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**The Promotion of Competitive Neutrality by Competition Authorities – Contribution from Spain**

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This contribution is submitted by Spain under Session III of the Global Forum on Competition to be held on 6-8 December 2021.

More documentation related to this discussion can be found at: [oe.cd/pcnca](https://oe.cd/pcnca)

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## *The Promotion of Competitive Neutrality by Competition Authorities*

### **Contribution from Spain**

1. This contribution addresses the promotion of Competitive Neutrality by Competition Authorities, a topic that will be discussed at Session III at the forthcoming 20th Global Forum on Competition meeting in December 2021.
2. The OCDE has recently adopted a [Recommendation of the Council on Competitive Neutrality](#)<sup>1</sup> which, mainly, encourages governments to: 1) Ensure that the legal framework applicable to markets in which enterprises currently or potentially compete is neutral and competition is not unduly prevented, restricted or distorted (including having a competitively neutral competition law, maintaining competitive neutrality in the enforcement of competition, bankruptcy law, and the regulatory environment, and establishing open, fair, non-discriminatory, and transparent conditions of competition in public procurement) and 2) Preserve competitive neutrality when designing measures that may enhance enterprises market performance and distort competition (includes avoiding offering undue advantages that distort competition and selectively benefit some enterprises over others, limiting compensation for any public service obligation placed upon an enterprise so that it is appropriate and proportionate to the value of the services, and adopting structural and governance rules for state-owned enterprises that do not provide them with an undue advantage that distorts competition).
3. In the light of that Recommendation, the GFC will held a discussion on how competition authorities can contribute to enhancing competitive neutrality in their jurisdiction. Particularly, it will explore the enforcement and advocacy tools that may be used by competition authorities to address competitive neutrality concerns.
4. Competition authorities are particularly well positioned to defend and promote competitive markets and efficient regulation. Promoting competitive neutrality can be achieved by addressing distortions to competition through their enforcement tools, and by advocating neutrality in market regulation and other state actions (e.g., public aid, public procurement).
5. Safeguarding an even level playing field among undertakings in any market, irrespective of their ownership, nationality, institutional settings, or objectives has been a major area of concern for the Spanish Competition Authority. The [CNMC Strategic Plan 2021-2026](#) reflects the CNMC's aspiration to promote and guarantee an effective and predictable supervisory and regulatory context, where companies may compete under equal conditions in competitive and innovative markets for the benefit of consumers and users.
6. Spanish competition provisions (mainly Law 15/2007 on the Protection of Competition and Law 3/2013 creating the CNMC) are consistent with the principle of competitive neutrality. Spanish antitrust rules apply to all enterprises, regardless of their ownership (public or private), their *raison d'être* (profit-oriented or not), nationality,

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<sup>1</sup> The CNMC has participated in the recently adopted [OECD Recommendation of the Council on Competitive Neutrality, OECD/LEGAL/0462](#).

market position or sector<sup>2</sup>. In parallel, the CNMC advocates better regulation across all markets and economic sectors irrespectively of operators' nationality or ownership and disseminates the culture of competition among public and private sector and society.

7. Accordingly, our competition legal framework provides the Spanish Competition and Markets Authority (CNMC) with different but complementary powers and tools to address distortions to competition stemming from market regulation and state actions:

8. **Firstly, from the point of view of antitrust and enforcement powers**, Spanish antitrust rules apply irrespectively of the ownership - public or private -, nationality or sector of the undertakings concerned. Competition Law also applies to situations restricting competition which are derived from the exercise of other administrative powers or are caused by the action of public authorities or public companies without legal protection. Therefore, competition rules are applicable to address anti-competitive state-actions if there is not a law that explicitly exempt them from antitrust regime.

9. **Secondly, from the point of view of competition advocacy powers**, the Competition Authority has made use of its advocacy powers to address distortions to competition caused by the State (i.e., public sector policies or measures that distort *competition on the merits*, e.g., by enacting inappropriate regulation, public procurement, and State aid). Taking advantage of its consultative role<sup>3</sup>, the CNMC regularly issues opinions and reports regarding public sector actions and regulations, and on a more proactive role, it conducts in-depth market studies. Additionally, the CNMC has specific functions regarding State aid. Under those functions, the CNMC provides recommendations to remove barriers to competition that are not justified under grounds of necessity or proportionality. In addition, the CNMC has *locus standi* to challenge before national Courts uncompetitive administrative acts or regulations (under the rank of law) which raise obstacles to effective competition in the markets.

10. **Thirdly, the fact that the CNMC combines competition-related and regulatory powers offers an appropriate venue to integrate competition considerations into its regulatory decisions<sup>4</sup>**. In this sense, the exercise of regulatory functions by the CNMC is subject to the CNMC's main purpose established by Law to guarantee, preserve and promote the proper operation, transparency, and existence of effective competition in all markets and economic sectors to the benefit of consumers and users<sup>5</sup>. Coherently, laws providing for sector regulation to be applied by the CNMC include competition neutrality

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<sup>2</sup> In that sense, Fourth Additional provision of Spanish Competition Law envisages: "For the purposes of this Act, a business is understood to be any person or entity engaged in an economic activity, regardless of the legal status of that entity and its mode of financing".

<sup>3</sup> Article 5.2 of Law 3/2013 establishes "The National Markets and Competition Commission shall act as a consultative body on matters relating to the maintenance of effective competition and the good functioning of economic sectors and the markets. In particular, it may be consulted by legislative chambers, the Government, ministerial departments, the autonomous communities, local government corporations, professional associations, chambers of commerce, business associations and organisations of consumers and users. In the exercise of this function, it shall take the following action: a) To participate, through the issuance of reports, in the process for drawing up rules which affect the scope of its powers in sectors under its supervision, competition legislation and its legal regime. (..)"

<sup>4</sup> The CNMC was established in 2013 integrating the previously existing National Competition Authority with sectorial regulators in the postal, energy, telecommunications, audio-visual, railways and air transport sectors. The functions of the CNMC over the aforementioned sectors include supervision and control, as well as extensive functions of conflict resolution.

<sup>5</sup> See Article 1 of Law 3/2013, of June 4th, creating the CNMC.

within their main principles<sup>6</sup>. The resulting scheme has proven to be beneficial overall, allowing to take advantage of synergies and to deliver a more efficient and coherent regulation and competition service.

