

Annual Report on Competition Policy Developments in Spain

-- 2017 --

6-8 June 2018

This report is submitted by Spain to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 6-8 June 2018.

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1. Executive Summary

1. The CNMC was established in October 2013 with the merger between the CNC (Competition Authority) and a number of sectorial regulators including the CMT (Telecommunications), the CNE (Energy), the CRFA (Railroads and Air Tariffs), the CNSP (Post), and the CEMA (Audio-visual).

2. The economic rationale that underpins this innovative structural design, and the main driver of the CNMC as an institution, is the systematic defence and promotion of economic efficiency in the Spanish markets and economy as a mean to increase consumer's welfare.

3. The CNMC's mission is thus to promote and defend the proper and correct functioning of all markets in the interests of citizens and economic operators. In other words, to promote effective competition and better regulation for more efficient markets and increased welfare.

4. The coordination between the different directorates (competition, telecoms, energy, postal and transport services) is allowing the CNMC to reach more informed decisions on competition and regulatory issues. Furthermore, its larger size and the greater diversification of activities constitute a solid safeguard for the independence of the CNMC. Four years after its inception, the CNMC is reaping the fruits of this institutional framework.

5. On the merger side, the CNMC has assessed 371 mergers in the period 2014-2017 (95 in 2017). Most of them raised no competition concerns, so they were cleared under the fast-track procedure, with which it takes less than 1 month to give the transaction the green light. Numbers have been picking up recently in line with the recovery of the Spanish economy.

6. In the antitrust domain, the CNMC has been especially active in the detection and prosecution of cartels. This result has been achieved thanks to a mix of proactive ex officio work, a well-functioning leniency program and the good results obtained in dawn raids. The CNMC counts on the experience of a skilled and dedicated team of inspectors working in close contact with our IT experts. Indeed, in the period 2014-2017 the CNMC sanctioned 30 cartels (which represent 55% of the antitrust cases in that period). One third of those cartels were uncovered thanks to our leniency program which has proved to be very effective, with over 100 leniency applications since it began in 2008. In the period 2014-2017, 32 inspections involving 129 companies were carried out, many of them following leniency applications which, in some cases, allowed the CNMC to detect additional competition infringements in neighbouring markets.

7. In this 4-year period, the CNMC has imposed fines totalling more than €996.5 million euros, more than 80% of which correspond to fines on cartels. The CNMC imposed fines on senior managers for the first time despite the fact that this tool had been available for the Spanish competition authority since 2007. The benefits for leniency applicants have also been high. Since the introduction of our leniency program, total fine immunity amounts to around €200 million and fine reductions have reached €24 million so far.

8. In 2017, 3 cartels have been dismantled by the CNMC, with fines totalling € 60 million, in the sectors of electrical cables, passenger transport by road and cement). The CNMC launched in the last year 8 dawn raids and 30 companies from different sectors were inspected with the participation of more than 179 investigators.

9. Moreover, all these proceedings were conducted within a more than reasonable timeframe. Indeed, our Competition Act requires that the investigation after the opening of formal proceedings following an inspection be carried out within a maximum of 18 months, something that is very uncommon, as most jurisdictions do not establish specific deadlines for their investigations.

10. On advocacy, the CNMC has been extremely active in the promotion, dissemination, training and analysis of competition and efficient economic regulation. Since the birth of the CNMC, the Competition Advocacy Department has issued 108 regulatory reports (70 draft regulation reports and 34 reports on draft administrative acts), most of them dealing with public procurement, transport, professional services and the agrifood sector. 15 of these reports were issued in 2017, in line with the numbers of previous years, as well as 6 reports on non-legislative activities, mainly dealing with centralised public sector contracts.

11. The CNMC so far has also issued 4 annual reports on state aid and 8 sector inquiries with an in-depth economic and legal review of sectors such as fuel retailing, airports and pharma. During these 4 years, 9 market studies have been issued with a more targeted approach and some recommendations, for instance regarding rail transport, road transport and intellectual property rights. The CNMC has also issued guidelines concerning the methodology of market studies and the evaluation of public aid. In the last year 2017, the CNMC launched a study on the market for wholesale distribution and marketing of medicines in Spain and approved a report on the benefits derived from international trade and its implications in terms of competition policy.

12. However, the most powerful advocacy tool of the CNMC is undoubtedly the possibility to challenge national, regional and local regulations that hinder competition. Indeed, the CNMC is empowered to contest certain governmental administrative acts and regulations before an administrative judiciary if they threaten to introduce barriers to entry or limiting a healthy competition in the marketplace. In this 4-year period, the CNMC has challenged 6 anti-competitive regulations (2 in 2017), most of them at the regional and local level, in some cases including internal expert economic reports (3 in 2017). The courts have upheld so far 6 of these appeals and ordered the removal of such anticompetitive regulations.

13. Looking ahead, the CNMC will endeavour to remain active in all these domains. As far as enforcement is concerned, the CNMC has announced as a major priority the fight against collusion in public procurement. Therefore, a specialised unit is being set up to boost ex officio detection of cartels, especially those affecting bid-rigging in public procurement. Undoubtedly, the interplay between private and public enforcement, and particularly the effect that damages actions might have on the incentives of firms to apply for leniency, has also raised awareness of the need to intensify ex officio investigations as a more proactive approach towards detection of cartels. That is why the CNMC is

creating its own economic intelligence unit within the Competition Directorate to carry out a wide variety of market screening activities, including structural and behavioural screens, and with a special focus in the detection of bid rigging in public procurement activities. The unit will include staff specialised in quantitative techniques and forensic IT and will be headed by cartel detection experts, with an aim to improving the likelihood of turning these quantitative findings into investigation cases.

