CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

RECOMMENDATIONS TO PUBLIC AUTHORITIES FOR MORE EFFICIENT AND PRO-COMPETITIVE MARKET REGULATION

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The new Ley de Defensa de la Competencia (Competition Law), Law 15/2007 of 3 July, lays down as the mission of the Comisión Nacional de la Competencia (National Competition Commission – NCC) the combating of anti-competitive practices or exercise of control over major business mergers, preserving and ensuring effective competition in the markets by exercise of the powers conferred on it by the Law, and active advocacy of competition in the markets.

The greater emphasis in Law 15/2007 on the work of competition advocacy has given rise to the NCC action plan for 2008 and 2009[1], which sets out amongst its principal objectives that of "advocating competition in sectors in which it is restricted, whether as a result of market characteristics, regulation or other interventions by public authorities, and fostering awareness and the preparation of competition surveys".

Consideration has been given in recent years in the context of the International Competition Network to the meaning of the expression "competition advocacy". The consensus reached[2] is that the expression refers to all those activities conducted by the competition authority relating to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, through interaction with economic agents and other actors in society and by increasing public awareness of the benefits of competition.

Activities typical of competition advocacy will be, for example, publication of sector or market surveys, training and the work of disseminating the policies and specific initiatives of the competition authority. They will also include, however, the preparation of reports on the regulatory activity of the public authorities to evaluate its design and impact from a competition perspective and include recommendations for the adoption of pro-competitive measures or the removal of measures which hinder competition in the markets.

[1] Available at http://www.cncompetencia.es/PDFs/Novedades/PlanLanzamiento.pdf.
[2] Advocacy and Competition Policy, Report prepared for ICN by the Advocacy Working Group, Naples, 2002.

The recent entry into operation of a new competition institution in Spain is a good opportunity to look at the principles which should inform efficient pro-competitive economic regulation and then to assess, by way of example and in the light of those principles, a number of rules governing economic activity in place in Spain.

The report is structured as follows. First there is a brief review of the international market liberalisation and deregulation context in which the move to evaluate public policy and better regulation proposals have emerged. The principles which should guide better regulation of economic activity are described, mentioning the initiatives which have taken place in this field in the OECD, the European Union and a number of Member States, including Spain. Those principles are then expanded upon from the point of view of protecting and advocating effective competition in the markets, after setting out the progress made on this in the OECD and the European Union. Lastly, by way of example, a number of rules governing certain aspects of the activity of various economic sectors are described and assessed in the light of those principles, highlighting the restrictions on competition which they impose.

I. BACKGROUND

Spain has undergone an intense process of market liberalisation in the last two decades which has contributed fundamentally to achieving a long period of growth and development in the Spanish economy. Many strategic sectors have seen significant structural reforms, reforms which have promoted free competition in many markets where such competition was possible and desirable, and has introduced far-reaching regulatory changes in other sectors where, as a result of their structural characteristics, it remained necessary for activities which were natural monopolies to coexist with others able to be carried on under competitive conditions. Those reforms have on occasion also been accompanied by the privatisation of major public enterprises.

The reports produced in the early 1990s by the Tribunal de Defensa de la Competencia (Tribunal for Defense of Competition)[3], the NCC's predecessor, contributed to triggering that liberalisation process. The most significant work of the Tribunal at that time in fact centred on designing the broad guidelines to be followed in the processes of opening up, liberalising and deregulating the Spanish economy which were then beginning to happen, emphasising that those processes had to be directed at creating market structures based on the principles of free competition.

[3] Available at http://www.cncompetencia.es/index.asp?m=15&p=12.

In that regard the report "Remedios políticos que pueden favorecer la libre competencia en los servicios y atajar el daño causado por los monopolios" (Political remedies capable of fostering competition in services and curtailing the damage caused by monopolies) produced by the Tribunal in 1993 had particular impact because, in addition to establishing the bases in legal thinking behind the transfer of the benefits of competition to society as a whole and devising criteria for drawing up liberalisation policies, it offered specific recommendations for embarking on liberalisation processes in such economically significant sectors as telecommunications, electricity, property and transport.

Those liberalisation proposals were supplemented a few years later with preparation in 1995 of the report "La competencia en España: balance y nuevas propuestas" (Competition in Spain: the current situation and new proposals), which in addition to assessing the evolution of the sectors analysed previously[4] and follow-up of its proposals, widened its recommendations for regulatory review to other economic sectors (retail banking, ports, cinemas and pharmacies).[5]

Those processes of invigorating the market economy using processes of liberalisation, privatisation and reducing the State's weight in the economy, part of what have been referred to as First Generation Reforms, have taken place in all neighbouring countries, although according to varying chronologies and at varying paces.[6]

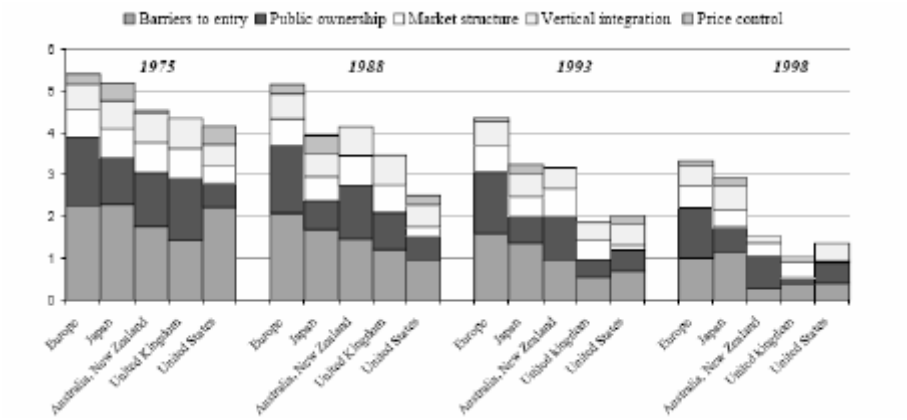
By way of illustration, the data set out in Table 1 shows the evolution of a number of indicators associated with the deregulation and privatisation processes undergone in the majority of OECD countries. These allow us to identify, in specific non-manufacturing sectors, changes relating to barriers to entry, the presence of public ownership, market structure, vertical integration and the degree of price control. As can be seen, the indicators show very considerable progress in general terms in the over 20-year period analysed, although the pace of change varies according to the group of countries under consideration.