11. The aim of this contribution is to present how the CNMC contributes to enhancing competitive neutrality from competition policy perspective in Spain<sup>7</sup>. It is structured as follows: The first section summarizes the rules and tools available to the CNMC to tackle competitive neutrality distortions coming from public sector from an antitrust law and enforcement and competition advocacy point of view. The second deals with relevant cases and sectors where the CNMC has implemented different initiatives to address competitive neutrality distortions. The sections three and four address the CNMC's experience in dealing with competition neutrality and, on the one hand, public procurement and on the other hand, public support, and public service obligations. The section five concludes with the main takeaways.

## 1. Main CNMC rules and tools to achieve competition neutrality from competition policy perspective

12. As stated above, the CNMC engages to promote competitive neutrality as a fundamental principle of competition law and policy, promoting that companies can compete on the merits and do not benefit from undue advantages (for example due to their ownership, nationality, or market position)<sup>8</sup>. With that aim in mind special focus must be placed on government actions since sometimes those public interventions can prevent, restrict, or distort competition among firms in a particular market, consequently, create a potential risk in terms of neutrality in the market.

13. In order to perform its duties effectively, the Competition Authority must be conferred with sufficient powers, instruments, and tools to be fully effective in removing barriers to market entry and creating fairer competitive markets where undertakings compete on their merits. At the EU level, it has been recognised that National Competition

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<sup>6</sup> For instance, in the telecoms sector it is established that the deployment of networks and the provision of electronic communication services by Public Administrations must abide by State aid rules and by the market economy investor's principle, carrying appropriate accounting practices so that the costs and benefits of its intervention are transparent (Article 9 of Law 9/2014, of May 9th, on Telecommunications).

<sup>7</sup> This contribution seeks to cover the most relevant questions for the CNMC raised in the Call for Contributions by the OECD (on August 6<sup>th</sup> 2021) regarding Session III of 20<sup>th</sup> Global Forum on Competition.

<sup>8</sup> It must be noted that for the purpose of this contribution "Enterprise" is considered as any entity engaged in offering goods and services on a market, irrespective of its legal form, thus in line with the definition provided in the [OECD Recommendation of the Council on Competitive Neutrality \(OECD/LEGAL/0462\)](#). Similarly, [Directive \(EU\) 2019/1](#) of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, define "undertaking as referred to in Articles 101 and 102 TFEU, means any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed".

Authorities shall enjoy the guarantees of independence, resources, and enforcement and fining powers necessary to apply EU competition rules effectively<sup>9</sup>.

14. As regards to enforcement powers, the Spanish Competition law establishes the grounding for neutrality, as it provides sufficient tools to address anti-competitive state-actions. The CNMC has applied these tools on many occasions.

15. Indeed, the Spanish Competition Authority has prosecuted Public Administrations under competition law. This was the case, in [S/0167/09 Productores de Uva y Mosto de Jerez](#)<sup>10</sup> (Sherry wine and grape producers), the Spanish Competition Authority prosecuted the Consejería de Agricultura y Pesca de la Junta de Andalucía (a regional Department of agriculture) due to its conduct as co-perpetrator or necessary collaborator acting jointly with other associations in the market that agreed on a grape minimum price. The [Spanish Supreme Court](#) confirmed its active role in the organization and surveillance of the agreement, contributing to its maintenance and endurance. That Judgement determines that in the field of competition law there is a broad and functional concept of an enterprise, so that what is relevant is not the economic legal status of the subject that performs the conduct, but that its conduct has caused or is apt to cause an economically harmful or competition restrictive result in the market<sup>11</sup>. Similarly, in [S/0314/10 PUERTO VALENCIA](#)<sup>12</sup>, the Consellería de Infraestructuras y Transporte de la Generalitat Valenciana (a regional Department of transport) was considered responsible due its active participation in cartel meetings<sup>13</sup>.

16. More recently, and regarding other kind of public interventions, such as public enterprises, the CNMC opened formal investigations against the Spanish Post Company (Sociedad Estatal de Correos y Telégrafos, SA -CORREOS-) as it found reasonable grounds for a potential abuse of a dominant position consisting in the existence of high discounts to large customers, offering prices well below operating costs. This proceeding is still pending a resolution<sup>14</sup>. Furthermore, Competition law is equally applied to all enterprises (foreign and national, SOE or private). This is well illustrated by a recent gun-jumping case. In May 2021, the CNMC opened another formal investigation in the context of the DGTF/Parública/TAP merger case. The CNMC determined that DGTF (a public entity of the Republic of Portugal) had breached the standstill obligation when acquiring sole control over TAP airlines. The merger was executed in October 2020 and notified in April 2021. The CNMC sanctioned DGTF and imposed a €30,000 fine. However, DGTF benefited from a 40 per cent reduction of the proposed fine (€50,000) based on both the acknowledgement of the infringement and voluntary payment of the fine<sup>15</sup>.

17. From the non-enforcement side, the CNMC has traditionally engaged in advocacy efforts to advance competition culture and to limit public restrictions to competition to those areas where they are needed to address market failures or objectives of common

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<sup>9</sup> See [Directive \(EU\) 2019/1](#) of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

<sup>10</sup> [S/0167/09 Productores de Uva y Mosto de Jerez](#).

<sup>11</sup> See Supreme Court in its final [judgement, dated July 18th 2016](#), appeal n° 2946/2013.

<sup>12</sup> [S/0314/10 Puerto Valencia](#).

<sup>13</sup> It is a firm Resolution as the Conselleria did not appeal. See also, the Supreme Court in its final judgement, dated May 21st 2020, appeal 7880/2018 over [S/DC/0504/14 AIO](#).

<sup>14</sup> [S/0041/19: CORREOS 3](#).

<sup>15</sup> [SNC/DC/048/21: DGTF/PARPÚBLICA/TAP](#).

interest. In other words, it focusses on promoting public intervention that follows minimal competition distortion and efficient economic regulation principles (necessity, proportionality, and non-discrimination). For that purpose, the Authority may assist policymakers to design pro-competitive measures, act to prevent unnecessary or unjustified regulatory barriers and intervene to avoid that public intervention unnecessarily damages competitive neutrality in market.

