



**COMPETITION COMMITTEE**

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS  
IN SPAIN**

**2003**

## **Executive Summary**

1. As in the past years, Competition policy remains in 2003 to play a central role in the framework of the domestic economic policy. This policy is 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 relative efficiency and ability for innovation.

2. Along with the modernisation of the legal and procedural framework made over last years, in order to enhance the legal certainty, transparency and efficiency of the domestic Competition System, during 2003 several legal reforms have been made, notably with the aim to adapt the legislation to the relevant legislative changes in the European Community stemming from the entry into force of Regulation (EC) 1/2003, of 16 December, concerning the application of the competition rules foreseen in articles 81 and 82 of the European Union Treaty.

3. It is also necessary to highlight the important activity developed concerning the review of the judicial activity of the European Community Courts. It was submitted to the knowledge and study of the Spanish Competition Authorities several *pre-judicial questions* and appeals concerning State aids and restrictive conducts.

4. Advocacy remains to be stressed through an active participation in legislative activities issuing reports on the drafts versions of any regulation which could affect competition in any market, besides merger control and the activity concerning anticompetitive conducts specially oriented to strategic sectors recently liberalised.

5. The advisory role of the Competition Authorities concerning the analysis of the conditions of competition in the economic sectors has been specially developed in 2003 by issuing several reports notably those focussed on the price performance and market foreclosure effects in certain markets.

6. Finally, the establishment of the new Spanish decentralised institutional framework settled up in Act 1/2002, along with the future implementation of the new European framework foreseen in the Regulation (EC) N° 1/2003 on which the domestic Competition Authorities will play a leading role, will allow for a broader and closer enforcement of competition legislation.

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

#### ***1.1 Summary of new legal provisions of competition law and related legislation***

##### *1.1.1 Act 36/2003, of November 11, on economic reform measures.*

7. This Act modifies the article 16.3 of the Competition Act 16/1989, of 17<sup>th</sup> July, establishing the immediate publicity of the Tribunal de Defensa de la Competencia (TDC)'s reports in the field of merger control. Since the very moment of the reception of the report by the Minister of Economy in order to bring it before the Government, the TDC undertakes the publication of its report. Actually, this legal obligation is fulfilled uploading the report to the TDC webpage –[www.tdcompetencia.es](http://www.tdcompetencia.es) – as soon as the internal procedure to assure the non-disclosure of confidential information is completed. According to the former wording, the report was only public after the Council of Ministers' decision on the transaction.

8. This measure, which farther strengthens the role of the TDC, is on the line of the legal certainty and transparency objectives of the Spanish competition system as it allow all the interested parties to know immediately the objective framework in which the Council of Ministers' decisions are taken.

*1.1.2 Act 62/2003 of December 30, on Administrative, Tax and Social measures*

9. This Act gives a new wording to article 33 of the Competition Act 16/1989 concerning the research and inspection functions. On the one hand, it is introduced the possibility that the civil servants, in the course of their inspections on restrictive conducts, may access to any relevant documentation regardless of the material or electronical support ; thus, the Competition Act is adapted to the practical requirements of the new information technologies. On the other hand, Act 62/2003 modifies the sanction that can be imposed by the Director of the Servicio de Defensa de la Competencia (SDC) in case of obstruction of the labour of inspection; the new wording establishes a maximum fine (up to 1%) on the basis of the global turnover of the undertaking to be eventually sanctioned, instead the former system where the maximum amount of the fine was fixed beforehand. This gives to the SDC more effective instruments at the moment to carry out the labour of inspection according to the new instruments established in the Regulation (EC) N° 1/2003 of the European Union.

10. The Act 62/2003, also introduces other necessary modifications on the Competition Act for an effective enforcement of the new Regulation (EC) N°1/2003, specifically:

- Likewise, it is modified the article 1.5.d) of Act 1/2002, of February 21, regarding Coordination of the State and the Autonomous Communities competences on competition defence, in order to allow the State the direct enforcement of article 81 of EC Treaty;
- new wording of the article 25.c) in order to allow the TDC to grant individual authorisations between undertakings according to article 81.3 of the EC Treaty (direct enforcement of article 81.3 EC Treaty);
- new Single Additional Provision establishing the obligation for judicial bodies to send to the SDC a copy of the sentences performed in the civil judicial procedures on implementation of articles 81 and 82 of the EC Treaty.

