

# Regulatory Reform in Spain

**The Role of Competition Policy in Regulatory  
Reform**



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## FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Spain. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Spain* published in 2000. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Spain. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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## Executive Summary

### Background Report on the Role of Competition Policy in Regulatory Reform

Is competition policy sufficiently integrated into the general policy framework for regulation? Competition policy is central to regulatory reform, because its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. Moreover, as regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. A complement to competition enforcement is competition advocacy, the promotion of competitive, market principles in policy and regulatory processes. This report addresses two basic questions. First, is Spain's conception of competition policy, which will depend on its own history and culture, adequate to support pro-competitive reform? Second, do its institutions have the right tools to effectively promote competition policy? That is, are the competition laws and enforcement structures sufficient to prevent or correct collusion, monopoly, and unfair practices, now and after reform? And can its competition law and policy institutions encourage reform? The answers to these questions are assessed in terms of their implications for the strategies and sequencing of regulatory reform.

Competition policy in Spain revived in the 1980s as Spain moved to align its policies with the EU. Comprehensive competition policy action plans from the early 1990s targeted non-traded services where competition problems were most likely. The government has followed through to implement much of these plans, both by applying the competition law directly and by reforming and removing anti-competitive regulations. Many sectors have been privatised and liberalised, and indeed, in some respects Spain's efforts are more ambitious than its neighbours or EU requirements. In some sectors, though, the process has left market power in place, while in others the process is just beginning.

The competition policy bodies, the Tribunal and the *Servicio*, have been increasingly active, focusing their attention on sectors undergoing liberalisation. Notable illustrations are several recent orders, backed up by substantial fines, to ensure the development of competition in telecoms. But they may need more resources to do their jobs effectively, as their caseload has grown rapidly while their personnel levels have remained constant. Policy analysis and advocacy by the competition authorities, which can be the most effective kind of action against problems that are shielded by government sanction, appear to have declined, in part because of resource priorities.

There are few explicit sectoral or functional exemptions from competition policy, but the law includes a potentially broad exemption for officially authorised conduct. The Tribunal interprets that exemption narrowly, and programmes to reduce the remaining anti-competitive regulations and exemptions proceed. Some steps appear ambivalent, though. The recent legislation to liberalise the tobacco market retained a monopoly in distribution, for example. Remaining exemptions and constraints on competition should be removed, and the anti-competitive effects of special laws about retailing should be limited. Current moves to strengthen the competition institutions will add resources, refine and strengthen powers, and thus reinforce the priority and importance of competition policy. To ensure that competition policy remains a central theme of reform, it would be desirable to strengthen the functions of policy analysis and advocacy, as well as enforcement. To make competition policy more broadly effective, changes in the relationships among the institutions should be considered, to give the independent, decision-making Tribunal more control over the agenda, and to ensure that competition policy plays a central role in government decisions about restructuring prior to remaining privatisations.

## 1. COMPETITION POLICY FOUNDATIONS

Much has changed in Spain's government and economy over the last 20 years, as the country has taken its place within the European Community. Competition policy, which had long been dormant, has become a higher priority. The basic laws and institutions of competition policy, which have been in place since Spain's first competition law of 1962, became much more important and visible in the 1990s as Spain moved to reform its traditional interventionist economic policy. Meanwhile, Spain is creating and empowering other institutions, such as the new sectoral regulators and the regional governments, the *comunidades autónomas*, whose actions may influence or affect competition policy, or, in the case of the *comunidades*, might sometimes affect the degree of market competition. The national government has

proclaimed that competition policy is important and needs to be made stronger. What does that mean, and how will proposed reforms, including strengthening the competition law itself, accomplish that goal, in the Spanish context?

**Box 1. Competition policy's roles in regulatory reform**

In addition to the threshold, general issue, whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.
- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- Regulation can **reproduce** competition policy. Rules and regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different practical outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

**Spain's competition law and institutions, created in the 1960s, were not employed until the 1990s.**

Whether Spain's competition policy has grown from domestic roots, or whether it has been a response to outside pressures, has been a matter of debate. The first official statement about the desirability of a competition policy, a 1953 agreement with the US, suggests that external influences were critical (Cases, 1998, pp. 180-81). And a generation later, competition policy was an element in the process of integration into the European Community. But there were also historic links between competition policy and internally-motivated reform movements, evidenced by debates in the 1950s about the relationship between industry concentration and prices, and calls for laws to prevent market domination and cartels. The government even decreed, but never collected, an "antitrust tax" on profits from cartels. The 1959 Stabilisation Plan, which followed a request to the IMF and the OEEC (the OECD's predecessor) for assistance, called for the government to promote measures to prevent monopolistic practices (Borrell, 1998; Government of Spain, 1999).

The first competition law was adopted in 1963 and became effective in 1964. The law and enforcement institutions were influenced by OECD advice and EC models. The law, like the one now in effect, included a prohibition against anti-competitive restraints and abuse of dominance, modelled on Articles 85 and 86 of the Treaty of Rome, applied through a process of notification and authorisation for restraints. It provided for exemption from the prohibition for restraints due to other laws. And it called for registration for mergers (Cases 1998, p. 181-82).

The enforcement structure established at that time is still in place, too. The *Tribunal de Defensa de la Competencia* (Tribunal) was created as the main decision-making body, empowered to adjudicate, authorise exemptions, impose fines, and publish reports and studies. The *Servicio de Defensa de la Competencia* (Servicio), which at that time was a General Directorate in the Ministry of Trade, provided investigative support and follow-up<sup>1</sup> (Cases, 1998, p. 185).

But the law “remained largely unimplemented and unenforced for more than 20 years.” (Borrell 1998, p. 448) After the first years, the number of filings dropped off. The Tribunal decided only an average of 14 matters per year. Budgets and personnel declined, and little attention was paid to the quality of appointments to the Tribunal. The Tribunal did not impose economic sanctions under the law until 1988. Meanwhile, intervention, rather than competition, seemed to be delivering economic growth, so interest in strong competition policy was low. Indeed, the political impetus for promoting competition seems to have been expended in adopting the law (Borrell, 1998; Cases 1998, pp. 186-87).

The second phase of reform that followed the Moncloa agreements of 1977 made a gesture towards competition policy, when the new constitution in 1978 established competition policy as a state market-regulating function. The constitutional change called for modifying the competition policy institutions, in particular removing the Tribunal’s quasi-judicial character. But changing the role did not, at first, lead to increased enforcement or activity. The Tribunal went without a chairman for six years, from 1976 to 1982 (Borrell, 1998).

In the 1980s, competition policy revived. The prospect of EC integration in the 1980’s encouraged the third phase of reform, of opening up domestic markets and deregulating business activity. This brought with it a new competition act, and finally, in the 1990s, a period of active enforcement. The decision to modernise competition policy was made in 1985, when the government appointed a new head of the Tribunal, reorganised the Servicio and added to its resources, and made competition policy a budget line item. A committee drawn from the Servicio and the Tribunal recommended against special laws to conform Spain’s law to the EC treaty, because the Treaty would be directly applicable with respect to competition policy anyway. But it did recommend revising the 1963 Act so it could deal more effectively with domestic competition problems that would not be reached by EC jurisdiction (Borrell, 1998; Cases, 1998, pp. 188-89).

The new Competition Act of 1989 retained the old institutions (except for the Council). Additions to the 1963 Act include provisions about public aids and authorising the Tribunal to engage in advocacy. Although the technical changes were modest, they were enough to reinvigorate competition policy. The Tribunal became much more active. Moreover, the Tribunal focused on policy concern about “dual inflation” in services in the early 1990s to take a prominent position in the debate over regulatory reform.

### **Competition is now considered an important policy standard.**

Official pronouncements underline the importance of competition in national economic policy. The competition law states:

*Competition, as the governing principle of the entire market economy, represents an inseparable element of the model of economic organisation of our society and constitutes, in the sphere of individual liberties, the first and most important manifestation of the exercise of freedom of enterprise.*

(Competition Act, Preamble).<sup>2</sup> By associating competition policy with individual liberties, in the context of freedom of enterprise, this statement implies that competition’s salient features would be absence of constraint on business decision-making or on entry into a market. The government has also emphasised that, because competition policy aims at improving the functioning of markets, so prices reflect production costs, it can be a tool against inflation.

The Tribunal's own view of competition policy's goals, announced in a critical 1989 review of Spain's experience, is expansive. The Tribunal recognised that competition policy not only controls the market and protects against restraints on business freedom to compete, but it also promotes dispersion of economic power, helps achieve monetary stability, brings down prices, protects consumers, promotes innovation, and improves services (Borrell, 1998, p. 461).

Public authorities have a mandate to defend competition derived from Article 38 of the Constitution, which recognises the right of freedom of enterprise. The Constitutional Court interpreted this provision as authorising the government to adopt and apply laws to eliminate practices that can affect or seriously damage competition. That is, "competition law enforcement is a necessary protection, not a restriction, of the freedom of enterprise and of the market economy, which could be threatened by the absence of control of its natural tendencies" (Cases 1998, p. 188). The Constitutional Court evidently did not consider *laissez faire* to be an acceptable approach to vindicating the right of free enterprise.

But the constitutional and statutory mandates also call for balancing competition against other policy interests. For example, the defence of competition is to be in accordance with the needs of the economy, including planning (Constitution, Art. 38; Competition Act, Preamble). The objective of the Act is to guarantee the existence of sufficient competition and to protect it against any attack contrary to the public interest, while at the same time being compatible with those other laws that regulate the market in accordance with other legal or economic requirements of a public or private nature (Competition Act, Preamble, ¶2). This statement describes a problem, as much as an objective. Restating the problem, the Servicio says that the primary objectives pursued in the application of the general competition law have to do with economic efficiency and the public interest (Government of Spain, 1999, Item 1).

### **Spain's statist traditions, and efforts to reverse them, explain aspects of its reform process.**

Spanish popular opinion appears to support competition policy, however its goals are conceived. One reason for support may be historical. Spain was one of the most closed and interventionist economies in Europe before 1960. Embracing competition and markets implies correcting the policy mistakes of that period. Moreover, keeping costs low through increased competition and deregulation could now represent Spain's comparative advantage within Europe.

Spain has been engaged in reform for a generation. Since 1977, both the government and the private sector have been moving to adapt Spain's economic and legal frameworks to the European ones. Reforming the institutions of economic control has been difficult and time-consuming, because of the long history of either state ownership or tight, centralised regulation. But the goal, and then the fact, of membership in the European Community has been an impetus for reform. Changes in Spain's regulatory approach, including its competition policy, coincide with efforts to conform to EU standards. The pace of change has accelerated over the last ten years. Indeed, within the European community Spain takes positions on economic policy issues pushing for further reform and liberalisation. The government has been committed to a wide programme of reform and privatisation for several years. Since the last election, the government has tried to intensify it, even to change the social consensus about the role of regulation. This means developing a new concept of the state's role, as well as ensuring that deregulation, privatisation, and competition policy are applied correctly and in the right sequence.

