

**SPAIN**

**2002**

**Executive summary**

1. During 2002, Competition policy remains to play a central role in the framework of the domestic economic policy. Over last years, this economic policy has been targeted to enhance markets efficiency in order to maintain sustainable and balanced economic growth in a scenario where the competitiveness of undertakings almost exclusively depends on their relatively efficiency and ability for innovation.

2. The efforts made over the last years in the field of legal certainty, transparency and efficiency enhancing in our Competition System, by means of relevant legal reforms, have lead to the consolidation of the System and to prepare it to face the new challenges stemming from the structural evolution of markets. Along with the modernisation of the legal and procedural framework, the activity in the field of competition has been adapted to the new scenarios incorporating a more dynamic economic assessment largely based on the abolition of entry or exit barriers to foster potential competition.

3. At the same time, the former reforms have recently come along with an important increase of central competition agencies budgets and human resources aiming at enhancing a pro-active activity in competition.

4. Recently, besides merger control –where the record figure of 100 notified operations were reached in 2002- and the activity in the field of anticompetitive conducts specially oriented to strategic sectors recently liberalised, the relevant activity on advocacy has been stressed through an active participation in legislative activities issuing reports on the drafts versions of any regulation which could affect competition in any market.

5. This consolidation of our Competition System is a positive advantage to succeed in the establishment of the new decentralised institutional framework settled up in Act 1/2002, in force since May 2002. The decentralised process will allowed for still more resources at the regional level and for a broader and closer enforcement of competition legislation. To this end, it seems most relevant to preserve enforcement coherence, this being the main goal in the settlement of the whole new decentralised system.

**I. Changes in Competition Laws and Policies; Proposed or Adopted**

**1. Summary of new legal provisions of competition law and related legislation**

1.1. *Act 1/2002, of February 21, regarding Coordination of the State and the Autonomous Communities competences on competition defence.*

6. The most relevant new legal provision in 2002 has been the approval and the entry into force of the Act 1/2002, which constitutes the framework of a decentralised system of enforcement of articles 1, 6 and 7 of the Competition Act related to anticompetitive agreements and abuse of dominance. The new

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regulation implies, due to a Constitutional Court decision, the major administrative reform in the current institutional design of the Spanish competition system.

7. The Constitutional Court sentence issued on 11 November 1999, acknowledges that the Autonomous Communities have executive powers in the enforcement of the competition legislation. Nonetheless, the exercise of these powers must be reconciled with the need to protect the unity of the national economy and the demand for a single market that can allow the State to develop its constitutional powers in laying down and co-ordinating the general plans for economic activity in the interests of respecting the equality of the basic conditions for the exercise of economic activity.

8. The effects of the judicial decision are reflected in the need to establish, by means of a State Act, the framework for the development and coordination of the enforcing powers of the State and the Autonomous Communities foreseen in the Competition Act 16/1989, of 17<sup>th</sup> July.

9. The Act 1/2002 is the result of that mandate and it came into force on May 23, 2002. The main elements and effects of this Act are the following:

- The Autonomous Communities have only competences in the enforcement of the Spanish Competition Law concerning anticompetitive practices (agreements and abuse of dominance). Competition legislation, Merger control, Public aids control and the approval of block exemption regulations are still exclusively State competences. Institutional representation before international organizations and the enforcement of articles 81 and 82 of the European Community Treaty are State competences as well.
- The Autonomous Communities will be competent in proceedings when the conduct produces effects only in their territories and there is no a national market effect. This implies that the State remains competent for prosecuting practices that may alter free competition in the supra-autonomous sphere or in the national market as a whole.
- The Autonomous Communities will set up their own institutions to develop their competences on antitrust practices. At the end, this will mean an important increase in resources devoted to maintain competition in markets.
- As coordination and collaboration among all the institutions concerned becomes the key element to achieve efficiency and coherence, the Act establishes mechanisms for the settlement of conflicts and coordination based on reciprocal information and the creation of two *ad hoc* bodies:
  - The mechanism for the settlement of conflicts is established for dealing with conflicts regarding the attribution of competences that may arise between the State Administration and the Autonomous Communities or among the latter as a result of the application of the legislation on competition. The *Consulting Committee on Conflicts*, is a specialised consulting body, formed by an equal number of representatives appointed by the State and by the Autonomous Communities, which issues of a non-binding report assessing the attribution of the competences to process and settle the procedure in question.
  - There are three types of Coordination mechanisms:
    - a) *The Competition Council*, a body that unites representatives of all the Territorial Administrations with competences on this matter, whose basic