18. Within its advocacy tools, the CNMC has the power to issue formal opinions in the form of market studies or regulatory proposals, which include recommendations to all government levels (national, regional and local) aimed at removing or preventing unjustified obstacles to competition in laws, regulations and administrative decisions that range from public procurement procedures to subsidies instances.

19. As a recent example, the CNMC has published [guidelines](#) to policymakers to boost growth and accelerate economic recovery, with a concrete focus on state aid, public procurement, and better regulation<sup>16</sup>. This initiative includes several recommendations to policymakers to foster economic recovery without undue competitive distortions (to adopt “good regulation” principles in specific activities, following a procompetitive approach). Competitive neutrality is highlighted in the guidelines as a key principle to be considered by governments in this new era post-Covid-19.

20. As stated above, the CNMC has used all its competition advocacy tools to contribute to enhancing competitive neutrality in our jurisdiction regarding the main anti-competitive state actions such as:

- **Better regulation<sup>17</sup>**: the CNMC analyses regulation in a broad sense across all markets and economic sectors to eliminate unjustified restrictions to competition which are harmful to general welfare through **market studies, regulatory reports and legal appeals before Courts on regulations that unduly impair competition<sup>18</sup>**. The CNMC’s Advocacy Department tends to be proactive when carrying out a market study for the analysis of a given sector or activity or a wider horizontal competition issue concerning different sectors, so priority can be given to those where competition concerns such as neutrality distortions may arise. Also, as a consultative body, the CNMC assesses legislative and regulatory proposals and administrative acts from the government, regulators and public bodies at their request. Furthermore, the CNMC can issue *ex officio* reports. CNMC’s opinions conclude with recommendations directed towards the policymakers to adopt “better regulation” principles in specific activities, following a procompetitive approach, including competitive neutrality concerns.

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<sup>16</sup> CNMC (2021): [Guidelines to policymakers to boost growth and accelerate economic recovery](#).

<sup>17</sup> See [Article 5 of Law 3/2013](#).

<sup>18</sup> The capacity to bring legal actions is set out both in [Article 5.4](#) of Law 3/2013 of 4 June, on creation of the CNMC and in [Article 27](#) of Law 20/2013 of 9 December on Ensuring Market Unity. Their application is based on the principles of need and proportionality and represents the final recourse available in situations that are especially serious in their impact on effective competition. The CNMC is one of the few competition and regulatory authorities in the world able to make use of this instrument to implement better regulation. Some of the CNMC's legal challenges are accompanied by an expert Economic Report whose objective is to perform an economic analysis of the restrictions on competition subject to legal challenges. They sometimes incorporate a quantification of the costs that such restrictions entail for consumers and social welfare.

- **Public aid.** The CNMC has also competences regarding State aid, including reports about individual schemes and an annual review. Therefore, it can provide guidance to governments to make sure that public aid is competitively neutral.
- **Public procurement:** Competition advocacy in public procurement is a priority for the CNMC, thus it undertakes a varied number of activities: provide guidance for a better design of tenders and specific trainings to civil servants in charge of procurement procedures.

## 2. Relevant Cases and Sectors Where the CNMC has Implemented Different Initiatives to Address Competitive Neutrality Distortions

21. The CNMC role is more intense (albeit with the same instruments as the ones mentioned above) in the case of heavily regulated sectors and network industries. In this regard, it is important to recall the characteristic nature of the CNMC as a sector regulator and competition authority that may ensure that sector regulation is understanding towards the preservation of a competitive environment.

### 2.1. Railway sector

22. The strategic relevance of rail transport and its nature as a network industry explains why the State has traditionally had a strong presence in the sector. When an activity has just started the liberalization process, competition issues may arise given the strong position of the former monopolist (very often a SOE). In Spain, the transposition of European Directives (promote the liberalization process through the so-called “railway liberalisation packages”) into national laws promotes a model of vertical separation in which the infrastructure management operations, entrusted to ADIF are unbundled from the provision of transport services, provided by the incumbent operator (RENFE). All of these companies remain SOE and they are operated under the Spanish Ministry of Public Works.

23. There have been several CNMC reports in the last years regarding the **liberalization process of railway transport services** in Spain and the significance of the competitive neutrality principle:

24. A **market study on the “[liberalization of railway passenger transport services](#)”**<sup>19</sup>, warning about potential competition concerns that could arise in the process of liberalization (started in 2020). For instance, potential issues of access to spaces in passenger stations, to rolling stock, to maintenance facilities, to the market of recruitment and training of engine drivers. In addition, the combination of subsidized public service obligations (PSO) with commercial services can also affect competition in the latter. Consequently, the CNMC lays out some recommendations aimed at maximizing the positive effects of liberalisation and reducing the restrictions on competition that have been

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<sup>19</sup> CNMC (2019): “Market study on the “liberalisation of railway passenger transport services”. Previously, the CNMC issued a report called (2014) “Discussion paper on the process for liberalizing rail passenger transport” providing suggestions for a pro-competitive strategy for this subsector. Firstly, appropriate accounting practices must be adopted to prevent the potential for crossed-subsidies between the different branches of the public incumbent (RENFE). Secondly, the liberalization strategy may be progressive but it should give certainty to public operators through a binding calendar and the opening of corridors with the highest demand and potential profitability. Thirdly, PSO services must be liberalized through public tendering, which creates ex ante and ex post competition, instead of opting for automatic entrustment. And last but not least, all grandfather clauses which benefit RENFE vis-à-vis its competitors should be eliminated.

identified: as to prevent RENFE from using the subsidies it receives to operate PSO services to compete more aggressively in the liberalised market by separating the accounting, operational and legal aspects of the two PSO and commercial activities.

25. A "[Report on competition in railway freight transport in Spain](#)<sup>20</sup>" (released several years ago, since the liberalization process had started earlier for freight), where similar concerns on the advantages enjoyed by the State-Owned RENFE which had a market share in the range of 80%-90%, partly due to the lack of competitive neutrality, were raised. The incumbent – RENFE- enjoyed certain exclusive advantages such as a more favourable treatment as regards access to infrastructure, such as capacity allocation criteria; the surplus rolling stock available to it, while other operators find it difficult to secure access to material that can be used in Spain; its leading position in the market for the maintenance and repair of such rolling stock; and institutional advantages linked to the public financing it receives and its connections with the Ministry of Works and the infrastructure manager (ADIF). In this regard, the main concern was the risk of crossed subsidies coming from non-liberalized activities, like passenger transport.

