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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SPAIN

-- 2009 --

This report is submitted by Spain to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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Executive summary

1. The passing of Competition Act 15/2007 was a milestone in the country's competition system. The Act merged the previous two competition authorities into one, the CNC, and critically reinforced its independence from the Government and its investigation and advocacy functions.

2. Despite the budgetary constraints which have followed the economic crisis, the CNC has managed to hold the pace of its activities throughout 2009. As its key achievements in year 2009, the following may be highlighted:

- The publication of a Communication on the quantification of sanctions.
- The imposition of the highest ever fine on a cartel (around €120 million on six companies in the buildings insurance sector).
- The CNC has more intensively used commitments decisions: in 2009 four commitments decisions were adopted.
- 73% of the CNC's Decisions appealed before the *Audiencia Nacional* and the *Tribunal Supremo* were totally upheld; only 14% were totally overturned.
- New ex officio investigations have been launched, meaning that the CNC has been able to save resources for priority cases.
- The leniency program remains in good health. The first decision on a leniency case was issued in January 2010, where fines totaling €8 million were imposed on three companies found to have established a cartel in the bath gel market. Two companies were awarded a 100 per cent and 40 per cent reduction in fines.
- New IT tools and training to the CNC's employees have been developed in 2009 and a new specialized IT forensic in-house task-force has been created. 2009 has been a record year in dawn raids with 38 undertakings raided – mostly in the context of cartel cases – and nine files opened as a result of them.
- The CNC has made a big effort in reducing its deadlines relating to its decisions in merger cases in first phase; a specific simplified procedure has been implemented and has led to a fast-track approval process for the most straightforward deals.
- In the field of advocacy, the CNC has been able to substantially increase its releases of in-depth sector studies, regulatory reports, reports on public aid, etc. In 2009 a Guide to competition assessment of draft regulation was issued and, following the CNC's recommendations, a new law regulating the report on the impact of new legal provisions has for the first time expressly established the obligation to assess competition issues when carrying out a report on the impact of any new regulation. The first CNC annual report on public aid awarded in Spain saw the light in 2009. The CNC has elaborated reports on draft legislation transposing the EU Services Directive. Other reports on draft legislation include those on the Audiovisual Communication Act, the Ports Act and the Professional Services Act.

- The CNC has issued in 2009 three in-depth reports (market/sector studies) on competition in the automotive fuel sector, on the activity of court procurators, and on intellectual property rights' collecting societies. Also, it has drafted a number of reports on the definition of relevant markets in the telecoms sector.
- The CNC has reinforced its transparency policy by substantially improving its website and the communication of its actions. The President of the CNC appeared before Parliament for the third time in order to explain the institution's past activities and its plans for the future. The third Annual Competition Day took place at the CNC's premises in November 2009.

3. The CNC's progress has been recognized by the Global Competition Review's Enforcement Rating in June 2009 (the CNC gained half a star), and by the most important consumer organization in Spain, OCU, which in 2009 awarded the CNC's President its annual prize as a distinction for his job in the defense of consumers.

1. Changes to competition laws and policies proposed or adopted

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

4. The current Competition Act was approved on 3 July 2007, the Competition Regulation on 22 February 2008, and the CNC Statute on 29 February 2008.

1.2 Other relevant measures, including new guidelines

5. The CNC's Communication on the Quantification of Sanctions was approved in 2009. It establishes the criteria that the CNC will apply when quantifying sanctions. The aim of the guidelines is to ensure clarity, uniformity, transparency and predictability about the CNC's sanctioning policy.

6. The Communication establishes that the penalties must be proportional to the seriousness of the offence, to the damage caused and to the illegal benefit obtained by the offender. The base amount of the sanction is calculated as a percentage (10 to 30, depending on the seriousness of the infringement and the nature of the product or service involved) of the *sales volume affected by the violation*. The *sales volume affected by the violation* is the weighted sum of the sales of the offender in the relevant market(s) before applying VAT and other related taxes. The last year of the infringement is weighted 1 and from the sixth year after before last, 0.05. The base amount of the sanction is then increased or reduced as a function of the aggravating or mitigating circumstances established in the Competition Act. There are upper and lower limits to the sanctions. They must never be higher than the maximum established in the Competition Act nor lower than the illegal profit obtained by the infringer.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices

2.1.1 CNC's activities

7. In 2009, 94 cases were dealt with, of which 80 emanated from complaints and 14 were initiated *ex officio*. In the same year the CNC formally opened a total of 21 investigations regarding anticompetitive agreements, abuse of dominant positions and unfair competition¹.

¹ Article 3 of the Competition Act provides that the CNC "shall hear under the terms that this Act establishes for prohibited conduct the acts of unfair competition which affect the public interest by the distortion of free competition".

8. The number of decisions issued on anticompetitive practices was 44 on concerted practices cases and 23 on abuse of dominance cases. Out of the decisions on concerted practices, 14 declared an infringement and imposed fines, 1 declared the infringement but imposed no fine, 26 did not declare any infringement and 3 involved commitment. Out of the decisions on abuse of dominance, 9 declared an infringement and 14 did not declare any infringement.

9. Most cases concerned the following sectors: energy, repairs and installation services, information society, transport and warehousing, and professional bodies.

