring exercise of the commitments offered in the TELEFÓNICA/DTS merger case.

### *2.8.2. Football TV rights*

58. In May 2016, the CNMC released its report on the system for the sale of TV rights of the Spanish Football League. Moreover, a monitoring exercise was carried out regarding the implementation by the Spanish Football League Association (LNFP) of the agreements of with third parties that dealt with football TV rights.

59. Given that football TV rights for the Spanish Liga have been awarded until June 2019, no significant events are expected in this area during 2017.

### *2.8.3. Digital economy*

60. In 2016, coordination with the European Commission intensified, particularly as regards the ongoing e-commerce sector inquiry conducted by DGCOMP. The CNMC stuck to the agreement reached by the competition authorities of the Member States (within the framework of the European Competition Network -ECN-) in the field of online hotel booking platforms, whereby Member States would abstain from initiating investigations for one year until a monitoring exercise on the effects of the commitments already adopted in investigations by other Member States has been conducted.

61. In any case, the two main online hotel booking platforms, Booking.com and Expedia, have unilaterally amended their contracts for the Spanish market in line with the commitments reached with the competition authorities of France, Italy and Sweden.

62. In addition, as already mentioned before, the CNMC placed special emphasis on the strict adherence of notifying firms to market share thresholds concerning mergers dealing with the digital economy (cases JUST EAT/LA NEVERA ROJA and MYTAXI/HAILO), in order to ensure their proper supervision.

63. The Competition Directorate also conducted an assessment of the new app developed by the majority of Spanish banks enabling immediate money transfers between individuals via their smartphones, with a view to allow online purchases in the future.

64. Lastly, the previous activity has been accompanied by an intensification of CNMC's participation in international conferences on the application of competition rules to the digital economy.

### *2.8.4. Intellectual property*

65. The Competition Directorate has held several meetings with the Intellectual Property Commission in order to exchange information and views on the implementation of the new tariff regulation for intellectual property rights (Ministerial Order ECD/2574/2015, of 2 December). In 2017, this joint work will continue in order to provide the Intellectual Property Commission with economic tools to handle complaints against the entities that manage intellectual property rights, complementing the technical analysis this Commission will carry out.

### *2.8.5. Financial sector*

#### *ATMs Report*

66. As mandated by the Royal Decree Act 11/2015, October 2th, that regulates fees for the withdrawal of cash from ATMs, the CNMC released a report on the agreements or decisions reached by banks on the level and application of such a fee.

67. This report analysed the structure of the market and the content and implementation of multilateral decisions, agreements and alliances between banks as well as the effect of these on the fees charged between banks and between banks and end users of ATMs.

#### *Derivatives*

68. In April 2016, the Competition Directorate initiated proceedings regarding potential restrictive practices in the market of interest rate derivatives used as a risk-hedging instrument for syndicated loans, an investigation which is still ongoing.

#### *Others*

69. The Competition Directorate is also investigating the working of the market for access to ATM networks and agreements for the development of new means of payment.

#### *Professional services*

70. In 2016, the CNMC initiated disciplinary proceedings against several bar associations following a complaint filed by Bankia regarding the fees recommended by these associations on lawsuits against Bankia. The case is still under investigation.

71. In this area, it is also worth noting the work carried out by the regional competition authorities in Spain, for they deal with the complaints against professional associations whose effects on competition are limited to their region.

## **2.9. Other Activities**

### *2.9.1. Promotion of the electronic administration in the processing of competition cases*

72. In 2016, with the close help of the IT Unit of the CNMC, the CNMC undertook the necessary steps to implement the complete electronic management of proceeding in order to comply with the new Administrative Proceedings Act 39/2015.

73. Currently, virtually all new proceedings are handled electronically, which entails the receipt and notification of documents through a dedicated website.