Privatisation, a centrepiece of this process, illustrates both progress toward the new concept and persistence of old patterns of retaining control. Since 1996, under the State Enterprise Modernisation Programme, interests in most of Spain's biggest state-owned companies have been sold, raising over 4.5 trillion Pesetas. More sales are planned, so that by the year 2000 the only activities left within the public enterprise sector will be mining and certain defence companies (other public entities would remain, in postal services, railroads, and broadcasting) (Government of Spain, 1998). The government no longer has

significant holdings in these firms, although in some cases the government has retained a “golden share”. But the process has either left, or produced, dominant firms in several sectors, such as electric power, telecoms, and tobacco.

The attitude of business and the public toward the state’s role in regulation was long based on a strategy of rent-seeking. Breaking that habit is a major challenge and a subject of debate now in Spain. Critics claim that, even though the government has announced its commitment to markets and competition, the regulatory framework has aimed narrowly and permitted dominant firms to persist in some infrastructure sectors, leading to increased costs for Spanish firms. The government responds by pointing out how prices have been declining as those sectors are being liberalised. Despite the government’s repeated statements about the importance of ensuring that the benefits of competition are passed on to consumers, (for example, Government of Spain, 1998) some observers contend that consumer impacts have not been prominent enough in the public policy debate. Other critics point to development of networks and webs of influence through designation of government-connected insiders to boards and managements of privatised companies. But since those appointments are now up to the private owners, rather than the government, they might well represent private choices, not government policy.

Another topic of current debate in Spain is increasing concentration of control over business. Consolidations of banks, which are the principal holders of equity in Spanish enterprises, could lead to large, and overlapping, investment holdings in competing industrial firms. On the other hand, some experts point out that combinations must be understood in the right context, and that firms may need more resources to compete in a larger European market or to expand in Latin America.

To develop a new concept of the state’s role in regulation will require grappling with the changing roles of political institutions. Pro-competitive reform led by the central government must deal with a complicating aspect of political reform, namely the constitutional devolution of powers to regional governments who may not agree with the national government about decisions or priorities. The Constitutional Court has rejected national legislation reforming the land law and retail shop hours, because these matters are the responsibility of regional governments. Too much variation in regional legislation, as regional governments differ in their appreciation of market institutions, could lead to fragmentation of the internal market. There is concern that such initiatives could threaten or weaken the next wave of liberalisation, involving airports, ports, retailing, and urban land, and also, through indirect effects, gas and coal. The first wave of liberalisation, including electric power and telecoms, may have been facilitated because those projects generally did not involve these constitutional problems.

One concern is that local and regional governments might be taking actions that run counter to the national efforts to conform to EU liberalising directives. Municipalities and regional governments are said to be re-introducing monopoly operations or promoting combinations in sectors such as cable television and electric power. Other functions provided by local monopolies, which have been in place for some time, include bus services and funeral homes. Some of these operations could be considered part of the local government administration, while others are formally separate enterprises. To some extent, fears that local or regional actions could fragment the internal market are aimed at the economic effects of initiatives about social regulation, rather than at matters that are more directly the object of competition policy.

In Spain as in many other EU countries, a principal object of national competition policy is services and other sectors that are not affected by international trade. And in Spain as elsewhere, evidence commonly cited to show that there is a problem is comparatively high inflation rates for these sectors. From the early 1990s, the problem of higher inflation in non-tradable services has been well recognised (Tribunal, 1992). From 1991 to 1998, services prices rose by 47%, compared with a 25% increase in consumer prices of non-energy industrial goods (inflation is measured by the consumer price indexes

published by the National Statistics Institute). In 1998, inflation in services, at 3.6%, was still two times higher than the general inflation rate. Such a gap does not reflect wage pressures in services, which are generally more labour intensive than other sectors, since compensation per employee in the service sector rose just 2% (less than in the industry and construction sectors). Contending that chief contributors to the services inflation were postal services, telecoms, rent, medical services, and drugs, labour groups have called for more activity by the competition authority. But over the last three years the top contributor to services inflation was hotel accommodations and tourism, a sector that appears substantially competitive. One reason for the disparate effects may be that Spain is still catching up to Europe's average income level, and as that process proceeds, services prices would be bid up faster. Moreover, in the past government intervention kept some of these prices low, notably for telecoms and postal services. Much of the "dual inflation" data may thus be explained by demand or income effects in the particular sectors.

To demonstrate the high priority it has assigned to competition policy, the government has announced that it is committed to increasing the available tools and resources. The government's 1996 reform package made some changes in the law, to give the competition authorities power to reject complaints about matters that are too small to threaten the public interest, and to clarify how the law would apply to restrictive agreements arising from actions of government or of public entities. The government has proposed or implemented additional changes, including greater resources for the competition institutions, more transparent assessment of state aids, compulsory notification for mergers, improved co-ordination with EU competition enforcement processes, and providing for consent settlement ("*termination conventional*") of sanctions proceedings (Government of Spain, 1998). Increasing resources will evidently mean adding two more members to the Tribunal and increasing the budget and staff of the two organisations (Romero, 1999).

## 2. SUBSTANTIVE ISSUES: CONTENT OF THE COMPETITION LAW

If regulatory reform is to yield its full benefits, the competition law must be effective in protecting the public interest in markets where regulatory reform enhances the scope for competition. Spain's substantive competition law has been based on EU norms since 1963. The legal criteria and available sanctions are generally comprehensive enough to cover competition problems that may have been required or encouraged by regulation, or that will appear as regulatory structures change. Uncertainty about the role and priority of competition policy in decisions about mergers had been a weakness, but recent actions to strengthen legal tools and apply them more aggressively suggest that has changed.

### Box 2. The competition policy toolkit

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

**Agreements** may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

**Vertical agreements** try to control aspects of distribution. The reasons for concern are the same – that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

**Abuse of dominance** or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

**Merger control** tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

### **The prohibition concerning agreements prevents anti-competition co-ordination.**

All agreements, decisions and concerted practices which have as their object or effect to restrict, impede or distort competition in all or a part of the national market are prohibited (Art. 1). As in the EU legislation, there are two kinds of exemptions from this prohibition: case-by-case authorisations, granted by the Tribunal, and exemptions by categories, granted by the government (Art. 4, Art. 5). The exemptions process is elaborated in an implementing decree. The EU block exemptions have been incorporated into Spanish national law where the relevant agreements affect only the national market.

One set of criteria for granting exemption is similar to those under the EU Treaty (Art. 3.1). In addition, there is another set of criteria, not derived from the EU treaty. Restraints that would otherwise be prohibited can be authorised, to the extent that is justified by the general economic situation and the public interest, if their objective is to promote exports (and they are consistent with Spain's external obligations), or to adapt supply to demand under conditions of declining demand or uneconomic excess capacity, or to improve social or economic conditions in depressed regions, or if they are otherwise too insignificant to affect competition (Art. 3.2).

Applying the law to industry-wide agreements sometimes encounters objections based on regulation, such as claims that horizontal price fixing was necessary to comply with product quality regulations. Such claims have been rejected. For example, the Tribunal found that a dairy industry association document setting out premiums or discounts based on quality amounted to a price recommendation. That some 49 dairy firms applied these "recommended" prices showed that the action was the result of an agreement and not simply a consequence of the Common Market Organisation and the European Regulation for milk. The Tribunal fined the association 15 million Pesetas, and fined the 49 individual dairy firms a total of more than 1 billion Pesetas (Government of Spain, 1999).

### Box 3. The EU competition law toolkit

The Spanish law follows closely the basic elements of competition law that have developed under the Treaty of Rome:

- **Agreements:** Article 85 prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 85's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.
- **Exemptions:** An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.
- **Abuse of dominance:** Article 86 prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50%, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.

As in other systems based on the EU principles, most of the detail about exemptions from the prohibition of restrictive agreements deals with vertical relationships, such as exclusive distribution, exclusive purchasing, selective distribution, and franchising. But most of the individual exemptions that have been granted (25 in 1996 and 27 in 1997) involve registers of late-paying clients, and only a few cover vertical restraints such as exclusive and selective distribution agreements (four in 1996 and three in 1997) (Government of Spain, 1999; OECD/CLP, 1997*a*; OECD/CLP, 1998*a*).

The competition law has been applied to prevent vertical distribution arrangements from being used to extend a monopoly authorised by law. The issue, which has arisen elsewhere in Europe, was vertical price fixing and exclusive distribution of non-prescription items, such as cosmetics, through pharmacies. The same system of exclusive distribution of cosmetics through pharmacies has been used elsewhere for many years and has drawn the attention of both France's *Conseil de la Concurrence* and the Commission of the EU (Government of Spain, 1999).

### **The law against abuse of dominance has been applied to government-backed firms and to deregulated network industries.**

The substantive law of abuse of dominance is again based on the EU norms (Art. 6). As is common elsewhere, the prohibition of abuse applies even if the dominant position has been established pursuant to legal authority (Art. 6.3).

A common market-dominance setting in Spain has been funeral services, which were typically municipally sponsored monopolies before legislation in 1996 liberalised this sector. The fact of local government authorisation complicated enforcement action. In an early case under the revived 1989 competition law, an association of insurance companies filed a complaint in 1991 against the monopoly provider in Madrid, EMSFM, for increasing the price of services, eliminating less expensive services, imposing a 300% surtax on burial of non-residents, and extending its monopoly over transporting remains to other cities. It took until 1995 for the Servicio to decide not to pursue the case, because EMSFM, as a monopoly established under law, was protected by the Competition Act's exemption for conduct authorised by law or regulation. The Tribunal reversed the Servicio decision. The exercise of market power was undeniable. The new, higher prices had been approved by the Madrid municipal government, though, so the central question was whether EMSFM, which was partially owned by the municipal government, was obliged to accept the "public prices" that government had approved. The Tribunal decided that this "official" action and the partial public ownership made no difference to EMSFM's liability, and imposed a fine of 138 million Pesetas (1.5% of EMSFM's 1996 turnover) (Government of Spain, 1999). Since the liberalisation, the Servicio has opened a number of cases in this sector.

The telecoms sector has produced several important decisions about abuse of dominance (OECD/CLP, 1997*a*; OECD/CLP, 1998*a*). An illustration is an early case about competing public telephones and denial of access by Telefónica de España, S.A. (Telefónica), the historic legal monopoly, to companies providing enhanced services. One of these, 3C Communications España, planned to introduce credit card public telephones. In applying for authorisation from the regulator, 3C described these units as modems. But when Telefónica learned that they were actually used as public telephones, it rejected or delayed the new lines, particularly in airports. Whether or not these units provided an "enhanced", and thus liberalised, service, or a final service which would still be subject to Telefónica's monopoly, the Tribunal ruled that refusing service to 3C was abusive. The reason, though, was grounded in regulation: Telefónica could not unilaterally cut off, reject or delay telephone lines without approval from the regulatory authority, which it did not have. Exacerbating the threat to competition was the fact that Telefónica was delaying a pioneering competitive entry to give it more time to introduce its own credit card phones, for which it was demanding five-year exclusivity clauses that would have further inhibited competitive responses. The Tribunal's remedies included orders protecting 3C's access and a fine of 124 million Pesetas. On several other occasions, the Tribunal has had to take enforcement action, including interim orders and sanctions for violating them, against Telefónica's efforts to resist or delay deregulation.