14. Since the end of 2014, a Working Group has been devoting a lot of time to the creation of a database with most of the information included in the Public Procurement Platform from the Spanish Ministry of Finance, which includes the majority of public tenders from the National Government and some of the Regional and Local Governments. The CNMC has also carried out for the last 3 years training sessions for public officials dealing with public procurement that could help to uncover bid rigging cases. In addition, public campaigns on the media and collaboration with other Public Administrations have been ramped up, to get the necessary access to relevant data from those public tenders that deserve major scrutiny.

15. The focus will now turn to develop statistical tools and screening techniques to identify collusion patterns using detailed data from these public procurement databases. The new economic intelligence unit will make a deep dive, among other projects, into the development of a software application which uses quantitative indicators to identify collusion patterns and signs of bid-rigging. This application will be used to “red-flag” potential markets and infringements that deserve a closer investigation and to complement information from other sources such as our tool for whistleblowers and complaints.

16. At the same time, advocacy will remain crucial for the CNMC, with 9 ongoing studies (e.g. fintech, water supply, public procurement, professional services, pharma at the wholesale level), and several anti-competitive regulations in the road transport and tourist accommodation sectors that are under scrutiny and could end up being appealed.

2. Changes to competition laws and policies, proposed or adopted

17. The most remarkable change in the Spanish competition legislation in 2017 was the transposition of the Damages Directive into national Law, which took place in May 2017 through the Decree-Law 9/2017. This transposition has led to major changes in the Competition Act (Law 15/2007) as well as in the Spanish civil legislation (Law 1/2000), introducing specific regulation concerning infringers’ liabilities, the right to full compensation, limitation periods, the definition of a cartel, disclosure policy and protection of leniency statements, among others. The new framework is expected to increase the volume of actions for damages under national law for infringements of the competition law provisions.

18. Furthermore, in 2017 a new Act for Public Procurement was adopted (Act 9/2017). Under the new framework, disqualification from public tenders for the infringement of the Competition Act as a tool for deterrence is reinforced as another tool for deterrence. The new act foresees also a fast-track procedure by

which public officials dealing with public procurement can request the immediate assistance of the Competition Authority to uncover bid rigging in an ongoing tender. These new provisions will be further developed in regulations which are expected to be adopted by the end of 2018.

19. 2017 also marked the 10th Anniversary of the Spanish Competition Act, which came into force in July 2007. Since its inception, the Spanish Competition Authority has successfully established itself in the eyes of consumers, businesses and the public sector in Spain as well as in the international arena. The role of the CNMC has been particularly crucial for Spain's economic recovery, fostering competitive markets that contributed to the current healthy growth and fiscal consolidation, while at the same time fighting anticompetitive practices that were harming our society in a particularly difficult moment. The role of competition policy in Spain will remain extremely relevant as we face new challenges stemming from the global economic environment, the development of new markets and ways of doing business, and the continuous need for a level playing field.

20. During this 10th anniversary celebration of the Competition Act we had a good opportunity to review the development of competition law in Spain during the last decade and to set a strategy for the challenges ahead. It seems clear to me that the time has come for some adjustments of the legislation to ensure that the CNMC is equipped with the best toolkit to conduct effective investigations. Introducing settlements or developing a fine-setting methodology that combines proportionality and dissuasion are just a few of the things that are being discussed, both internally and in seminars with the antitrust community formed by lawyers and academics. Our aim is to ensure an even more effective enforcement of competition rules in Spain and the promotion of a culture of competition that will help to boost economic growth, dampen inequalities, hopefully maintaining the CNMC as one of the top world Competition authorities.

21. Another upcoming legislative proposal concerning competition is the so-called ECN+ Directive proposal, aimed at empowering the competition authorities of the EU to be more effective enforcers and to ensure the proper functioning of the internal market. The proposal aims to ensure that when applying the same legal basis (articles 101 and 102 of the EU Treaty), national competition authorities have the appropriate enforcement tools in order to bring about a genuine common competition enforcement area. To that end, the proposal provides for minimum guarantees and standards to empower national competition authorities to reach their full potential. The Directive is expected to be adopted by mid-2018 and will allow European competition authorities including the CNMC to have an effective enforcement toolbox, to impose effective fines, to have more coordinated and effective leniency programs and to have the adequate resources and be sufficiently independent.

3. Enforcement of competition laws and policies

3.1. Cartels

22. Competition law has been applied to agreements, which were clearly damaging the functioning of the Spanish markets. In 2017, 3 cartels have been dismantled by the CNMC, with fines totalling € 60 million. After deducting exemptions and reductions applied to leniency applicants (€12.7 million), total fines have reached €47.3 million.

23. The 3 Decisions issued on the cartel front concerned secret agreements among undertakings that implied to avoid competing by the means of price fixing, sharing of markets and customers, and the exchange of commercially sensitive information, among others.

3.1.1. ELECTRICAL CABLES BT/MT S/DC/0562/15

24. The case with the highest sanctions (€ 44.8 million) involved several firms of power line's supply and distribution. The companies were sanctioned for the participation in several cartels;

- One single and continuous agreement for market sharing and price fixing between GC, PRYSMIAN, NEXANS, CABELTE, SOLIDAL, DRAKA COMTEQ IBÉRICA, S.L., TOP CABLE y MIGUÉLEZ, with the collaboration of the sectorial association, FACEL.
- Three agreements for sharing big clients' projects.
- One single and continuous infringement between two distributors of power lines.

12.7 million € fine were waived for the leniency applicant.

3.1.2. PASSENGER'S TRANSPORT IN THE BALEARIC ISLANDS S/DC/0512/14

25. The CNMC also imposed fines totalling € 9 million on 34 companies and one association that acted in the passenger road transport market in the Balearic Islands. The companies were involved in three infringements, price-fixing and bid-rigging practices, in the market of school transport. Eight of the companies were involved in bilateral agreements for the occasional transport of passengers distribution and the association recommended trip prices and discretionary transport prices in Mallorca to its members.

3.1.3. CEMENT PRODUCERS IN ASTURIAS REGION S/DC/0545/15

26. Similarly, CNMC fined 13 companies and one individual involved in the Asturias Cement Cartel with a sanction of € 6.12 million. The companies participated in a cartel, which included market sharing, price-fixing and exchange of sensitive commercial information in Asturias Region throughout 15 years.