[4] There is a report earlier than the 1993 report, the 1992 "Informe sobre el libre ejercicio de las profesiones" (Report on freedom to exercise liberal professions), in which various liberal professions are analysed in terms of competition.

[5] Many of the sector-specific recommendations put forward by the Tribunal in those reports have to a great extent been taken up by the legislature and the Government in the course of successive reviews of the regulations, although a number of the considerations advocated at that time remain current. These include the proposal to develop a Restrictions on Competition Budget, which will be discussed below.

[6] Jacobs, S. H., *The Second Generation of Regulatory Reforms*, IMF Conference on Second Generation Reforms, 8 and 9 November 1999.

Table 1: Regulatory reform in OECD countries for selected non-manufacturing sectors (1975-1998)



Source: G. Nicoletti and S. Scarpetta, *Regulation, Productivity and Growth: OCDE evidence*, Economics Department Working Paper, 347, 2003.

However, despite the in no way negligible extent of the market opening and privatisation processes undergone in recent decades, the public sector continues to play a crucial role in market economies, and here too Spain is no exception.

According to Eurostat data published in May 2008, total public revenue in Spain represented 41% of Gross Domestic Product in 2007. Although above the 40% threshold, the presence of public authorities in the Spanish economy continues to be lower than in the EU as a whole. At the close of 2007 public revenue represented 45.6% of GDP in the euro zone, and in the 27-member EU, 44.9%. In terms of expenditure the weight of the public sector in Spain is also very significant, although appreciably less in comparison with the euro zone, representing 38.8% of GDP as opposed to 46.3% for the euro zone.

Public authorities are involved in the economy in widely-differing ways: as economic operators via demand for goods and services or direct or indirect provision of public services and infrastructure, but also in the form of the regulation of economic activity. This latter type of intervention is increasingly prevalent in developed economies, as it is more and more public institutions with norm-making capacity which impact on the activity of businesses, this being particularly the case in countries such as Spain which have various levels of government with rule-making capacity.

Whilst not questioning the need for the public sector to intervene in the economy by regulating certain economic activities, which can be warranted in the interests of

pursuing certain public aims and the presence of market failures, it is true that in many cases those interventions can distort or hinder the conduct of economic activities more than is strictly necessary to achieve their legitimate objectives.

Those distortions can be of many different kinds. They may take the form of the imposition of specific arrangements for the provision of goods and services, such as where with no duly justified grounds an exclusive concession is granted instead of using a licensing system for the provision of a service, or the appearance of disproportionate administrative burdens, sometimes associated with the large quantity of rules generated at different levels of government. Those burdens affect the behaviour of economic agents, slowing down their operations, diverting resources from other productive activities and giving rise to obstacles to entry and exit to and from the market. The development of economic activity and investment decisions may also be affected by the legal uncertainty associated with the lack of transparency and insecurity which sometimes characterises sector-specific regulation. Unpredictable regulation may also be an incentive for "regulatory capture" activities by businesses, that is to say, lobbying activities aimed at persuading the regulator to issue rules favourable to their interests. Such activities use up resources which businesses could otherwise devote to their productive work.

Competition and the proper functioning of markets can be impaired as a result of those and other regulatory deficiencies to the detriment of consumers and with the resulting adverse effect on the country's macroeconomic results in terms of growth, jobs, productivity, inflation and so on. Hence the importance of ensuring that where intervention by public authorities in the markets is necessary it takes place in accordance with the principles of good regulatory practice.

II. BETTER REGULATION: THE PRESENT CONTEXT

The extent of first generation liberalisation and privatisation reforms has been widely discussed and assessment of the results varies from country to country, but there seems to be consensus that although the opening up of markets and privatisation has brought productivity gains, the level of those benefits depends crucially on the institutional and regulatory framework which has accompanied the reforms. Accordingly, the great disparity in the national reform policies followed in OECD countries explains the varying rates of growth in those countries, even though in their vast majority they have opted to open up a large number of markets.

It is precisely on those two cornerstones, institutional capacity and the quality of regulation, that many of the subsequent reforms are based, those referred to as second generation reforms and which aspire to achieve further productivity gains implementing changes in the regulatory environment, with particular emphasis on the markets in services, taking further the reduction of the role of the State in the economy.

In this context a reconsideration has begun of the role which regulatory institutions should play in maximising the benefits of competition in the markets and debate has intensified on how the State can intervene in the markets to safeguard certain legitimate social interests, by using flexible mechanisms which distort economic incentives and free operation of the market as little as possible.

This whole series of initiatives is what has come to be called, using the English expression, better regulation or, more broadly, regulatory reform processes. Better regulation refers both to the quality of rules and to the quality of government intervention, which must be streamlined so as to ensure that general interests are protected. With precisely that aim many public bodies and international organisations have devised a series of tools to improve the quality of legal systems, and a considerable number of studies and contributions has emerged over the last decade which have, on a comparative basis, documented the advantages of incorporating better regulation principles as the foundation not only of economic and social regulation in general, but also of sector-specific regulation.

