

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Spain****4 June 2019**

This document reproduces a written contribution from Spain submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

Please contact Ms. Despina Pachnou if you have any questions about this document.

Email: Despina.Pachnou@oecd.org

JT03447778

Spain

1. Legal framework and standard of review

1.1. Is your jurisdiction an adversarial or an administrative competition enforcement system? Please describe the main features of your public enforcement regime.

1. Spain follows the unitary administrative model, in which the same administrative authority investigates potential violations and brings the case to an end by taking a final decision and imposing a remedy. The National Authority for Markets and Competition (Comisión Nacional de los Mercados y la Competencia- CNMC) enforces competition rules, especially in two areas: fighting anticompetitive infringements, whether as a result of collusion between companies, abuse of dominant position or unfair competition and ex-ante evaluation of mergers.
2. The Competition Directorate is entrusted with the investigation of anticompetitive conducts and the monitoring of mergers between companies, submitting its proposals to the Board for their subsequent deliberation and decision. Final decisions of the CNMC's Board are subject to judicial review.
3. The Spanish enforcement system is mainly based on three principles: efficiency, flexibility and protection of rights of defence. The CNMC enjoys significant investigative powers. Specifically, our national law allows to inspect business premises, to issue requests of information and to access the necessary information for the investigations, irrespective of the medium on which the information is stored. As a result of the investigation, prohibition decisions can be combined with imposition of fines, behavioural or structural remedies, and cease and removal orders. Commitment and positive decisions can also be adopted. At every stage the decision-making process is respectful of the rights of defence of the parties.
4. Additionally, it should be noted that Spain has a system of concurrent competences in application of the Competition Act. The prosecution of anticompetitive practices is shared among central and regional governments. The role of the CNMC is the allocation of cases between national and regional authorities and the maintaining of consistency in enforcement in the decentralised enforcement system. At present, there are 12 regional authorities: Cataluña, Galicia, País Vasco, Andalucía, Valencia, Aragón, Castilla-León and Extremadura with prosecution and decision bodies and Murcia, Canary Islands, Madrid and Navarra only with prosecution. All of them follow the unitary administrative enforcement model.

1.2. What is the standard of review for courts reviewing public competition decisions in your jurisdiction? Does the review court perform a full review on the merits or a review of legality on specific grounds? Is there a different standard for

questions of fact than for questions of law? If the review is one of legality, what are the grounds for challenge? Please provide case examples.

1.3. What competition enforcement acts and decisions are subject to review?

1.4. Are commitments or settlements common in your jurisdiction? Can they be appealed, including by third parties, and is the standard of review the same as that applicable to infringement decisions? Do courts review them before they become binding?

1.5. Is the review of decisions imposing fines or jail sentences subject to a different standard?

5. Undertakings have several opportunities for appeal or judicial review of all decisions on competitive matters. Decisions of the Competition Directorate can be appealed to the CNMC Board and decisions of the CNMC Board can be challenged before the National High Court (Audiencia Nacional). Decisions which have been upheld by the National High Court can be appealed (reviewed in cassation) before the Supreme Court (Tribunal Supremo).

6. The CNMC Board Decisions can be challenged on the following grounds: through an ordinary administrative procedure for any contestation or on protection of citizens' fundamental rights through special civil proceedings. This special civil proceeding enjoy preferential processing.

7. In Spain the judicial review perform a full review on the merits, with the only limit of the allegations submitted by the parts according to the consistency principle of the judgments. Typically, in support of their actions undertakings relies on a wide range of pleas in law, alleging both procedural and substantive issues. Therefore, courts are forced to decide on both issues.

8. Appellants can also ask for the suspension of the CNMC's resolution execution, a request that is usually admitted by the courts, exclusively, in respect of fulfilment of the fine and usually subjected to sufficient guarantee. This means that, in general, the fines imposed for breach of Competition Law in Spain are not usually paid by the undertakings until the judicial review finishes.

9. All decisions of the CNMC Board can be challenged before courts, including commitment and merger decisions. Any natural or legal person with a legitimate interest is entitled to bring an appeal before the Court.

10. Recently the CNMC has analysed the judicial review of its sanctioning decisions regarding articles 1 and 2 –which are equivalent to 101 and 102 of the TFEU– of the Spanish Competition Act. The study carried out for the period 2014-2017 shows that the Spanish National Court has confirmed on average 75% of the Competition Authority's sanctioning decisions. The percentage rises to 82.7% in the case of the Spanish Supreme Court.