3.2. Inspections

27. CNMC continued with a good inspection record during 2017: 8 dawn raids were launched and 30 companies from different sectors were inspected with the participation of more than 179 investigators. This reflects the CNMC's commitment to fight cartels and ensures a continuous flow of cases in this key area of competition enforcement.

3.3. Fighting bid-rigging in public procurement

28. 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-) and other cartel infringements. To this end, a working group inside the Competition Directorate was created to train civil servants working on public bidding institutions on competition matters and to develop screening techniques and data analysis and statistics to detect collusion and has also driven the *ex-officio* detection.

29. In this context, in 2017:

- The working group provided 7 training sessions on how to detect indicia of potential bid rigging to 530 civil servants actively involved in public tenders.
- Bid-rigging detection material was provided to encourage collaboration between public bidding institutions and the CNMC.
- Screening: the working group continues striving for gathering data on public tenders from several public institutions to detect illegal agreements through data analysis techniques. During 2017, the group worked on the design of methods to collect public information and process it to increase its detection capacity. It also started to evaluate the information received from informants and other sources to provide a better approach in the preparation of dawn raids and to cross it with other market information that could help to detect possible infringements.

3.4. Other type of sanctions in the fight against cartels

30. Article 63.2 of the Competition Act allows personal sanctions on managers for breaching the competition law. During 2017 the CNMC use this particular deterrent measure with a sanction to one manager totalling € 12.000.

31. 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, and could be use as another tool for deterrence. However, up to now the CNMC has adopted a rather cautious approach in its application until a clear legal framework is developed.

3.5. Other anticompetitive actions

3.5.1. Prohibited practices

32. Apart from cartels, the CNMC has sanctioned other prohibited practices under the Spanish Competition Act during 2017.

Renfe Case S/0511/14

33. The most relevant non cartel case has been the RENFE S/0511/14 on rail freight transport

34. According to the Decision, RENFE and DEUTSCHE BAHN participated in a complex web of agreements and concerted practices that had the effect of restricting competition, leading to market sharing between both railway groups.

35. RENFE and DEUTSCHE BAHN were fined for a single and continuous infringement of Article 1 of the LDC and 101 of the TFEU, consisting of agreements and concerted practices that, due to their effect, restrict the competition by contributing to the sharing of markets, by respecting the existing status quo in the rail traction markets for the transport of goods and in the transport of goods by rail. These practices were carried out at the time of the liberalisation of the rail freight market in Spain, with the consequences that this derived for the aforementioned liberalisation.

36. RENFE and TRANSFESA group (acquired by DB in 2008) were the only significant competitors in the rail freight market in Spain until 2007, with more than 80% and 20% market share respectively. Grupo TRANSFESA was looking to develop a significant own railway traction capacity, a strategy that was reversed after the purchase of the TRANSFESA by DEUTSCHE BAHN and the agreements signed between them, just after.

37. On the one hand, the agreements by which the TRANSFESA group delayed the use of the traction capacity it had available in the autumn of 2008, leasing the 10 locomotives it had acquired. On the other hand, the agreements by which RENFE and DEUTSCHE BAHN granted each other preferential terms when contracting railway traction services, privileging DB as a customer of railway traction services and assuring RENFE to benefit from the clients that DB could capture in the retail field

38. Although the acquisition of the TRANSFESA group by DEUTSCHE BAHN allowed the emergence of a vertically integrated operator (with traction capacity and its own railway wagons) and independent of RENFE, the agreements led to the preservation of the pre-existing status quo to liberalisation, limiting the development of competition, especially the transport of goods by rail in Spain.

39. As a result, CNMC fined RENFE with 49.962.000 € and DEUTSCHE BAHN with a 10.513.000 €

40. Separately, the CNMC also found that RENFE had infringed article 2 LDC and article 102 TFEU by abusing its dominant position in the Spanish market for traction used in rail freight transport. This abuse took the form of discrimination to third operators who demanded rail traction services (in particular, undertakings that were members of the AEFPP), with respect to the

commercial conditions that RENFE offered DEUTSCHE BAHN (for instance, in terms of price and the possibility to cancel any service without penalty). As a result of this commercial discrimination, third operators were limited in their ability to compete in the Spanish rail freight market without an objective justification.

41. The above-mentioned abuse took place from November 2008 to October 2014, and RENFE was fined with 15.129.000 €

Other abuse cases

- Penalty of 400.000 euros to the basketball league (ACB) for anti-competitive practices by imposing inequitable and discriminatory economic and administrative conditions on the basketball clubs that were able to promote from the LEB league to the ACB league for their sporting merits, and that were prevented to do so because the discriminatory conditions.
- Abuse of NOKIA's dominance position (1.741.478 €) in the wholesale market for support and supply of spare parts for the maintenance of GSM-R mobile telecommunications installations of NOKIA equipment, through a margin squeeze between the wholesale price of the NOKIA GSM-R equipment support service and the retail price of ADIF's GSM-R network maintenance services.
- Finally, the National Association of Horse Breeders of Purebred Spanish Horses (187.677 euros) abused its dominant position in the management markets of the Purebred Spanish Stud Book through the approval of a series of arbitrary, discriminatory or non-objective provisions in the Regulations for Morphological Contests

Commitment decisions

42. Likewise, 2 cases were closed through Commitment decisions foreseen in article 52 of the CA

- MARKET STUDIES FOR THE PHARMA INDUSTRY; a complaint was filed by HMR against IMS Health for an alleged abuse of dominant position of the latter, consisting of imposing on pharmaceutical distributors (data providers to market research companies in the pharmaceutical industry) limitations on the supply of data to competing operators (HMR), making it difficult for HMR to enter the Spanish pharmaceutical database market. The Board agreed to the termination of the sanctioning file, declaring the commitments presented by IMS adequate and binding. Remedies were the following; waive the most favoured customer clause in favour of IMS under which the distributor should equal IMS any more advantageous conditions granted to a competitor; give up the possibility of proceeding to the early termination of the contract in the event that the wholesale distributor decided to sell the information to a third party; and commitment not to alter the percentages in the reduction of the price to be paid to the wholesale distributors in case data were sold to a third party.