26. Interestingly, years after the publication of the referred study the incumbent (RENFE) was sanctioned by the CNMC<sup>21</sup> for anticompetitive infringements because (apart from collusive agreements with other company, Deutsche Bahn) it applied discriminatory commercial conditions to other companies (vis-à-vis Deutsche Bahn) in the markets for rail freight services and rail traction.

27. **In addition, the CNMC has issued several reports regarding draft Law on the railway sector and its amendments.** For instance, the CNMC issued a [report on the draft Law on the railway sector](#)<sup>22</sup> which main strength was the liberalization of PSO services through a transparent and non-discriminatory public tendering and the enhancement of transparency for the infrastructure owners and the elimination of the access toll (which generated a barrier to entry). However, the CNMC report stressed the need for RENFE to allow access to its rolling material and its maintenance services, to adopt appropriate accounting practices (allocating net profits to each corridor) and to address the risk of aggressive commercial practices. Also, the CNMC considered that it was not any progress on detaching RENFE from the Ministry of Works.

28. Recently, the CNMC released other **regulation report regarding an amendment of the Law on railway sector**<sup>23</sup> in which it recalled the need for a broad revision of the regulation since there are still provisions issued before liberalisation that led to a discriminatory situation among rail enterprises, that benefits RENFE. For instance, there are provisions on early retirement for engineer drivers which exclusively applies to employees from public railway companies and not to private ones, therefore creating discrimination regimen between economic operators that could result in a distortion of effective competition in the market. The CNMC remarks that an active defense and promotion of the principle of neutrality competitive should lead to correct situations of this type. Also, it recalls that competitive neutrality principle far being used only as a reference parameter for the backbone regulations that regulate the railway activity, should also be

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<sup>20</sup> CNC (2013): "[Report on competition in railway freight transport in Spain](#)".

<sup>21</sup> See case [S/DC/0511/14: RENFE OPERADORA](#).

<sup>22</sup> CNMC (2015): "Report on draft Law railway sector" ([IPN/DTSP/001/15](#)).

<sup>23</sup> CNMC (2020): "Report on law amendment draft on railway sector" ([IPN/CNMC/002/20](#)).



extended to all those situations that *de iure or de facto* suppose a discriminatory treatment between potential competitors<sup>24</sup>.

## 2.2. Air sector

29. Air transport is one of the most important sectors in the Spanish economy, which is inevitably affected the airport sector. Airports have gone from being considered a natural monopoly to being a potentially profitable business unit and compete among infrastructures in terms of passengers and airlines. Airport sector is highly regulated in Spain and used to be centralised, joint management system in the hands of one single manager (AENA) with a large number of infrastructures and a high volume of passengers. The CNMC has analysed and issued recommendations in order to promote an efficient model and regulation in line with competitive neutrality principle.

30. A [study on the situation of airports in Spain and its prospects for liberalization](#) (2014)<sup>25</sup> analysed the situation of AENA (public corporation) which owned the whole network of 46 airports. This led to over-capacity (which is perceived as a barrier to entry in a sector that already has many other economic and technical barriers), inefficient centralized decisions on fares and lack of development of commercial revenues. The CNMC made a series of recommendations designed to set up a more efficient airport model and others dealing with how to handle the privatisation process the airport network in lots and allowing the entrance of private capital so that these groups of airports could compete among them. Therefore, the model and the regulations should take into account the possibility of other private operators developing their own airport initiatives alongside the AENA airports, to prevent the erecting of barriers to entry and activity and to safeguard the neutrality of the market.

31. In addition, the CNMC issued a [report on draft regulation on a new legal framework for airport activities](#)<sup>26</sup>. Even if the new framework has facilitated the entrance of private capital in AENA, the absence of division in lots keeps the sector away from competition and perpetuates cross-subsidies between airports. The CNMC report also alerts of the potential violations of competition law in the system of discounts (be it because of an abuse of dominant position or be it due to illegal state aid).

32. More recently, the CNMC published a **market study on “[Air traffic services in Spain](#)”**<sup>27</sup>. It analysed the market of some air traffic services (e.g. aerodrome services) and training of air traffic controllers that were liberalized in 2010. The study pointed out as a potential problem of competition the vertical integration between the air traffic services provider (ENAIRES which holds 51% of AENA.) and the airport manager (AENA).

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<sup>24</sup> Other examples refer from some discounts that RENFE offers to different groups for train journeys. It is recommended to opt for a competitive tendering to enable new rail operators to provide rail services to these groups.

<sup>25</sup> CNMC (2014): “The airport sector in Spain: current situation and recommendations for liberalisation” ([E/CNMC/0002/14](#)).

<sup>26</sup> CNMC (2014): “Report on draft Royal Decree Law on new legal framework for airport activities” ([IPN/0013/14](#)).

<sup>27</sup> CNMC (2018): “Market Study on Air Traffic Services in Spain” ([E/CNMC/002/2018](#)).

### 2.3. Postal services

33. The Competition Authority has analysed the regulatory framework of postal services warning about competitive neutrality concerns in different occasions (a [report in 2010](#)<sup>28</sup> and a [market study in 2011](#)<sup>29</sup>). The main concerns were the presence of public incumbent operator (Correos) that has been entrusted with the universal postal service (UPS) for a period of 15 years<sup>30</sup>, instead of considering the selection of one or more postal operators through public tendering and the division of the market into geographic lots.

34. Moreover, Correos enjoys some competitive advantages, like tax exemptions or the presumption of veracity in administrative notifications<sup>31</sup>, and potentially some disadvantages, given the lack of updating of conditions to be included in the UPS. Complexity of PSOs reduces transparency in the computation of the compensation to Correos as the UPS provider, creating risks of an excessive or an insufficient remuneration, jeopardizing in any case competitive neutrality.