functions are related to centralising relevant information on competition in the markets and discussing the criteria conducive to achieving adequate coordination in applying the Law.

- b) *Mechanisms* that ensure complete, symmetrical and mutual information on the restrictive conduct files.
  - c) Attribution of legitimisation to the Servicio de Defensa de la Competencia to intervene in the regional institutions proceedings (similar to *amicus curiae* under Regulation 1/2003/CE), whereas this legitimisation is understood to be a final instrument aiming to assure a consistent application of the regulations on competition.
- Lastly, the Act foresees the possibility that the Servicio de Defensa de la Competencia and the Tribunal de Defensa de la Competencia may close collaboration agreements with the competent bodies in the Autonomous Communities to instruct and settle the proceedings. Such agreements shall establish the concrete issues and mechanisms that shall govern the aforementioned collaboration.

As a final conclusions, one can expect with this Act:

- a broader and closer enforcement of competition legislation. A net increase in the number of cases is expected due to the “proximity effect” of new regional institutions.
- an increase of the resources devoted to competition as regional competition competences develops.

### ***1.2. Act 53/2002, of December 2002, on Administrative, Tax and Social measures,***

10. The Act 53/2002 has clarified certain aspects concerning the maximum procedural periods, established in the Competition Act 16/1989, of 17<sup>th</sup>July, related to the revision of the decisions issued by the Servicio de Defensa de la Competencia (SDC).

11. Article 56 of the Competition Act establishes the maximum procedural periods for the sanctioning proceedings in the instruction phase before the SDC as well as in the resolution phase before the Tribunal de Defensa de la Competencia (TDC). In both cases the maximum term is twelve months. Nevertheless, the Act did not determine the rest of the period that the SDC has for conducting a complementary instruction ordered by the TDC in certain cases.

12. In order to assure legal certainty, the new wording given to article 56 by the Act 53/2002, introduced a new paragraph establishing a maximum period –of six months- as follows: *When the Court for Competition Defence send back the proceedings due to the admission of an appeal against a resolution to supersede or in order to conduct the appropriate inquiries as foreseen under article 39 of this Competition Act, the Service for Competition Defence will have a maximum term of six months, reckoned from the date of notice of the resolution of the Court, to conduct the necessary complementary instruction proceedings in order to complete the clarification of the circumstances and to determine responsibilities.*

13. On the other hand, the article 48 of the Competition Act lays down the procedure for the appeal against certain decisions issued by the SDC and the resolutions to supersede the suit of the proceedings as well, but without establishing the maximum deadline on which the TDC should issue the resolution of the appeals. Again, legal certainty reasons made necessary to determine this term giving a new wording to the

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article 48. The term has been fixed in three months except when the appeal is lodged against a resolution to supersede or filing the proceedings, case on which the maximum term to issue and notify the resolution of the appeal will not exceed of twelve months reckoned from the date on which the appeal was lodged.

14. These modifications concerning procedural periods enhance legal certainty for undertakings and economic agents due to the establishment a maximum term for the activity of the competition authority. In this respect, it should be noted that Spain is one of the few countries that has maximum procedural periods in the anticompetitive conducts proceedings, both in the instruction and resolution phases.