- SCHWEPPEES; complain against SCHWEPPEES, S.A (SAA) for its agreements with its distributors to restrict parallel imports. The file was closed through commitments presented by SSA, focused on the fact that agreements signed by SSA with distributors only opposes the commercialisation of the Schweppes® tonic from the United Kingdom manufactured by COCA-COLA. Likewise, SSA must publish the decision on its corporate website and ensure proper compliance of the commitments.

3.5.2. Penalties for non-compliance

43. In 2017, the CNMC issued one sanctioning decision in the framework of the 30/92 Act (SCN) for non-compliance with obligations in the Competition Act (LDC). In this case, Consenur was fined €20,000 for gun jumping (carrying out a merger without presenting the compulsory notification)

Table 1.

INFRINGEMENT DECISIONS 2017									
Case	Decision date	Fines (Euros)	Exemption or reduction	Net amount	Cartels	Other horizontal conducts	Vertical agreements	Abuse of dominant position	Executing a merger without notification
S/DC/0512/14	TRANSPORTE BALEAR DE VIAJEROS	09/03/17	9.170.452	22.468	9.147.984	X			
S/DC/0545/15	HORMIGONES DE ASTURIAS	23/02/17	6.119.796		6.119.796	X			
S/DC/0562/15	CABLES BT/MT	21/11/17	44.820.895	12.669.440	32.151.455	X			
TOTAL OF CARTELS			60.111.143	12.691.908					
S/DC/0558/15	ACB	11/04/17	400.000		400.000		X		
S/DC/0511/14	RENFE OPERADORA	28/02/17	75.604.000		75.604.000		X	X	X
S/DC/0557/15	NOKIA	08/06/17	1.741.478		1.741.478				X
S/DC/0580/16	CRIADORES DE CABALLOS 2	21/11/17	187.677		187.677				X
TOTAL OTHER ANTITRUST			77.933.155						
SNC/074/16	CONSEUR	14/03/17	20.000		20.000				X

3.6. Mergers

3.6.1. Notifications

44. In 2017, 94 mergers were notified, a slightly lower number compared to the previous year (104 mergers notified to the CNMC in 2016), but continuing the growing of the last 5 years.

45. More than 90 per cent of the mergers notified used the pre-notification procedure, showing the usefulness of this instrument for both the notifying companies and the CNMC. Moreover, 60 transactions were notified through the simplified procedure that reduces the workload and the reporting requirements for the notifying parties, speeding the approval of non-problematic mergers.

3.6.2. Decisions

46. Out of 95 operations decided in 2017, 91 were cleared in phase I without additional remedies and 3 with remedies offered by the parties. One notification was shelved because it did not fall within the thresholds to be notified. None of the notified mergers led to a phase II proceeding.

47. Below are detailed some of the transactions that were cleared subject to commitments.

3.6.3. Approved with commitments

DISA/GESA

48. This transaction consisted of the acquisition by DISA of 9 companies devoted to retail distribution of automotive fuels, through 30 petrol service stations located in different regions of Spain.

49. The Competition Directorate considered that the transaction would neither give rise to competition concerns in the automotive retail distribution market of automotive fuel through service station nor in the automotive fuel supply market. However the transitory maintenance of 26 ongoing supply contracts with other competing operators, as well as those of management of another 4 petrol stations owned and supplied by two competitors, would increase the risk of information exchanges between operators in the retail fuel distribution market, facilitating collusion in a market characterised by the presence of a small number of operators, product homogeneity and low elasticity of demand.

50. DISA proposed commitments, aimed at the early termination of three of the management contracts. As for the 26 current supply contracts, DISA would begin negotiations to resolve them in advance and commit to implementing a separate and autonomous commercial management structure, which would maintain the commercial information of the affected service stations isolated from the ordinary administration of the Company and its distribution business.

51. The Council of the CNMC considered that the commitments solved the risks of information exchange and, therefore, cleared the merger in phase I subject to the fulfilment of the abovementioned commitments.

52. This transaction consisted in the acquisition by CEPSA of 24 highly competitive (low prices; big sale volumes and excellent location) petrol stations in different regions of Spain

53. A competition assessment was carried out in each of the surroundings in which the petrol stations were located, to determine the existing competitive pressure after the merger and consumers alternatives capable of compensating the possible changes in the competitive policy of petrol stations purchased.

54. In a single petrol station, the operation threatened competition, in the sense that it meant the disappearance of a very competitive petrol station and no alternative was found in the area capable of compensating it. As a remedy, the acquiring company proposed the elimination of this petrol station of the transaction and the Council cleared the acquisition of the 23 petrol stations.

3.7. Sectors and Market Monitoring

55. In 2017, the Competition Directorate committed itself to a greater scrutiny of the following sectors:

3.7.1. Telecommunications and pay television

56. In telecommunications sector, the Competition Directorate has coordinated its work with the CNMC's Telecom Directorate for the development of a replicability methodology of Telefónica's retail commercial offers of fixed broadband products, in order to determine the maximum regulated prices of the fixed broadband wholesale services of this operator.

57. In the context of the Telefonica /DTS merger surveillance, CNMC requested Telefónica to return the amounts it had overcharged to its competitors for the football channels of its wholesale offer in the 2015/2016 season. In net terms, Telefónica had to give back 25 million euros.

58. As for football TV rights, the CNMC informed the bidding of the international TV rights of the Spanish League in September 2017

3.7.2. Digital economy

59. The CNMC carried out 2 internal investigations on possible vertical restrictions to online sellers by E-bay and Amazon. The companies modified some aspects of their contract models to avoid misinterpretations that could unjustifiably limit seller's capacity to compete in the marketplaces.