### *2.9.2. Cooperation with regional competition authorities in Spain*

74. In 2016, the CNMC signed a collaboration agreement with La Rioja region of Spain, with the purpose of improving the application of competition law through the mutual exchange of information. It should be taken into account that the CNMC signs this agreement with the government of those Spanish regions that have not put in place its own regional competition authority.

75. Moreover, the Working Group between the CNMC and the regional competition authorities of Spain met in Bilbao in order to analyse the allocation of cases and to exchange information on topics of common interest, such as non-regulated collaborations and the future course action of the CNMC regarding case allocation.

76. Collaboration between competition authorities in Spain also took place in the area of inspections. In particular, the CNMC requested collaboration from regional authorities for conducting 5 inspections and assisted a regional competition authority in a regional dawn raid. In addition, a session focused on how to conduct inspections was organised by the CNMC and attended by around twenty inspectors from different Spanish regions.

## 2.10. Courts

77. The CNMC's decisions can be appealed before the Audiencia Nacional (AN), and the Judgments of the Audiencia Nacional may be reviewed in cassation by the Tribunal Supremo. It is relevant to mention that each appeal and judgement corresponds to each sanctioned company that appeals, so that a single sanctioning file of the NCA's with one decision addressed to several undertaking gives rise to as many judgments as companies challenged the decision.

78. In 2016, the AN resolved on 94 different appeals (corresponding to 26 different NCA's decisions) of which 16 (17%) were rejected, 13 (13,8%) accepted, and 54 (57,4%) partially accepted. Besides, the AN decided on 11 appeals that the CNMC resolution was issued once the maximum period of resolution of the file was exceeded. Most of the partially accepted decisions were related, not to the substance, but to the amount of the fine.

79. It has to be reminded that in January 2015 the Spanish Supreme Court issued a series of judgements on the fine methodology of the NCA that is affecting all NCA's previous decisions on fines. According to Supreme Court case law, the legal maximum of 10% in Spanish competition Act should be interpreted as an upper limit of a range of fines, not a cap or a levelling threshold. Besides, confirming the NCA's position, the total turnover should be understood as total turnover (and no turnover in the market affected by the infringement, as interpreted by the National Court). This judgement continuous to be in the origin of most of the partially accepted appeals that are being decided again by the NCA in order to fix a fine according to the Supreme Court criteria on the legal maximum.

80. In 2016, there have been 66 Supreme Court judgements related to 22 different cases. The Supreme Court granted the appeal in 5 cases corresponding to 3 different NCA'S decisions (7,6%). Three sentences annulled the AN previous sentence according to NCA's criteria (4,5%). The remaining cases were partially accepted exclusively as regards the amount of the fine (88%), due to judgement related to the fine methodology quoted above.

## 3. The Role of Competition Authorities in the Formulation and Implementation of Other Policies

81. The CNMC counts on very powerful tools to act against anti-competitive legislation compared to other Competition authorities. It also has gained a lot of experience during the last decade on advocacy issues thanks to a specific department. Furthermore, the fact that the institution also supervises and regulates several core sectors

such as energy, telecoms, postal or transport makes the institution particularly privileged to go beyond pure enforcement.

82. Through its advocacy role, the CNMC promotes and encourages a competitive environment in the Spanish economy. To achieve this goal, the CNMC employs several tools: dissemination of competition benefits, promotion, training and analysis, as well as recommendations to improve the regulation and a more pro-competitive behaviour of Public Administrations. Among the instruments used for these advocacy functions it is worth highlighting reports on draft legislation; capacity to challenge in courts Public Administrations' anti-competitive decisions; reports and studies of economic sectors, as well as guides and recommendations. The communication strategy also plays an important role to achieve the institution's objectives.

### 3.1. Reports on Draft Legislation

83. According to article 5.2 a) of Law 3/2013, of 4 June, establishing the National Authority for Markets and Competition, the CNMC acts as a consultative body with the capacity to make proposals and recommendations to the different Public Administrations regarding draft legislation.