11. Regarding commitment decisions, in the vast majority of cases the appeal of the parties focus on the resolution of the Competition Directorate rejecting the start of the commitments procedure. The case law has confirmed that decisions to initiate these proceedings and accept commitments are discretionary on the part of the CNMC, provided

that they are sufficiently reasoned and motivated (e.g., National High Court judgment of 26 January 2016, n°. 164/13).

12. Regarding merger decisions, the incidence of appeals submitted by undertakings is lower than in antitrust prohibited practices. Nevertheless, Court rulings have been made with regard to issues such as the proportionality of the approved commitments (e.g. Supreme Court judgement of 7 November 2005, n°. 32/2003), the rejection of the Minister of Economy to refer the decision on the concentration to the Council of Ministers after the second phase (National high Court judgement of 20 September 2010, n°. 175/2009), the application period of the commitments approved (Supreme Court of 15 December 2014, n°. 2038/2012), whether a certain agreement between undertakings can be considered to be a concentration or not (National High Court judgement of 24 March 2015, n° 136/2012), or the effects of a merger notification withdrawal (National High Court judgement of 7 March 2012, n°. 434/2010).

1.6. Is it possible to challenge charging documents (e.g., statements of objections in administrative systems; complaints in prosecutorial systems) and procedural acts, like requests for information, requests for interviews, and dawn raids? What is the standard for their review?

1.7. Are the opening or closing of enforcement proceedings or merger remedies appealable in your jurisdiction? What is the standard for their review?

13. As mentioned above, decisions of the Competition Directorate such as statements of objections, dawn raids, requests of information, refusal of deadline extension for allegations, openings or closings of proceedings can be appealed to the CNMC Board, only when certain conditions are met. Specifically, in those cases where an irreparable damage or grounds for legal defencelessness exist. In such cases, the appellant may also challenge the mentioned board resolution before the National High Court.

14. In this regard it is settled case law of the Spanish Supreme Court that only final administrative acts with sanctioning content may result in legal defencelessness or irreparable damages (Supreme Court judgment of 7 February 2007, n°. 6456/2002).

1.8. What is the margin of appreciation reserved by case law to the decision-maker?

15. The margin of appreciation of the CNMC is only constrained by the principles of rule of law and due process. Given the existence in competition field of undetermined and open legal concepts, the margin of the administrative authority is broad, as long as the decisions are reasoned, reasonable and proportioned. Notwithstanding, this margin of appreciation is subject in all cases to judicial review.

1.9. Is the review of economic evidence subject to a different standard? Is the review court free to interpret economic assessments?

16. No, the courts in their reviews can assess economic facts or concepts to the same extent that legal ones.

1.10. What is the average duration of a court case? Is there a possibility to expedite the court's review or use a simplified procedure?

17. The duration of a court case is very variable and it primarily depends if the case is appealed before the Supreme Court or not. Typically the first review by the National High Court may last from two to four years and the subsequent appeal before the Supreme Court from one to three years.

2. Courts' access to competition expertise

2.1. In your jurisdiction, how do the courts acquire sufficient expertise to adjudicate competition law and economic matters? Have any cases posed particular problems as a result of the court's lack of understanding of technical or economic concepts? Please provide examples.

18. According to the latin maxim *Iura novit curia*, the courts know the law. Nevertheless, courts may submit certain questions of law (for instance, the application of European law) to other courts (European Court of Justice).

19. Furthermore, expert witnesses may be called by judges to explain technical or economic issues. Appellants may provide economic reports and the competition authority may also contest these reports submitted by the parties.

20. In 2015 the Spanish Supreme Court confirmed the annulment of the sanctions applied to Telefónica Móviles de España, Vodafone España y France Telecom España challenging the reasonings of the decision about the dominant position of the mentioned companies in the wholesale market of short messages (S/0248/10 MENSAJES CORTOS).

21. In February 2019 the Supreme Court has also confirmed the annulment of the decision of the CNMC sanctioning Telefónica Móviles de España because of the restrictive contractual conditions imposed by Telefónica to their clients which are small and medium-sized companies. Nonetheless, the Supreme Court have adjusted the previous arguments of the National High Court which considered that the contracts between Telefónica and pymes could not be qualified as vertical agreements. The Supreme Court, on the contrary, has identified them as vertical agreements. However, it has concluded the adverse effects on competition were not proved (S/0422/12 CONTRATOS DE PERMANENCIA).