3.7.3. Financial sector

60. During 2017, the Competition Directorate ended up an investigation against four banks for possible price agreements of derivative contracts used as a hedge on the interest rate risk of syndicated credits. The Council took a decision at the beginning of 2018

61. In November of 2017 the authority assessed the merger between the companies that manage the domestic card payment system in Spain (Servired, System 4B and Euro 6000) and the creation of a new company jointly controlled by its main shareholders, Spanish banks. The Council authorised the operation in phase I subject to remedies in 2018.

3.7.4. Intellectual property

62. In 2017, this joint work has continued in order to provide the Intellectual Property Commission with economic tools to handle complaints against the collective entities that manage intellectual property rights, complementing the technical analysis this Commission will carry out.

3.8. Other Activities

3.8.1. Tenth anniversary of the Competition Act

63. On the 10th anniversary of the Competition Act, the CNMC has reviewed the application of the Act with relevant stakeholders to discuss the need for improvements in the Competition Act, including the introduction of a settlement procedure.

64. The impression was that the Competition Act requires minor changes. Some of these changes are in line with the ECN + proposal. Other changes are related to the necessity of updating the tools for improving the effectiveness of the application and decreasing the litigation, such as introducing settlements or developing a fine-setting methodology that combines proportionality and dissuasion.

3.8.2. Cooperation with regional competition authorities in Spain

65. At the present, there are 12 Autonomous Communities (regional governments) with competition bodies: 8 with prosecution and decision bodies (Cataluña, Galicia, País Vasco, Andalucía, Valencia, Aragón, Castilla y León and Extremadura) and 4 that only investigate and prosecute (Murcia, Canary Islands, Madrid and Navarra). In 2017, a total of 83 cases were allocated between the CNMC and those regional competition authorities

66. The Advisory Board on Conflict Matters is the advisory expert body on resolution of allocation conflicts between CNMC and the regional authorities, has been convened once due to the conflict posed by the Andalusian and Catalan authorities. The report concluded that the CNMC was competent to deal with the said case.

67. Moreover, the Working Group between the CNMC and the regional competition authorities of Spain met in Madrid 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.

68. 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 twenty one inspectors from different regional Authorities.

3.9. Courts

69. In 2017, the National High Court (Audiencia Nacional, AN) and the Supreme Court (Tribunal Supremo, TS) delivered 162 decisions (137 decisions of the National High Court and 25 of the Supreme Court) resolving 58 appeals with respect to Resolutions adopted by the CNMC as authority of competition.

70. Most of the decisions of both Courts (147) refer to conducts prohibited by Article 1 of the Competition Act, and to a lesser extent by Articles 2 and 3 and to procedural issues, such as obstruction of an inspection and breach of duty to notify.

71. The other decisions of the Courts (15) refer to matters different from prohibited conducts, such as monitoring of conventional termination agreements and mergers, requests for access to files, orders of inspection, denials of conventional termination or requests for confidential treatment of the information.

72. Three judgments of the Spanish Courts have been especially relevant in 2017:

- The Supreme Court decision of January 30th 2017 related to case S/0305/10, Designation of Origin Valdepeñas. The TS confirmed the illegal nature of the statements made by the representative of the sectoral association, where he tried to persuade the companies to lower the price of grapes purchased to the growers. It was confirmed that this conduct tantamount to a collective recommendation prohibited by art. 1 of the Competition Act.
- The Supreme Court decision of April 20th 2017 related to case S/0318/10, Paper Envelopes Exports. The TS rejects previous AN decisions and confirms the cartel nature of an instrumental company incorporated by the appellants. Although they argued that the company had been formed for a legitimate aim (i.e., promoting the exports of paper envelopes surplus production to non-EU markets), the TS, confirming the analysis made by the CNMC, found that it actually acted as a cartel, coordinating the partners strategies' in order to share the market and set prices.
- The National High Court decision of April 20th 2017, related to the case S/DC/0519/14, Railway Infrastructures. This is a landmark case for the CNMC as it entails one of the first decisions fining individuals for their direct involvement in an antitrust infringement by virtue of Article 63.2 of the Competition Act. The AN dismissed the manager's appeal who argued that he could not be formally considered legal representative of the company. The AN ruled that he was indeed acting as a director on behalf of the company and was therefore liable on its own individual basis.

3.10. International Activity

73. 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.

74. During 2017 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 28 times in 2017. Among the working groups, we can highlight: Telecommunications, Transport, Agribusiness, Sports, Insurance, Cooperation, Cartels, Forensic IT, Vertical Agreements, Banks and horizontal means of payment, Chief Economists, Pharmaceutical Products and Concentrations.

75. The CNMC also attended to the European Competition Authority (ECA) meeting hosted by the German competition authority in 2017.

76. CNMC has also actively participated in the activities of the OECD Competition Committee and its working groups. In the meetings of the Committee and its working groups in June and November/ December 2017, the CNMC made both written contributions, interventions and presentations on the methodology of market studies, competition and aftermarkets, cooperation between competition authorities and regulators in the financial sector and innovation and competition in land transport

77. The CNMC participates in conferences, working groups and meetings of the International Network of Competent Authorities (ICN); in the Annual Conference of the ICN held in Oporto in May 2017; in the Senior Economists Workshop, held in Vancouver, in Mexico city where it contributed to the Workshop on the Promotion of Competition or at the annual Workshop on Cartels held in Ottawa in October 2017.

78. The Latin American and Caribbean Competition Forum is a joint project of the OECD and the Inter-American Development Bank (IDB) to promote the effective application of competition policy in Latin America and the Caribbean. In the framework of its XIV Edition, held in Mexico in April, the CNMC presented two written contributions.

79. The Ibero-American Competition Forum is an annual meeting promoted by the competition authorities of Spain and Portugal with the purpose of strengthening ties with the Ibero-American authorities. The CNMC participated in the Forum, which this year was organised around two round tables: on the functioning of competition authorities: theoretical institutional foundations, practical experience, and information exchange.