35. Also, regarding OSP and a specific activity of postal services to be provided during an electoral process (such as the postal handling of electoral material sent out by political candidates, handling of postal ballots, the sending materials by the Electoral Roll Office (e.g. voter registration cards) and the collection of electoral documentation once the counting is complete), the CNMC analysed in a [report](#)<sup>32</sup> **the advantage granted to Correos since those services for distribution of electoral material** were entrusted directly to it in exchange of an economic compensation for it. The report pointed out that, regardless of the consideration of PSOs of these services, it must not be interpreted that the SPU provider is the only one that can provide them. Therefore, the CNMC recommended the provision of postal services related to the election process should be subjected to an open competitive, transparent, and non-discriminatory tendering<sup>33</sup>.

### 2.4. Fuel sector

36. A study on the [wholesale automotive fuel market](#)<sup>34</sup>, finding that operators with refining capacity (Repsol, Cepsa and BP) might be able to influence the company (CLH) owning the pipeline network and the majority of storage facilities (assets which are essential for the distribution of automotive fuels). Furthermore, these vertically integrated

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<sup>28</sup> CNMC (2010): “Draft law on the universal postal service, the rights of users and the postal market” ([IPN 045/10](#)).

<sup>29</sup> CNMC (2011): “[The new regulatory framework for the traditional postal sector in Spain](#)”.

<sup>30</sup> By Law 43/2010, 30 December, on The Universal Postal Service, The Rights of Users and The Postal Market.

<sup>31</sup> This issue has been analysed by the CNMC in some reports regarding the public procurement of administrative notifications services. See the following reports [INF/CNMC/032/20](#), [INF/DP/0010/14](#) and [INF/DP/0012/14](#).

<sup>32</sup> CNMC (2014): “[Report on PSO imposed to universal postal service provider in relation to electoral processes](#)”.

<sup>33</sup> This issued was also analysed by the European Commission from State aid rules perspective. In relation to the postal handling of electoral material sent out by political candidates, Correos should be considered to constitute an undertaking for the purposes of Article 107(1) of the TFUE. See Commission Decision of 10 July 2018 on the measures [SA.37977](#) (2016/C) (ex 2016/NN) implemented by Spain for Sociedad Estatal de Correos y Telégrafos, S.A.(Correos).

<sup>34</sup> CNMC (2015): “Study on the wholesale automotive fuel market in Spain” ([E/CNMC/002/15](#)).

operators enjoyed market power in wholesale and retail markets. Therefore, the market study proposed to limit the influence of these companies on CLH<sup>35</sup>. Also, in order to access CLH's facilities and services, it was recommended to set tariffs based on costs and according to an objective, transparent and non-discriminatory methodology. In addition, the CNMC proposed to reduce vertical integration between wholesale and retail activities (operational and accounting separation) and between wholesale and refining activities (personnel separation).

37. Also, related to fuel sector, the CNMC adopted a [report on the regulation of the market for distribution of road fuels through unmanned petrol stations](#).<sup>36</sup> The report 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, regional regulation imposes an obligation to physically have a person at the facility. However, agricultural cooperatives in Spain have supplied fuels for many decades without significant incidents and without having the burden to necessarily have a physical person on the ground.

38. The CNMC has also identified other barriers to entry and exercise that discriminate between formats (petrol stations and unmanned petrol stations), reduce the competitive pressure in the market of retail fuel distribution and are incompatible with an efficient economic regulation. Therefore, the CNMC recommended to increase competition in the market for retail distribution of road fuels and to promote the general interest, thus, to remove or avoid any regulatory provision, in process or into force, which prohibits or discriminates, either directly or indirectly, automatic or unmanned petrol stations. In particular, to avoid any provisions that hinder the development of new formats of petrol stations. These restrictions are particularly harmful to competition as unmanned petrol stations are an emerging market force that increase actual competition in the market for retail distribution of road fuels through petrol stations and have the features of a maverick.

## 2.5. Road transport

39. The CMNC has been very active in advocating competition neutrality in urban passenger transport sector. In the last years, many initiatives have been adopted as regards to **private hire vehicle (PHV) and Taxi markets**. It is a clear example of how innovation and technology -such as geo-localisation of both drivers and users- have reduced the asymmetric information in the market and have increased the level of competition in the taxi and PHV markets, increasing the pressure on prices, the choice available for consumers, the level of safeness in the market, and introducing better price mechanisms.

40. The CNMC has carefully supervised State actions and regulations imposed on new services such as PHV (as alternative to those traditionally offered by taxi and chauffeur-driven passenger car hire services) characterised for having major unjustified restrictions on entry and practice in Spain. For instance, the number of licenses for PHV service is dependent on the number of taxi medallions in the proportion 30 to 1 (*numerus clausus*)<sup>37</sup>.

41. Despite carrying out a similar economic activity, taxis and private hire vehicles services present different regulatory frameworks, with different requirements to exercise the activity, and different price policies for the provided services. Therefore, the main

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<sup>35</sup> After the approval of the study, the three companies actually decided to sell their stakes in CLH.

<sup>36</sup> CNMC (2016): "A report concerning the regulation of the market for retail distribution of road fuels through unmanned petrol stations" ([PRO/CNMC/002/16](#)).

<sup>37</sup> Also, PHD are subject to geographical limitations and to regional authorisation regime.

CNMC recommendation in this regard is to review the regulatory framework in order to foster competition among transport operators (level playing field)<sup>38</sup>. The CNMC believes that the regulatory response to the new models of urban transport should be solely based on the evaluation of general interest, regardless of routine, alleged acquired rights or particular interests of incumbents. Thus, it is needed a regulatory review in line with principles of efficient economic regulation.

42. In that sense, the CNMC has issued several regulatory reports (making proposals for liberalization, deregulation<sup>39</sup> or regulatory amendment in the markets).<sup>40</sup> These reports analysed the implications of draft regulations from the standpoint of competition and efficient economic regulation, with the aim of preventing the introduction of new provisions that could damage competition in the market.

43. The CNMC has also challenged restrictive regulations on PHV<sup>41</sup> and taxi services<sup>42</sup> in courts. Particularly, it has challenged unjustified restrictions on competition such as: the requirement for a minimum pre-hire period (e.g., 30 minutes); the prohibition of driving on public roads when the service is not being provided; the obligation not to display the availability of the PHV vehicle when it is parked on a public road or the prohibition to geolocate the vehicles available.