10. In 2009, 9 cases merited down-raids that were carried out in the premises of 38 different companies. Additionally, CNC staff collaborated with the EC DGCOMP in dawn raids in 3 different companies in the framework of EC investigations.

2.1.2 *Summary of a selection of cases*

2.1.2.1 *Concerted practices*

- Decision of 22 April 2009 (Pharmacists' Professional Association of Castilla-La-Mancha Region)

The Council of the Pharmacists' Professional Association of Castilla-La-Mancha Region, and the Health Department of the same Region (SESCAM) signed an agreement that established a market sharing system for the supply of medicines by pharmacies to residential care homes in the Region. The agreement also imposed reductions for medicines required from health centres with more than 50 residents. As for the first conduct, the CNC did not share the efficiency arguments alleged by the parties, but it considered, as for the second, that it did not affect competition because it did not discriminate between pharmacies. Finally, the CNC did not impose any financial penalties but ordered to stop the conduct and refrain from repeating it in the future.

- Decision of 16 June 2009 (Jerez Wines)

The CNC Council imposed a fine of €400,000 on the Regulatory Board for "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" wines for approving and applying various arrangements based on the historical sales volumes of each wine seller, which restricted competition between wine sellers and limited their freedom of trade. Indeed, the Regulatory Board adopted those arrangements as a stabilizing mechanism based on sales quotas and not on product quality and identity, hence, lacking in the necessary legal justification.

- Decision of 29 July 2009 (Concrete companies)

The CNC had access to documents showing evidence of the existence, for 10 years, of market sharing agreements between eight concrete makers and distributors in Cantabria Region which accounted for a supply-side majority in the relevant region. As part of the said agreements, the companies arranged to exchange information on customers with overdue accounts and to prohibit supply to those customers. The infringers did not deny the existence of the anticompetitive conduct, but argued lapse of the proceedings, questioned the scope of the misconduct and tried mitigating factors. The CNC Council finally levied total fines of nearly €3 million.

- Decision of 30 July 2009 (Oil companies)

The CNC Council imposed a total fine of €7.9 million on oil companies Repsol, Cepsa and BP (5 millions on Repsol only), for indirectly fixing the retail prices charged by gas stations operated by independent companies. The Council concluded that the way in which the oil companies price

the fuel, and the method for establishing the commissions received by gas stations as compensation for their service, combined with other factors in their trading relations, eliminated the incentives for station owners to apply discounts and compete on prices. As a result of those practices, the maximum prices and recommended prices communicated to the gas stations became fixed prices, thereby eliminating the distributors' freedom to set their own retail prices. This indirect fixing of prices also prevented competition between gas stations of different networks, because the maximum and recommended prices issued by the three companies (and followed by the gas stations) are contractually based on the prices in the relevant area of influence and so are the same. This is a case of a vertical practice for fixing prices which results in a horizontal fixing of prices as well.

- Decision of 24 September 2009 (Stevedoring services)

The CNC resolved to penalise the National Association of Stevedoring Companies and Shipping Agents, and several trade unions, with fines totalling around €1 million (of which 900,000 on the Association), for having engaged in an anti-competitive agreement that prevented and hindered non-stevedoring companies from providing complementary port services related to transit, deposit, stevedoring, loading, unloading and trans-shipment of cargo. The infringement involved the signing and implementation of *Agreement IV* regulating Labor Relations in the Port Stevedoring Sector, the first agreement in the sector signed after the entry into force of the Ports Act (Act 48/2003 of 26 November 2003, on the Economic and Service Provision Regime for Ports of General Interest).

- Decision of 14 of October 2009 (Food and Beverage Industries)

Some press releases issued in the summer of 2007 by several food industry associations ostensibly alerted the public opinion about the increase in the cost of certain commodities, quantified those increments, emphasized they were of a structural nature and voiced the idea, more or less explicitly, that an impact would follow on the food prices paid by consumers. The CNC considered the associations' action as a collective recommendation strategy contrary to the Competition Act. The content, language and dissemination of the press releases contributed to transmitting the message that passing on the cost increments to end prices was inevitable. This served as a signal for competitors to act along the same lines and predisposed consumers to accepting the price hikes. As a result of the communication between associations, some of them were able to take into account the press releases issued by others, thus contributing to a coordination of messages and making the conduct all the more likely to distort competition. The CNC levied total fines of €1,219,000 on nine associations in the food sector (€500,000 was the highest fine imposed on a single association). Only a few days before, the CNC had also sanctioned three other associations, of producers of eggs, chicken and bread, with fines of €100,000, €200,000 and €22,500, respectively, on grounds of certain statements and press releases.