84. Through these reports, the Advocacy Department analyses any possible restriction to competition included in the draft legislation under the necessity and proportionality criteria, and recommends less restrictive alternatives to achieve policy objectives. The ultimate goal for the CNMC is to improve the impact on effective competition of new regulation and to build, therefore, a more pro-competitive and economically efficient regulatory framework.

85. These reports on draft legislation are approved by the CNMC council in response to the request of the body proposing the draft legislation, and are published on the CNMC website. In 2016, up to 13 reports were issued. In general, although the reports refer to the most diverse aspects of the normative activity of the public sector, three themes are worth mentioning:

- Professional associations known as Colegios Profesionales (which will hereinafter be referred to as "Professional Colleges" or "Colleges"): several draft Royal Decrees were reported for the approval of General Statutes of Professional Colleges, among other, agro and industrial engineers and economists. From the CNMC's point of view all collegial organisations are urged to review their internal rules (bylaws, deontological codes, internal regulations and other norms governing their operation) to bring them into line with the new regulatory framework and avoid elements that may restrict competition in the market limiting access to exercise of their professional activities.
- Agri-food and environmental sectors: several reports were issued in different areas: agriculture, fisheries and food. CNMC defends the importance of examining the criteria of necessity, proportionality and minimum competitive constraint in relation to requirements, procedures and other administrative burdens.
- Technical inspections of vehicles: two regulatory projects related to the technical inspection of vehicles were informed, each of them aimed at regulating one of the pillars of the technical inspection system: on the one hand, the periodic inspection of vehicles, and on the other hand, the roadside inspection of commercial vehicles. Both highlight the need for liberalization by eliminating restrictions on

access and exercise, including unjustified restrictions on the type of personnel providing services at fixed ITV stations.

	<b>2016 Reports on Draft Legislation (IPN)</b> <i>The names of the reports refer to the Spanish title of the draft regulation analysed.</i>	
<a href="#">IPN/CNMC/001/16</a>	P.O.M. DE VALORIZACIÓN DE MATERIALES NATURALES EXCAVADOS.	25/02/2016
<a href="#">IPN/CNMC/002/16</a>	P.R.D. SECTOR CUNÍCOLA	25/04/2016
<a href="#">IPN/CNMC/003/16</a>	PROYECTO DE R.D. SOBRE DECLARACIONES OBLIGATORIAS A EFECTUAR POR LOS FABRICANTES DE LECHE LÍQUIDA ENVASADA DE VACA.	03/03/2016
<a href="#">IPN/CNMC/004/16</a>	R.D. POR EL QUE SE APRUEBAN LOS ESTATUTOS GENERALES DE LOS COLEGIOS OFICIALES DE INGENIEROS AGRÓNOMOS Y DE SU CONSEJO GENERAL.	07/04/2016
<a href="#">IPN/CNMC/005/16</a>	P.R.D. ESTATUTOS CONSEJO GENERAL ECONOMISTAS	05/05/2016
<a href="#">IPN/CNMC/008/16</a>	R.D. POR EL QUE SE APRUEBAN LOS ESTATUTOS DEL COLEGIO OFICIAL DE INGENIEROS DE MONTES.	19/05/2016
<a href="#">IPN/CNMC/010/16</a>	P.R.D. POR EL QUE SE DESARROLLA LA LEY 6/2015 DE DENOMINACIÓN DE ORIGEN E INDICACIONES GEOGRÁFICAS PROTEGIDAS DE ÁMBITO SUPRAAUTONÓMICO.	21/06/2016
<a href="#">IPN/CNMC/011/16</a>	P.O. POR LOS QUE SE DETERMINAN PARA EL AÑO 2015 LOS COSTES TIPO APLICABLES A COSTES SUBVENCIONABLES REGULADOS EN R.D. 170/2009 Y R.D. 362/2009 SOBRE COMPENSACIÓN AL TRANSPORTE MARÍTIMO Y AÉREO DE MERCANCIAS EN LAS ISLAS CANARIAS	07/07/2016
<a href="#">IPN/CNMC/018/16</a>	PROYECTO DE REAL DECRETO POR EL QUE SE REGULA LA INSPECCIÓN TÉCNICA DE VEHÍCULOS Y SE ESTABLECEN LAS NORMAS GENERALES DE INSTALACIÓN Y FUNCIONAMIENTO DE LAS ESTACIONES DE INSPECCIÓN TÉCNICA DE VEHÍCULOS.	13/10/2016
<a href="#">IPN/CNMC/019/16</a>	P.R.D. POR EL QUE SE APRUEBA EL REGLAMENTO PARA LA EJECUCIÓN DE LA LEY 24/2015 DE 24 DE JULIO DE PATENTES.	24/11/2016
<a href="#">IPN/CNMC/021/16</a>	ESTATUTOS GENERALES DE LOS COLEGIOS OFICIALES DE GRADUADOS DE LA RAMA INDUSTRIAL DE LA INGENIERIA INGENIEROS TEC. INDUSTRIALES Y PERITOS INDUSTRIALES DE ESPAÑA Y DE SU CONSEJO GENERAL.	15/12/2016
<a href="#">IPN/CNMC/025/16</a>	P.R.D. POR EL QUE SE REGULAN LAS INSPECCIONES TÉCNICAS EN CARRETERA DE VEHÍCULOS COMERCIALES QUE CIRCULAN EN TERRITORIO ESPAÑOL.	26/01/2016