### **In merger review, the Tribunal's competition policy role is advisory.**

The competition law (Art. 14) and an implementing regulation set out rules and procedures governing mergers, including the content of notifications. The law applies to mergers affecting the Spanish market if they result in a firm with a 25% or greater market share (either of the national market, or a substantial part of it), or the parties' combined annual turnover in Spain exceeds 40 billion Pesetas. (That threshold was increased by decree from 20 billion Pesetas in April 1999.) Authority to take action about mergers rests in the government, not the Tribunal. The government's powers over mergers that meet the statutory standards are very wide. Sanctions or remedies include an order of divestiture or controls on prices or other conduct.

Notification of mergers and acquisitions is now required within a month after the parties' agreement is reached, or in any case before the transaction is consummated. Failure to notify is now subject to fine. (Previously, notification was voluntary, but notifying gave the merging parties legal certainty over the timing of the government's action.) The April 1999 Decree, which has since been made into law, made notification mandatory. Notifications are made to the Servicio, which determines whether the transaction raises issues that call for study and report by the Tribunal.

It is up to the Servicio, and thus the ministry, whether to refer a notified merger to the Tribunal. There is no institutional check on the ministry's determination of whether there is an effect on competition that would call for referral to the Tribunal. If the ministry does not refer it, then the Tribunal will have no role. If the Tribunal does receive the file, it must issue an opinion. The Tribunal may request information from other parts of the government and from private parties. It may hold a hearing. And it must advise the parties to the merger of the information or allegations received from others. The Tribunal's opinion can include recommended conditions to impose or means to re-establish effective competition. In all, though, the Tribunal's role is advisory; the decision is made by the Council of Ministers.

In evaluating a merger, the Tribunal in its advisory report and the government in its decision may take into account the usual competition issues, of market definition and structure, substitution possibilities, economic and market power, development of supply and demand, and external competition. In addition, both may also consider general interest principles. Factors to be considered include, among others, the improvement of systems of production or commercialisation, the development of technical or economic progress, the international competitiveness of the national industry, and the interest of consumers and users (Art. 16). The Servicio has developed a methodology for market definition and assessing market concentration and other criteria. The Servicio and the Tribunal are most concerned about competition policy impacts, leaving questions about effects on economic development to the government (Government of Spain 1999).

In the past, only a handful of merger matters were considered by the Tribunal. For example, in 1996, there were 23 notifications to the Servicio. (In addition, the Servicio undertook 27 merger inquiries that year, of which three resulted in formal notifications). Of those, only two were referred to the Tribunal, which produced four reports (OECD, 1997a; OECD/CLP, 1997a; OECD/CLP, 1998a). In 1999, the Servicio had the highest number of notifications ever – 51 – and 15 of those, or nearly 30%, were referred to the Tribunal. Before notification became mandatory, the Servicio often considered mergers that came to its attention through the financial press, private parties or otherwise. The Merger Unit in the Servicio also examines transactions notified to the European Commission, and if they are likely to affect the Spanish market, the Servicio may request referral.

Because mergers have been treated leniently – until 1999, the government had never blocked a merger – a few companies (two in four years) have been tempted to present agreements to co-operate as though they were mergers. The law was amended in 1996 to address this loophole. The revision gave the

Servicio a month to determine whether the notified transaction is a concentration or whether the filing should be treated as an application for authorisation of a restrictive agreement (Art. 15; OECD/CLP, 1997a).

An example of the application of merger law to firms in recently deregulated industries was the Retevisión-Redes TB-Servicom transaction. Retevisión, which had entered as a new telecoms operator after the partial liberalisation of 1996, acquired Redes TB and Servicom, two Internet services and access suppliers, in 1998. The incumbent monopolist, Telefónica, also had subsidiaries in the Internet services market. The merger was authorised, so that Retevisión could compete more efficiently with the dominant firm in downstream telecoms markets (Government of Spain, 1999). On the other hand, Endesa's acquisition of controlling shares of other electric power firms, Fecsa and Sevillana, late in 1996, was not notified to the Servicio, and the Tribunal was not consulted about the combination. While the acquiring company, Endesa, already owned large stakes in the two acquisitions, Sevillana and Fecsa, an opportunity was missed at the time of privatisation in 1996 to reduce concentration in the sector.

Mergers and acquisitions in the financial sector have been the subject of debate recently. One dimension of potential concern would be competition within the financial sector itself. If mergers reduced competition, that could increase interest rates; on the other hand, interest rates in Spain are now relatively low, and mergers might combine resources and promote diversification and effective participation in larger markets. Another potentially more important issue, though, is concern about concentration of investment and thus of corporate control. The major investors in Spain now are banks, although institutional investors are increasingly important. Thus, the use of bank equity holdings in the exercise of management influence, leading to interlocked control over industrial sectors, could be a matter of competition concern. The recently proposed merger of Banco Santander and Banco Central Hispano was referred to the Tribunal, and future bank mergers will be referred. Responding to this transaction's effects in telecoms, the Council of Ministers required that the merged bank sell its equity holdings in one of the two telecoms firms in which they have significant participation.

Privatisation decisions are made by the Council of Ministers, based on ministry proposals and the approval of the *Comisión Delegada del Gobierno para Asuntos Económicos*. The *Consejo Consultivo de las Privatizaciones* was set up to ensure transparency in the process. The Servicio and the Tribunal do not have a formal role in that process, although some merger cases have come out of it.

Sectoral regulators have some role in mergers in telecoms, electric power, and insurance. The regulatory agencies in telecoms and electric power markets must issue a report to the government on mergers in their respective markets if the mergers are subjected to Tribunal review and report under the Competition Act. The General Directorate for Insurance must notify the Servicio of mergers that meet the Competition Act thresholds, at which point the Competition Act process applies and the insurance directorate's consideration is suspended pending the outcome.

### **Provisions about state aids may be strengthened.**

Government aids are addressed in the Competition Act<sup>3</sup> (Art. 19). The Minister of Economics and Finance can require that the Tribunal provide an opinion about the competitive effects of a particular programme of state aid. The minister may then propose termination or modification of the programme, to maintain or re-establish competition. That decision need not take into account the assessment of competitive effects or even the balance of costs and benefits. The Tribunal's powers to act are thus minimal. The provision was described in the original parliamentary debate as "very timid" and even "ineffective" (Cases 1998, p. 195).

State aids from local or regional governments are an increasing concern. The European Commission has taken action against industry aids provided by Spain's regional governments. The ministry has proposed strengthening this part of Spain's law, so that the Tribunal will be empowered to initiate cases about state aids. Although the Tribunal would not have power to regulate them, its analysis and resulting transparency may help ensure that decisions about them take account of their competitive effects.

### **The laws about unfair competition complement, and sometimes conflict with, the Competition Act.**

Rules about unfair competition are set out in a separate law, and the two bodies of law are kept distinct. The Competition Act and the Unfair Competition Act<sup>4</sup> are said to aim at different objectives. The Competition Act is enforced by the Tribunal, and the Unfair Competition Act, by the ordinary courts. There is some conceptual overlap, though. The Competition Act refers to distortion of free competition by unfair acts, by making the Tribunal "competent to adjudicate, in the terms established by the present law regarding prohibited conduct, those acts of unfair competition which affect the public interest by falsifying, in an appreciable manner, free competition in all or part of the national market" (Art. 7). The Competition Act could thus be applied to a practice that is unfair pursuant to the Unfair Competition Act, if it met those conditions (Government of Spain, 1999).

The Unfair Competition Act includes "exploitation of economic dependence" as an unfair practice, if suppliers or clients have no alternatives to dealing with the provider. This could be relevant to competition-based claims of "buyer power." Another overlap is presented by the 1996 retailing law, which was promoted by traditional retailers and tries to control competition from non-traditional sellers such as hyper-markets by regulating payment terms, sales at a loss, and business hours. But the conception of "sale at a loss" is different under the Retail Trade law than it is even under the Unfair Competition Act. The competition authorities believe that the general competition law is a more satisfactory way to deal with the (rare) problems of dominance in the retail distribution sector (OECD/CLP, 1998*b*).

An interesting application at the interface of these two laws involved resale price maintenance. Resale price maintenance is permitted for textbooks. They can be discounted, but only up to 12%. The Tribunal refused to entertain a complaint that someone who was discounting too low was engaged in unfair competition. The Tribunal found that, although this practice may have violated another law, it was not anti-competitive, so it was not the Tribunal's responsibility to correct or remedy it.

### **Consumer protection bodies co-operate with the competition authorities and initiate many complaints.**

The Spanish Constitution instructs public authorities to protect the consumers' economic interest (Constitution, Art. 51). Competition and consumer protection policies are linked twice in the Competition Act. Exemptions from the prohibition against anti-competitive agreements depend on a showing that consumers or users will benefit from them (Art. 3). And a report of the Council of Consumer Associations is necessary in considering applications to authorise otherwise prohibited restraints (Art. 38.4). Many competition matters are initiated by complaints forwarded by the National Institute of Consumption, the secretariat for the Council of Consumer Associations. The Institute maintains a continuing working relationship with the competition agencies.

### 3. INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

Reform of economic regulation can be less beneficial or even harmful if the competition authority does not act vigorously to prevent abuses in developing markets. Spain's two competition policy institutions have the necessary tools, but they could use more resources.

**Competition policy institutions include both a ministry department and an independent decision-maker.**

The two institutions of Spanish competition policy are the *Tribunal de Defensa de la Competencia* (Tribunal) and the *Servicio de Defensa de la Competencia* (Servicio). The Servicio is responsible for investigation and preparation of reports to the Tribunal; the Tribunal is responsible for resolving matters, taking into account the report of the Servicio and the outcome of its own investigation, if any (Government of Spain, 1999).

The Tribunal was created originally by the 1963 competition law as an agency within the Ministry of Commerce, but with a quasi-judicial status. (Its precise jurisprudential nature has been a matter of debate. It is an administrative body that is not technically part of the judiciary, but it functions much like a court). It has sole power to reach decisions under the competition law. (The 1963 law provided that those decisions were not reviewable by another court.) It was conceived as independent, and independence is assured by protected tenure. Originally, appointments were for indefinite terms, which meant in effect that they were permanent (Cases, 1998, p. 182).