- Decision of 12 November 2009 (Decennial Insurance)

In 2002 the Spanish Building Regulatory Act (*Ley de Ordenación de la Edificación*) introduced the obligation for developers of new residential buildings to contract an insurance for latent defects to cover damage caused by flaws or defects originating in their structural elements (decennial insurance). The construction boom propelled a notable expansion and high growth rates in the decennial insurance market. In this environment of growing demand and in order to avoid the decline in decennial insurance prices spurred by competition between insurers, the biggest of them (Asefa and Mapfre Empresas) and the three top reinsurers (Scor, Switzerland and Münchener) met and exchanged information with the aim of reaching a minimum price

arrangement. The result was complete uniformity in the premiums proposed by the different underwriters present in the Spanish decennial insurance market and, thus, the elimination of competition from 2002 to 2007. During that period, the cartel made sure that the minimum price agreement was observed by all of its members and by other insurers and reinsurers active in the market. Indeed, there is evidence that certain cartel members pressured and boycotted other companies that had shown a willingness to stray from the cartel's minimum price discipline. In some cases they went so far as to break off commercial operations that had already been agreed. The CNC levied total fines €120,728,000 on the infringers (€27,759,000 was the highest fine imposed on a single firm).

- Decision of 3 of December 2009 (*El Corral de las Flamencas*)

El Corral de las Flamencas S.L., an enterprise designing, importing and marketing women's fashion articles, clothes and complements under the brand “Flamenco” was denounced for alleged RPM conduct. It did not have a significant share in the relevant markets and sold its products primarily through third parties in multi-brand stores. The CNC considered that *El Corral de las Flamencas* was in breach of the Competition Act for the fixing of retail prices, but took into account the economic context and resolved that such conduct was to be exempted since it was not significant enough to negatively affect competition.

- Decision of 2 July 2009 (Mobile phone tariffs)

Act 44/2006, of 29 December 2006, to Improve Protection for Consumers and Users, imposed a change in mobile operators' pricing policies. Movistar was the first to announce its new rates, which increased connection fees from €0.12 to €0.15 and changed the time-based charges, upwards in many cases. Between 23 and 25 January, Orange and Vodafone fixed the same €0.15 connection fee. In view of these facts, which were the subject of complaints from some consumer associations, the CNC's Investigations Division opened formal proceedings and found that the three operators were guilty of a concerted practice consisting of the announcement by Movistar of the new rates it would apply from 1 March 2007, sufficiently far in advance to enable his competitors to copy them, as they did. However, the CNC Council took the different view that that it was not possible to conclude that the actions observed were the consequence of collusion.

- Decision of 24 March 2009 (Associations of Pharmacists)

The CNC Council issued a Decision levying fines for a total of €1 million on four associations of pharmacists for having made a collective recommendation seeking to unify trading practices vis-à-vis Davur Laboratories in the generic drugs market. Indeed, the Council found that the associations had concerted efforts to stave off decreases in the prices of major generic specialty drugs sold by Davur by spreading misleading or negative information.

2.1.2.2 *Abuse of dominance*

- Decision of 26 March 2009 (Gas Natural)

Gas Natural was found to have abused its dominant position as owner of an essential facility -the network for gas transport and distribution-, by refusing access to Gas Alicante, a competitor in the downstream market for gas commercialisation. The fine imposed on the infringer amounted to €492.000. The CNC put the emphasis in the harm caused to competitors and to end users. The complainant, Gas Alicante, had failed to honour contracts with clients in due manner at the subsequent reputation cost, and was obliged to make additional investments in order to supply its

clients with other types of gas. On their side, clients suffered delays in the introduction of gas supply in their homes and were obliged to use energy sources of less quality.

- Decisions of 2 April 2009 (on four cases against electricity companies)

The CNC Council issued four Decisions levying fines for a total of €35.8 million on Endesa (€15.3), Iberdrola (€15), Unión Fenosa (€5) and Viesgo (€0.5) for having abused their of dominant positions by refusing to give electricity retail supplier Centrica access to information on consumers needed to compete in the market. Over the last decade, lawmakers have enacted a series of measures designed to facilitate access by independent retailers to information on consumers. Royal Decree 1435/2002 established the SIPS, a database with detailed information on consumers which the law requires be made available to retail suppliers who so request. According to the Decisions, the companies denied Centrica access to databases on consumer supply points, in violation of the sector regulations and of competition law. Refusal to provide such information restricted Centrica's capacity to compete with the supply subsidiaries of the vertically integrated groups, putting it at an informational disadvantage that regulators had expressly sought to avoid. Furthermore, in the cases of Endesa, Iberdrola, and Unión Fenosa, the Council ruled that the abusive conduct also involved discriminatory practices because the same information denied to the complainant was, in fact, released to the supplier companies in their respective groups.

- Decision of 19 May 2009 (Axion/Abertis)

The Council of the CNC imposed a fine of around €22,5 millions to Abertis Telecom SAU (Abertis) for having conducted exclusionary practices that prevented potential competitors from entering the national market of the public service broadcasting of terrestrial (analogue or digital) television signals, where Abertis was the dominant operator. Abertis had set an excessive duration of its agreements with costumers, and imposed large penalties on these in the event of early termination. Also, Abertis had offered discounts for jointly purchasing broadcasting services on all of the regional zones into which the national territory could be divided, with the effect of impeding the entry of new competitors in any of those regions. The CNC took into account the particular seriousness of the anti-competitive practices and the fact that they affected a recently liberalised market.

- Decision of 3 August 2009 (AIE)

The CNC Council levied a fine of €770,000 on *Artistas, Intérpretes o Ejecutantes* (AIE), an intellectual property rights collecting society, for charging Telecinco, a TV operator, unfair and discriminatory rates. The Council took the opportunity to recall that AIE's responsibility as regards transparency, objectivity and reasonableness is especially great because of its monopoly position and the diverse privileges granted to it by intellectual property law.