Source: CNMC

### 3.2. Other Reports

86. Also within the scope of article 5.2 of Law 3/2013, the CNMC is entitled to play an advisory role regarding non regulatory acts of Public Administrations. To perform this function, the Advocacy Department applies the above mentioned pro-competition and efficient economic regulation principles. In 2016, the CNMC Council approved 6 reports in application of this function. These reports deal with, among others, the supply of audio-visual equipment and commercial industrial vehicles.

### 3.3. Reports on Public Aid

87. In December 2016, the CNMC published the Eighth Annual Report on Public Aid. These annual reports, as part of the advocacy and monitoring functions of the CNMC, aim at providing a general overview of the quantitative evolution of public aid in Spain as well as of the main legislative and decision-making new developments at EU level. It is worth noting that, regarding the data, there is always a temporary lag. Therefore, the main figures included in the report (regarding the volume of assistance granted) refer to year 2014.

88. Besides this general annual report, the CNMC approved in 2016 other specific reports including public aid aspects. Namely, the CNMC approved the methodological

report for the evaluation of public aid. This report emphasizes the importance of evaluation not only as a tool of transparency and accountability but also as a basis for better learning the effects on the market. It stresses the importance of impact analysis on effective competition, efficiency and public finance.

89. The report describes the advantages and disadvantages of granting aid. Among the latter, the analysis of impact on effective competition, efficiency and public finance stands out and proposes some methodological guidelines for doing so.

90. As far as the ex-ante evaluation is concerned, it is intended to predict the impact from the information prior to its application, starting from the so-called "balancing test" of the aid. The approach is carried out in two directions: qualitative, through the analysis of the principles of efficient economic regulation (necessity, proportionality, minimum competitive constraint) and quantitative, through the possible use of econometric and structural models.

91. With regard to ex-post evaluation, it would be carried out when the program is ongoing or completed. In this case it is a question of comparing the result that has occurred after the execution of the aid program with what would have happened in a "counterfactual" scenario without them. This analysis requires the construction of a "control group" with companies comparable to those that have benefited from the subsidy, so that the true effects of the aid can be separated from other differences between beneficiaries and non-beneficiaries.

92. The CNMC considers that the value of evaluation lies to be included into the whole cycle of public policy, only in this way a regular improvement could be achieved.

### 3.4. Sectoral Studies

93. Article 5.1.h) of Law 3/2013 empowers the CNMC to conduct sectoral studies and reports. Once they have been approved by the Council, these sectoral studies, reports, or guides, prepared by the Advocacy Department, are published in the CNMC web site.