Now, Tribunal Members are recommended by the Ministry of Economic and Finance and appointed, by the government, for fixed terms of six years, renewable for three years. Thus it is possible, even likely, that members will not have been appointed by the government in power at any time. Members cannot be suspended or dismissed, though they may be removed for cause, such as conflict of interest (Art. 23). A member can be ousted for non-performance, but only by a vote of three-fourths of the Tribunal members (given the size of the Tribunal, this means a nearly unanimous vote of the other members). Members have the status of senior civil servants (Art 27; Cases, 1998, p. 190). A basic qualification requirement is at least 15 years of professional practice (including academic work) in economics or law. There are now eight members, serving terms staggered at 3 year periods (with four appointments in each appointment year), plus the president. On the present (March 1999) Tribunal, two members including the chair are economics professors, four others are economists, and two are former judges or prosecutors.

The Servicio, which was until 1996 a separate General Directorate in the Ministry of Economy and Finance, is now part of the General Directorate for Economic Policy and Protection of Competition. The Servicio takes the enforcement initiative and forwards cases to the Tribunal for decision if it finds evidence. The Servicio's two principal departments are for Restrictive Practices and for Mergers and Studies (OECD/CLP, 1997a). (Before the 1996 reorganisation, when it was still a separate General Directorate, there were three: Investigation, Monitoring and Registration, dealing with restraints and prohibited practices; Control of Competition Structures, for mergers; and Research and International Competition, handling studies of sectors, collaboration with European Commission, and co-operation with international institutions) (Cases, 1998, p. 192). The studies unit follows current issues and backs up enforcement operations; subjects of recent studies and research include banks and credit cards.

**Enforcement processes, spread between two institutions, are now subject to deadlines to prevent delays.**

The Servicio initiates action either on its own or in response to a complaint, which can be submitted by any person. When the Servicio opens a file, the interested parties are notified, and notification may also be published in the Official Journal and a national or regional newspaper. If the Servicio decides that the evidence demonstrates a violation of the law, it will present a statement of objections to the presumed violators, giving them an opportunity to reply and present a defence. If the Servicio declines to take action, the complainant can appeal that decision to the Tribunal. If the Servicio decides to proceed, it will send the file to the Tribunal, with a report and a preliminary legal assessment. The Tribunal may convene a hearing, and parties may have an opportunity to bring additional matter to the Tribunal's attention. Tribunal decisions, which are considered administrative, not judicial, can be appealed to the Chamber of Administrative Litigation of the National Supreme Court (Government of Spain 1999; OECD, 1997a).

The Tribunal may issue orders to cease and desist and to eliminate the effects of violations, and it may impose fines. Fines can be up to 150 million Pesetas, plus up to 10% of the firms' annual turnover in cases of serious and repeated violations, and the firms' directors and senior management can also be fined up to 5 million Pesetas each. Fines may be re-imposed periodically if a violation continues (Government of Spain 1999; Cases, 1998, p. 193). The Tribunal can impose interim relief, for up to six months, pending its final resolution. An example is the Tribunal's 1997 interim order that Telefónica and related companies stop a joint marketing campaign, including using a single access number, that was arguably preventing competition in Internet services. When it appeared that the parties had not complied with the order, the Tribunal imposed a fine of 148 million Pesetas (OECD/CLP, 1997a).

Responding to concerns about how much time competition matters were taking, deadlines have now been established (Art. 56). As of 1 January 1998, the basic deadline for Servicio investigation is 18 months, and for a Tribunal decision, 12 months. Each step in the process is also subject to (short) time deadlines, too. The Tribunal's final decision must be issued within 20 days after proceedings have been closed (Government of Spain, 1999). The proposed new provision for "consent" resolutions may also respond to a desire to make proceedings more expeditious. This resolution would be more formal than a comfort letter. It evidently would involve agreement among the Director of the Servicio, the complainant, and the respondent, and it would provide for a notice and comment process to ensure that the resolution does not harm third parties.

Servicio officials may inspect and obtain documents, including originals, and may have access to premises, pursuant to court order. Individual, firms, and government agencies are obliged to co-operate with Servicio investigations. The Servicio has powers to impose fines in order to enforce compliance with its investigations ranging from 50 000 to 1 000 000 Pesetas (Arts. 32-34).

Private lawsuits are possible in theory, but have been little used. The Act's prohibition and nullification *ab initio* of anti-competitive practices gives the courts jurisdiction to award damages under the Civil Code. But any judicial action would take a long time to obtain relief (Government of Spain, 1999). The court system is backlogged, with old procedures and few resources. Despite many reports about the problem, there has not been much movement toward solving it. In a competition matter a few years ago, after a big fine was issued, the victim went bankrupt, and the creditors went to court and eventually recovered; however, it took eight years. Nonetheless, some private suits are expected following on recent telecoms cases. (Actions that infringe Articles 85.1 and 86 of the EC Treaty may also be the basis for damages actions in national courts.) Criminal proceedings are also possible, in principle, under general provisions of the administrative law; if brought, they would suspend resolution of administrative proceedings based on the same facts (Cases, 1998, pp. 192-93).

Spain's competition policy institutions are authorised, by decree, to apply EU law in Spain. The relevant responsibilities are distributed among the different bodies. The General Directorate of Economic Policy and Protection of Competition deals with co-operation on competition matters with the EU Commission. The Servicio has the power to open files related to Articles 85.1 and 86 of the EC Treaty and to deal with issues related to the EU merger regulation. The Tribunal applies Articles 85.1 and 86 of EC

Treaty in Spain, and can also render decisions on merger issues related to the Council regulation. Finally, the government exercises the power to decide whether or not to clear mergers which have been submitted by the Commission under Article 9 of the Council regulation (Government of Spain, 1999).

Mergers with substantial effects on trade in other member states of the EU usually comply with the thresholds established in the EU regulation and then are handled by the European Commission. After the last amendment of EU Merger Regulation, other thresholds have been established for concentrations without a community dimension but with a significant impact in at least three member states, to avoid conflicting remedies imposed by several national authorities. Where there is national jurisdiction in Spain, its regulations require examining its effects in the Spanish market, even if the relevant geographic market is broader than Spain alone.

Market openness, as it affects barriers to entry or potential competition, plays a substantive role when assessing competitive effects. Co-operation among the national authorities is essential in this process, and Spain intends to improve co-operation and exchange of views, to the extent that confidentiality is not violated. Spain has not, however, entered any co-operative agreements with other countries. There are no special procedures concerning foreign firms or transactions for obtaining information or for notification, in enforcement generally or in the merger notification programme. Spanish procedure does not vary according to the nationality of the parties. There are no differences related to the nationality of parties. Competition authorities in Spain have no role in the regulation of international trade through measures such as anti-dumping laws, because those are EU-level responsibilities (Government of Spain, 1999).

#### **Competition policy resources have remained constant while the workload has doubled.**

Resources assigned to competition policy have been basically unchanged for several years. Although the Tribunal now has about 15% more human resources than it did six years ago, its budget has not increased commensurately. Its total staff of 34 (including the nine members of the Tribunal themselves) has fewer than a half dozen professional support staff. Individual members have no direct staff support. The Servicio, meanwhile, evidently shrank by more than 10% between 1993 and 1998. Taking the two bodies together, the total commitment of person-years to competition issues was about the same in 1998 as it was in 1993.

Table 1. Trends in competition policy resources

Servicio	Person-years	Budget (Ptas MM)
1999	68	343.3
1998	64	340.1
1997	64	333.0
1996	75	330.5
1995	75	303.1
1994	71	285.5
1993	73	290.7
Tribunal		
1999	41	231.5
1998	34	227.1
1997	34	224.3
1996	32	214.7
1995	28	202.6
1994	30	212.2
1993	29	210.1

*Source:* Government of Spain 1999. For the Servicio's budget expenditure, the figures are estimates, as the Servicio is included in the budget of the General Directorate for Economic Policy and Protection of Competition.

Yet the workload has increased markedly, especially in the last year or so. From 1990 to 1995, the Servicio received an average of about 90 complaints per year; in 1996, though, it received 120, and in 1997 over 200, mostly concerning the service sector (OECD/CLP, 1997*a*). And the sanctions imposed in 1997 soared, amounting to five times more than the record set just the year before.

Table 2. Trends in competition policy actions

	Horizontal agreements	Vertical agreements	Abuse of dominance	Mergers	Unfair competition
<b>1999:</b> matters opened	76		58	51	36
sanctions or orders sought	22		9		3
orders or sanctions imposed	13		9		1
total sanctions imposed (Ptas)	3 366 585 000				
<b>1998:</b> matters opened	58		39	31	51
sanctions or orders sought	18		10	-	2
orders or sanctions imposed	5		2	-	1
total sanctions imposed (Ptas)	356 520 000			-	-
<b>1997:</b> matters opened	48		57	19	45
sanctions or orders sought	17		10	-	2
orders or sanctions imposed	5		3	-	-
total sanctions imposed (Ptas)	1 492 087 080		247 710 000	-	-
<b>1996:</b> matters opened	56		62	23	29
sanctions or orders sought	14		7	-	-
orders or sanctions imposed	9		3	-	-
total sanctions imposed (Ptas)	188 000 000	134 975 000	-	-	-
<b>1995:</b> matters opened	23		33	20	30
sanctions or orders sought	6		4	-	-
orders or sanctions imposed	6		1	-	1
total sanctions imposed (Ptas)	100 300 000	-	124 000 000	-	-
<b>1994:</b> matters opened	19		21	13	20
sanctions or orders sought	7		4	-	1
orders or sanctions imposed	5		3	-	-
total sanctions imposed (Ptas)	36 690 000	-	-	-	-
<b>1993:</b> matters opened	34		46	15	21
sanctions or orders sought	7		10	-	-
orders or sanctions imposed	8		3	-	-
total sanctions imposed (Ptas)	99 140 000	-	195 400 000	-	-

Source: Government of Spain 1999.

At the Servicio, because of the reforms to merger control, the staff of the Studies Unit (a total of 10 people) focuses efforts now on national and EU merger cases. Compulsory notification will reduce the effort it now spends on finding non-notified transactions, but it will also increase the number of items to be reviewed. Studying post-merger situations and monitoring compliance with conditions is an important task, but resource constraints make it difficult to do.

The Servicio's top priority now is competition problems in network markets and newly liberalised sectors. A number of recent cases have targeted restraints in industries that have recently been liberalised, such as professional services and petroleum products, or that have some degree of exemption from the competition law, such as tobacco and pharmaceuticals.

Table 3. **Recent actions in selected sectors**

<b>Cases since 1995</b>	<b>Professional services</b>	<b>Petroleum products</b>	<b>Tobacco products</b>	<b>Pharmaceuticals</b>
Files Opened	37	33	7	13
Pending, Servicio	9	11	2	8
Pending, Tribunal	9	1	-	2
Orders, Tribunal	7	7	1	2

Source: Government of Spain 1999.