2.1.2.3 *Commitments Decisions*

- Decision of 29 July 2009 (Cepsa)

The agreements signed between the oil company Cepsa and gas stations included no-compete clauses of allegedly excessive duration. The commitments put forward by Cepsa and approved by the CNC Council sought to achieve an immediate entry in the market of the affected gas stations by means of early cancellation of the relevant contracts.

- Decision of 16 March 2009 (Collective bargaining agreements)

Two cases brought against various employer associations and trade unions in the security and "contact center" sectors ended in commitments, as approved by the CNC Council. The object of the investigations was the collective bargaining agreements in both sectors. Those agreements stipulated that the economic terms in them would have an impact on the price of the services provided to clients, and that offering commercial discounts below the costs fixed in the agreements would qualify as unfair competition. The conditions advanced by the parties, accepted by the CNC Council, consisted in the elimination or non-application of the questioned articles and the commitment not to include them in future agreements.

2.1.3 *Activities of the Courts of Appeal*

11. The CNC's decisions may be appealed before the *Audiencia Nacional*, whose judgments are subject to review by the *Tribunal Supremo*. In 2009, the revision Courts have completely upheld almost 75% of the appealed Competition Authority's decisions. Out of the 48 decisions that were reviewed by the *Audiencia Nacional*, 37 were upheld, 6 overturned and 5 partially overturned. In the same period, the *Tribunal Supremo* resolved 29 cassation appeals against Judgements of the *Audiencia Nacional* regarding CNC's decisions, of which 19 were upheld, 5 overturned and 5 partially overturned.

- Judgement on down-raids

An increase in the submission of administrative appeals has followed the CNC's intense down-raid activity. The *Audiencia Nacional* ruled on 30 September 2009 on the dawn raid carried out on STAMPA's premises (Perfume and Cosmetics Association) in 2008. The Judgement partially upheld STAMPA's appeal and forced the CNC to hand back any documents not related to the specific sector (professional hairdressers' products) that was being investigated.

2.1.4 *Private enforcement*

12. According to the Competition Act, Civil Courts shall have jurisdiction in civil actions concerning the application of Articles 1 (concerted practices) and 2 (abuse of dominance) of the Act. These Courts were already competent in the application of EU Competition Law since 2004. Moreover, the CNC, acting on its own initiative, may provide information or submit observations to Judges (*amicus curiae*).

13. In 2009, the CNC collaborated with the judiciary in 22 civil cases related to competition matters. In 20 cases the cooperation was limited to the reception and transmission of documents between the CNC and the Courts. In the other two cases, the CNC issued a report or submitted observations upon request of the judge. Besides, the CNC has received notification of nine judgements of Civil Courts on competition cases. The CNC has sent to the EC a copy of five judgements of Civil Courts regarding the enforcement of articles 101 and 102 TFEU.

- Damages claim in the Sugar cartel case

On 9 October 2009, the Provincial Court of Valladolid awarded nine snack and confectionery producers a total compensation of €1,1 million for damages caused by a price-fixing cartel between sugar producers. This is the first time that a Spanish Court awards compensation to firms damaged by a cartel. In 1999 the Competition Authority fined the sugar industry for price-fixing. The Decision was confirmed by the *Audiencia Nacional* in July 2002 and by the Supreme Court in April 2005. After the last instance's Judgment, the snack and confectionery industry sought to claim damages from each member of the sugar cartel. The Civil Court of First Instance denied

both the existence of the damages and the causality relation with the infringement. But the Provincial Court of Valladolid accepted the existence of damages and their calculation in an expert report submitted by the claimants (which was not made public). Unfortunately, the judgment is brief and does not argue why the plaintiffs' damage estimates, and not the defendants', were accepted. Nor does the Judgement include the criteria to estimate the damages. It is under appeal.

2.2. *Mergers and acquisitions*

14. Competition Act 15/2007 strengthened the role of the CNC in merger control. Now it is the CNC who makes the final decisions both in the first and second phases of the procedure. Nevertheless, the Act still reserves a minor role for the Government, which can revise, for reasons of general interest different from competition defence – such as defence, public health, free movement of goods and services, environment, R&D or sector regulation matters-, second phase merger decisions of the CNC prohibiting an operation or submitting it to conditions. On the other hand, notification thresholds were raised.

15. The total number of merger operations reported decreased from 127 in 2007 to 89 in 2008 and 74 in 2009. The operations were in the following sectors: industrial manufacturing (21), chemistry and pharmacy (12), retail distribution (11), financial and insurance (8), transport and storage (6), Public Administration (5), building and real estate (4), information and communications (3), energy (3), agriculture and animal production (1), recycling - waste treatment (1), extractive industries (1) and others (8).