Salient amongst the initiatives to which most effort has been given in assessment and defining mechanisms are those to measure and reduce administrative burdens,[7] which focus on reducing unnecessary costs and eliminating obstacles to private activities resulting from the practices of public authorities, measures to simplify regulations and bring them into line with social needs, which involve systematic review and, where possible, codification, of rules, and measures to analyse regulatory impact, which include rigorous evaluation of regulatory proposals and the identification of possible alternatives, and assessment of the economic consequences of their implementation.

A) Principles of better regulation from an OECD perspective

One of the first documents to highlight the need to adopt governing principles for good regulation was the 1995 "OECD Recommendations on Improving the Quality of

[7] Administrative burdens are the costs borne by businesses as a result of an obligation contained in the rule such that, if the rules disappeared, businesses would no longer incur those costs.

Government Regulation", which proposed a series of guiding principles for high quality regulation.[8] On the basis of that text the OECD published a further report in 1997, the Report on Regulatory Reform, which included examples from various countries in which it was sought to evaluate the benefits, in terms of efficiency gains, from adoption of particular regulatory improvements. By way of illustration, the following table sets out some of those results alongside others from subsequent studies. Although the cost and benefit calculation methodologies in the studies have their limitations and the actual figures may be questionable, they are useful exercises in that they reflect substantial gains resulting from the regulatory improvements put in place.

Benefits of regulatory reform

- Analyses have been carried out in various countries of the benefits of recent regulatory reform.

- It has been found that the measures implemented in Europe to promote competition and replace national with European regulations in order to achieve the European single market have contributed to an increase of 1.5% in European GDP between 1987 and 1993.

- In the US it has been found that reforms carried out in various sectors such as air transport, road haulage and financial services, amongst others, generate annual benefits for consumers and producers in the region of 42,000 to 54,000 million dollars. Assessment of 15 regulatory impact analyses carried out in that country have also shown that, although the aggregate cost of carrying out the analyses was 10 million dollars, they led to changes to regulatory reform which generated net benefits put at around 10,000 million dollars, that is to say, a cost-benefit ratio of almost 1,000 to one.

- In Japan it has been found that efficiency gains arising from the elimination of unnecessary or inefficient regulations have led to an increase in consumer income of almost 0.3% or, in other words, there has been a total saving of 36,000 million dollars as the result of lower prices.

- According to British government estimates, the total cost to business of

[8] Those principles were as follows: transparency in decision-making by public authorities, non-discrimination, avoidance of unnecessary trade restrictiveness, use of internationally coherent measures, equivalence in the recognition of measures adopted by other countries and attention to competition principles.

the principal regulations implemented in the United Kingdom between 1998 and 2008 is 65,990 million pounds. Of that, 28.9% relates to the impact of British regulations, whilst the other 71.1% is attributable to the effects of regulations driven by the European Union.

- In Holland it has been found that the total administrative burden was 16,400 million euros in 2002, representing some 3.6% of Dutch GDP. Of that administrative burden it is calculated that approximately 53% was caused by only ten legislative provisions.

- In Australia in 1995 the federal government, working with the state and regional governments, undertook a wide-ranging policy of pro-competitive reforms in significant sectors of the economy. Following an ambitious process of identifying and reviewing regulations, analysis of the results indicates that changes observed in productivity and prices in the principal economic sectors in the 1990s, changes to which the reforms have contributed directly, have enabled GDP to be increased by some 2.5%, or 20,000 million Australian dollars.

Source: Report on Regulatory Reform, OECD, 1997; Burdens Barometer, British Chambers of Commerce, 2008; Standard Cost Model Network, Holland; Report on National Competition Policy, Productivity Commission, Australia, 2005.

Subsequently, the OECD has continued to review implementation of those principles and evaluation of the results obtained in various Member States. On the basis of the lessons learned from these reviews and taking into account the evolution of specific sectors, such as network services for example, the OECD has updated its earlier recommendations, by means of the approval, in April 2005, of the "Guiding Principles for Regulatory Quality and Performance". Those guiding principles are as follows:

- Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.

- Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment.

- Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory.

- Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.

- Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.

- Eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness.

- Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

Worthy of highlighting amongst the elements comprising the regulatory reform package is the **Regulatory Impact Assessment (RIA)**. The RIA consists of a methodological framework enabling rigorous analysis of the consequences of approving a particular regulation, the possible alternatives to the regulation and the economic consequences of its implementation. Although various countries and institutions have developed this methodology with a number of particular variations, there are many elements common to them. The following table summarises the most important steps to be taken in assessing the impact of a regulation.

Principal elements of the Regulatory Impact Assessment

- Ascertaining the issue, and the necessity and expediency of the regulatory intervention.
- Identifying alternatives to regulation.
- Identifying the tangible effects of each regulatory alternative, including potential and unintentional effects.
- Assessing the cost and benefit of each alternative, including opportunity cost.
- Assessing other economic impacts, including effects on competition, SMEs, or international trade.
- Identifying "winners and losers" for each regulatory alternative.
- Disclosure to the public and the economic and social agents affected by the regulation in question, at various stages of the preparation process, with an opportunity for them to make comments.
- Clear justification of the regulatory option ultimately chosen.
- Prior planning for ex post assessment of the results of the regulation, determining procedures for gathering significant data.

Source: P. Ladegaard, 'Measuring RIA quality and performance', in Regulatory Impact assessment. Toward better regulation, *eds C. Kirkpatrck and D. Parker, Edgard Elgar, 2007.*

B) Principles of better regulation from the Community perspective

Many initiatives advocating better regulation have also been developed in the EU context. Although their origin can be traced to the 1992 Edinburgh Summit, it would not be until the Lisbon Council in 2001, in the context of the "Lisbon Agenda" that the Commission would commit to take steps to improve the quality of EU legislation, by means of its White Paper on European Governance.