### 2. Other relevant measures, including new guidelines

15. During 2002 the SDC has elaborated and published **guidelines on the assessment of mergers**. The document explains the general criteria usually considered by the SDC to determine whether a merger should be notify, the relevant markets potentially affected, the competitive structure of those markets, the application of the substantial test and so on.

16. The objective of this exercise is to foster the transparency of the procedure and to strengthens the legal certainty of the economic agents, to facilitate the planning of the mergers and to minimise not only the uncertainty of the economic agents but also the possible anticompetitive effects of the concentrations.

17. The document do not address all the possible elements to be considered in the analysis of the mergers but only explain or expose the general criteria which are necessary to be applied with flexibility by the competition authorities in a case by case basis.

### 3. Government proposal for new legislation

3.1. *In 2002, the final drafting of the Royal Decree 378/2003, of 28 March, implementing the Competition Act 16/1989, of 17 July, concerning block exemptions, individual authorisations and Competition Register, already in force since April 2003, was finished.*

18. The objective of the Royal Decree is to adapt the Spanish regulation on this field to the recent changes introduced in European Union legislation, as well as to the changes introduced in domestic legislation in recent years and, finally, to modernise it by means of the introduction of technical improvements resulting from the experience. Hence, this new Royal Decree replaces the former Royal Decree 157/1992, of 21 February.

19. The Royal Decree includes 24 articles organised in four chapters:

- Chapter I, regulates the authorisation of block exemptions regulations. In particular, and due to economic and legal coherence reasons, it incorporates to the Spanish law these categories of agreements already exempted in Community Law by means of the new European block exemption.
- Chapter II, modifies certain aspects of individual authorisation proceedings, established in article 4 of the Competition Act 16/1985 which confer TDC the ability to authorise, at the request of the interested party, individual and specific agreements when they are beneficial to the domestic economy and consumers.
- Chapter III, regulates the Competition Register, where individual agreements authorised or banned by the TDC are recorded as well as economic concentration operations.

- Lastly, Chapter IV addresses the regulation of appeals and includes an additional provision concerning the competition institutions of the Autonomous Communities, a transitional provision regarding the regime of the agreements already in force, a repeal provision of the Royal Decree 157/1992, and two final provisions concerning developing entitling and entry into force of this new Royal Decree.

3.2. *The new wording given in 2001 to articles 20 and subsequent of the Competition Act 16/1989, modified the legal status of the Tribunal de Defensa de la Competencia becoming as a autonomous Body with a differentiated public legal personality and autonomous management which, without prejudice to its administrative secondment, exercises its functions in a fully independent way.*

20. This modification makes necessary to give the TDC its own Bye-Laws as well as to adequate its internal organisation. Thus, during 2002 it has been prepared the draft version of the *Royal Decree 864/2003, of 4 July, approving the Tribunal de Defensa de la Competencia Bye-Laws*, already in force since 10 July 2003.

21. Finally, it is necessary to highlight that the trend beginning in 2001 concerning the increase of the resources of the TDC, both human and financial, has continued in 2002.

## II. Enforcement of Competition Law and Policies

### 1. *Action against anticompetitive practices, including agreements and abuses of dominant positions*

a) *Summary of activities of:*

a.1. Competition Authorities

Servicio de Defensa de la Competencia (SDC)

22. The number of cases started in 2002 were 95 (122 in 2001), of which 70 (86 in 2001) in response to complaints, 23 (26 in 2001) were single authorisation proceedings and 2 (2 in 2001) were initiated ex officio. During 2002, 102 cases were completed (119 in 2001). The *SDC* decided to proceed in 42 (46 in 2001) cases that were forwarded to the *Tribunal*, of which were 22 single authorisations (24 in 2001) and 20 sanctioning files (22 in 2001). At the end of 2002, 113 (122 in 2001) cases remained open.

23. The *SDC* initiated 92 (113 in 2001) actions against anticompetitive practices, of which 30 (30 in 2001) were agreements (infringement of article 1 of Competition Act 16/1989, of July 17), 29 (39 in 2001) were abuse of dominance (infringement of article 6 of Competition Act 16/1989, of July 17).