16. None of the merger operations notified was blocked by the CNC. Four merger operations were approved in second phase of the proceedings, subject to the fulfilment of commitments:

2.2.1 *Gas Natural/Unión Fenosa*

17. The operation consisted in Gas Natural acquiring full control of Unión Fenosa. Gas Natural, jointly controlled by Repsol and La Caixa, was the parent company of a vertically integrated energy group, mainly active in supplying, transporting, distributing and selling gas in Spain, where it is the main operator, and in generating and marketing electricity in Spain, where it ranks amongst the sector leaders. Repsol operated in the hydrocarbons sector, where its activities included producing and supplying fuel-oil to power stations, as well as in the gas and electricity industries. Unión Fenosa was an integrated energy group that operated in the power industry -electricity generation, distribution and marketing-, where it was one of the top companies. In recent years it had also taken up activity in gas markets -basically, supply and retail sale-, being one of the principal operators in those segments as well. The takeover raised competition concerns but, by Decision of 11 February, the CNC Council finally authorized the merger subject to compliance with commitments consisting mainly on divestments and other measures designed to ensure that Unión Fenosa Gas continues operating as an autonomous gas supplier.

2.2.2 *Distrirutas/Siglo XX/Geles /Logintegra*

18. The parties in the concentration proposed the creation of a new newspaper distribution company in the Region of Madrid, bringing together the four companies, which had carried out that activity independently in the past. The CNC Council issued a Decision on 10 June 2009 giving conditional approval to the operation. The conditions aimed at ensuring the maintenance, for a limited period of time, of the commercial and service conditions that were being offered to clients before the merger. Also, the new entity should operate as an open platform offering objective and non-discriminatory access conditions for clients and a protocol for the handling of information would need to be issued.

2.2.3 *Abertis/Axión and Tradia/Teledifusión Madrid*

19. Two merger operations were notified to the CNC in the same sector where the purchaser was, directly or indirectly, Abertis Telecom. In the first operation it would, via Tradia Telecom, acquire Teledifusión Madrid, an operator active in the Region of Madrid, and in the second, it would acquire Red De Banda Ancha De Andalucía (Axion), an operator active in the Region of Andalusia. The markets affected by the operation were those of audiovisual signal transport services in different geographical levels: national, regional, and local. The takeover would result in Abertis becoming the only terrestrial television carrier in the Region of Madrid. This loss of competitive pressure would occur in a market with high barriers to entry and insufficient ex ante regulation in force to offset those barriers. In its Decision of 16 July 2009, the CNC Council authorised the merger subject to the compliance with conditions intended to allow access to the market for the transport and broadcasting of television signals, and to the market for the transport and broadcasting of radio signals.

2.2.4 *Orona/Omega*

20. Orona was one of the main operators in the elevator sector in Spain, and Omega was a competitor with a significant presence in certain provinces of Central-Northern Spain. Analyses concluded that competition in the activity of lift maintenance and repair was at risk in the provinces of Álava and Guipúzcoa. Therefore, the CNC Council made approval of the operation conditional to the compliance of conditions proposed by Orona after having submitted them to the main competitors and clients for comments. The commitments referred to Omega's portfolio of lift maintenance and repair contracts in Guipúzcoa and in Álava. Orona should give Omega's former customers the option of terminating their contracts, should make the information on Omega's maintenance contracts available to its competitors for three years, and should refrain from submitting counter-offers within six months after offers made by competitors to Omega's former customers and from recapturing customers switching to a competitor within one year of their departure.

3. **The role of the CNC in the formulation and implementation of other policies (e.g. regulatory reform, trade and industrial policies)**

21. Competition Act 15/2007 attributed to the CNC new and stronger functions in the area of advocacy, and created the Advocacy Division within that institution. The advocacy powers of the CNC include reports on draft legislation affecting competition, reports on state aid and market studies.

22. As regards the CNC's advocacy role towards legislators, a Guide to Competition Assessment was issued in 2009 aimed at providing orientation to legislators on how to achieve their objectives on the least competition-harmful way. A few months after the Guide was published, a new Act² for the first time expressly established the obligation to assess competition issues when carrying out a report on the impact of new regulation. The Act entered into force on January 1st 2010, right after the elaboration of a *Methodological Guide for Impact Assessment of Regulation*, which contains the principles put forward in the CNC's Guide.

23. Those principles are in fact used by the CNC when elaborating its reports on draft regulation. In this area, a special effort was made in 2009 regarding the transposition of the EU Services Directive. In the CNC's view, the need to transpose the Services Directive provided a unique opportunity to eliminate unnecessary restrictions on the economic activity. The CNC has issued 24 reports on draft legislation transposing the EU Services Directive, including the two general/horizontal laws on the transposition, as well as reports on a number of sectors, such as, hydrocarbons, explosives, energy and mining, healthcare

² The Act regulating the Report on the impact of new legal provisions.

and pharmaceutical services, professional services, agriculture and food, retail distribution, environment, franchises, electricity, railway transport, etc.

24. It is also worthwhile mentioning other reports on draft legislation such as those on the Audiovisual Communication Act and the Ports Act.