80. For another year, the Ibero-American Competition School consolidates itself as a way to strengthen the institutional links between all Competition Authorities of the region, and the informal links between the technician and civil servants of these agencies.

81. 38 representatives from more than 15 different nationalities from Latin America (Peru, Chile, Colombia, Nicaragua, Argentina, Paraguay, El Salvador, etc.) attended during one week the classes, both theoretical as well as practical cases, in competition law and relations between competition and regulated sectors. There were bilateral meetings and informal encounters between CNMC staff and officials from different Latin-American authorities that participated in September 2017.

4. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

82. For accomplishing the goal of promoting effective competition and better regulation for more efficient markets and increased welfare, the CNMC has developed the advocacy toolbox at a fast pace, with an emphasis on transparency, independence and legal certainty. The advocacy toolbox has helped the authority to reinforce and clarify its role and competences as competition authority vis-à-vis both the sectorial Ministries in the respective regulated sectors, and the former sectorial regulators, now part of the authority.

83. The CNMC's advocacy toolbox includes a number of *ex ante* and *ex post* instruments that have been consistently used in the formulation of regulatory reforms, trade and industrial policies and structural reforms, *inter alia*. The toolbox includes

consultative, non-enforcement instruments (such as market studies, economic reports and public reports on draft or in force regulation, and administrative acts) and, quasi-enforcement mechanisms (such as active legal capacity to challenge regulations and administrative acts before Spanish Courts). In addition, the advocacy department has access to statistics on network sectors and competition.

84. The toolbox instruments can be used jointly, in an integrated approach, or in isolation. In general, after identifying the competition concerns, the most suitable and potentially successful advocacy instrument is used. In case the advocacy action does not have a positive outcome, or not as positive as expected, other advocacy instruments could be used to reinforce the outcome. In some instances, however, we use a combination of instruments, as one advocacy tool cannot fully tackle the competition concern identified. In those cases, the CNMC uses different instruments to complete the 'story' and maximise the impact of our advocacy actions and recommendations on the markets.

85. The main advocacy instruments are the following:

4.1. Studies and Guides

86. Market studies are one of the main instruments included in the advocacy toolbox to address competition issues in the Spanish markets.

87. The CNMC defines market studies as in-depth economic and regulatory analysis conducted on the Spanish markets with the objective to gain a thorough understanding of how sectors, markets, or market practices work, and to identify existing restrictions, which may hinder or prevent efficient resource allocation. They are conducted primarily in relation to concerns about the functioning of markets arising from: (i) market operators' behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector intervention, as well as (vi) other factors, which may give rise to consumer harm.

88. The CNMC has over the years consistently used a common approach to undertake market studies. However, no written, neither public methodology on how our Agency conducted market studies existed. For that reason, in 2016 the Advocacy Department of the CNMC decided to adopt and make public our Methodology on how to conduct Market Studies. The decision to carry out this methodology was prompted by the CNMC's call for transparency on its internal procedures and the aim to give guidance to operators and the general public on how we conduct our market studies and why we carry them out.

89. In addition, the CNMC has Guides, or Guidance Manuals, which deal with the safeguarding and competition advocacy from a more practical angle. These Guides are mainly addressed to public administrations and market operators, and cover a broad spectrum of activities, such as public procurement, business associations, or efficient economic market regulation.

4.2. Reports on Draft Regulation and Position Reports

90. The CNMC publishes Reports on Draft Regulation (called IPNs), in which at the request of the drafting authority, or *ex officio* (at its own initiative), it identifies potential restrictions existing in the Spanish legislative or regulatory proposals which are still at the drafting stage. In these reports, the CNMC evaluates the draft regulations from an effective competition and efficient economic regulation point of view, and makes

proposals as appropriate to make them more favourable to competition. Although public administrations have the legal obligation to refer draft regulations that might affect competition to the CNMC, the IPNs are non-binding.

91. The *ex-ante* nature of this intervention enables the CNMC to exert a pre-emptive influence on regulatory policy. On the other hand, such reports facilitate the awareness and integration of competition policy and efficient economic regulation principles at all levels of the Spanish public administration.

92. As regards regulation in force – typically, regulation which may affect competition, on which the CNMC may not have been consulted –, the CNMC can issue a Position Report. These reports are carried out on an *ex post* basis and as part of the CNMC’s consultative remit. In the Position Reports, the competition authority analyses the regulation and the level of competition existing in a specific sector and may propose amendments to regulation and/or administrative acts.

4.3. Reports on Non-legislative Activities

93. The CNMC also carries out reports on other, non-legislative, activities in the public sector (these reports are called INF). Those reports serve as a guide to the issuing entity for achieving more effective and competitive activities. Furthermore, because they are publicly available, those recommendations could be readily taken on board by other public entities, if such recommendations could also be applicable to their activities. For example, every year we undertake a number of reports on draft tendering documents, where we typically give recommendations to increase efficiency in the procuring process.

4.4. Active Legal Capacity Instruments

94. The CNMC has an additional advocacy tool: the active legal capacity. The CNMC has *locus standi* to challenge before national Courts uncompetitive administrative acts and regulations, which raise obstacles to the maintenance of effective competition in the markets. This represents an advanced command that not many jurisdictions enjoy but that has nonetheless proved to be highly effective in the fight for a more competitive and efficient economic regulation. The legal provisions under which the active legal capacity is granted can be found in [Article 5.4 of Law 3/2013 of 4 June 2013, of creation of the CNMC](#), and [Article 27 of Law 20/2013 of 9 December 2013 guaranteeing the single market](#). Under these two active legal capacity instruments the CNMC may, of its own motion (5.4 and 27) or at the request of an economic operator (27), challenge administrative acts and rules which:

1. Introduce obstacles to effective competition in the markets (5.4) or
2. Are inconsistent with effective economic regulation and the principles of necessity and proportionality, especially those that fragment the market (27).