2.2. Does your competition authority take action, alone or with other authorities, to ensure that judges have the knowledge and the expertise required in each case?

22. In 2018 the CNMC signed an agreement with the University of Valencia to support their proposal for the project "Training of national judges in EU Competition Law" (DEFCOMCOURT4). The University of Valencia have been beneficiary of the Grant Agreement with the CNMC as associate partner. In October and November 2019 will take place the proposed actions (seminars), focus mainly on training on economic principles of Competition law and the assessment of economic evidence studies in litigation and its procedural handling; actual trends in the application of arts 101 and 102 TFEU and training on the application of competition law in regulated markets. Target audience of the mentioned actions consists exclusively on national judges dealing with competition cases in the public enforcement field.

23. Additionally, in November 2018 the CNMC promoted a full-day meeting with judges of the Third Chamber of the National High Court in order to discuss some problematic and trending topics in the application of competition law, such as dawn raids, single and continuous infringements, the 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 or the impact of economic analysis in competition cases.

2.3. Does your jurisdiction provide for external expert advice to the court? If so, how does this work? Who can request it — the judge, the parties, or both?

24. The intervention of the CNMC in judicial procedures was introduced by Spanish Competition Act 2007 in article 15 of the Procedure Act 1/2000, of 7 January. According to this article, the European Commission, the CNMC and the competent bodies of the Autonomous Communities within the sphere of their competences may intervene, without being considered a party, ex officio or at the request of the judicial body, by providing information or submitting written observations on issues relating to the application of Articles 101 and 102 of the TFEU or Articles 1 and 2 of the Competition Act. With the permission of the court, they may also make verbal observations.

25. After the entry into force of Spanish Competition Act of 2007, the number of interventions of the Spanish competition authority at the request of the judicial body has increased significantly over the years and they focus on various subjects, such as fuel distribution, bid rigging, intellectual property rights, beverage distribution or franchises.

26. The observations of the competition authority has no binding legal effect for the court.

27. Additionally, according to articles 212, 404 and 461 of Civil Procedure Act 1/2000, the judgements, the court decisions admitting the lawsuit and the notices of appeal in competition proceedings shall be communicated by the Judicial Secretary to the CNMC. The transmission of this information is crucial for the intervention of the CNMC in this stage.

28. Furthermore, regarding the judicial review of the CNMC resolutions, the participation of the CNMC has also increased, supporting the State's legal counsel in the judicial procedures.

29. Finally, the CNMC, at the request of the judicial body, may inform about the criteria of the quantification of damages caused by infringements of Union or national competition law (art. 5.2.b) of the Act 3/2013 of 4 June 2013 creating the National Markets and Competition Commission) .

2.4. For judicial review, is there a specialised competition court, or a competition chamber in a general court? Was this always the case or was there a reform of the system (or is a reform contemplated) based on considerations linked to the effectiveness of the review?

30. The Administrative Chambers of both National High Court and Supreme Court are in charge, among others issues, of the resolution of competition matters.

2.5. What are the advantages and disadvantages of your review system? How could the effectiveness of review improve?

31. Two of the most serious problems of the system are the extremely high numbers of appeals and the slowness of judicial procedures. This latter problem is the reason in those cases in which the resolution of the CNMC is annulled based on procedural grounds, of the impossibility of starting proceedings against the companies a second time due to the lapse of the infringement (e.g. Spanish case S/0469/13 FABRICANTES DE PAPEL Y DE CARTÓN ONDULADO). In this regard, it must be considered as extremely positive the provision of the Directive declaring that the limitation period for the imposition of fines or periodic penalty payments by a national competition authority shall be suspended or interrupted for as long as the decision of that national competition authority is the subject of proceedings pending before a review court.

32. In 2017 the CNMC made public and implemented some actions in order to improve the effectiveness of the CNMC resolutions and the judicial review, such as strengthen the coordination with the State's legal counsel in the judicial procedures on competition matters in order to assure a more proactive role of the CNMC in the review, including the participation of the Competition Directorate's officials as experts before the court and to provide with greater legal resources the CNMC in order to strengthen the legal robustness of the resolutions and facilitate the subsequent judicial review. In this spirit, the CNMC has also become more involved in the training of national judges, as mentioned above, considering this a key aspect for a more effective judicial review.