24. Most cases have arisen in the service sector (81). In particular, the following are the most significant: 2 in production and distribution of electricity, gas and water; 4 in fuel sell for automobiles; 21 in wholesale and retail distribution; 14 in transports and communications; 5 in financial services; 2 in real state transactions; 2 in advertising activities; 3 related to activities of the Public Administration; 4 concerning data bases; 5 related to health and social assistance; 11 in sports and cultural activities and 2 concerning funeral services.

25. During 2002, *SDC* officials have carried out 15 inspections in premises of undertakings of which 9 inspections were together with officials of the European Commission.

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Tribunal de Defensa de la Competencia (TDC):

26. In 2002, the *TDC* issued 25 sanctioning resolutions: there were 18 cases where the infringement was proven and the *TDC* imposed fines; 2 cases where the infringement was proven but the *TDC* did not impose any fine and 4 cases where the *TDC* did not appreciate the existence of infringement. Interim measures were decided in 1 case.

27. The *TDC* decided on 42 single authorisations. 21 of them, were renewed, 20 were new exemptions granted and 1 modified.

28. Finally, complying with its advisory role in the opening of new hypermarkets in regions, the *TDC* issued 191 reports on this matter.

### a.2. Courts

29. During 2002, the Audiencia Nacional has issued 55 judgements concerning the appeals against resolutions of the TDC; 45 of which were not admitted, 3 of the appeal were admitted and 7 of them were partially admitted. 23 of the 55 judgements are still subject to a *Casación appeal* before the Tribunal Supremo.

30. In its turn, during 2002, the Tribunal Supremo has issued 4 judgements dismissing the appeal against judgements of the Audiencia Nacional which, previously, were not admitted the appeal against the resolution of the TDC.

### b) Description of significant cases

#### 1. REPSOL BUTANO

31. The Asociación Española de Empresas Distribuidoras de Gases Licuados del Petroleo lodged a complaint against Repsol Butano based on a presumed commission of the conduct prohibited by the Competition Act 16/1989, of 17 July, consisting of the existence of restrictive clauses in the butano distribution contract. The TDC declared the infringement of article 1.1. of the Competition Act considering that they were an exclusive distribution agreement which include anticompetitive restrictions not covered by the Commission Regulation EEC 1983/1983. In addition, it was declared the breach of article 1.1 because of the inclusion in the franchise contract of the Repsol Butano Official post sale Service the explicit prohibition for the franchisee to buy products of equivalent quality as such as offered by the franchiser.

#### 2. DISA RED

32. In the field of petrol distribution and following previous resolutions against Repsol and Cepsa, the TDC imposed to DISA a fine of 300.000 euros based on the inclusion in the exclusive buy contracts signed with retailer's owners of Petrol Stations in the Canary Islands, of certain clauses not permitted by the EEC Regulation 1948/83 neither by the Royal Decree 157/92 concerning block exemption. These clauses concerned, among others, the excessive length of the contracts and the fixing of the resale price of the fuel and lubricants.

#### 3. TELEFONICA INTERNAUTAS

33. In the field of telecommunications, the TDC imposed a fine of 900.000 euros to Telefónica based on the infringement of article 6 of the Competition Act consisting on the abuse of a dominant position . It has been proved that Telefonica conferred its subsidiary Telefonica Data a temporary

privileged indirect access to the local loop; additionally it was included in the contract for the service *Megavia ADSL* certain clauses that were contrary to the legislation in force which could induce their clients, without any justification, to choose that service instead other provided by its competitors in the market of internet access services.

4. IBERIA

34. The TDC declared the commission by IBERIA of a conduct prohibited by article 6 of Competition Act due to the establishment of a fidelity mechanism for the travel agency -by means of a variable bonus called *Creciberia*, to pay to these travel agencies- that distort competition in the domestic air transport market, and on which IBERIA has a dominant position.