44. These advocacy tools, either separately or jointly, could promote greater competition in the taxi and PHV markets, maximizing consumer welfare with innovation, quality, variety and prices.

### 3. Public procurement and competitive neutrality. CNMC's experience and tools

45. European and national public procurement legal framework incorporates elements related to competitive neutrality. It recognised that State-owned enterprises are allowed to participate as bidders. In these cases, procurement rules and principles aim to ensure that all bidders (public or private) are afforded equal treatment in procurement procedures; that

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<sup>38</sup> In this regard it is relevant CNMC (2019): "Report on the PHV legal regime" ([PRO/CNMC/003/17](#)).

<sup>39</sup> It should not be ruled out that the absence of regulation is efficient in those instances where: (i) there is no market failure and, (ii) free market mechanisms are the most suitable for achieving efficient economic and social welfare outcomes.

<sup>40</sup> See IPN/CNMC/012/15: Draft Royal Decree which modifies the regulation of Law 16/1987, on the Organization of Land Transport to adopt it to the Law 16/1987, of July 30, on the Organization of Land Transport ; IPN/013/15 : Draft Ministerial Order which modifies the Ministerial Order FOM/36/2008, of January 9th, that develops section II of chapter IV of Title V about chauffeured car rental of the Royal Decree 1211/1990 on Land Transport Management ; IPN/CNMC/018/17: Draft Royal Decree which adapts the existing rules to the Law 16/1987, on the Organization of Land Transport ; [IPN/CNMC/020/19](#), draft regional regulation on PHV services in Madrid; [IPN/CNMC/003/20](#), draft regional regulation on PHV services in Murcia; [IPN/CNMC/040/20](#): Draft Royal Decree on control measures imposed on PHV licenses.

<sup>41</sup> For instance, the CNMC has challenged national regulation on PHV requirements (Royal Decree 1076/2017) (see [LA/01/2018](#)) and regional restricted regulation imposed on PHV, such a Decree 200/2019, on the conditions for nationally authorised operators to provide private hire services (PHV-N) in the Autonomous Community of the Basque Country (see [press release](#)).

<sup>42</sup> For instance, the CNMC challenged at court a Decree adopted in the region of Catalonia on the apps to book taxis through mobiles and other devices (see the [CNMC economic report](#)) and a Decree on PHV requirements adopted in Barcelona ([LA/08/2018](#)).

procurement selection criteria and processes are non-discriminatory; that bidding procedures and results are transparent; and that the outcome of managed competitions leads to more efficient use of public funds.

46. Public procurement is a CNMC’s top priority for action<sup>43</sup> consequently a variety of different advocacy initiatives have been adopted in this area.<sup>44</sup> Focusing on competitive neutrality, the CNMC has implemented the following initiatives:

47. A specific **CNMC study addressed the issue of [in-house providing](#) given its negative impact on competition**<sup>45</sup>. It refers to internal or instrumental relationships between an awarding authority and its in-house entity for the provision of works, goods and supplies have been carefully examined from competition perspective.

48. On the one hand, in-house procurement is not subject to public procurement rules as such competitive tendering may not be required.<sup>46</sup> Thus, those services demanded by the public sector are provided by a public entity (in-house provider) and consequently, no competitive tendering occurs. The study recommended that the existence of every in-house provider was duly justified and that the direct award of works, supplies and services to an in-house provider instead of their provision by the market through public tendering was also justified on a case-by-case basis.

49. On the other hand, an in-house provider can take advantage of its privileged transactions with the public sector to compete in private markets. This circumstance is crucial for maintaining a level playing field between public and private enterprises. In that sense, the CNMC highlighted the following aspects:

50. First, all public entities, including in-house providers, participating in a bidding process should operate according to standards of competitive neutrality. Then, if public entities (such as in-house operators) participate as tenderers in public procurement procedures conducted by contracting authorities, they are to be treated equally in relation to any private bidders that are participating, without benefiting from any special advantages linked to their status.

51. Second, as far as competition in commercial markets is concerned, in-house providers and economic operators must compete under the same conditions. Thus, in-house entities have limited participation on commercial markets and should not enjoy any undue competitive advantage in commercial markets in competition with other economic operators<sup>47</sup>.

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<sup>43</sup> As reflected in both its 2021-26 [Strategic plan](#) and its 2021-22 [Action Plan](#) include measures from competition enforcement and advocacy fields strategically targeted to the public sector such as procurement bodies.

<sup>44</sup> A [dedicated website](#) summarizes CNMC’s efforts in the area of public procurement.

<sup>45</sup> CNC (2013): “[Report on in-house providing in Spain: Implications of its use from the perspective of the promotion of competition](#)”.

<sup>46</sup> The in – house exception have been developed over many years in the Case law of the CJEU and is regulated in Directive 2014/24/EU (Article 12) and Spanish Public procurement Law (Articles 31-33).

<sup>47</sup> According to EU and national public procurement law, these entities have to carry out the essential part of its activities for the contracting authority (80% of its total economic activity) and limited participation in commercial markets (19%).

52. The CNMC recommended ensuring competitive neutrality between in-house operators and private players and expressly referred to “Competitive neutrality: maintaining a level playing between public and private business”.<sup>48</sup>

53. The CNMC is currently updating its “[Guide on Public Procurement and Competition](#)”<sup>49</sup>. This guide provides a reference to improve the design of public tenders following competition-friendly principles and to identify possible contexts of bid-rigging and collusion. It was originally published in 2011, so adapting it to reflect new economic and legal contexts can be very useful for procurement bodies<sup>50</sup>. This process is being carried out in phases which reproduce the cycle of public procurement<sup>51</sup>.

54. [Planning](#) has been the first phase analysed from a competition point of view<sup>52</sup>. Currently, the CNMC is drafting Phase II focused on the assessment of the procurement alternatives relying on a market analysis<sup>53</sup>. Consequently, it will cover the different procurement alternatives (in-house providing, horizontal cooperation and externalisation through bidding procedures) with the aim of highlighting the competition concerns that may arise from its use according to market conditions.