*1.1.3 Royal Decree 378/2003, of 28 March, implementing the Competition Act 16/1989, of 17 July, concerning block exemptions, individual authorisations and Competition Register*

11. The objective of the Royal Decree, in force since April 2003, 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.

12. 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.

#### *1.1.4 Act 8/2003, of 9 of July*

13. The Act 8/2003 modifies the Organic Act 6/1985, of 1 July, of the Judiciary Power. As regards competition, it recognises as of 1 September 2004, the competence of the newly created *commercial courts*, to fully apply articles 81 and 82 of the EC Treaty and its derived legislation.

#### **1.2 Other relevant measures, including new guidelines**

14. During the year 2003, it was submitted to the knowledge and study of the SDC several *pre-judicial questions* and appeals before the First Instance Court and/or Justice Court of the European Community. Specifically 9 pre-judicial questions were received, most of them concerning State aids, and 63 appeals concerning restrictive conducts ex article 1 of Competition Act 16/1989. Concerning the appeals it was decided to take part in four of them.

#### **3. Government proposals for new legislation**

15. During 2003, it has been working on the preparation of a draft of Royal Decree concerning the enforcement in Spain of the new framework of European Community competition law established in the Regulation (EC) N° 1/2003 and the Regulation (EC) N°139/2004 regarding merger control. This future Royal Decree will replace the current Royal Decree 295/1998, of February 27, concerning the application in Spain of the Community competition law.

16. The draft Royal Decree attributes the competence derived from the Community law to the State Competition Bodies. This competence comprise the cooperation tasks with the European Commission, with the domestic judicial bodies and with other State Members' Competition Authorities. The power of the civil servants or authorized staff which carry out investigations in Spain, is also delimited. Moreover, the rules applicable to the duty of secrecy and the confidential information as well as the cooperation with the judicial bodies are considered and clarified. Finally, the proceeding rules for the application of the Community law by the domestic competition authorities, it is also established.

#### **2. Enforcement of competition laws and policies**

##### **2.1 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)

17. The number of cases started in 2003 were 69 (95 in 2002), of which 53 (70 in 2002) in response to complaints, 16 (23 in 2002) were single authorisation proceedings (2 in 2002 were initiated ex officio).

During 2003, 117 cases were completed (102 in 2002). The *SDC* decided to proceed in 34 (42 in 2002) cases, 1 of them was a termination by agreement and the rest were forwarded to the *Tribunal*, of which were 13 single authorisations (22 in 2002) and 20 sanctioning files (20 in 2002). At the end of 2003, 64 (113 in 2002) cases remained open.

18. The *SDC* initiated 43 (92 in 2002) actions against anticompetitive practices, of which 23 (30 in 2001) were agreements (infringement of article 1 of Competition Act 16/1989), 13 (29 in 2002) were abuse of dominance (infringement of article 6 of Competition Act 16/1989) and 7 with unfair acts of unfair competition (infringement of article 7 of Competition Act 16/1989).

19. Most cases have arisen in the service sector (36). In particular, the following are the most significant: 4 in production and distribution of electricity, gas and water; 3 in fuel sell for automobiles; 7 in wholesale and retail distribution; 7 in transports and communications; 2 in financial services; 2 related to activities of the Public Administration; 7 concerning data bases; 1 related to health and social assistance; 4 concerning liberal professions 5 in sports and cultural activities and 2 concerning intellectual propriety rights; 2 related to sale and repair of automobiles and 1 concerning funeral services .

20. During 2003, *SDC* officials have carried out 3 inspections in premises of undertakings and in different points of the domestic territory in the framework of five proceedings.

Tribunal de Defensa de la Competencia (TDC):

21. In 2003, the TDC issued a total of 110 resolutions: 19 sanctioning resolutions; 29 individual authorisations (13 new requests, 16 were renewed); 39 appeals against decisions issues by the *SDC*; 6 appeals against decisions and resolutions of the TDC and 17 incidental resolutions.

22. The total amount of fines imposed by the TDC in 2003 comes to 4.617, 9 Million. Euros (2.285 Million. Euros in 2002).

a).2 Courts

23. During 2003, the Audiencia Nacional has issued 59 judgements concerning the appeals against resolutions of the TDC; 52 of which were not admitted, 2 of the appeal were admitted and 5 of them were partially admitted.