94. The objective of these studies is identifying competition problems on a specific sector and to make recommendations on regulatory or behavioural issues. In particular, guides are aimed at promoting more pro-competitive behaviour of sector agents. To fulfil this function, guides include specific examples that can be easily understood by economic agents and applied to similar real situations.

95. In 2016, the CNMC approved the methodology for the elaboration of CNMC market studies, a report on the regulation of the market for distribution of road fuels through unmanned petrol stations. Two public consultations were launched during 2016: one on the preliminary results of the study of new models of service delivery and the sharing economy and another on the Spanish university system.

#### 3.4.1. Methodology for the Elaboration of Market Studies

96. The methodology for the elaboration of market studies of the CNMC was approved in 2006 as a systematization of a set of procedures, guidelines and actions that must be followed in the process of preparing a study. The CNMC studies analyse the situation of a sector or branch of economic activity from the perspective of competition and efficient economic regulation and combine the examination of the regulatory framework with the analysis of the market structure, the behaviour and incentives of the operators and the economic determinants of the sector or sectors analysed.

97. Therefore, this methodology includes, as a guide, a list of procedures or actions to be carried out by the CNMC or economic operators, as well as their sequence or order of execution, the duration of the different actions, the description of the ultimate objective to be achieved at each stage, and a set of recommendations or good practices to be followed. The methodology allows a greater transparency in the CNMC actions and how it relates to other market agents in the area of elaboration of studies through meetings and information requirements. It is a predictable and transparent procedure to promote the dissemination of the study and its recommendations which, in order to promote competition and obtain more efficient economic results, benefit consumers, businesses and public administrations.

### *3.4.2. Regulation of the Market for Distribution of Road Fuels through Unmanned Petrol Stations*

98. The study on the regulation of the market for retail distribution of road fuels through unmanned petrol stations was approved by the CNMC in July 2016. To this end, it conducted a thorough analysis of the regulation applicable to petrol stations, specifically to unmanned petrol stations. As a result, CNMC has identified several barriers to entry and exercise this activity, which unnecessarily or disproportionately restrict the freedom of enterprises and consumer choice, damaging the public interest. In particular, regulation in various regions imposes an obligation to physically have a person at the facility. This regulation often links the discrimination against the unmanned format of petrol stations with (i) the maintenance of employment, (ii) the facility safety or (iii) the consumer protection. Contrary to the objective, the regulation stands out as a particularly unjustified imposition, which does not correspond with the evidence available in the European Union and Spain.

99. Therefore, the CNMC makes several recommendations to increase competition in the market for retail distribution of road fuels and to promote the general interest: to remove any regulatory provision, in process or into force, which prohibits or discriminates, either directly or indirectly, automatic or unmanned petrol stations; to avoid the current quantitative restriction limiting the ability of agricultural cooperatives to supply road fuels to non-members; to ensure that the regulation applicable to cooperatives is applied, without restrictions, in a non-discriminatory basis to all kinds of automatic or unmanned petrol stations; to give alternative wordings to the requirements included in the regulation, such as the obligation to have complaint forms, calibrated measuring containers, or single-use gloves and paper at petrol stations. If these requirements are not justified under the principles of necessity and proportionality, they may cause disproportionate administrative costs which could hinder or impede the correct functioning of many petrol stations. In this sense, the CNMC makes drafting proposals in its report and finally to avoid any provision, present or future, that restricts the development of the market for retail distribution of road fuels through petrol stations, or restricts the effective competition in this market. In particular, avoid any provisions that hinder the development of new formats of petrol stations.

100. The report recommends promoting a regulatory framework that encourages the development of new and effective competitors in the market and increase the welfare of final consumers.

101. Finally, two public consultations were launched, first, on the preliminary results of the study of new models of service delivery and the sharing economy and, secondly, on the Spanish university system.