5. SGAE/Vale Music

35. The Author and Publisher General Society (SGAE) abused of its dominant position in the market of author rights by means of imposing to phonographic producers that are not integrated in AFYVE, the obligation to pay much higher amounts that producers which belongs to this Association, in the use of the same repertory to produce phonogram's for selling to the public or for private use. The application of these dissimilar conditions place some competitors at a competitive disadvantage compared to others, without given any justification concerning the economic reasons for that discrimination. The TDC imposed the SGAE a fine of 125.000 euros.

**2 Mergers and acquisitions**

a) *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

36. In the field of merger control, year 2002 is highlighted by the entering into force on February 8, of the new Royal Decree 1443/2001, of 21 December, implementing the Competition Act 16/1989, of 17 July, regarding the control of economic concentrations. This new Regulation replaces the former Royal Decree 1080/1992, of 11 September, modernising the merger control regulations and adapting it to the recent reforms of the Competition Act 16/1989; among these reforms, the main one was the change from a system based on voluntary notification to a system based on prior compulsory notification.

37. One of the outstanding features of this new regulation is the publication of the reports issued by the Servicio de Defensa de la Competencia concerning every notified merger. These reports may be consulted in web page of the SDC. The list is permanent updated and include a brief information concerning the concentration, its notification date and the proceedings stage; when appropriate the Decision of the Council of Ministers will be included as well. Finally, the web page also offers information about the way to notify an economic concentration along with the application form to fulfil. This has strengthened legal certainty as well as the transparency of the procedure.

38. After the relative stabilization in the number of notified concentrations in 2001, year 2002 has register an spectacular increase on the merger assessed by the SDC, reaching to a record figure of 100 (76 in 2001 and 93 in 2000) operations notified along with a high number of prior consultations and preliminary inquiries.

39. On the other hand, it is keeping up the trend beginning in 1999 with the entry into force the new system of compulsory notification in regard to the enlargement of the scope of control, the dimension and the complexity of the notified transactions.

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	1996	1997	1998	1999	2000	2001	2002
Notifications	23	19	31	51	93	76	<b>100</b>
Referrals to the TDC	2	7	5	15	12	6	<b>9</b>

40. 83 notified mergers were tacitly authorised. The Minister of Economy, upon proposal of the SDC, referred 9 to the Tribunal. After the TDC issued its report, the Council of Ministers adopted its final decision, through an Agreement: 4 were authorised subject to conditions (1 already in 2003) and the rest were cleared. In all this 9 cases, the Council of Ministers followed the advise of the TDC.

Notifications: type of transactions in 2002			
Acquisition	Joint control	Takeover bid	Others
92%	4%	3%	1%

### b) *Summary of significant cases*

#### 1. DELOITTE-ANDERSEN

41. The transaction, notified at the request of the SDC, consisted of the conclusion of several agreements between Deloitte&Touche Tohmatsu (DTT) and Andersen España aiming to join the latter organisation the DTT international network and, in the future, the merger of both undertakings.

42. The transaction implies the replacement of Andersen by Deloitte España as first operator in the field of auditing and accounting services for undertakings listed on the Stock Exchange. After the transaction, it would disappear one independent competitor of the five that operates on this sub market.

43. In its report, the SDC considered that the need to have an international network for the big size enterprises is an entry barrier which explains the existence of only four suppliers in that sub market and the wide gap between the market shares of these players and the rest of accounting enterprises.

44. Given these considerations, the file was referred to the TDC who pointed out, among other considerations, that the strengthening of the first operator was almost insignificant, that the association with Deloitte was the more neutral option for competition, that the demand for a new auditor is made in general by means of a public tender and that the recent modification on the domestic auditing legislation will increase competition on this field.

45. Thus, the TDC recommended not opposing to the transaction, recommendation which was followed by the Council of Ministers.