24. In its turn, during 2003, the Tribunal Supremo has issued 4 judgements dismissing the appeal against judgements of the Audiencia Nacional.

b) *Description of significant cases, including those with international implications*

1. TRANSMEDITERRANEA-EUROFERRY-BUQUEBUS

25. The navigation companies Transmediterranea S.A., Europea Ferrey, S.A. and Buquebus España, S.A., applied similar prices to their transport services for passengers and vehicles between Ceuta and the Spanish Peninsula, over several years. The TDC considered that coincidence in prices as a concerted practice prohibited in article 1 of the Spanish Competition Act and imposed to each company a fine of 600.000 euros. In addition, the TDC refused an individual authorisation for a “System to interchange tickets and establishing a timetable” in that shipping line based on the consideration, between other reasons, that the mutual acceptance of tickets was not justified outside the intense traffic months on which the “Operación Paso del Estrecho” (“Operation to Cross the Strait of Gibraltar”) is usually developed.

## 2. IFCC-CORREOS

26. The Spanish Public Postal Service Company (Sociedad Estatal de Correos y Telégrafos, S.A.- Correos) has a dominant position in the domestic market for the collection, sorting and transport of cross border postal despatches concerning letters and postal cards. The TDC declared that Correos abused of its dominant position by means of, firstly, retaining correspondence with the anagram of a competitor (International First Class Courier, S.L.- IFCC) placed by mistake by the users in the letter box of the public network and, secondly, through the public dissemination of a degrading and partially false information about this competitor. The TDC imposed a fine of 900.000 euros to Correos.

## 3. MAZDA

27. Mazda Motor España, S.A. had a distribution contract signed with Mazda Motor Corporation according to EU Regulation N° 1475/95 concerning distribution agreements and selling services in the sector of car vehicles. The TDC considered that Mazda Motor Corporation has infringed the competition rules due to its unilateral refusal to accept the “Rapid dispute settlement mechanism” foreseen in that EU Regulation and decide to impose to this company a fine of 300.000 euros.

## 4. REVISA-ANFEVI-ECOVIDRIO

28. The company Vidrio Recuperado S.A. (REVISA) logged a complain against the Asociación de Fabricantes de Envases de Vidrio (ANFEVI) (Glass containers manufacturer association) and against the Sociedad Ecológica para el Reciclado de los Envases de Vidrio (ECOVIDRIO) (Ecologic Society for the recycling of glass containers) based on the presumed commission of a prohibited conduct by the Spanish Competition Act consisting on the promotion of several agreements to share geographically the market with the aim to send the claimant out off the market. The TDC imposed a fine of 600.000 euros to ANFEVI and of 300.000 euros to ECOVIDRIO.

### 2.2 *Mergers and acquisitions*

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

29. In the field of merger control, 2003 may be considered as a year of consolidation. There has not been any substantial legislative changes but it has progressed in the enforcement of the relevant changes introduced during the last years and thus in the consolidation of the criteria on which is based the merger control process in the last years.

30. After the spectacular increase on the mergers assessed by the SDC in 2002, (reaching to a record figure of 100), year 2003 has registered an stabilization in the number of notified concentrations. Nevertheless, 79 mergers were notified in 2003, thus it remains the high figures registered since the implementation of the system of prior compulsory notification in 1999 y 2000. Along with this, the number of prior consultations (14) and preliminary inquiries (52) has increased with respect to the previous years (12 and 45 in 2002).

31. 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.

|                      | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003      |
|----------------------|------|------|------|------|------|------|------|-----------|
| Notifications        | 23   | 19   | 31   | 51   | 93   | 76   | 100  | <b>79</b> |
| Referrals to the TDC | 2    | 7    | 5    | 15   | 12   | 6    | 9    | <b>6</b>  |

32. Annualising the cases according to the notification date at the SDC, 72 notified mergers were tacitly authorised. The Minister of Economy, upon proposal of the SDC, referred in 2003 6 concentrations to the Tribunal for further investigation. One of them, GAS NATURAL/IBERDROLA, was withdraw by the parties. In the remaining 5 cases after the TDC issued its report, the Council of Ministers adopted its final decision, through an Agreement: In one case the operation was authorised subject to conditions while the rest were cleared without conditions. In all this 5 cases, the Council of Ministers followed the advice of the TDC.

| Notifications: type of transactions in 2003 |               |              |        |
|---|---------------|--------------|--------|
| Acquisition                                 | Joint control | Takeover bid | Others |
| 81%   | 9%            | 9%           | 1%     |

33. In 2003 an important number of merger assessed were in the electricity sector, but other traditional sectors remain its leading role as machinery, electricity material and equipment or chemical and pharmacy industry.