The first step towards this took the form of the adoption in June 2002 of a Better Regulation Action Plan. The plan identified a series of improvement measures applicable in the various stages of the legislative cycle, from conception of a particular policy to its implementation. From then on, the European Commission has progressively introduced a system in which it proposes that every major political initiative should include consultation with the interested parties, analysis of the expected impact of the measure and justification of the action at EU level in accordance with the principles of subsidiarity and proportionality.

The Communication "Improvement of Regulation for Growth and Jobs in the European Union" was adopted in March 2005, and established three objectives applicable to Community legislation itself, consisting of carrying out impact assessments of new legislative proposals, simplification of existing Community legislation, with particular attention to certain sectors such as the automobile industry and the construction, food and pharmaceutical sectors, and review of all pending Community legislation giving consideration to its withdrawal or redrafting in accordance with the principles informing regulatory quality.

Subsequently, in its strategic review of improvements in legislation (November 2006), the European Commission added to those initiatives an undertaking to speed up efforts to reduce bureaucracy after new figures revealed that its efforts in the area had until that time produced limited results.[9]

One of the priorities in many countries in terms of studying initiatives for regulatory form has indeed been to reduce the administrative burdens which citizens and businesses have to bear in order to carry on their activities, inasmuch as they involve a cost which should be justified and should not, in any event, be disproportionate. The effect of administrative burdens can have a considerable impact on a country's economy. For example, a study in Spain in 2005 found that such burdens involved between 3.6% and 4.6% of national GDP, a relatively high figure if we compare it with that of the United Kingdom (between 1.2% and 1.5%), although similar to that in other countries such as

[9] It was even found that the annual burden on businesses associated with the administrative costs of EU legislation would in fact be double the initial estimate of 320 million euros.

Italy and Portugal, and lower than that of Greece or Hungary (between 5.4% and 6.8%).[10] In short, the Commission is at the moment, on the basis of the March 2007 mandate from the European Council, seeking to strengthen its work of better regulation by means of the three kinds of initiative:

- Improving the quality of impact assessments, by setting up an independent group of experts, the Impact Assessment Board, which will be responsible for examining draft impact assessments?
- Reducing the administrative burden of existing regulations. The Commission estimates that administrative costs are approximately 3.5% of EU GDP. It therefore proposes to set a legally binding target to reduce the administrative burdens resulting from Community legislation by 25% by 2012, a step which could generate some 150 million euros to boost the European economy. It is also put in place a specific action plan to measure administrative costs and the reduction in the administrative burden.[11]
- Extension of its programme to simplify existing regulation, including review and possible withdrawal of pending draft regulations and finalisation of a programme to simplify existing European legislation by means of codification initiatives.

As regards individual better regulation initiatives by the Member States, the United Kingdom experience is salient. The UK Government has a specific department devoted to developing better regulation,[12] which heads the regulatory reform agenda seeking to work with the various ministries and the regulators to improve the drafting and dissemination of new regulations, simplify and modernise existing regulations and change attitudes and approaches to regulation to make them more innovative.

Another good example of concern for these matters is Holland, where a specific programme has been developed to evaluate and reduce administrative burdens on businesses. To do this, an independent consultative and oversight body was created in 2000,[13] to underpin the Dutch Government's undertaking to achieve a 25% reduction in overall bureaucratic procedures for businesses. Its functions include, in addition to providing advice to Government on its overall strategy and achieving structurally lower

[10] Kox, Henk L.M., *EU Competitiveness Report 2005. Intra-EU differences in regulation-caused administrative burden for companies, European Commission*, 2005.
[11] At the March 2007 European Summit meeting EU leaders expressed agreement with that objective, but ruled out the idea of setting compulsory national targets.
[12] The Department for Business, Enterprise and Regulatory Reform, which houses the Executive Committee Regulatory Reform.
[13] This is the *Dutch Advisory Board on Administrative Burdens*, ACTAL.

administrative burdens, independently reviewing new draft legislation and assessing ministerial plans to reduce administrative burdens in existing legislation.

Also of note is the methodology for the quantification of administrative burdens developed in that country in 2004, known as the Standard Cost Model, SCM. It is based on identifying the requirements of legislation and assessing those requirements in the light of the time and money which undertakings employ to comply with them. The SCM is both an instrument for quantifying the administrative burdens associated with existing legislation and a design tool to limit administrative burdens resulting from new draft legislation. Recently Denmark, the United Kingdom, the Czech Republic and Norway have opted to follow the Dutch approach to integral reduction of the administrative burdens.

C) Principles of better regulation from the Spanish perspective

Various initiatives in this field have also been put in place recently in Spain. Accordingly, in line with the mandate under the Lisbon Plan, the Programa Nacional de Reformas (National Reform Programme -- NRP) was approved in October 2005, point 5 of which refers to promoting and introducing specific better regulation measures such as improving the report accompanying draft regulations, both as regards analysis of the global impact of the regulations and analysis of their economic impact, besides merely the budgetary impact.

Similarly in implementation of the NRP, with the broader aim of achieving practical application of principles of rationality and efficiency in public sector activity, the Agencia Estatal de Evaluación de las Políticas Públicas y la Calidad de Servicios (State Public Policy and Quality of Services Evaluation Agency) has been set up, with areas of activity including the analysis of regulatory impact with a view to improving the quality of regulation.

More recently, the Council of Ministers Resolution of 4 May 2007, ("Promotion of the Programme Better Regulation and Reduction in Administrative Burdens") embodies a number of initiatives to implement this commitment, consisting of strengthening the institutions responsible for drawing up an action plan to reduce administrative burdens and for coordinating the work which will be required by Spain's participation in the European Commission action programme, the necessary collaboration with autonomous communities and local bodies and the setting up of channels for

cooperation with business organisations and other social partners so as to make progress in the rapid detection of unnecessary administrative burdens.