#### **4. LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES**

Whether competition policy can be a credible, useful framework for broad-based regulatory reform is partly determined by the breadth of its effective coverage. The extent and justifications for general exemptions or special treatment for types of enterprises or actions measures the relative importance and impact of the general competition laws. At the national level, Spain is reducing the number of nationally-owned firms and cutting back on special competition rules or exemptions for sectors. The remaining general provision that can authorise exemption is potentially broad, but the competition bodies have worked to keep its application narrow. At the sub-national level, regulations are sometimes invoked to avoid competition policy, and here too the Tribunal has construed those exemptions strictly.

##### **Other regulatory programmes take precedence over competition policy, in the event of conflict.**

The principal means of exempting conduct or firms from the reach of competition law is through the general provision concerning regulatory compulsion or authorisation, that is, the rules or conditions under which the exercise of authority by another government body displaces or overrules competition law. The effects of this exemption are detailed below, in discussions of the anti-competitive features of regulations in particular sectors. Most of those sectors are not covered by laws or provisions that confer explicit exemption from the competition law. Instead, their laws and regulations permit or require non-competitive conditions and behaviour in a way that meets the competition law's general exemption criteria.

Conduct that is authorised by other law or regulation is excluded from the coverage of the Competition Act (Art. 2). That is, the Act's prohibitions do not apply to agreements, decisions, recommendations and practices that result from the application of a law or of the regulations that are issued in application of a law. Where anti-competitive conduct enjoys this protection from liability, the Tribunal may submit proposals to the government, through the Ministry of Economy and Finance, to modify or correct the laws or regulations that lead to this result.

This exemption was tightened up some in 1996, to make it clearer that the law nonetheless applies to the actions of public bodies themselves, when they are not properly protected by legal authorisation. A new paragraph was added to Art. 2 of the Competition Act, intended to clarify that competition law is also applicable to restrictive agreements which are the result of actions carried out by the public administration or public enterprises, if their actions were not authorised by law. In other respects, competition policy applies completely to public owned or managed enterprises (Government of Spain, 1999).

The exemption for conduct authorised by regulation, though seemingly broad in its literal terms, is construed strictly. Laws in existence before 1989 that continue in effect and authorise or require conduct which is otherwise in violation of the Competition Act still confer an exemption. All the Tribunal can do about them is propose modifications. As for later acts, though, there must be a clear showing that the legislature intended to create an exclusion. The government may not allow anti-competitive conduct by means of decisions or regulations that are not based on a law under which the legislature clearly intended to create an exemption. And the link between the practice and the norm is strictly interpreted. The law need not set out an explicit statement of exclusion, but it must be clear that the legislature intended to permit conduct that could not be modified to conform to the competition law.

The Tribunal has taken the position that only national government laws can support this immunity for private conduct. And it has held that even national laws have to be explicit. Examples of explicit laws are those that authorise margin or price fixing for books and pharmaceuticals. Parties making more imaginative claims have lost. Cosmetics makers unsuccessfully argued that the Drugs Law authorised them to limit distribution of their own products to drug stores, for example.

The problem of monopoly authorised by local regulation is exemplified in a case about funeral services. The Tribunal decided it had no power over an abuse of dominance by the monopoly provider in the city of Vigo, which was a mixed enterprise partly owned by the city and regulated by it. The Tribunal held that the enterprise could be liable for violating the Competition Act, despite its publicly-owned status, if it operated beyond its regulated authority. But the law could not be applied to the particular conduct at issue, because that had been duly authorised. The Tribunal highlighted the problem, that the regulator was dominated by the regulated company. Using this case as an example, it recommended that the government review the law that authorised local governments to establish mortuary monopolies (OECD, 1997a). That advice was followed a few years later, when funeral services were liberalised in 1996. The episode illustrates the theme of “success through failure”, that is, motivating the elimination of an exemption by trying, and failing, to apply the law to the problem.

The extent of monopoly sponsored by local or regional government, or of business protected by local or regional government regulation, is not clear. Spanish law includes principles to control how much regional governments can obstruct national economic markets (Constitution, Arts. 139.2, 157). But there are also strong interests in permitting regional autonomy. Decisional gridlock and concern about fairness may make it difficult to eliminate local constraints by means of something like the Australian solution, of compensating local governments to go along.

To accommodate the positions of smaller businesses, both particular and general authorisations for agreements with *de minimis* impact are possible. The Tribunal may authorise certain agreements to promote exports or rationalise production, if consistent with the public interest and justified by the economic situation (Arts. 3.2(d), 4). Although it does not appear in the statutory text, evidently this provision is conceived principally for small and medium sized businesses. In addition, the government may authorise agreements, decisions, recommendations, and concerted practices that have as their purpose or effect to rationalise or improve the competitiveness of companies, especially small and medium-sized companies (Art. 5.1(c)). The only part of this authority that has been developed so far is the clauses about distribution agreements and intellectual property rights. That is, no block exemptions have been issued under the very broad “catch-all” paragraph.

In June 1996, a provision was added to the Competition Act giving the competition authorities the flexibility to apply a *de minimis* rule (Art. 1.3). The authorities can reject complaints that, due to their small scale, do not affect the public interest. The rules do not fix any specific thresholds for what may actually amount to an agreement of “minor importance”, nor is there any indication as to what the Servicio would consider *de minimis*. And the provision does not depend on the small size of the firms, but rather on the small size of the likely competitive effect. The provision gives the enforcement bodies some valuable flexibility in managing their workload, to concentrate on more important cases. It does not amount to an exemption from the prohibition as a matter of law, but as a practical matter it probably means that restrictive agreements among smaller enterprises may not be sanctioned as often, in part because the alternative of a private lawsuit will be impractical.

#### Box 4. Examples of local and regional government actions

Local or regional government action is often invoked as a defence, and the defence is often rejected. For instance, in 1996 an association of forestry firms in Aragón complained that a publicly owned enterprise abused a dominant position (and violated of the law on public procurement). The enterprise argued that its activities were protected, under a regulation approved by the regional government. But what was at issue was not a general regulation, but a particular action amounting to an agreement with the government giving it all the forestry work in the region. The Tribunal found that this agreement did not amount to regulated conduct protected by the statutory exemption.

The Consumers Association of Catalonia complained that bakers agreed to produce only a single type of bread to be sold Sundays and holidays. By law, bakeries could not open on those days, and the pastry shops that were allowed to open had agreed to sell only the so-called “enriched bread”. The administration in Catalonia welcomed the bakers’ agreement, believing it a satisfactory compromise among the interested parties. The Tribunal, however, found that the agreement violated the law. In rejecting the defence, that the administration supported the agreement, the Tribunal relied on constitutional principle. Because the Spanish constitution supports free market competition, administrative interventions in the market can only be justified by other public interests such as safety, health, or consumer protection. Here the administration had supported a restriction on market competition that was contrary to the interests of the consumers.

And in the cider cartel case, the companies argued that their agreement on a single price to pay for apples was supported by the Asturias Administration in order to promote the sector. The Tribunal resolution pointed out that the law confers protection only for conduct under administrative interventions authorised by a specific law. No national or regional regulation could authorise intervention over the price of apples.

In both the bakers case and the cider case, the Tribunal considered the administration involvement as an extenuation, leading to a lower fine than might otherwise have been imposed (Government of Spain, 1999).

### Sector-specific exclusions, rules and exemptions.

The sectors explicitly excluded by law or regulation, in whole or in part, from the general competition law are the postal service, pharmaceuticals, and tobacco products (Government of Spain, 1999). Spain has been engaged in an active programme of liberalisation, but there are some sectors where remaining regulation authorises anti-competitive practices and conditions, and thus conduct that is exempted pursuant to the Act’s general provision concerning regulatory authorisation. And in sectors that are being reformed to introduce more competition, sectoral regulators may have powers that affect competition (OECD/CLP, 1998c).

#### *Tobacco products*

Retail distribution of tobacco products is a monopoly, a status that was confirmed by a 1998 law.<sup>5</sup> The justification for this monopoly is given simply as the public interest. A new regulatory agency was created, which both regulates and, ostensibly, promotes competition, by separating regulatory

functions from operating interests (Government of Spain, 1999). The retail monopoly is run by a concession system. Profit margins at retail are set by law. (This is tied to a monopoly in retailing postage stamps, too, which is being phased out). Regular retail licenses are issued by the Ministry of Economy and Finance, and licenses for resales at bars and restaurants are issued by the new regulatory agency.

The new legislation represents a small step toward liberalisation, in that the monopoly had previously included manufacture, import, and wholesale distribution too (Government of Spain, 1998). The government retains a small share of the firm that had the monopoly over these functions, Tabacalera, although there is no longer a government representative on its board or the boards of its subsidiaries. Although the new law formally removed the monopoly status, the requirements for a license are very demanding, and no competitor has entered as of early 1999. To get a license, a firm must demonstrate financial and entrepreneurial capacity, have property for storage in customs areas, have a contract with a shipper or other access to transport, not be vertically integrated downstream, commit to supplying a full line of products on request to any retailer in all regions of the country, and submit to other requirements about matters such as payment terms. The Tribunal objected, unsuccessfully, to the exclusionary effect of these license requirements.

### ***Pharmacies***

Regulation in this sector is applied by the Ministry of Public Health, (Government of Spain 1999) which sets the selling prices for pharmaceuticals. Profit margins at retail and wholesale levels are fixed, but wholesale mark-ups have recently been reduced. Pharmacies must be owned by persons with professional degrees in pharmacy. Authorisations for opening a pharmacy must be granted by the governments of the *comunidades autónomas*, subject to geographical and demographic parameters limiting the number of pharmacies based on population and setting minimum distances between shops. A decree in 1996 liberalised pharmacy opening hours and eliminated some constraints on opening new shops (OECD/CLP, 1997a). Business hours are thus free, but they must be communicated to the regional governments.<sup>6</sup> The 1997 law took control over opening new pharmacies away from the collegium of pharmacists and gave it to regional administrations. But in some regions, the result is more restrictive rules than before over such issues as transfers of pharmacy operations. The government points to other reforms in this sector such as reducing the mark-ups of pharmacies and wholesale distributors, rationalising the list of drugs financed by the Social Security System, introducing generic medicines, and establishing reference prices (Government of Spain, 1998). Note that some of these moves could have ambiguous competitive effects; for example, a reference price system setting a maximum price may also create a focal point and thus reduce, rather than encourage, competition (Puig, 1999).