2. CAPRABO-ENACO

46. The transaction consisted of the take over of 100% of the capital of Enaco S.A. by Caprabo S.A. by means of a take-over bid. After the merger, Caprabo would strengthen its position in the cash and carry and retail distribution of consumption goods markets in certain localities or geographic areas of the Autonomous Communities of Cataluña and Castilla La Mancha.

47. The file was referred to the TDC and the obligation to suspend the execution of the transaction was lifted. This case was the first concerning a take-over bid.

48. In its report, the TDC considered that the transaction could lessen the conditions of competition existing in the affected market due to the increase of the market share of Enaco and Caprabo, market on which the main entry barriers are of legal nature. Cataluña has the most restrictive regulation in the field of retail trade, according to which it does not grant the authorisation to open stores when it exceeds certain threshold of market share at regional or local level. The TDC considered this prohibition inconsistent because in the attempt to avoid the increase of the regional market share it is in fact a protecting the local monopolist. On the basis of all of this, the TDC concluded that the transaction could be approved subject to the condition that certain outlets in Cataluña should be sold by Caprabo.

3. IER-THALES (ATB)

49. The notified transaction consisted of the acquisition by IER, S.A. of the assets of THALES e-TRANSACTIONS, S.A. concerning ATB products. After the merger, IER, leader in that market, would have a market share of 73,5% of the global market on ATB products and the 99% of the Spanish market; the second operator at global level would disappear and the competition would be limited.

50. The file was referred to the TDC. In its report, the TDC pointed out that, in spite of the direct effect of the increase of the business concentration, no restrictive effects on the conditions of competition in the affected markets would arise given the absence of entry barriers and the power of the demand in these markets.

51. The Council of Ministers, following the report of the TDC, decided not to oppose the transaction.

4. DANA AUTOMOCION-GKN AYRAN CARDAN

52. The notified transaction consisted of the merger of the two main operators in the Spanish market of certain spare parts or pieces (ATL) for automobiles by means of the acquisition by Dana Corporation and GKN Holdings of its common subsidiary GKN Driveshafts. After the transaction, the buyer company would become the sole operator in the affected market, who is also the first operator, with an important market share, in the related market of ATMP automobile pieces.

53. The file was referred to the TDC who recommended not opposing to the transaction because it did not create any threat to competition. Following the report of the TDC, the Council of Ministers decided not to oppose the transaction.

5. SOGECABLE-VIA DIGITAL

54. The transaction notified in July 2002, consisted on the integration of DTS Distribuidora de Televisión Digital S.A. (Vía Digital), the second pay TV operator in Spain, in Sogecable S.A., leader of the Spanish pay TV market. The former was controlled by the Spanish Telefónica group. The latter was jointly controlled by the Spanish media group Promotora de Informaciones S.A. (Prisa) and Groupe Canal + S.A.

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55. In its report, the SDC considered that the main effect of the merger is the integration of the two main pay TV platforms which operate in Spain and which are the only two that broadcast by means of satellite technology. Both belong to media groups that are present in markets vertically or closely related to the pay TV market. So, the relevant product market was the pay television market along with other product markets, linked or closely related to pay TV which could also be affected by the concentration: the acquisition of rights of premium contents (football events and premium films); production and sale of TV thematic channels; production and sale of audiovisual works for television; Telecommunication services (telephony and Internet access) and wholesale digital platform services.

56. The transaction was referred to the TDC. In its report, the TDC considered that the transaction would hinder the maintenance of the effective competition in all the markets mentioned above.

57. Sogecable had a combined market share in the pay TV market of around 55%, in terms of number of subscribers. The integration of Via Digital in Sogecable would raise this market share to around 80%. Sogecable would become the sole satellite television platform in Spain and would only compete with cable operators in the geographic areas where they are legally and technically established. Nevertheless, the main risks of the merger came from the position of the parties in the upstream markets of acquisition of rights of premium contents (football, premium films, thematic channels) strongly related to pay TV market and from the position of Telefónica (which hold a minority but relevant stake in Sogecable) in telecommunications markets.