3.1 Reports on the two draft horizontal acts transposing the EU services Directive

25. The Report on the draft Bill on free access to, and exercise, of service activities, the so-called “Umbrella” Act, highlights that the genuinely ambitious character of the process would flow not only from the content of this Bill, but also from the regulatory adaptation to which it would give rise. It recommends that the liberalising philosophy at work in the Bill and the Directive should be applied beyond their strict scope of application, so that the same spirit can inform the treatment of certain questions regarding access to, and exercise of, service activities which are not directly affected by the Directive. Besides, the Report makes specific observations on the operative part of the draft Bill to try to deepen its liberalising potential. The Act finally passed included a good part of the proposals and suggestions made by the CNC, echoing its message about being ambitious in the transposition. The second step in the transposition was the so-called Omnibus Bill, which develops a modern regulatory framework for many different sectors. The CNC issued a Report on the draft Bill too where it pointed out that the Bill was scaled down in certain areas and did not incorporate many of the recommendations made by the CNC in the past, for example, those to repeal professional associations’ rules on project certifications, advertising, conflicts of interest, geographical restrictions, exclusivity obligations and fee scales.

3.2 Report on the draft Bill for the reform of the Retail Sector Regulatory Act

26. The CNC had issued and published a paper taking stance on the regulatory overhaul of the retail sector two months before it had to inform the draft Bill in June 2009. In that paper, stress was given to the need to reform the rules for authorizing the opening of new big commercial outlets. The June Report acknowledged that some of the concerns voiced in that paper had been addressed in the draft Bill, but many others had not. Indeed, certain reforms urged by the CNC, such as the elimination of the prescribed calendar for sales seasons and provisions on below-cost sales. As for the opening of big stores, the draft Bill gives regional legislatures absolute authority as regards the existence of a second licence (a licence coming from the regional government; the “first” would come from the City Council) and its conditions. This means that regional governments may impose authorisation schemes on grounds of inappropriate reasons, where it would be preferable that the second licence was completely overruled, for the sake of legal security, market efficiency and consumer welfare.

3.3 Report on the draft Royal Decree regulating the procedure for resolving supply security restrictions

27. The new Royal Decree would amend *Royal Decree 2019/1997, of 26 December 1997, regulating the electricity production market*. The CNC issued a Report stating that the new regulation would introduce strong distortions into the electricity generation market, and that the procedure for resolving supply security restrictions was not justified (is the support of the national coal mining sector key to guaranteeing the supply of electricity in Spain?). Also, the draft Royal Decree lacked interpretation of some concepts, which introduced uncertainties able to distort investment incentives. Finally, it was possible that the measure would constitute State aid in the EC sense and so there was a need to issue a notification to the EC.

3.4 *Report on the draft Ports Act*

28. In February 2009, the CNC issued a report analysing the impact on competition of the draft Bill amending *Act 48/2003, of 26 November 2003, regulating the provision of services in public interest ports*. In its Report, the CNC questioned the advisability of restoring public ownership of port services. According to the draft Bill, these services would be provided either by private operators under an indirect management arrangement or by the respective Port Authority in certain conditions. In addition, the draft Bill did not go far enough in the needed progressive liberalization of the cargo handling service model. Attention was called to certain issues arising from the foreseen expanded funding autonomy of Port Authorities and the approach taken to cost-based pricing. The absence of efficiency incentives and the passing of costs directly on to prices would result in higher prices for the services. Although the draft Bill that was finally brought before Parliament took some of the CNC's observations into account, it failed to consider others. For example, it did not incorporate the criteria for considering investments as significant, a key factor when deciding the duration of service agreements, nor guidelines for determining market shares in relation to rules on conflicts of interest and disqualifications, nor precise criteria for limiting the number of providers of the different port services.

3.5 *Report on the draft General Broadcasting Act*

29. The draft Bill reviews the basic rules of the audiovisual sector and presents a varied content. It describes new ways of providing services given the new technologies (high-definition, mobile television...), and improves aids to the cinema (now extended to TV series, animation and documentaries). It also creates the so-called State Council of Audiovisual Media (CEMA) as an independent authority, with sanctioning capacity and responsible for controlling and monitoring the compliance with audiovisual legislation at State level. The Bill attributes to CEMA a number of functions, including some related to the maintenance of effective competition in the markets. This merited the CNC's criticism, since the mechanisms of interaction between sector regulators are established by Law. In addition, the CNC highlights a series of observations to specific articles regarding self-regulatory codes, the codified broadcasting of events of general interest to society, or the purchase of exclusive football broadcasting rights, among others. The last part of the Report is devoted to the draft *Bill on the financing of Spanish public broadcasting entity RTVE* (radio and TV), which abolishes advertising and other commercial activities of RTVE and replaces this source of income by new taxes on TV and telecommunications operators. The CNC considered that these new fiscal measures could qualify as State aid and therefore, should be notified to the EC.

30. Connected to this advisory function of the CNC is its capacity to analyse aids provided by the Public Administrations. Indeed, under Competition Act 15/2007 the CNC may analyse the competition implications of public aid policies and issue reports on specific aid programmes and individual subsidies (see reports on the draft Bill on the financing of RTVE and on the procedure for resolving supply security restrictions above). Also, the CNC is bound to issue annual reports on State Aids.