III. BETTER REGULATION FROM A COMPETITION POINT OF VIEW: INTERNATIONAL EXPERIENCES

Many of the regulatory reform initiatives referred to above stress the importance of regulations which stimulate competition and market efficiency and the fact that they must serve, precisely, to regulate market failures in cases where effective competition is not possible.

In this context initiatives have emerged recently which seek to apply the reflections set out above in the context of more or less general better regulation processes more specifically to the competition sphere, and to incorporate the cost-benefit analysis from a better regulation point of view into processes to evaluate the regulatory impact of draft regulations.

On the one hand, in 2005 the European Commission published "Better Regulation: a Guide to Competition Screening", which distinguishes between three main categories of rules which can be restrictive on competition: those which exempt certain markets or sectors from competition rules, those which directly interfere with the commercial conduct of companies, either by reducing operators' incentive to compete vigorously or by limiting how they compete and position their products in relation to others, and finally rules which can indirectly interfere with that commercial conduct by setting up barriers to entry or favouring incumbents to the detriment of new entrants.

The document makes suggestions for incorporating competition analysis into the framework of regulatory impact assessments. It proposes two questions to be considered in those assessments -- whether the regulation under analysis gives rise to restrictions on competition and whether less restrictive means could be used to achieve the same ends so as to avoid unnecessary or disproportionate restrictions on competition.

In the same vein the UK Office of Fair Trading in 2007 published "Completing Competition Assessments in Impact Assessments", which includes useful recommendations aimed at the designers of public policy for the inclusion of competition considerations in regulatory impact assessments.

The OECD in turn has invested great efforts in preparing a "Competition Assessment Toolkit", published in 2007. This document proposes a general methodology for identifying unnecessary restrictions on competition and for developing alternatives, that is to say, rules which are less restrictive on competition but equally able to achieve the objectives sought by the regulation. One of the principal elements of the Toolkit is the "Competition Checklist" which contains a series of questions for identifying rules and regulations which potentially restrict competition unnecessarily. Where a given regulation produces an affirmative response or responses to the questions on the list, it is recommended that an in-depth analysis be carried out, the guidelines for which are also set out in the Toolkit. The resources allocated to the competition assessment of rules can in this way be prioritised and used more appropriately.

Independently of the practical value of a checklist as an automatic exercise for assessing competition, there is no doubt that the list can help in setting out the questions to which thought needs to be given when assessing the impact of a rule on competition. They include the following:

- Whether the rule being assessed limits the number or range of suppliers, for example by granting exclusive rights to one supplier or setting up a licensing or authorisation process as a requirement for operation, limiting the ability of certain suppliers to offer a good or service, or increasing the cost of entry or exit to or from the market.

- Whether the rule limits the ability of suppliers to compete, for example, by imposing excessive price controls on goods and services, limiting freedom for suppliers to advertise, or significantly increasing the products or services of some suppliers over others.

- Whether the rule reduces the incentives of suppliers to compete between each other, for example, by facilitating the ability to coordinate by setting up co-regulation regimes or imposing increased transparency obligations for access to information.

Lastly, it should be pointed out that the process of transposing the recently approved Directive 2006/123/EC on services in the internal market[14] is also representing a major opportunity for Member States to modify aspects of their internal rules which run counter to certain objectives of the EC Treaty relating to competition policy, such as freedom of establishment and freedom to provide services.

[14] Although Member States have a transposition period of three years, which expires on 28 December 2009, the Services Directive has already been in force since 28 December 2006.

The Directive is intended to facilitate cross-border provision of services and to achieve an effective internal market in the field, by removing any statutory and administrative obstacles which still impede the provision of such services. It therefore establishes a series of obligations in terms of administrative simplification and prohibiting all unnecessary, discriminatory or disproportionate forms of licences and procedures.

In this context, the Spanish authorities responsible for transposing the Directive are working to identify rules potentially liable to infringe the Directive, and to evaluate whether it is appropriate to eliminate them. The analytical tools used for those assessments, which include evaluation of the necessity of the restriction and, if there is a necessity, the proportionality of the terms in which the restriction is couched, are similar to those used by the OECD and the European Commission itself to assess the competitive impact of draft rules.

In short, the various initiatives referred to in comparative terms reveal the need, in Spain likewise, for the initiatives undertaken for the ex ante monitoring of the quality and performance of regulations to be supplemented in terms of advocating competition. The debate has not yet gained sufficient ground in Spain, particularly amongst public institutions. Accordingly, the NCC seeks in what follows to put forward a series of principles and recommendations for the development of efficient pro-competitive regulation.

IV. PRINCIPLES OF EFFICIENT PRO-COMPETITIVE REGULATION

As we have been emphasising throughout this report, experience acquired over the last two decades has shown us that in order to foster competitive development of the markets it may not be sufficient to introduce liberalising measures. It is also necessary to ensure that the regulatory framework is efficient because, if it is not, liberalisation may not have the desired effects.

By "regulatory framework" we are referring here to any type of measure which, although it may not apparently have the direct objective of regulating an economic activity, could have implications for the activity carried on by economic operators. Accordingly, rules which are on the face of it unrelated to economic issues (such as health and safety, public health or the promotion of a language) may have repercussions on the activity of economic operators and, therefore, should also comply with the principles of efficient regulation from the point of view of competition.

In economics, efficiency refers to the relationship between the results obtained and the resources used. For example, we say that the combination of factors with the minimum cost enabling us to obtain a given level of output is efficient. In the present context regulation is efficient when the objective sought by the regulation is achieved by means of a regulatory exercise which imposes the minimum restrictions possible on economic activity.

For a regulatory framework to be efficient it must comply at all times with a series of principles which contribute to minimising the burden on economic activity and detriment to the operation of competition in the market. Those principles are specifically: 1) necessity and proportionality; 2) least distortion; 3) effectiveness; 4) transparency and 5) predictability. Those principles are expanded upon and explained below.