55. Also, related to competition neutrality in public procurement policy, it is worth referring to a **recent new duty imposed by Law on the CNMC by which it has to issue a report assessing the impact of competition arising from contracts directly awarded to affiliated enterprises belonging to the same group**<sup>54</sup>. These are specific cases where an exception of competitive bidding procedures applies, under certain conditions, to two or more undertakings (commercial companies belonging to the public sector) which are mutually-owned or mutually-dependant companies.

56. In that sense, it must be noted that the general rule under Spanish jurisdiction is to apply specific public procurement rules to contracts entered into by contracting authorities that are not classified as public administration (this category is called “contracts from other public entities” such as commercial companies belonging to the public sector)<sup>55</sup>. These rules governing the awarding of contracts by “other public entities” are aimed to ensuring

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<sup>48</sup> OCDE (2012): “[Competitive neutrality: maintaining a level playing between public and private business](#)”.

<sup>49</sup> CNC (2011): “[Guide on Public Procurement and Competition](#)”.

<sup>50</sup> In Spain, the legal framework of public procurement has changed substantially with the transposition of EU Directives [2014/23/EU](#) and [2014/24/EU](#) in the [Law 9/2017](#).

<sup>51</sup> The different phases envisaged are planning, alternatives to public contracts, preparation and design of the procedures, awarding, execution and ex-post evaluation.

<sup>52</sup> CNMC (2021): “[G-2019-02 Guide to public procurement and competition. Phase 1: planning public procurement](#)”. The document emphasizes the relevance of appropriate planning when managing public purchases and the benefits in terms of efficiency and competition. In particular, planning promotes transparency and facilitates the access of operators (namely SMEs) to tenders. It also favours the use of open and competitive award procedures that incentivise competition.

<sup>53</sup> In parallel, the CNMC has organised a [public debate session](#) on Public contracts between entities within the public sector (horizontal cooperation and in-house arrangements) under the prism of competition advocacy gathering experts from the academia, public and private sector, and a [public consultation](#) on the topic.

<sup>54</sup> See Article 321.6 of Law 9/2017, 8 November, of contracts of the public sector, which entered into force on 1 January 2021.

<sup>55</sup> See Article 321 of Law 9/2017, 8 November of contracts of the public sector.

principles of equality, non-discrimination, transparency, publicity, and free competition in those awarding process.

57. However, an exclusion from that general rule has been introduced by law to cases whether the contracts are awarded to affiliates whose essential purpose is to act as a service provider to the group to which they belong, rather than selling their services commercially on the open market. Thus, this exclusion permits the direct award of contracts between affiliated undertakings. It is nevertheless subject to specific conditions<sup>56</sup>. One of those is that those direct awarded contracts do not distort competition in the market.

58. This provision is directly related to competitive neutrality principle since the purpose of the exclusion is allow companies belonging to the public sector that engage in purely commercial activities to compete on equal terms with the rest of the private market operators. Competition concerns may arise whether those companies belonging to public sector also perform non-commercial activities.

59. In that scenario, privileges or advantages may be attached to the company (e.g., compensation provided for fulfilling public services obligations) that potentially may distort competition in open market. Bearing in mind that circumstance, the CNMC assess if there is a potential risk of cross-subsidization (from non-commercial activities to commercial ones in an open market) and if there are implemented high standards of governance, transparency, and account separation.

60. In this regard, the CNMC has analysed the application of the referred exclusion from a competition perspective for the following intra- business groups contracts (Hunosa, Correos and Cesce).<sup>57</sup> Those reports explicitly refer to the competition neutrality principle (and to the OECD Recommendation on the topic).

61. Another CNMC's advocacy tool used for ensuring a level playing field in public procurement are the [reports on competition-related aspects on draft tender procedures](#) at the request of procurement bodies at all level of government (national, regional and local). The CNMC assesses specific tender procedures as a competition consultative body<sup>58</sup>. Most of these CNMC's opinions refer to tender documentation for centralized purchasing of a wide variety of goods and supplies (office supplies, vehicles, furniture, audio-visual devices and computers, among others).

62. These reports are prepared before the procurement process has started, with the aim to promote competition *ex ante*<sup>59</sup>. These CNMC opinions have built a closer relationship with contracting authorities in charge of high-volume contracts (e.g., framework agreements) and have set a wide range of recommendations on different key issues which

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<sup>56</sup> The referred Article 321 establishes the accumulative conditions: a) That the contracting company directly or indirectly holds the totality of the contractor's capital stock or vice versa; b) That the contracts are aimed at the acquisition of goods or the provision of services that are necessary to carry out the commercial activity of the corporate purpose of the contracting entity; c) That the contracts do not distort free competition in the market.

<sup>57</sup> See CNMC (2021) : reports on contracts between companies belonging to the following bussiness groups: Hunosa ([INF/CNMC/063/21](#)); Cesce ([INF/CNMC/028/21](#)) and Correos ([INF/CNMC/074/21](#)).

<sup>58</sup> See [Article 5.2. of Law 3/2013](#).

<sup>59</sup> It is important to recall that the CNMC has also used its capacity to challenge administrative acts in courts (see [Article 5.4 of Law 3/2013](#)), to challenge tenders or other acts related to public procurement which unduly restrict competition. For instance, cases related to the extension of intercity buses concessions period in [Galicia and Valencia](#).

are decisive for a genuine competitive bidding procedure (market analysis; capacity criteria; awarding criteria, duration, technical specifications, etc).

63. An illustrative example of these kind of draft tender documents reports is telecommunications services contract at State level (466 million euros as estimated value) analysed by the CNMC in 2018<sup>60</sup>. Due to the high degree of concentration in this market (strong position of the incumbent- Telefónica- which used to be awarded 3/4 lots), the CNMC recommended to enhance competition through a division of this large contract (from 4 to 10 lots)<sup>61</sup>, and to reduce the capacity requirements as to facilitates access to SMEs and new entrants. In the end, the contracting authority was encouraged to reduce the financial capacity requirements. As a result, more participation per lot was ensured, and three different firms won the contract (Telefónica 2 lots, BT one lot and Vodafone one lot).