31. The First Annual Report on Public Aids was published in 2009³. The Report details a series of principles for the assessment of public aid, reports on the main developments regarding public aid in the period 2007-2008, and contains a statistical section with estimates on public aid granted in Spain. It also devotes a specific chapter to the description of the economic criteria that should guide the evaluation of public aids. That chapter emphasises the need to take into account the balance between the presumed benefits of the aids and the harm caused by them, to see whether the first outweigh the second. The idea is to raise awareness among the Public Administrations in charge of designing public aids about the need to

³ The Second Public Aids Report has just been published.

perform a cost-benefit analysis to make sure that the benefits of the planned aids compensate the potential distortion of competition trade they may cause.

32. Finally, an on-line public aids centre has been available on the CNC's website since July 2009, which enables access to information on the public aids granted in Spain.

4. Priorities and Resources

4.1 Priorities

33. The CNC's Action Plan for 2007 to 2009, issued in November 2007, states that the CNC's mission is that of enforcing competition rules in Spain, and translates this general objective into a series of more specific goals:

- Make the CNC a solid and well organised institution, endowed with modern resources and highly qualified personnel;
- Ensure the maximum compliance with the Competition Act, by effectively combating anticompetitive practices;
- Foster competition in sectors where it is restricted and promote the understanding and study of competition matters;
- Allocate resources efficiently so that the CNC can respond nimbly to society's demands in the competition area increasing the quantity and quality of our actions, and disseminate CNC activities as widely and transparently as possible in order to the benefits of competition be better understood by all;
- Pursue, at the national level, coordination and cooperation with all other authorities who play an active role in defending competition;
- Actively participate in international competition forums and contribute to strengthening the international competition system.

34. At the end of 2009 the CNC published its 2010-2012 Action Plan which sets out the areas of work and priority tasks to be carried out by the CNC in the coming three years. All of them contribute to the development of the three core areas inspiring the work of the CNC: effectiveness in competition advocacy and in the fight against the most damaging anticompetitive practices of economic operators, transparency in the decision-making and activities of the institution, and the internal cohesion needed to attain synergies between our departments. The Plan has been designed in the firm belief that competition protection and advocacy are particularly necessary if we are successfully to overcome the challenges posed by the current economic situation.

35. The specific work to be done in the various spheres can be summarized as follow:

- Optimising capacity for analysis and prioritising in order to significantly contribute to improving competition and productivity in the economy.
- Developing guidance for better compliance with competition rules and more efficient and transparent enforcement.
- Optimising the use of information technologies in order to reduce the administrative burden on businesses and individuals.

- Improving communication with the public authorities and with supervisory bodies and sector regulators. Among other key tasks, the CNC pretends to assert the existing legal requirement to submit regulatory proposals to competition impact analysis.
- Promoting competition culture among businesses and consumers, and continuing technical cooperation with Ibero-American countries.
- Enhancing cooperation and coordination with the regional competition authorities in Spain and with the judiciary.
- Investing in human capital.
- Strengthening the CNC's international relations.

Resources (as of 31 December 2009)

Total staff: 203

No. of staff working on competition enforcement: 203

Non-administrative staff: 131

Percentage who are lawyers: 30.53%

Percentage who are economists: 35.11%

Percentage who are others: 34.36%

N° with PhDs in economics: 4 (plus 26 Economists of the Public Administration, the highest economy-specialised body of Spain's Public Administration)

Average age of staff: 41.22

Average tenure: 5.5 years

Budget: €13,359,463 million

Amount spent on salary: € 9,818,653 million

No. of staff who left: 16

No. of staff who retired: 0

No. of staff who joined in 2009: 17

No. who have spent at least 5 years in private practice: 4 (This information is only available for the directors)

No. of staff working on mergers: n/a*

No. of staff working on cartels or dominance: n/a*

No. of staff working on other matters: n/a*

Percentage of staff working on mergers: n/a*

Percentage of staff working on cartels or dominance: n/a*

Percentage of staff working on other matters: n/a*

* The CNC's staff working at the Investigations Division is organised by industry/sector and not by enforcement area.

5. Reports and studies on competition policy issues

36. The CNC has published several in-depth studies throughout 2009: on competition in the automotive fuel sector, on intellectual property rights and on the activity of Court Procurators. All of them generated a significant response from the affected sectors and the media. The CNC also issued reports on the definition of relevant markets in the telecoms sector at the request of the Telecommunications Regulator.

5.1 Competition within the Automotive Fuel Sector

37. Even though at the end of the 90's, during the process of privatisation and deregulation, some legal measures were adopted in order to increase the degree of competition in the sector, some problems preventing the development of greater competition pressure still remain. There is still a significant degree of vertical integration, which, together with the high level of concentration, hinders the entry of new competitors and facilitates anticompetitive conducts. New efforts reducing barriers to entry, and so allowing the introduction of greater competition, are needed. The CNC recommends a series of measures such as simplifying the opening of new gas stations, including in hypermarkets, designing competition-enhancing tenders for concessions of new gas stations in major roadways, or impose free access to the pipeline network.

5.2 Collective Management of Intellectual Property Rights

38. The Spanish intellectual property rights' collecting societies enjoy a monopolistic position, which may reduce their incentives to operate efficiently and may lead to problems regarding their pricing policies, as shown by several cases of unfair and/or discriminatory fees examined in the past by the Spanish Competition Authority. The Report analyzes the current regulatory framework as well as certain practices performed by collecting societies, and makes recommendations to reform the Intellectual Property Act to allow for a more competitive system for rights' management, by introducing more transparency, changing the way fees are determined and guaranteeing the rights holders' capacity to switch collecting societies, among others.