*b) Summary of significant cases*

1. LEROY MERLIN-BRICO

34. The transaction consisted of the take over of several undertakings of the DIY (do-it-yourself) sector, hitherto controlled by BRICO BELGIUM, S.A. (BRICO group) by LEROY MERLIN PARTICIPATIONS, S.A. (LM)

35. In its report, the SDC recommended to refer the file to the TDC because the transaction would consist of the merger of the two main DIY large retail outlets hitherto operatives in Spain, and thus it would disappear the single competitor on size and similar characteristics as LEROY MERLIN in several local markets of large towns' outskirts.

36. In its report, the TDC considered that the relevant market should include the DIY goods and home equipment to be shell through different types of outlets: DIY large retail outlets, small and medium size DIY outlets with a broad assortment, the food hypermarkets and the big department stores as well as the specialized shops.

37. The TDC pointed out the limited market power that BRICO would add to which that LM has at national and local level, the existence of competition on the side of the strong and well organized sector of a small and medium size outlets specialized on ironmongery (beside to food hypermarkets, big department

stores and the specialized shops) as well as the existence of requests for authorization to open DIY large retail outlets by the first operator at European level and others of smaller size.

38. Based on these grounds, the TDC considered that the transaction would not hinder the maintenance of the effective competition in the market mentioned above, even at local as well as national level, so that the transaction could be approved without to be subject to conditions.

39. The 4 of April of 2003, the Council of Ministers, following the report of the TDC, decided not to oppose the transaction.

## 2. DIA-EL ARBOL

40. The transaction consisted of the acquisition by DISTRIBUIDORA INTERNACIONAL DE ALIMENTACION, S.A. (DIA), belonging to the French group CARREFOUR, of the assets of 36 outlets of the GRUPO EL ARBOL DISTRIBUCION Y SUPERMERCADOS, S.A.

41. The file was referred to the TDC and the obligation to suspend the execution of the transaction was partially lifted.

42. In its report, the TDC considered that in none of the local affected markets were entry barriers since the outlets to be acquired were not considered as a large retail outlets. Based on those grounds, the TDC recommended not opposing to the transaction, recommendation which was followed by the Council of Ministers of 6 of June of 2003.

## 3. GAS NATURAL – IBERDROLA

43. The transaction consisted of the acquisition by GAS NATURAL S.D.G. of the control of IBERDROLA, S.A. by means of a take-over bid..

44. In its report, the SDC recommended the Minister of Economy to refer the file to the TDC.

45. The 6 of May of 2003 GAS NATURAL S.D.G. notified the Competition Authorities the withdrawal of the planned operation.

## 4. ABERTIS TELECOM-RETEVISION

46. The transaction consisted of the take over of 100% of the capital of RETEVISION I, S.A.U., holder of the single transport and broadcast signal network of terrestrial television, by ABERTIS TELECOM, S.A.U., subsidiary of Albertis Infraestructuras, S.A.

47. After the merger, the two terrestrial television network in the Cataluña Region would be controlled by Abertis Telecom, since the acquirer, through its subsidiary Tradia, provide services of transport and broadcast audiovisual signal to the regional channels and is the holder of the hiring infrastructure rights owned to the *Centre de Telecomunicacions de la Generalitat de Catalunya*.

48. The file was referred to the TDC. In its report, the TDC concluded that the transaction did not hinder the competition in the following markets: transport of TV and radio signal services, broadcast radio signal services, broadcast TV signal services at local level.

49. The transaction did not modify either the dominant position of Retevision in the market of broadcast TV signal services at national level. Nevertheless, the two active operators in the Cataluña Region stayed under control of the same undertaking and, due to the holder'ship of the hiring public

infrastructure rights, owned to the *Centre de Telecomunicacions de la Generalitat de Catalunya*, by Tradia through a long term contract, it was fundamental to guarantee the access and interconnection to this infrastructure to any other competitor.

50. In its report, the TDC concluded that the transaction could be approved subject to the condition of renouncing by Abertis Telecom to accumulate the rights over Tradia and Retevision' infrastructures in the geographical area of Cataluña. The renunciation could be made alternatively, through getting rid of the hiring right of the *Generalitat de Catalunya*' infrastructure, or excluding from the transaction the Retevision' infrastructures in Cataluña.