102. The first public consultation was launched in March 2016. The study of new models of service delivery analyses the phenomenon of collaborative economy and its effects on the market from the perspective of competition and efficient economic regulation. In particular, the markets for tourist accommodation and urban passenger transport, as they present numerous barriers to entry and to exercise the activity in Spain.

103. The second public consultation was launched in June 2016, within the framework of the elaboration of a study on universities. The study will analyse the barriers to access and exercise of university teaching and research and their degree of justification in accordance with the principles of necessity and proportionality. In this sense, the CNMC considers that the public objectives that underlie the current regulatory design of universities are compatible with the strengthening of competitive mechanisms and other measures of efficient economic regulation. The objective is to promote those that generate the appropriate incentives to improve the efficiency of the system without undermining the plurality of objectives of public intervention in this area.

### 3.5. Legal Standing to Sue (“legitimación activa”)

104. The CNMC is entitled to challenge before the courts acts of public administrations deemed to be contrary to competition rules, provided that these acts are not normative or that the concerned norms are not laws.

105. On May 31, 2016, the High Court of Justice of Madrid delivered judgment on the appeal challenged by the CNMC in relation to the Decree of the Madrid Regional Administration on tourist accommodation. The ruling fully estimates the appeal filed by the CNMC and annuls the only recourse, which set in five days the minimum stay in a home for tourism use.

106. Likewise, in March 2016, the Supreme Court confirmed the appeal challenged by the CNMC about certain extensions of urban bus concessions by different regional administrations (Galicia and Valencia).

## 4. International Activity

107. As a convergent authority, with regulatory competences in different sectors and as competition authority, the CNMC maintains a varied international activity on multilateral or bilateral stands in different fields. This epigraph, however, refers only to the CNMC’s international activity as Spanish Competition Authority.

108. During 2016 the CNMC maintained a continuous cooperation with other European competition authorities within the European Competition Network (ECN) framework regarding enforcement of articles 101 and 102 of the TFEU, under EU Regulation 1/2003, and merger control, under EU Regulation 139/2004. In particular, the CNMC has actively participated in ECN working groups, aimed at reaching common approaches, exchanging experiences and identifying best practices in different sectors or topics. These groups met 33 times in 2016. Furthermore, the CNMC collaborated with DGCOMP in the design of the public consultation: Empowering the National Competition Authorities to be more Effective Enforcers, launched in November 2015.

109. The CNMC also attended the two ECN Board of Directors meetings in Brussels as well as the European Competition Authority (ECA) meeting hosted by the Belgium competition authority in 2016.

110. In April 2016, during the Annual Conference of the International Competition Network in Singapore, the CNMC participated as speaker in the Break Out Sessions of cartels and study markets.

111. In October 2016, the CNMC hosted in Madrid the annual Cartel Workshop of the International Competition Network (ICN). 195 international delegates from more than 50 jurisdictions attended the workshop, 134 representatives from Competition Authorities and 61 representatives from non-governmental organisations. 44 people from the CNMC attended the meeting, 10 of them as panellists.

112. A total of 27 expert meetings were held: 3 plenary sessions, 10 mini plenary sessions and 14 workshops. As a novelty, two workshops were held in Spanish. The main topic of the meeting was Enhancing Cartel Enforcement with three sub-topics: strategies and techniques of investigation; public and private enforcement of competition rules; and sanctions and tools for deterrence.

113. The conference was a unique opportunity to share experiences and knowledge among experts, both public and private, in the fight against cartels around the world and to make more publicly known to the international competition law community the huge effort made by the Spanish competition authority in the fight against cartels.

114. The CNMC also participated in other international multilateral competition organizations, including the OECD Competition Committee or the Latin American and Caribbean Forum, where the CNMC participated with two written contributions: one focused on disruptive innovation and another focused on public procurement. Two roundtables about theoretical and practical issues of independent Authorities and exchange of information were also organized in the framework of the 2016 Ibero American Forum organized by Autoridade da Concorrência of Portugal and CNMC in the city of Mexico.