1. Justification of the restriction (principle of necessity and proportionality)

Since the market and freedom to conduct business are the general rule, when a regulation contravenes those principles it must be explicit and give reasons for its necessity.

The Spanish Constitution recognizes freedom to conduct business in the context of a market economy. The operation of our economy is based on those principles and, therefore, they must be safeguarded by the public authorities. That duty to protect binds all public authorities, not only the competition authorities.

Undeniably, that protection and guarantee of the freedom to conduct business and the competitive operation of the market must dovetail with other public interests equally worthy of safeguarding. However, that coordination must comply with a series of principles which ensure regulatory efficiency and prevent the proper functioning of the market from ultimately being unnecessarily subject to diffuse or poorly-defined objectives.

In that regard it is fundamental that the drafting of any rule or regulation is preceded by a **clear definition of its objectives** and that those objectives are made explicit. That assertion may to a certain extent seem to be stating the obvious. However, it is not uncommon to find statutory texts whose purposes are unspecific or which state that they pursue various irreconcilable objectives. It is also often the case that the provisions contained in the regulation are unnecessary or not in accord with the stated purpose. Accordingly, clear definition of objectives, irrespective of the level of the rule, must be an indispensable practice contributing to an understanding of the reason for the intervention and that it is appropriate and coherent.

It is not sufficient, however, to define the objectives of the regulation. Where attainment of the objectives requires, directly or indirectly, some form of restriction on competition, a sine qua non for its approval must be **justification of the necessity of those restrictions**. Ultimately, as we have said, freedom to conduct business and the proper functioning of the market are objectives which the public authorities are also bound to protect. If those principles are going to be infringed or restricted, this must be done stating reasons, so that it is possible to ascertain whether the objective pursued justifies the restriction imposed and the distortion it entails. That is to say, it must be demonstrated whether that distortion is really necessary or whether the aim sought can be achieved without the need to impose restrictions on competition. It will also be necessary to think about the **proportionality of the restriction imposed** to ensure that attainment of an objective which involves only a relative or slight improvement in terms of social welfare does not give rise, on the other hand, to serious harm to that welfare as a result of the serious restrictions on economic activity it entails. At the same time, the foregoing requirements are closely linked to the principle of least distortion to which we shall refer below.

Although this exercise of justifying the regulation takes place from a purely analytical point of view, without embarking on a quantitative assessment of the impact of the regulation on social welfare, it will be tremendously useful. First, it will force the legislature and public opinion to become aware of why it is legislating and using what tools, which will produce better quality regulations. Second, it will contribute to avoiding gratuitous restrictions on competition. Third, it will mean that any restrictions on competition introduced will be explicit, even if they are justified, and draw attention to their cost for the economic system. Fourth, it will help ex post assessment of the effectiveness of the regulation. That is to say, if the measures introduced do not achieve the intended objectives, it will be easier to diagnose that they should be eliminated, since they impose a cost in terms of market operation with no counterpart in a different kinds of social benefit.

2. Justification of the mechanisms used (principle of least distortion)

Of the available mechanisms to achieve a given objective one should use those which involve the least distortion to competition.

It is often the case that various regulatory mechanisms can be used to achieve a particular end and that their impact on the conditions of competition is not always the same. Lack of consideration of this matter can mean that measures may be imposed which are excessively restrictive of competition, where the aim sought could be equally safeguarded using less restrictive mechanisms.

We would therefore stress that the fact that the necessity of restricting competition in order to achieve a given end is justified and that it is proportional (that the benefit obtained is greater than the harm caused) is not sufficient to ensure that the proposed regulation is efficient. To do that one must also find that ***there is no alternative mechanism enabling the same end to be achieved whilst imposing less distortion on operation of the market***.

For example, in certain sectors it is necessary to regulate the entry of operators for quality of service reasons. It may even be necessary to regulate the number of operators entering a market on the grounds of public policy, space or return on investment in the light of high fixed costs. There are many mechanisms enabling this objective to be achieved: administrative authorisation, which allows for a check that entrants comply with certain objective requirements, a licensing regime, which in addition to establishing requirements may in contrast to the preceding system operate a quota, limiting entry to a certain number of operators, and concession arrangements, which may involve a single operator exploiting a service as a monopoly, confining competition to the time when the concession is granted.

Obviously, the impact on competition of each of these mechanisms regulating entry depends crucially on how it is drafted. Even so, there is no doubt that their impact in terms of barriers to entry to the market is very different. That is why, when regulating, it is necessary to ask oneself whether the objective sought can be achieved using a less restrictive mechanism in order to prevent unnecessary restrictions which, moreover, once approved, usually last a long time.

It is fairly usual to find that entry control and restriction on competition are directly proportional. This tends to lead an approach to justifying restrictions on competition tending to maximum restriction, by which it is sought to argue that, although various mechanisms are possible, the most restrictive is that which contributes most to achieving the objectives, such as organisation of the sector. In particular, there is often an inclination towards the concession regime where it is justified neither by the presence of specific investment nor on the grounds of safety or security in provision of the service.[15] However, this maximum restriction approach should be avoided. Even in a case where a more restrictive regime better contributes to achieving the objectives sought by the regulation, there must be justification of whether that improvement warrants the greater harm caused by the restriction. If the objectives sought can reasonably be secured using less restrictive mechanisms, those latter must be chosen.

[15] Interesting in this regard is the work in progress on public procurement processes being carried out by the Dirección General de Defensa de la Competencia (Competition Department) of the Consejería de Economía and Finanzas (Advisory Council on Economy and Finance) of the Generalitat de Cataluña.

3. Effectiveness

The drafting of regulations should enable their effective application.