5.3 Activity of Court Procurators

39. The Report studies a professional figure, that of the Court Procurator, which is hard to find in other countries. Particular features of that profession are the following: There is a mandatory requirement to be represented in court proceedings by a professional, the activity is generally reserved to procurators, the profession of procurator is incompatible with other professions, and there are price and territorial restrictions to the activity. In line with the remedies suggested by the CNC in its 2008 Report on professional services and professional associations, the Report advises that: The mandatory requirement to be represented in court proceedings by a professional be revised and reduced, the incompatibility of the profession of Procurator with other professions be removed, the reservation of activity to procurators be eliminated, in particular so that lawyers are also allowed to carry out procurator activities, the current system of quasi-fixed prices or fee scales be removed, moving instead towards a system where prices are freely set by the parties, and the prohibition to exercising in more than one territory be removed, so that procurators are free to practice throughout the country. In sum, more competition should be introduced for the good of consumers, who would presumably enjoy better quality services for better prices.

6. Institutional activity

6.1 Transparency and accountability

40. As every year, the President of the CNC appeared before the Economy and Finance Commission of Parliament to report on the Competition Authority's work and to discuss on its priorities and plans for

periods to come. In this occasion the President took stock of the results of the CNC's activities over the year, emphasizing the greater intensity brought to bear on the fight against cartels. He also called attention to the wide circulation of the reports issued by the CNC as part of its competition advocacy work. Of prime focus in this regard were the CNC's efforts to achieve an ambitious transposition of the EU Services Directive. Finally, he explained the CNC's new Action Plan for the years 2010 to 2012.

41. In 2009 the CNC held its third Annual Competition Day, with the presence of the Second Vice President of the Government of Spain and Minister of Economy and Finance, and leading figures from the world of competition law. Discussions were organized around three topics: competition and infrastructure, electronic markets and competition, and the new antitrust enforcement proceedings. The event also featured the presentation of the CNC Report on its first two years of life, which were characterized by a markedly proactive approach to all areas of its activity.

6.2 *International cooperation*

42. The CNC participates in the meetings and works of many international competition forums: ICN, OECD Competition Committee (including the Global Forum on Competition and the Latin American Forum on Competition), ECA, ECN and UNCTAD Intergovernmental Group of Experts on Competition Law and Policy. It is worthwhile mentioning that the CNC hosted the 2009 Annual Meeting of Directors General of ECA on 21 and 22 April.

43. The CNC also plays a particularly active role in the Ibero-American Competition Forum, which comprises the competition authorities of Ibero-American countries and Portugal and Spain. In 2009, the Annual Meeting of the Forum took place in Chile on 12 September. The sessions revolved on competition advocacy, judicial review and relations with the judiciary. The Ibero-American Competition School held its seventh edition in March 2009 at the CNC's headquarters, as usual. This training initiative aimed at the staff of competition authorities members of the Forum is complementary to others: In the framework of the training events organised in collaboration with the Spanish Agency for International Cooperation and Development (Ministry of Foreign Affairs), the CNC participated in a workshop in Colombia which focused on leniency programmes and sanctions in competition cases. Also, the CNC organized, jointly with CEDDET Foundation, two new editions of the on-line competition course started three years ago. Since 2008, information sharing within the members of the Forum is enhanced by the *Red Iberoamericana de Autoridades de Competencia*.

44. In the context of bilateral relations, the CNC hosted the Iberian Competition Forum, where representatives of the Portuguese and the Spanish competition authorities exchanged points of view on the methodology used in the preparation of sector studies and in the process for calculation of fines. Besides, the CNC met the French competition authority in order to pool their experiences in the process of creating a single authority out of the previous two-institution model, and a delegation of a French business organization (AFEP-MEDEM). Finally, the President of the CNC visited Colombia, China and Morocco to take part in different competition events.

6.3 *Relations with the Competition Authorities of the Comunidades Autónomas ("Autonomous Communities", the Regions)*

45. Eleven Autonomous Communities in Spain (out of seventeen) have already set up their own competition bodies, competent to deal with anticompetitive practices deriving effects within their respective territories' boundaries.

46. The greater number of regional competition bodies in operation has led to a perceptible increase in the number of proceedings being heard under the case-allocation mechanisms set out in Article 2 of Act

1/2002⁴ from around 50 in 2007 to around 80 in 2008 and in 2009. In order to facilitate the coherent application of competition rules in Spain, Act 1/2002 establishes channels for the exchange of information between competition authorities, thereby avoiding duplication of efforts and divergent actions which would work to the detriment of efficient enforcement. The electronic platform “Network for Cooperation of the Spanish Competition Authorities (REC)” has proved very helpful for this purpose.

47. The heads of the competition authorities in Spain meet annually at the *Competition Council*. During the meeting in December 2009, the *Council* analysed progress in 2009, listened to reports by the *working groups* (on allocation of cases, advocacy initiatives, commercial distribution and the co-operation network-REC).

⁴ Act 1/2002, of February 21, on the Coordination of the State and the *Autonomous Communities’* Competences on Competition