4.5. Economic Reports

95. The economic Reports are elaborated to support the judiciary lawsuits presented by the CNMC within the framework of the active legal capacity mechanisms that the CNMC has at its disposal.

96. The Economic Reports elaborated up to date cover different sectors, such as road freight transport, urban passenger transport, retail distribution, or tourism. The objective

of the economic reports is twofold. On one hand, and as mentioned, to support the judiciary lawsuits, and on the other, to conduct an in-depth economic and quantitative analysis on the restrictions to competition existing in the Spanish markets and, if possible, including a quantification of their cost in terms of loss of welfare to consumers, and to the society as a whole.

4.6. Public Aid Reports

97. Beyond its impact on the implementation of the Community internal market, public aid granting, whatever the form thereof, constitutes a form of intervention in the economy that can disrupt the functioning of the markets. In some instances, public aid, far from benefiting public interest, can be significantly harmful to markets, by damaging effective competition and reducing social welfare.

98. Law 15/2007, of 3 July, on the Defence of Competition, consolidated and deepened the functions of the Spanish competition authority as regards public aid, by allowing the CNMC to issue reports with respect to public aid schemes, including recommendations to the public authorities to preserve effective competition in the markets. Likewise, the CNMC issues an annual report on the public aid granted in Spain, which is of a public nature. Finally, the CNMC also launched a telematics information centre including national public aid that has been published in official journals.

5. Resources of competition authorities

5.1. Resources overall

5.1.1. Annual budget

99. The CNMC 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 2017 was 58.4 Million €, compared to 60 Million € in 2016; the budget related to competition policy enforcement activities is around 13 Million €.

5.1.2. Number of employees

100. In 2017 the CNMC employed 489 people, of which 171 worked in competition matters, 107 of which are non-administrative staff.

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

101. The division of human resources between these areas is not entirely applicable to the case of CNMC. The Competition Division is organised by economic sectors (three sectorial divisions: Industry and Energy, Information Society and Services) plus two horizontal divisions -Leniency and Monitoring.

102. The staff works both in antitrust and in mergers although there is certain specialisation, but the number of full time equivalent people dedicated to each of these

tasks varies continuously adapting to needs. 119 people work in competition enforcement and 41 more people work in advocacy.

103. Besides, the General Secretariat of the CNMC provides administrative support to all areas of the institution, including the Competition Directorate and the Advocacy Department; an estimation of the general administrative staff dedicated to them has been made for the purpose of this report.

104. The main data are summarised in the following table:

Table 2.

	Human Resources (FTE)	2017
Total CNMC		489
Competition matters		171
Staff working on competition enforcement		119
Advocacy		41
General administrative support		22
University graduates		160
Lawyers		58
Economists		50
Other university degrees		52

6. Summaries of or references to new reports and studies on competition policy issues

6.1. Draft Regulation Reports and Position Reports Activity

105. In 2017, the CNMC approved 15 reports on draft regulation (or IPNs). The number of reports has been in line with the last years (18 IPN approved in 2015, 13 IPN approved in 2016). In addition, a Position Report was also published in 2017.

Table 3. List of IPNs and Position Reports (2017)

Expediente	Norma informada	Fecha de aprobación
IPN/CNMC/025/16	Draft Royal Decree regulating road technical inspections of commercial vehicles circulating in Spanish territory	27/01/2017
IPN/CNMC/002/17	Draft Royal Decree on reducing consumption of plastic bags	15/02/2017
IPN/CNMC/005/17	Draft Royal Decree which modifies the regulation of Law 38/2003, of November 17, of general grants approved by R.D. 887/2006 of July 21 on National Database of Subsidies	15/02/2017
IPN/CNMC/012/17	Royal Decree project by which the Regulation of hotel establishments and spa resorts in Aragon is approved	27/07/2017
IPN/CNMC/015/17	Preliminary Draft of Law of sanitary measures against smoking, which regulates the sale, supply, consumption and advertising of tobacco products	13/09/2017
IPN/CNMC/016/17	Projects of Ministerial Orders by which are determined for 2016 the standard costs applicable to costs that could be subsidised regulated in the R.D. 170/2009 and R.D. 362/2009 on compensation for maritime and air freight in the Canary Islands	27/07/2017
IPN/CNMC/017/17	Preliminary Draft Law which modifies Law 21/2013, on environmental assessment	13/09/2017
IPN/CNMC/025/17	Draft Royal Decree which developments certain rules of Royal Decree-Law 5/2015, of April 30, on urgent measures in relation to the commercialisation of the exploitation rights of audio-visual football content.	02/10/2017
IPN/CNMC/019/17	Draft Statute of the college of industrial property agents	27/10/2017
IPN/CNMC/034/17	Preliminary Draft Law on the Distribution of Private Insurance and Reinsurance	26/10/2017
IPN/CNMC/032/17	Draft Resolution of the DGOJ authorising the modality of international liquidity on the activity of the online poker game	10/11/2017
IPN/CNMC/040/17	Preliminary Draft Law amending the Revised Text of the Intellectual Property Law	30/11/2017
IPN/CNMC/018/17	Draft Royal Decree by which regulatory standards are modified to adapt them to the Land Transport Management Law	14/12/2017
IPN/CNMC/042/17	Draft Law amending the Consolidated Text of the General Law for the defence of consumers and users	21/12/2017
IPN/CNMC/043/17	Draft Royal Decree which changes the denomination of the forestry technical engineers' college	21/12/2017
PRO/CNMC/003/17	Draft Royal Decree establishing complementary rules to Royal Decree of Land Management in relation to the authorisations of Private Hire Car lease	30/11/2017

Source: CNMC

106. Albeit the reports refer to the most diverse aspects of the regulatory activity of the public sector, four economic activities can be highlighted:

1. **Transport:** special mentioned should be made to the observations made to the future modification of the regulation on land transportation services. The CNMC highlighted that there should be no unjustified discriminatory restrictions or unnecessary and disproportionate burdens for operators to access the market. Of special interest is the last position report carried out in relation to the Draft Royal Decree, which establishes complementary rules to the Land Transport Management Regulation in relation to the Private Hire Vehicle (PHV) activity.
2. **Tourism:** we adopted a number of reports on tourist regulation, at national and regional level. Among them, it should be highlighted the report on the regulation about the protection of consumers and users which incorporated into national law the Directive of Package Travel.
3. **Health and Environment:** as regards healthcare, the reports on the Draft Law on Health Measures against Smoking and the Draft Regulation on the Sale,

Consumption and Advertising of Tobacco Products should be underlined. Regarding the environment, the reports on the measures to be adopted to reduce the production and consumption of plastic bags and on environmental impact regulations are worth noting.