Effectiveness is defined as the ability to achieve the desired or expected effect. An effective normative framework is, therefore, one which enables achievement of the objectives sought. It goes without saying that this is a desirable objective. One might otherwise be imposing burdens on companies and accepting restrictions on competition to achieve certain objectives whose achievement may, nevertheless, be frustrated because the regulation is not effective.

There are many factors which affect the effectiveness of a regulation. We mention a few below:

- ***Clear definition of objectives***. As stated above, the exercise of clearly defining the ends pursued is fundamental. If it is not clear what is being sought by means of a particular regulatory intervention it is unlikely that the drafting of the regulation is going to be coherent and appropriate. Also, the risk of introducing gratuitous restrictions will be greater under such circumstances. Nor, if there is no clear definition of objectives, will it be possible to assess the effectiveness of the regulation after its introduction.

- ***Easily enforceable***. When drafting a particular regulation one must endeavour to ensure that its application is viable and as simple as possible. A regulation whose compliance or monitoring is complex and costly may become ineffective because neither the authority nor the person subject to authority is able properly to comply with it, without costs being imposed on both. Rules which are ineffective as a result of their complexity also generate a serious social cost to the system, because from the outset they invite non-compliance, which seriously damages the credibility of the normative framework.

- ***Need for coordination between administrations***. The complexity of the normative framework is a factor which must be kept particularly in mind in the case of Spain, where rules issuing from various administrations are superimposed or coexist. In this context lack of coordination between the various administrations can unnecessarily complicate the regulatory framework in which businesses which operate throughout Spain carry on their activity and at the same time can complicate the task of supervision and vigilance by the authorities, something which is also key from the point of view of the effectiveness of the system. It is therefore necessary to aim for coordination between administrations to facilitate enforcement of the regulations and prevent “regulatory tangles”.

- ***Need to prevent statutory lacunae***. It is frequently the case that attempts contained in a statutory rule to open up a particular sector to competition are frustrated by the absence or uncertainty of the implementing regulations. This habitually occurs when the opening up of sectors entails a need to regulate the terms of access and there is a delay in approving those rules or, as a result of regulatory capture or other problems, those rules take shape in such a way that they become ineffective. Effective drafting therefore means that implementing regulations must not be delayed and that it is known in advance what their broad outline is going to be. In short, the regulatory framework in sectors aspiring to open up to competition must be analysed and devised as concretely as possible in advance, avoiding arrangements in which very general principles are approved by law or royal decree with no advance knowledge of what the details embodying the liberalisation process are going to be. This does not mean that those details have to be contained in rules ranking as laws. What is desirable is that when it is sought to introduce competition, modification of the regulatory framework should be the outcome of a full and detailed process of analysis. Further, the fact that the "small print" of the regulatory process is known in advance may in certain cases "bind the regulator", helping to prevent regulatory implementation from going into retreat as a result of pressures from one side and avoiding periods of uncertainty for the affected undertakings which can have an adverse effect on investment decisions.

4. Transparency

The normative framework and the processes for its preparation should be imbued with the principle of transparency.

In Spain, once rules have been approved by the competent body they are generally public. However, there may be certain factors which diminish the transparency of the normative framework. First, the **dispersal of rules**. The rules relating to a sector have often been repeatedly amended by different statutory texts or included in various regulations, often produced by different administrations. This dispersal of rules significantly reduces the transparency of the normative framework, to which is added the sometimes confusing use of transitional and repealing provisions. The foregoing tends to operate as a barrier to entry to the market which protects incumbents to the detriment of entrants, less familiar with the normative framework and its loopholes and peculiarities.

The same degree of transparency should apply to **enforcement of the regulation**. In particular, where there are restrictions on entry and on activity the criteria which dictate which operators may or may not operate, and their justification, must be transparent. It

must not be forgotten that such restrictions are a direct derogation from Article 38 of the Constitution, and their justification must therefore be impeccable.

This transparency deficit also affects regulatory processes. The ideal situation is that those **regulatory processes should be transparent**, above all when they comprise the framework in which a particular economic activity is going to be pursued. It should therefore be regarded as a good practice to publish drafts of the regulation for consultation so as to foster public debate. However, this is not an overly widespread practice amongst the administrations of the various spheres comprising the Spanish State.

This suggestion that there should be a process of consultation and dialogue must not be confused with resorting to concerting and agreeing the liberalisation policy collectively with representatives of the sector. This tendency to negotiate collectively the normative framework and its opening is tremendously hazardous because it is liable to facilitate regulatory capture, relax the conditions of competition and facilitate the coordination of competitive behaviour and the sharing out of the market.

5. Predictability

The normative framework should be stable and its implementating provisions predictable.

Having a solid, stable normative framework is fundamental to economic activity. Where there is none, regulation gives rise to uncertainty, which jeopardises investment decisions by companies and can have other very damaging effects, such as discouraging the entry of new operators.

It is therefore good practice that norms requiring implementation should contain a forecast timetable for their completion such that, as we said above, the authority is bound and confidence is generated in the system.

In keeping with the foregoing one should avoid "surprise regulations" by which significant measures, with a clear impact on companies' bottom lines are introduced unexpectedly and somewhat hurriedly, surprising investors and giving rise to unnecessary loss of confidence in the capital markets. Instability should be avoided in the normative framework for the same reasons.

In the same vein, statutory vacuums and incomplete liberalisation must be avoided, because they do not effectively achieve the objective of opening up the market and subject it to serious uncertainty which tends to impact on investment processes.