58. Concerning the market of acquisition and sale of rights of football events, the merger had a negative effect on effective competition hindering new entrance. As for the market of acquisition of exclusive rights to broadcast films produced by the *Major American Studios* for first and second pay TV windows and the market of production and commercialisation of TV thematic channels, the merger also generated anticompetitive concerns in the sense that these markets would suffer a reduction of the demand without a simultaneous intensification of competition between producers and distributors for getting into the programming of the new platform.

59. With regards to the Telecommunication services market, the participation of Telefonica in Sogecable as the company that will control the main contents for pay TV, along with its activity as a provider of fixed telephony services, broadband Internet access and television through ADSL, would produce anti competitive effects in these markets. As technical progress allows telecommunication operators to provide integrated package services which include pay TV services as the key element to attract clients, the notified operation might produce effects not only over the single service of pay TV but also over other services which may be offered jointly with this one (ADSL) via cable or telephone. Besides, Sogecable and Telefónica would be interested in developing a joint supply of pay TV, voice and data services; this would lead to strengthening the position of Telefónica in the broadband Internet access market and the fixed telephony market.

60. Nevertheless, the TDC considered that the notified operation would enhance economic efficiencies in the resulting TV platform due to the acquisition of a critic number of subscribers which would enable the new entity to be profitable. The new platform would have incentives to transfer these efficiencies to consumers both via prices and via better contents. Thus, it was considered that the lessening of competition that the notified operation would produce, could be compensated with the compliance of a set of conditions by Sogecable concerning all the affected markets.

61. Following the advise of the TDC, the Council of Ministers decided to clear the merger subject to compliance with a number of conditions related to the abovementioned markets.

6. ACCIONA-TRANSMEDITERRANEA

62. The transaction consisted of the take over of Compañía Transmediterranea by a holding led by Acciona S.A. Although the concentration assessed would not imply an increase of the market share in the geographic areas defined by the passenger and goods shipping transport markets, the SDC considered that it was necessary to take into account the fact that a group of undertakings with some interests in the same transport sectors were a part of the acquiring holding; having regard that this group is present in the Board of Transmediterranea S.A, they would have all the information about its strategic management.

63. The file was referred to the TDC as it was considered convenient to carry out a more detail analysis of the transaction in order to avoid a possible hindering of the effective competition in the concerned markets. In its report, the TDC considered that the participation of this group of undertakings did not conferred the control to them; hence the transaction did not create any threat to competition and, accordingly, the TDC recommended not opposing the transaction. Following the TDC's recommendation, the Council of Ministers decided not to oppose the transaction.

7. ENDESA RED-HIDROFLAMICELL

64. The transaction consisted of the acquisition of 75% of the capital of Hidrofamicell, S.L.U. by Endesa Red, S.A.U.. The former is a small undertaking for distribution in the electricity sector that operates in three villages of the Pirineo mountains in Lerida (*Pirineo leridano*). After the acquisition, Endesa Red would become the sole electricity distributor in these three villages strengthening its market share in the province of Lérida.

65. The file was referred to the TDC in order to asses the possible reinforcement of the barriers to entry in the distribution and commercialisation of electricity. In its report, the TDC recommended not to oppose the transaction on the grounds that it is necessary to guarantee the proportionality between the decisions and the possible restrictive effects in the assessed transactions. In this case, the operation affected only a very small undertaking which has never developed activities in the commercialisation sector; hence, it was clear the relative unimportance effect on competition in the commercialisation and distribution activities.

66. On the other hand, the operation would produce beneficial effects on competition and consumers in the form of improvements in the maintenance of the electricity lines and in the provision of the service. Thus, it was considered that these improvements could compensate the lessening of competition that the notified operation would produce.

67. The Council of Ministers, following the recommendation of the TDC and the Comisión Nacional de la Energía (the Spanish Sector Regulator), decide not to oppose the transaction.