Following the advice of the TDC, the 11 of December of 2003 the Council of Ministers decided to clear the merger subject to compliance with a number of conditions related to the abovementioned markets and, in the case might be, under the supervision of the Spanish telecommunication regulator, the *Comisión del Mercado de las Telecomunicaciones (CMT)*.

#### 5. IBERDROLA-AYUNTAMIENTO DE VILLATOYA

51. The transaction consisted of the acquisition by IBERDROLA, S.A. of the electricity distribution undertaking of the Town Council of Villatoya (Albacete).

52. The file was referred to the TDC who recommended not opposing to the transaction pointing out the financial and technical unstable position of the acquired undertaking, its irregular administrative situation, along with its small-sized of electric power hired to provide electricity to a town of less than 300 people. Hence, the TDC considered that the transaction was relatively unimportant and unable to exert a significant effect on competition in the relevant markets.

53. The Council of Ministers, following the recommendation of the TDC and the mandatory report issued by Comisión Nacional de la Energía (the Spanish Sector Regulator), decide not to oppose the transaction, clearing it without conditions..

#### 6. CAPRABO-ALCOSTO

54. The transaction consisted of the take over of 100% of the capital of SUPERMERCADOS ALCOSTO S.A. by CAPRABO S.A. 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 Madrid and Castilla La Mancha.

55. The file was referred to the TDC and the obligation to suspend the execution of the transaction was partially lifted.

56. In its report, the TDC considered that the transaction would not lessen the effective competition in the affected markets in view of the size of the undertakings, their respective market shares and the extensive presence of potential and actual competitors. Moreover, the concentration presented some elements that could facilitate competition between different commercial forms, could increase the geographic scope of the acquiring undertaking and allowing it to exploit the economies of scale derived from a larger dimension. Finally, the TDC pointed out again in its report the existence of important entry barriers derived from an inadequate commercial distribution legislation.

57. Following the TDC recommendation, the 16 of January of 2004, the Council of Ministers decided to clear the merger without conditions.

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

58. 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. It has been analysed a total of 120 draft regulations from the Ministry of Economy or other ministerial departments.

59. Special attention was paid to these regulations which have the effect of market foreclosure by means of establishing entry barriers in different activities. During 2003, the analysis has been focused notably on energy, retailing sector, food safety, professional services, budget and social subjects, generic medicine and its prices, transport and environment sector.

### **4. Resources of competition authorities**

60. Over the last 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.

61. 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 Affaires and Institutional Relations, created in 2001.

62. Since 2001, the creation of the Deputy General Directorate for Legal Affaires 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 at present a staff of 95 people: of which 21 economist, 24 lawyers and 19 other professionals besides support staff.

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

64. The Annual budget in 2002 and 2003 reached in both cases the amount of 2, 4 million euros.

65. As for the **TDC**, its Annual budget increased more than 20% in 2001 and a 35% in 2002 reaching the amount of 2, 28 million euros. This trend continued and intensified in 2003 on which a considerable increase of about a 100% leads to the record amount of 4, 61 million euros. At the same time, new staff (about the double of 2002' human resources), was approved at the end of 2003 in order to be incorporate from 2004. The TDC had in 2002 45 people and 47 in 2003.

### **5. References to new reports and studies on competition policy issues**

66. As a consequence of the strong increase in the prices of certain fruit and vegetable products during 2003, the SDC decided to instruct reserved information in order to identify the economic explanations for these price' performance and, eventually, the existence of anticompetitive conducts, before resolving to initiate the sanction proceedings.

67. The investigation was focused on the six products which have a relevant weight on the shopping basket: tomato, lettuce, green pepper, green bean, apple and pears. It is investigated the prices system formation all along the distribution channel, in particular the reasons for those strong increases in the selling price to consumers. Based on the analysed information, the SDC issued a preliminary report and it was decided to continue with the investigation in order to verify the possible existence of an infringement of Competition Act in the distribution process of two products: tomato and apple.

68. Finally, complying with its advisory role in the opening of new hypermarkets, the TDC issued 130 reports on this subject and 3 reports requested by the Government or other public or private competent bodies (according to articles 2 and 26 of the Competition Act) between them, a report about the conditions of competition in wholesale and retail distribution.