64. Lastly, it must be pointed out that the CNMC devotes great efforts in **training program for public officials** in charge of public procurement at all levels of public administration in Spain. As to it, it has provided training to more than 40 public institutions and around 2,500 officials since 2014. The program seeks to improve public officials' capacity to detect bid-rigging practices and use best practices in the design of the procurement process in line with free competition and competitive neutrality principles. Thanks to these sessions, the CNMC has gained a sizeable number of formal and informal contacts from contracting bodies in the recent years.

#### 4. Public aid, public service obligations and competitive neutrality principle. CNMC's experience

65. It is well recognised that establishing mechanisms to monitor the impact of State aid contributes to efficient market operation and to reducing unjustified distortions caused by government intervention. The CNMC has been conferred with competences on State aid issues.

66. Without prejudice to the European Commission being responsible for enforcing State aid rules, competition authorities, like CNMC, can **provide guidance to governments to make sure that public aid is competitively neutral**. The CNMC can issue [reports regarding public aid](#) and address proposals to the Public Administration in order to maintain high competition levels according to Article 11 of the Spanish Competition Act, the CNMC, ex officio or at the instance of the Public Administrations, may analyse the criteria for awarding public aid in relation to its possible effects on the maintenance of effective competition in the markets. It may issue reports as well as address proposals to the Public Administration in order to maintain competition<sup>62</sup>.

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<sup>60</sup> See CNMC (2018): “centralised contract for Telecommunications services” ([INF/CNMC/136/18](#)).

<sup>61</sup> In that sense, it is also illustrative the CNMC report on “IMSERSO elderly holidays programs contract” ([INF/CNMC/033/19](#)) in which the CNMC strongly recommend to introduce amendments in the design of the lots in order to reinforce competition in the tender.

<sup>62</sup> It must be noted that the CNMC must prepare a report on the setting of prices and wholesale access conditions to the infrastructures that are the object of broadband aid to promote next generation broadband networks (according to Article 3 of Royal Decree 462/2015 of June 5, which regulates instruments and procedures for coordination between different Public Administrations in matters of public aid aimed at promoting the promotion of the information society by promoting the supply and availability of broadband networks.).



67. Likewise, the CNMC shall issue an [annual report on public aid](#) awarded in Spain, which shall be public<sup>63</sup>. The report includes a statistic analysis on the State aid granted in Spain based on data sourced from the European Commission, and the latest regulations and jurisprudence on the subject. The report also includes a summary of the main activities led by the CNMC on State aid throughout the year. Also, it must be noted that the CNMC must be informed of *ex ante* notification of State aid measures by Spain to the European Commission.<sup>64</sup>

68. An example of CNMC [report](#) concerning public support is the CNMC's Assessment on Tax created by Generalitat of Catalonia on Nitrogen Oxide Emissions into the Atmosphere by Commercial Aviation in Prat Airport<sup>65</sup>. In that case, the CNMC identified favourable tax treatment to certain airlines. Indeed, the report focuses on the design of the regional tax which had an impact on effective competition and the proper functioning of the market in the activity of airline companies (since the tax only applied to passenger transport, not air freight, or airlines with more than 20.000 annual operations were exempted therefore companies carrying out more operations at that airport would be benefited) and the risk of existence of State aid as referred to Article 107 (1) TFUE and consequently should be subject to European Commission scrutiny.

69. In addition, the CNMC has assessed **public contracts where public services obligations** were attached<sup>66</sup>. For instance, public service contract for maritime transport between Ceuta and Algeciras report<sup>67</sup>. The CNMC assessed the duties imposes on shipping companies (PSO) and the public service contract in that route. Thus, the report highlighted the importance of engaging with a market analysis as to verified if the public intervention was justified.

70. The CNMC concluded that it seemed that market forces already provided the service considering their own commercial interest (three shipping companies were active in that route with overcapacity) thus, it recommended to reconsider the need of public intervention. Then, it was studied the design of the public contract, the selection of the public service provider, and the economic compensation attached. The CNMC recommended a better design of the contract as to the value, procedure, capacity requirements and technical terms and conditions, in order to reinforce competition (since 2011, the same shipping company won the contract as the solely bidder). Due to lack of competition in the bidding process, the CNMC alerted of the potential risk of State aid since the economic compensation (around 4 million euros) given to the service provider was not based on open, transparent and non-discriminatory tender procedure<sup>68</sup>.

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<sup>63</sup> See [Article 11.2 of Act 15/2007, on Competition Law](#).

<sup>64</sup> See [Article 11.3 of Act 15/2007, on Competition Act](#).

<sup>65</sup> CNMC (2015): "Report on Tax on Nitrogen Oxide Emissions into the Atmosphere by commercial aviation in Prat Airport" ([PRO/CNMC/002/15](#)).

<sup>66</sup> See for instance CNMC (2018) reports on city buses transport concessions ([Coruña](#) and [Cádiz](#)) and CNMC (2019): "Report on Draft Decree on OSP for maritime transport proposed by Balearic Government".

<sup>67</sup> CNMC (2018): "Assessment on PSO maritime transport services between Ceuta and Algeciras" ([PRO/CNMC/002/18](#)).

<sup>68</sup> In December 2019, the CNMC investigated various shipping companies after identifying ongoing potential antitrust practices in the market for transporting passengers and vehicles by sea between Algeciras and Ceuta (see, [press release](#)).

## 5. Conclusions

71. CNMC's policy regarding the promotion of competitive neutrality principle is widespread. For that purpose, a wide array of tools is adopted. These include vigorous competition enforcement and competition advocacy.

72. The Spanish Competition law is enforced to every enterprise (be it public or private, and irrespective of its nationality) and economic sector, and only practices exempted by a law can escape to competition law requirements. In this regard the application of Competition Law to public entities is out of question and does not raise any specific problem. Indeed, the Spanish Supreme Court has ruled on the possibilities of the Spanish competition system to pursue anticompetitive behaviour no matter either the public condition of the entity nor its active participation in the market.

73. Competition Advocacy has had a leading role in promoting the competitive neutrality principle in different sectors, advising policymakers to foster better regulation and educating society about the benefits of competition. This activity will have to play a bigger role in the coming years to support competition and foster better regulation, focusing particularly on preventing regulatory barriers to market entry and competition, and defending equal access to public procurement procedures.