### ***Postal service***

In Spanish postal sector, competition has long been open for courier and parcel services, urban mailing, and inter-urban and international mailing over 2 kg. The remaining postal services monopoly is moving toward liberalisation under recent legislation (Government of Spain, 1998). The changes respond to EU requirements (Government of Spain, 1999). Competition is allowed, in theory, for inter-urban and international mailing, but private operators providing these services for ordinary letters up to 350 grams must charge prices five times greater than the basic price charged by the public, universal service operator. The universal service operator is attached to Ministry of Telecommunications, which is responsible for regulation under the new law. Universal postal service is defined as urban and international ordinary mailing (letters less than 2 kg. and parcels less than 10 kg.), postal monetary orders and consignments of advertising and books. The universal service system is to be financed out of the budget and revenues from new entrants, whose contribution is limited to about 20% of the public system's needs. That limitation responds to a recommendation of the Tribunal. The stamp retailing monopoly is being phased out over four years; now, it is an adjunct of the tobacco retailing monopoly.

## ***Publications***

In book selling, resale price maintenance is authorised and discounts are regulated (OECD/CLP, 1997b). Retail prices in cash transactions can be discounted up to 5% off the price set by the publisher. The discount can be as high as 10% on National Book Day and at book fairs, festivals and trade events; for sales to libraries, archives, museums, educational and scientific and research institutions, the discount can be up to 15%. In 1997, the limit was raised to 12% for textbooks (OECD/CLP, 1998a). The Tribunal has recommended phased elimination of this exemption, to permit wholesale and retail level prices to be set by the market (Tribunal, 1997). The Tribunal has predicted that the effect of permitting greater discounts, particularly for textbooks, would be an annual consumer saving of 50 billion Pesetas (in a total market of about Ptas 400 billion). This estimate was based on demand elasticity of about five, and predicted discounts over 20% on texts and best-sellers.

## ***Professional services***

The Tribunal's first report about competition issues, in response to the government's requests under the Convergence Plan in 1992, was about professional services (Tribunal, 1992). The professional groups identified in this report as entitled to organise into *Colegios Profesionales* included the doctors, dentists, pharmacists, lawyers, engineers, architects, surveyors, and host of other types of business, administrative and scientific agents and specialists, such as economists.<sup>7</sup>

The general exemption for regulated conduct meant that constraints in these fields were beyond the reach of the Competition Act, because they were imposed pursuant to regulation, not merely by agreement within professional associations. The basic law, which includes the requirement to belong to a professional association in order to practice, is the Professional Associations Act of 1974. For some professions, such as lawyers, that constraint is included in the profession's own regulatory act, too. Other restrictions appear in laws about particular professions. Revisions to the Professional Associations Act in 1978 eliminated some of its pre-constitutional political aspects, but left the economic provisions unchanged.

The Tribunal's 1992 report described the commonly encountered constraints on competition. Some associations imposed geographic constraints, even in addition to belonging to the regionally based association. The extent of constraints on free operation is illustrated by those that applied to dentists: they had to join one of a small number of regional professional associations, practice within that region and within 50 kilometres of their province, open only one clinic, receive permission in writing to open a clinic in the same building as another dentist, wait a year before occupying an office vacated by another dentist who continued to practice in the area, and charge the association's prescribed minimum fees. They might not advertise, compare themselves with other professionals, contract directly with insurance companies, or enter arrangements that deny customers a choice of dentists. Lawyers could not practice in a group larger than 20, and could not establish more than one office per region. Several professions, including engineers, architects, and some medical associations, required clients to make payments through the professional association, in order to ensure that fee levels were being maintained.

The Tribunal recommended in 1992 that controls on prices should be eliminated. In addition, it recommended eliminating special rules about advertising, since professional advertising would still be subject to the generally applicable rules against deception in the Unfair Competition Act. And it recommended that territorial restrictions and restraints on business structures of professional practices should be abolished, as archaic and even harmful to Spanish professionals competing in the European Community (Tribunal, 1992, pp. 49-50). The Tribunal did not object to the basic legal requirement of association membership, though, because it did not appear to be used to exclude competition, as essentially everyone who met the qualifications was admitted to association membership (Tribunal, 1992, pp. 21-23).

The major reform to date was a 1996 decree (afterwards enacted as a law 7/97) making clear that the competition law applies to professionals. It provided for free setting of fees, by preventing associations from prescribing minimum fees, and it permitted professionals to practice anywhere in Spain based on joining a single professional association (OECD/CLP, 1997*a*). A 1999 decree has extended the Competition Act's coverage to notaries, registrars, and commercial brokers. The associations' powers to compel payment through the association have also been eliminated.

But these steps have not yet succeeded in opening up the markets. Agreements on mandatory minimum fees are no longer permitted, but associations still announce recommended fees and rules against fee advertising. An association's effort to make members comply with agreements about recommended prices and advertising could violate the competition law. Many enforcement actions have been brought against "recommended" fees that were enforced in ways that showed their true, anti-competitive objective and intention. And the Servicio has forwarded cases against codes of conduct that restricted advertising. Enforcement can discourage this kind of behaviour by the associations, but little can be done to promote competition further if members simply go along with their associations' recommendations.

In resisting competition, the professions enlist the aid of regulators, concerning such threats as entry by foreign practitioners. Regional professional collegia are supposed to make agreements of mutual recognition with each other, but this does not always happen. In addition, and more importantly, professions such as architects and engineers are engaged in disputes about defining the limits of the professions and thus of regulatory competence. In the legal profession, *procuradores* and *advocats* have battled over their distinct roles. As proposed mergers between accounting and legal firms are under consideration, the bar associations are considering changing, or tightening, their ethical rules to control them.

Notaries in particular are a common subject of complaint. (Notaries were excluded from the Tribunal's 1992 report about professional services, on the grounds that notaries, like registrars and brokers, are civil servants, so that reform of those functions would stand on a different basis from the report's proposals for others). Rates for notary services were fixed as a percentage of transfer prices (as are the rates of property registers and stock transfer agents). The problem of controlling entry to limit competition appears to have been greatest for notaries. The notaries' special, monopoly powers and rights date from the 16<sup>th</sup> century, and changing their status raises sensitive political issues. The government lowered fees for real estate transactions in 1996 to encourage flexibility in refinancing. Measures the government has said might be considered include streamlining of the tasks now handled by different kinds of notaries, modifying fee schedules, and adapting notarial functions to changing market demand. In April, 1999, the government reduced the fees that notaries and certain other transactional professionals can charge, and permitted discounting from some of them as well.

There are a few reports that the limited liberalisation has reduced professional services costs; however, there are no quantitative studies. The Servicio has not received complaints about price levels in professions, but it has not done a study of the issue.

### ***Air transport***

So far, the clearest liberalisation in transport has been in airlines. The process began in 1994, and two private-sector companies now compete with the state-run group Iberia. There has been a significant reduction in prices, accompanied by a wider range of fares, more frequent flights and improved service quality. Plans to privatise Iberia further continue to develop. Handling operations at airports have been liberalised. In 1996, the public company Aena ceded its monopoly at the major airports. Airlines there now have a choice of two providers, one of them private and not controlled by Iberia (OECD, 1997*b*). Prices for these support services have fallen to almost half of their former levels (Government of Spain, 1998). As of April, 1999, Spanish airlines can hire European pilots.

Much of the relevant competition policy oversight here comes from the EU, including block exemptions about code-sharing and fare consultations. Consumers obviously benefited from airline deregulation, as prices dropped up to 50%. But there have been accusations that airlines are colluding to share markets or keep prices up. Indeed, a recent Spanish competition case in this sector was about price fixing. The airlines claimed, unsuccessfully, that the practice was covered by the EU block exemption.

### ***Rail transport***

The state company RENFE effectively operates as a monopoly. But because of low prices, yet low demand, RENFE now barely covers half of its running costs, it has been forced to delay investments in infrastructure upgrade, and its losses demand budgetary transfers, which have run as high as 0.5% of annual GDP (Government of Spain, 1998). Plans are underway to separate track construction and management from rail transport services. The first step was the 1997 creation of a new public entity, *Gestor de Infraestructuras Ferroviarias* (GIF), and adoption of some measures to open the market to new operators (OECD/CLP, 1998a). But although infrastructure has been separated out, and commuter and long-run operations have been managerially separated, there are as yet no new operators.

### ***Road transport***

The framework law for these sectors acknowledges the importance of competition and market forces, as the basic framework for their development (Tribunal, 1992b). Still, some restrictions or non-competitive conditions persist in the actual application of regulation. The largest inter-city bus company, Enatcar, is still 100% publicly owned, although the government plans to privatise it. There are many private firms in the sector. Domestic routes have not yet been liberalised, but there is a deadline for doing so in a few years. Rules have been introduced to eliminate quotas and administrative authorisations, (Government of Spain 1998) which reportedly have been used to encourage or permit market division. Although the duration of concessions has been reduced some, Tribunal recommendations to open up entry, even on an experimental basis, have not been adopted.

The road freight sector remains fragmented. Licensing standards have been relaxed, (OECD 1997b) with quantitative restrictions replaced with qualitative ones (OECD/CLP, 1998a). A programme of progressive fare liberalisation has been adopted. The EU has effectively opened up this sector by requiring nations to permit cabotage, which was set to be fully liberalised by July 1998 (OECD, 1997b).

### ***Ocean transport and ports***

Ocean shipping conferences meeting the requirements set out in the Ports Law were exempted from the Competition Act's prohibition of restrictive agreements. A requirement under the Ports Act is that there be effective competition to the conference (OECD, 1997a).

In port services, there has been some limited liberalisation. *Puertos del Estado* is 100% state-owned. Freight loading and unloading is jointly run by shippers and the port authority, with other services out-sourced based on concessions. The government has promised to increase port autonomy in management and tariff matters (Government of Spain, 1998). Ports now have authority to set their own prices (OECD/CLP, 1998a).

### ***Telecommunications***

Details about reform in this sector are set out in Ch. 6. Full liberalisation in this sector came in December 1998, eleven months after the EU target date but in advance of the extended deadline that Spain had negotiated. A second operator in basic telephony, Retevisión, began to compete with Telefónica in January 1998. A third basic telephony licence was also granted, in May 1998, to the Lince consortium (led by France Telecom). In mobile telephony, Telefónica's monopoly ended in 1995 with the entry of Airtel; here, too, a third licence has been granted, to Retevisión Mòvile (Government of Spain, 1998).

The telecoms regulator, *Comisión del Mercado de las Telecomunicaciones* (CMT), has some merger and competition policy responsibility over firms in the sector, but without prejudice to the powers of the competition bodies or the Council of Ministers. Like the Tribunal, the CMT may submit a non-binding report of its views about a particular concentration or accord (OECD/CLP, 1998c). The April 1998 telecoms law sets out some of the relationship between the CMT's functions and the powers of the Servicio and the Tribunal under the Competition Act (OECD/CLP, 1998c). The telecoms law obligates CMT to inform the Servicio about anti-competitive practices and proposed mergers and take-overs that could infringe competition policy. Indeed, both the telecoms and competition bodies are obliged to share what they know with each other. The 1999 revision of the Competition Act made clear that the Tribunal and the Servicio retain all of their enforcement powers concerning anti-competitive practices in the telecommunications sector.