8. IBERENOVA-GAMESA

68. The transaction consisted of the acquisition by Iberenova, belonging to IBERDROLA Group and specialised in the activity of wind electricity generation under a "Special Regime", of certain assets of Gamesa. To this end, the parties concluded a framework agreement and other complementary agreements that develop the main one.

69. In its report, the SDC considered necessary a more detail analysis of the operation in order to lay aside possible anticompetitive effects arising from the strengthening of the position of Iberdrola as integrated operator in the Spanish electricity sector along with the parallel weakening of Gamesa as one of the main independent operators.

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70. After the issue of the mandatory report of the Comisión Nacional de la Energía (The Spanish Sector Regulator), the file was referred to the TDC and, simultaneously, the obligation to suspend its execution.

71. In its report, the TDC recommended not opposing the transaction but subordinated it to certain conditions concerning the complementary agreements, specially those regarding the supply of “wind auto generators” by Gamesa to Ibernova. The Council of Ministers, following the TDC’s report, decided to subordinate the approval of the transaction to certain conditions.

### 9. LOGISTA-BURGAL

72. The transaction consisted of the acquisition of Bural who operates in the markets of industrial and corporate package by Logista, who operates mainly in the wholesale distribution of certain goods considered as an independent product market by the TDC. Nevertheless, the SDC pointed out the need to consider both as a very close related activities included in a larger sector: logistic services as a whole.

73. In this framework the merger implies for Logista the acquisition of a consolidate platform in the activities of transport and distribution of industrial and corporate package and the entrance in these markets which were complementary of its main activity; thus, the position of Logista as first logistic operator was strengthened.

74. The file was referred to the TDC who recommended not opposing to the transaction but subordinating it to certain condition, recommendation that was followed by the Council of Ministers.

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

75. As in the past years, the SDC has developed an important activity in the field of advocacy by means of the participation in the legislative process. Thus, the SDC issues reports concerning the draft versions of regulations affecting the conditions of competition in the markets and, specially, concerning energy, telecommunication, banking, professional services, commercial distribution sectors and state aids.

76. Special attention was paid to these regulations, which have the effect of market foreclosure by means of establishing entry barriers in different activities. During 2002, the analysis of the evolution of the regional legislation in retailing sector has been one of the main interesting subjects for the SDC and, specially, its implications on market fragmentation.

### **IV. Resources of Competition Authorities**

77. Over the last three years, the Spanish agencies, in a framework of public budget balance, have increased its resources substantially. Concerning the SDC, and in accordance with the Royal Decree 777/2002, of 26 Of July, a new General Directorate –the *Dirección General de Defensa de la Competencia*- has been created with the incorporation of a Director, exclusively dedicated to competition, which also has an additional support unit.

78. This new General Directorate, which exerts all the functions that the Competition Act 16/1989, of 17<sup>th</sup> July, have entrusted to the Servicio de Defensa de la Competencia (SDC), is organised in three units that configures the SDC: the Deputy General Directorate for Mergers, the Deputy General Directorate for Anticompetitive Conducts and the Deputy General Directorate for Legal Affairs and Institutional Relations, created in 2001.

79. Since 2001, the creation of the Deputy General Directorate for Legal Affairs and Institutional Relations first, and afterwards the General Directorate for Competition, has resulted in a new additional staff of 15 people, which implies a human resources' increase of around 18%. Hence, the SDC has a staff of 95 people (of which 13 economist, 16 lawyers and 9 other professionals besides support staff).

80. As for the TDC, its budget increased more than 20% in 2001 and a 35% .in 2002. This trend will continue and intensify in 2003 on which it is envisaged a considerable increase of the TDC financial resources of about a 100%. At the same time, new staff (probably about the double of present human resources, pending of approval) is also envisaged for the end of 2003 or next year.

81. Concerning the SDC, a 45% of human resources are applied to enforcement against anticompetitive practices, a 40% to merger review and enforcement and a 15% to advocacy efforts.