4. Professional services: two reports on draft regulation should be highlighted, one of the draft Statutes related to industrial property agents, and a second one on the Statutes of forestry technical engineers.

6.2. Reports on Non-legislative Activities

107. In this category of reports, the reports on centralised public sector contracts stand out for their importance. These reports focus on proposing improvements that would result in greater competition, such as the replacement of the Framework Agreements system with dynamic acquisition systems, the adequacy of the solvency requirements, the justification of the requirements for quality certificates and, the appropriate weighting of the price variable. We adopted the following reports in 2017.

Table 4.

Expediente	Norma informada	Fecha de aprobación
INF/CNMC/072/17	Framework Agreement 8/2016 to the provision of security systems and elements.	09/02/2017
INF/CNMC/096/17	Framework Agreement to buy advertisement space	25/05/2017
INF/CNMC/089/17	Proposal to replace the current air transport regime between the Balearic Islands, with subsidies for air fares.	18/06/2017
INF/CNMC/112/17	Framework Agreement for the provision of paper	13/07/2017
INF/CNMC/159/17	Framework Agreement for contracting the supply of passenger cars	03/07/2017
INF/CNMC/160/17	Draft code of conduct for voluntary collaboration against information society services that violate intellectual property rights	19/10/2017

Source: CNMC

6.3. Market Studies and Guides

108. In March 2017, the CNMC launched a study on the market for wholesale distribution and marketing of medicines in Spain. This study continues the analysis carried out in the Study on retail distribution of medicines in Spain, published by the CNMC in October 2015. The new analysis seeks to deepen the sectorial assessment and propose recommendations that encourage greater competition in the market.

109. In October 2017, we approved a report on the benefits derived from international trade and its implications in terms of competition policy (PRO/CNMC/002/17). This report analyses the theoretical framework of the benefits of trade liberalisation against protectionism, from a competition and efficient economic regulation point of view.

110. From the purely theoretical point of view, the gains from trade liberalisation can be both static and dynamic. The first ones include the immediate effect of this opening in terms of greater production possibilities, whilst the dynamic benefits translate into effects on innovation and long-term growth. The empirical evidence available for Spain reinforced the theoretical analysis in this case. The analysis carried out in the report concluded that there exist significant interactions between trade, competition policy and efficient economic regulation, so that greater trade openness leads to higher welfare gain.

6.4. Active Legal Capacity

111. In 2017, the CNMC filed two appeals on the basis of article 5.4 (Case LA/01/2017 and Case LA/02/2017). These proceedings concern two decrees in the field of tourism accommodation regulation in the Autonomous Communities of Galicia and Castilla y León, approved in January and February 2017, respectively. The CNMC considers that these decrees create unjustified obstacles to the maintenance of effective competition in the tourist accommodation sector, fundamentally because they establish an economic barrier to entry, limiting the operators' ability to compete and offer their services.

112. In February 2018, the Courts adopted judgments on both appeals: the Supreme Court of Castilla y León partially upheld the appeal of the CNMC, while in the case of Galicia the appeal was rejected in its entirety. These rulings can be challenged before the Supreme Court of Spain.

113. Additionally, the following Court cases concerning restrictions to competition in regulations are still pending:

- Case LA/01/2015 and Case LA/02/2015: regarding the Taxi Ordinances of the cities of Córdoba and Málaga.
- Case LA/01/2016: challenging the agreement on a Draft Sectorial Master Plan for Commercial Equipment of Mallorca.
- Case LA/03/2015: in relation to an appeal against Decree 113/2015, which approves the Regulation of tourist accommodation in the Autonomous Community of the Canary Islands.
- Case LA/05/2014: regarding an appeal against Decree 79/2014, which regulates the tourist accommodation market in the Autonomous Community of the Madrid.

6.5. Economic Reports

114. In 2017, the Advocacy Department issued three economic reports to support the judiciary lawsuits of the CNMC. Two out of these concern proceedings related to article 27 of Law 20/2013, of December 9, on the Guarantee of the Market Unity, and another one refers to a case on the grounds of article 5.4 of Law 3/2013, on the Creation of the CNMC:

- Professional services: Economic report on the reserve capacity held by architects and technical architects in building technical inspections in Bilbao (UM / 147/16). The report highlights the high level of regulation of architectural services in Spain and how this regulation negatively affects competition and productivity in the provision of these services. The report quantifies the potential loss in consumer welfare derived from the identified restriction, which would be 103,079 euros in Bilbao and 2,922,190 euros in the whole of the Basque Country.
- Tourism: Economic Report on the restrictions for establishment and expansion of hotel establishments, and the minimum distance requirement in Bilbao (LA-CA / 01/17). The report analyses the impact of these restrictions, which limit entry,

reduce the number of potential locations, restrict the ability to compete, and reduce competition in the land and real estate markets.

- Transport: Economic Report on Decree 314/2016, relating to the mediation activity in taxi services in Catalonia (UM / 010/17). The report analyses the restrictions on competition incorporated in the Decree and their effects on the market, in terms of cost, access to passenger pool, contractual conditions, and level of quality and pace of innovation in the provision of these services.