Many observers are encouraged by competitive developments in the telecoms sector. Firms are challenging Telefónica, in the marketplace and through complaints about its anti-competitive practices. The Servicio and the Tribunal have been very active, demonstrating the application of general competition law in this sector. The need for repeated action may also demonstrate the extent to which greater competition is being resisted, too. In early 1999, the Tribunal assessed substantial fines against Telefónica – 580 million and 750 million Pesetas – for abuse of dominance in basic and mobile telephony.

### *Electric power*

Details about reform in this sector are set out in the background report to Chapter 5. Generation and distribution are presently vertically integrated oligopolies, in which two companies, the recently privatised Endesa group and Iberdrola, control around 80% of the national market, while the high-voltage transmission grid is run by Red Eléctrica, now in private hands. Spanish electricity prices are relatively high. Electricity imports amount to only about 3% of potential capacity and are constrained by logistical, geographical and environmental factors (Government of Spain, 1998).

Reform legislation, passed in November 1997, creates a wholesale spot market, reduces nominal regulated prices by 8% through 2003, and promises full price liberalisation in 2007. It provides for legal separation of generation and distribution, privatisation of grid ownership, and staged introduction of retail competition for large, medium and small consumers. Regulatory oversight is provided principally by the Ministry of Industry and Energy and a new independent regulator (Government of Spain, 1998). The Ministry has cut access tariffs for liberalised customers by 25% to encourage participation in the market. The thresholds and tariffs were reduced further by a decree in April 1999.

At first, the electric power regulator, CSEN, had responsibility to monitor anti-competitive practices in the electric power sector, but the law did not specify what it was to do about what it found. This led to uncertainty about how CSEN's jurisdiction overlapped with that of the Servicio and the Tribunal under the Competition Act. Now, the law instructs the CSEN to communicate to the Servicio about restrictive practices that the CSEN had spotted in the electric power industry, and submit a non-binding report about them (OECD/CLP, 1998c). The two bodies now co-ordinate closely.

Several competition cases have already arisen in this sector. The EU is reviewing a joint venture between a Spanish and a Portuguese firm to build a transmission line. The Servicio is supporting the venture, because it creates a new supplier. The competition and energy regulators are co-operating in evaluating a joint venture between Gas Natural and Endesa, which was referred to the Tribunal for second-phase investigation into its potential market foreclosing effects. Complaints about access are being filed with the Servicio and reviewed by the Tribunal, which has decided at least three cases in this sector so far.<sup>8</sup>

Despite the reforms, though, business, consumer, and academic observers believe more could be done to promote competition. Consolidation that accompanied reform has left a highly concentrated industry with limited possibilities for entry.

### ***Natural gas***

The natural gas industry is essentially a monopoly. The private company Gas Natural has a 90% share of gas distribution and also owns the recently privatised ENAGAS, Spain's sole natural gas importer and quasi-exclusive operator of the high-pressure transport network (Government of Spain, 1998).

A long-term reform plan was adopted in late 1998, and some aspects were updated in April 1999. (Some previous, smaller reforms addressed retail distribution and third-party access to the pipeline net). Prices are to be liberalised over a 10 year period (reduced, in April 1999, from the originally planned 15 year period), beginning with largest customers (10 MM m<sup>3</sup> annual consumption, reduced from the original 25 million). A single tariff will apply for third-party network access. The concession system would be changed to a system of licenses with no time limits or regional limitations, and competition would be authorised in re-gasification, storage, and transmission. But cross-subsidisation is controlled only by accounting separation among transport, storage, and wholesale and retail distribution functions (Government of Spain, 1998; OECD/CLP, 1997; OECD/CLP, 1998).

### ***Financial services***

Business banking appears generally competitive, and interest rates for mortgages in Spain are the lowest in Europe. Some consumer rates, such as credit card and overdraft fees, are relatively high, though. And small businesses have complained that two firms controlling 80% of the payment systems market refuse to discount from their (common) merchant charges. Some of the Tribunal's recommendations to strengthen competition oversight have been adopted, notably submitting major bank mergers for competition policy review. But some others, such as to increase consumer protections and to put commercial banks and the *cajas de ahorro* (savings banks controlled by the *comunidades autónomas*) on a more equal competitive footing, have been rejected.

### ***Distribution***

The 1996 Retail Act, which sets out the regulatory framework for the sector, is more interventionist than the law it replaced. Though the aim of the law is to move towards complete freedom of opening hours in the year 2001, it is not clear that this goal will be met. The *comunidades autónomas* may curtail hours over the transition period. Even after 2001, the government will still have to reach agreements about opening hours with each of these regional governments. Other issues include restrictions on retailers' freedom to decide the timing of sales and the requirement of a second licence for opening large retail outlets (Government of Spain, 1998).

Opening new large-scale stores is controlled by the *comunidades autónomas*. There is a mild form of competition policy oversight, in that the local governments must obtain a non-binding report from the Tribunal before approving or denying an application. In 1997, the Tribunal issued 48 reports on proposed hyper-markets, and studied another 15 cases for which reports were deemed unnecessary (OECD/CLP, 1998a). In 1996, there were 30 such reports, and 12 cases where a report was deemed unnecessary (OECD/CLP, 1997a). The Tribunal virtually always recommends approval. The only exception, in Valencia, was for horizontal reasons; all the hyper-markets in the likely regional market were owned by the operator who wanted to open the proposed new one, in the only remaining good location. One control against abuse is that consumers are represented on the local commissions that make the decisions about permitting new stores. But the net effect of the process is to postpone entry. The latest controversy is over high-volume, single-theme "category-killer" outlets, where proposals for profile rules would prevent specialisation and high volume operations.

Opening hours had been unregulated from 1985 to 1996. They are now subject to a combination of national law and local decision. The current national standards are relatively liberal: stores may be open from 0800 to 2130, Monday to Saturday. Total hours are unrestricted up to 72 hours per week; at that point, regional authorities can impose an upper limit. And outlets may open at least eight Sundays and holidays per year, up to 12 hours per day. Convenience stores and some other categories are unrestricted (OECD, 1997b). But few of the *comunidades autónomas* have permitted opening hours longer than the national law requires. Consumers' views about this are split; a survey showed about 40% preferred more Sunday opening, but 30% did not object to the current situation. As elsewhere, the issue is one of conflict between the interests of large and small shops, and of regional government intervention ostensibly on behalf of the smaller ones. Representatives of the smaller retailers contend that consumers are not complaining and that the real problems are labour laws and social security costs which constrain the flexibility to take advantage of the hours that are available.

### ***Land use and transfer***

Distortions in the market for urban land are a serious concern, but reform is complicated by the constitutional devolution of responsibility to regional governments. A 1996 reform was overturned by the constitutional court, on the grounds that the particular issues at stake were matters for regional (and local) decision (OECD/CLP, 1997a). Land deals and land use control are a major source of funds for municipal budgets, and this aspect complicates decisions, increases costs and delays, (Government of Spain, 1998) and invites corruption. The latest reform effort, from 1998, included some of the Tribunal's recommendations, but not others. In principle, this reform reverses the old presumption and provides that all land is to be developable unless specifically ruled otherwise; nevertheless, it still permits local authorities to deny development rights. High and increasing prices for urban land remain a concern (OECD, 1999).

### ***Petroleum products***

Petroleum was once a state monopoly, but it is becoming increasingly competitive. The formal monopoly was eliminated when Spain entered the EU. Prices have been liberalised, although some of the changes came only recently. Diesel fuel prices were removed from the maximum price list in June 1996 (OECD/CLP, 1997a). It was not until the 1998 Hydrocarbon Law that prices for all home heating, gasoline and diesel fuels were freed.

Oil refining is an oligopoly dominated by Repsol, which was recently privatised, CEPSA, and BP. Transport and storage are handled practically exclusively by *Compañía Logística de Hidrocarburos* (CLH), which is controlled, in turn, by the three refiners. At retail, 90% of petrol stations are run under concession agreements with the three main players. These are long-term (10 year), fixed margin contracts. Although the old rule setting a minimum distance for new stations has been abolished, that will have little effect on competition until these concession agreements expire and are replaced (OECD, 1998, p. 110). The 1998 Hydrocarbon Law now provides for re-negotiation of these contracts, which could lead to arrangements that let the stations set the price (Government of Spain, 1998). That law also provides for transparent, equal third party access to oil storage and transport facilities. (Divesting CLH from the three wholesaler-refiners would be simpler and would obviate the need for special legislative access guarantees) (OECD, 1998, p. 128).

### ***Funeral services***

Funeral services have been provided by municipally-sponsored monopolies. The government has tried to permit competition by removing the municipalities' power to authorise these monopolies (OECD/CLP, 1997a, p. 17). Some have been privatised, and competition has increased since the 1996

liberalisation, but some monopolies remain. For example, there is only one provider in Barcelona. In theory, companies are free to compete subject only to compliance with technical and health requirements, and constraints on funeral transport services were dismantled (Government of Spain, 1998). But until there is actual entry, problems may remain and continued competition policy oversight will be called for.

## 5. COMPETITION ADVOCACY FOR REGULATORY REFORM

The competition bodies, especially the Tribunal, have statutory roles in administrative and legislative processes. The Tribunal has the authority to report and comment on draft laws and regulations concerning the Competition Act (Art. 26). It can issue reports on draft regulations that fall within its jurisdiction, send reports to other public bodies and agencies, and study and submit to the government proposals for the modification of laws. The Tribunal may be consulted by parliamentary committees about drafts or proposals for laws and about any other issues relating to competition. The Tribunal may also issue reports concerning competition policy upon the request of the government or any ministry department, the *comunidades autónomas*, local public administrations and business organisations, labour unions or consumers and users. The Tribunal can initiate and conduct studies and reports about competition. And the Tribunal may formulate proposals to the government, through the Ministry of Economy and Finance, to reform or eliminate restrictions on competition that result from other laws or regulations. The Tribunal's powers to issue opinions and reports, including recommendations about reducing or modifying exclusions from the law's coverage, date from the original 1963 Competition Act. (That law even required court approval, after a Tribunal opinion, for any newly adopted restrictions on competition) (Cases, 1998, p. 184). Since 1992, the Tribunal has made more than 150 recommendations for revising or repealing anti-competitive laws and regulations. About two-thirds of its recommendations were accepted, in whole or in part.

The Servicio performs some similar functions (Art. 31). The Servicio researches economic sectors, analysing the extent of competition and the possible presence of restrictive practices, and issues reports about competition policy problems. In the last three years, its studies and reports have concentrated on sectors which have been liberalised (Government of Spain, 1999). In 1997, the Servicio did 60 studies and reports about competitive conditions in markets; in 1996, there had been 44, of which nearly half were about sectors being liberalised (OECD/CLP, 1998a; OECD/CLP, 1997a). The roles and competences of the Tribunal and the Servicio in these respects are complementary. The Tribunal has the principal decision-making and advisory powers, and thus the Servicio's work might be expected to follow Tribunal's lead and model. As a part of the government, though, the Servicio provides advice and analysis in deliberations and in developing the government's programme and priorities for competition policy. The Tribunal can be more effective as a voice in public debate analysing and criticising current policies, because of its independent position.