115. The CNMC was also engaged in bilateral cooperation. In February in Madrid the CNMC hold a bilateral meeting with the Autorité de la Concurrence to strengthen bilateral cooperation in priority areas such as competition investigation, legal and advocacy issues.

116. As far as study visits were concerned, in September the CNMC received a representation of the Economy and Foreign Trade Committee of the Congress of the Republic of Guatemala to exchange experience in the application of the Spanish Competition Law. What is more, in November CNMC received a study visit of the Moldovan Council of Competition to exchange experiences in competition enforcement.

117. In the framework of international bilateral and multilateral cooperation, in October the CNMC signed a Memorandum of Understanding on cooperation with Comisión para la Defensa y Promoción de la Competencia of Honduras. In September 2016 the CNMC signed a letter of intention on cooperation with the World Bank Group (Trade and Competitiveness Global Practice). Key areas were covered by this inter-institutional cooperation: participating in seminar/workshops and academic conferences; facilitating the mutual exchange of knowledge and expertise and developing joint research activities.

118. Other international activities carried out by the CNMC in 2016 to reinforce cooperation and best practices knowledge included:

- Participation, with Comisión Federal de Competencia of Mexico, COFECE, and Instituto Nacional de Defensa de la Competencia y de la Protección de la

Propiedad Intelectual of Peru, INDECOPI, in the voluntary peer review of Uruguay organized in the framework of the XV Session of the Intergovernmental Group of Experts on Competition Law and Policy of the United Nations Conference on Trade and Development in October in Geneva.

- Participation in the National Free Competition Day and several seminars organized by the Panama Consumer Protection and Defence Authority (ACODECO) in February in Panama.
- Participation in the Annual Regulatory Meeting on Postal Statistics, sponsored by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROWTH) in April. In this meeting postal market statistics, methodological issues, data confidentiality, as well as training aspects for the new route of data transmission through a specific web portal were presented.
- Participation in the Pharmaceutical Competition Forum, organized by the Malaysian Competition Authority (MyCC) in Kuala Lumpur, Malaysia in October.
- Participation in the Workshop on Sharing Economy, organized by the European Parliament in Brussels.

## 5. Resources of Competition Authorities

### 5.1. Annual budget

119. The CMNC is convergent regulator that integrates competition law enforcement functions together with sectorial regulatory functions in telecommunications and media, energy, transport and postal services. Within the CNMC there are four directorates, each one responsible, respectively, for competition, telecommunications, energy and post and transport. CNMC is the agency responsible for the public enforcement of competition law. The overall approved budget of the CNMC for 2016 was around 60 Million €, with a rise of about 0, 52% (in €) compared to 2015.

### 5.2. Number of employees

120. In 2016 the CNMC employed 509 people, of which around 160 worked in competition matters: 1/3 lawyers, 1/3 economist and 1/3 others. 1/4 as support staff and the rest case handlers, legal and economic advisors, IT experts, etc.

121. 5.2 Human resources (person-years) applied to enforcement against anticompetitive practices/ Merger review and enforcement.

122. The division of human resources between these areas is not entirely applicable to the case of CNMC. The Competition Division is organized in economic sectors (three sectorial divisions -Industry and Energy, Information Society and Services- plus two horizontal divisions -Leniency and Monitoring. The staff works both in antitrust and in mergers although there is certain specialization, but the number of full time equivalent people dedicated to each of these tasks varies continuously adapting to needs. Around work 89 people work in competition enforcement and 22 more people work in the Advocacy Department. Main data are summarised in the following table:

<b>HUMAN RESSOURCES (FTE)</b>	<b>2015</b>	<b>2016</b>
Total CNMC	515	509
Competition matters	163	162
Staff working on competition enforcement	107	106
Advocacy	22	22
General administrative support	34	34
University graduates		
Lawyers	39	39
Economists	31	31
Other university degrees	36	36