### Box 5. Comprehensive advocacy

The Tribunal prepared a major, comprehensive report on structural reforms in response to a government request in 1992 (Tribunal, 1992*b*). This report is a blueprint for reform and a model of integrating competition agency expertise in the policy process. Recognising that, at that time, there were more restrictions on competition in Spain than in most other developed European economies, the Tribunal initially chose sectors for study and recommendation based on three criteria: significance of impact on the economy's competitiveness, severity of restriction on competition, or success in liberalisation in other countries. The original focus was thus on electric power, local monopolies, public utility installation and maintenance, telecoms, and urban real estate. But the list quickly grew, to include water and gas distribution, publications, postal services, taxis, mass media, sea ports, pharmacies, and contracting. The report recommended changes in legislation. And it also outlined ways to overcome the inevitable opposition to change from the groups that benefit from these special-interest privileges. The report made several general recommendations about regulatory methods and the reform process: that regulators be fully independent from the regulated businesses; that reform be implemented by specific government actions pursuant to general parliamentary instruction; that social policies and objectives not be jeopardised by competition; and that cross-subsidies be eliminated by removing monopolies from public holdings. After the report appeared, the Government Commission for Economic Affairs asked the Tribunal to present an annual report on competition with both a general survey and in-depth analysis of competition in particular sectors. These annual reports were issued through 1995 (OECD, 1997*a*).

The Tribunal has continued to issue some reports and studies, but the pace and focus have changed. Tribunal reports in 1997 dealt with tobacco regulation, financing of public television, television satellite services, pharmaceutical distribution, sports broadcasting, electricity liberalisation, telecoms legislation, aid to cinema production, access to gas facilities, postal service liberalisation and universal service, and enforcement of EU rules (OECD/CLP, 1998*a*). In 1996, Tribunal reports dealt with distribution of motor vehicles, regulation of municipal markets, professional fees for construction, football broadcast rights, as well as draft regulations about corporate taxes and a draft local government industrial promotion plan (OECD/CLP, 1997*a*). Recent work includes reports on gas, textbooks, tobacco, postal services, and land use. The number of these studies has declined in the last few years. In 1996 and 1997, the Tribunal issued about 10 reports per year assessing competition issues in current or proposed laws and regulations; in the two years before, it had issued about 60 per year. Some of the early reports addressed very broad subjects or issues, while recent ones are more narrowly targeted to specific situations and rules.

The reduced rate of these reports, and the narrower focus, are explained by staff changes, and by a management decision that workload constraints meant other matters were higher priority. Another reason may be that the early reports addressed the most important issues, and appeared when public acceptance of competitive, market approaches was still unclear. Now, persuading the public is less important, and many of the major subjects have been addressed. Still, though, it would be unfortunate if the problem of resource constraints is met by reducing the Tribunal's advocacy role. Already, that role is less public than before, as some of the Tribunal's reports to the government about legislative proposals have not been published. Thus, this work is not available in public debate.

## 6. CONCLUSIONS AND POLICY OPTIONS

The Spanish economy has moved quite far over the last 20 years, and especially over the last ten, toward greater reliance on competition. The project of joining the EU and following EU reform programmes has been a powerful stimulus and guide for Spain's own reforms. And exposure to the competition within the European Community has no doubt helped spur Spanish industry to greater efficiency. Launching of modern competition policy in 1989 was complemented by active advocacy of reforming non-competitive regulations. The Tribunal's programme was virtually a blueprint for reform, both in content and in model of analysis and advocacy for the policy process. Much of the programme has been followed in efforts to introduce competition in telecoms, airlines and other transport sectors, electric power, and the professions.

But in some respects, moves toward reform still leave much to be done. It may be of concern that the Tribunal's policy advocacy role has appeared to decline in importance, even though some problems it identified remain only partly resolved. Its views are less prominent in public debate now, as recent Tribunal reports about proposals concerning tobacco, transport, drug stores, and other subjects have not been published. Sectoral regulatory bodies have only advisory powers with respect to some important issues, and the Tribunal's role is advisory, too, concerning major policies and mergers. In these circumstances, and in view of such actions as retaining a post-reform monopoly in tobacco and a highly concentrated electric power sector, it remains necessary to stress the priority of competition policy in reform.

### **Policy options for consideration**

- *Remove remaining exemptions and unnecessary constraints on competition.*

In most of the sectors discussed above, some reform steps have already been taken and plans are in place to remove constraints in the future. For others, though, more deliberate action is needed. The special rule permitting price fixing for books should be changed, because consumers could benefit substantially from lower prices there. Competition among pharmacies remains limited. And professional services are unlikely to move toward significantly greater competition as long as they recommend prices and discourage advertising.

- *Limit the anti-competitive effects of special laws about retailing.*

Before 1996, Spain's retail environment was subject to relatively few competitive constraints. Now, regional governments have powers to control new locations and operating hours. Control over entry risks affording unfair advantages to firms that were in place before the controls were adopted, and may permit them to exercise some market power. And the 1995 legislation also set special rules about unfair competition in this sector. It is unclear why general principles of competition law, and of unfair competition, would be inadequate in this sector. This legislation will be reviewed in 2001.

- *Increase resources for competition policy.*

The Tribunal has virtually no professional staff to support the members. It is unlikely that the Tribunal could effectively conduct any independent or supplementary investigation, without the assistance of the Servicio or of parties to a controversy. One proposal to increase resources would involve adding members to the Tribunal. But with nine members, the Tribunal is already a fairly large decision-making body. To be sure, the Tribunal has a practice of rotating responsibilities, to use its members' time more efficiently. Still, more staff, rather than more members, would probably have a greater impact on its output and efficiency. The Servicio actually shrank in the last few years, even though it is handling twice as many complaints and may now review a larger number of proposed mergers, under tighter time constraints. The Servicio too is likely to be strained, especially as sectoral reforms expose previously sheltered firms to competitive forces.

- *Consider consolidating decision processes.*

Originally, the Tribunal and the Servicio were separated because one was a quasi-judicial body and the other was administrative. But now that both are clearly administrative, and a further appeal to the judiciary is possible, that formal reason for separation no longer obtains. Separating the powers of initiation and decision may diffuse responsibility for developing policy and potentially lead to conflict about policy priorities. The Tribunal in 1989 suggested that the Servicio become a component of the Tribunal, so that the Tribunal would in effect have the power to open and conduct proceedings (Cases,

1998, p. 198). The Tribunal already has some control over its agenda, when it responds to complaints about the Servicio's actions and its failures to act. But as a practical matter, it appears that the Tribunal does not manage the development of competition policy. One way to strengthen its role could be to give other parties, such as sectoral regulators and even private complainants, greater powers to bring matters to the Tribunal directly. That could require a substantial increase in the Tribunal's resources.

- *Make competition policy in merger review and privatisation more transparent by strengthening the role of the Tribunal.*

In these important functions, the Tribunal's role is advisory. And although competition policy is a principal concern, in some important decisions review by the competition policy bodies was not sought. One effective way to make competition policy the top priority in these decisions would be to give the Tribunal decision power over mergers and the power to disqualify potential privatisation bidders. That is the approach applied in Mexico, for example. If that assignment of power is thought inappropriate within the structure of Spain's government, then at least the Tribunal's analysis and recommendations in such matters should be publicly available before a final decision is reached.

- *Maintain the Tribunal's independent advocacy function.*

Over the years, the Tribunal's public studies and reports have played a central role in the reform process. That process is not over. To be sure, the major subjects have been identified and many of the reform recommendations have been implemented. For others, the tasks are now to work out details and to resist back-sliding. But even if the level of reform is the details, continued study, analysis, and public debate will be important. The Tribunal, from its position of independence from the government, can be a particularly powerful and credible voice in that debate. The latest revisions to the Competition Law give the Tribunal a valuable new advocacy role, in making the anti-competitive impacts of government aid transparent. In addition, the competition policy analysis responsibilities of the Servicio have evidently been expanded.<sup>9</sup> The additional resources devoted to this function could be valuable, but it is important that the Tribunal's independent voice continues to be heard.

## **Managing regulatory reform**

Other structural reforms are needed to supplement strengthening of competition policy. Spain's bankruptcy and temporary receivership laws are urgently in need of change, so that competition among market institutions can do its job of allocating resources. There is widespread recognition that Spain must undertake reform of bankruptcy procedures along the lines of those enacted in other countries (Government of Spain, 1998). And reform of the rules governing civil law procedures is necessary to the effectiveness of law-based enforcement and privately-initiated actions. Now, civil law proceedings are often too complex and drawn out, so parties seeking the aid or protection of the courts are often disappointed. A bill about civil procedures is under consideration. The most important innovations would be speeding up court cases by cutting out procedural stages, streamlining administrative requirements, and improving the notification system for hearings, as well as measures to improve processes for collecting debts (Government of Spain, 1998).

Clear, publicly acknowledged objectives for regulation and reform, taking consumer interests into account, and independent monitoring are important elements for ensuring that reform process is open and inclusive, and not just a dialogue between the government and the industry involved. Spain has had a long history of excessive economic regulation, an experience that has inevitably shaped public opinions and expectations. But Spain also appears determined to put that experience behind it. Reforms can be promoted as elements of a comprehensive programme, both to reduce input prices and thus maintain Spain's comparative advantage and to promote the interests of consumers generally.

## NOTES

1. The 1963 law also established a Council, with members from ministries and the trade unions, which had broad powers, to provide opinions, study sectoral problems, propose matters for action, and even be consulted before the Servicio forwarded matters to the Tribunal.
2. All citations are to the Competition Act 16/1989, by article or paragraph.
3. This provision is somewhat analogous to Art. 92 of the Treaty of Rome, which prohibits competition-distorting aids where the Treaty's jurisdictional requirements are met.
4. Unfair Competition Act 3/1991, 10 January 1991.
5. Law 13/1998, 4 April 1998, on the Tobacco Market.
6. Spain's laws concerning pharmaceuticals take account of Council Directive 85/432/CEE, concerning geographical distribution of pharmacies and monopolies for selling pharmaceutical products in member states.
7. The list also includes "stomatologists".
8. Eléctrica Eriste, r336/98, 27 Jan 99; Electra Caldense, 427/98, 19 Feb 99; Hidroeléctrica del Ampurdan, r180/96, 14 May /97, texts at <http://www.meh.es/TDC>.
9. See *El Pais*, 8 May 1999 ([www.elpais.com](http://www.elpais.com)), "Economía aumenta las sanciones para las empresas que violen la libre competencia."

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