V RECOMMENDATIONS FOR EFFICIENT REGULATION

1. Every regulation must specify clearly, as part of its wording, the objective it seeks.
2. It is considered good practice for draft regulations to be submitted for public consultation. It is therefore necessary to implement more rigorously existing provisions regarding procedures for "hearing representations" and "public disclosure".
3. In the case of draft regulations to liberalise and introduce competition in a given sector, the detailed draft regulation should be timetabled and if possible issued in advance to be debated.
4. That process of consultation and dialogue should not be confused with resorting to concerting and agreeing the liberalisation policy collectively with representatives of the sector.
5. Where there are various administrations with competence in the matter, whether with rule-making capacity or enforcement powers, coordination and consistency between the various regulations should be ensured, both in their definition and their enforcement.
6. Where the effectiveness of the regulation depends on its implementing regulations a time-limit for their enactment must be set in all cases.
7. Regulations must include precise repealing provisions and avoid generalised repeals of "all earlier provisions contrary to the new regulation". This would not only achieve greater legal certainty for operators in the market, but would enable more precise assessment of the "net" effect of the new regulation in terms of any restrictions it may introduce [16].

[16] In the particular case of administrative burdens, the Dutch Government has laid down a rule under which a new regulation cannot give rise to "net" new burdens and, therefore, if it introduces a new burden, the regulation must itself eliminate an existing burden.

8. Regulations liable to have a direct or indirect effect on the freedom to conduct business of economic agents and operation of the markets must be accompanied by a report on their direct or indirect impact on competition in the market (the competition report). To be effective, that report must comply with a series of requirements set out below.

9. Draft regulations which include measures which may have effects on competition must have the NCC opinion referred to in Article 25 a) of Law 15/2007, the Competition Law.

The competition report

Having established the principles for efficient regulation, it is also necessary to set out mechanisms to contribute to safeguarding that regulation.

Prior analysis of measures contained in a regulation which may have an impact on competition and on economic activity by businesses is nothing new. There have already been precedents for proposals of this kind. In a report published in 1993[17] the Tribunal for Defense of Competition put forward the idea of introducing a "Restrictions on Competition Budget". It was suggested that Parliament, in addition to the revenue and expenditure set out in the General State Budgets, should approve -- or at least take cognizance of annually -- the costs and benefits implicit in restrictions on competition.

Much more recently, the "Plan de Dinamización de la Economía e Impulso de la Productividad" (Plan for increasing the dynamism of the economy and promoting productivity) included as an initiative increased assessment of the regulatory impact of draft regulations. To that end the procedure was commenced for enactment of the Real Decreto de Memoria de impacto normativo (Royal Decree on regulatory impact reports). That royal decree sought to extend and improve the content of the economic reports which must accompany any draft regulation, so that before regulations of a certain level were approved there would be an in-depth analysis of the global impact of the draft regulations. This mechanism involves ex ante monitoring of regulations, mindful of their necessity and effects, in such a way that the secondary effects of any regulation are made explicit and, where it is decided to accept them, this is done consciously.

The NCC believes it is vital that, in the procedure for the drawing up a regulation, any measures which may involve restrictions on competition are identified in advance so that they can be eliminated, and should it not be possible to do so completely, that the restriction introduced should be the minimum possible and proportionate to the objective

[17] Remedios políticos que pueden favorecer la libre competencia en los servicios and atajar el daño causado por los monopolios (Political remedies capable of fostering competition in services and curtailing the damage caused by monopolies).

pursued. In short, one should endeavour to make the normative framework efficient and non-distorting.

In the opinion of the NCC that kind of exercise should not be confined to regulations of a certain level proposed or approved by central Government, but should apply to all kinds of rules and any sphere of the administration. This is because restrictions on competition are often introduced not in core statutory texts, but essentially in implementing regulations. At the same time, in view of the make-up of the Spanish State, in which many significant powers have been decentralised to regional governments or lie with local authorities, it would be meaningless to have the commitment of central Government alone to identify and combat restrictions on competition. This is all the more so because, as public authorities, the other administrations are equally bound to ensure compliance with the principle of freedom to conduct business and the proper operation of the markets.

Furthermore, as we have seen in previous sections, this kind of mechanism is in keeping with the recommendations for better regulatory quality being made under the auspices of international organisations and is in line with the policies which the European Commission and the authorities of a number of EU Member States at the forefront of this kind of initiative (the UK and Holland for example) are attempting to implement.

If it is to be effective, the competition report must satisfy series of requirements:

a) Any form of public authority, whether State, regional or local, must have a duty to submit a competition report as a requirement of processing a regulation.

b) The competition report must logically be produced ex ante. Performing this exercise after the event would make little sense because it would not prevent restrictions on competition from being entrenched in our law.

c) It must be public, not only for the sake of consistency with the principle that rule-making should be transparent, but also because publicity here acts as a mechanism to discipline the legislature, with the effect that if it is sought to introduce restrictions they must be disclosed publicly.

d) The competition report must be independent, or form part of the "economic report" for the draft regulation referred to in Law 50/1997, provided that the latter report contains all competition information and factors.

e) The competition report shall assess whether the principles are satisfied for the regulation to qualify as efficient, in particular:

- Whether the rule introduces any form of restriction on competition.
- Its necessity and proportionality: whether it is indispensable for the objectives pursued and whether those objectives have an impact on social welfare proportionate to the restriction being introduced.
- Least distortion: why it is believed there are no alternatives which are less burdensome for operation of the market.

f) It must be prepared by the proposing body (as must the rest of the economic report, the explanatory report and the gender impact report), although it may have the support of a different body specialised in competition matters.

To assist in the task of satisfactorily evaluating rules in terms of competition, "supplementary" work must be envisaged. Accordingly, the NCC proposes to draw up for publication a practical guide to the preparation of the contents of a competition report.

The NCC could also publish, annually, a report on the competition reports issued, in which it would assess their quality and lessons could be learned from the best (and worst) practices.

These steps would be in addition to those already established in competition legislation as regards the preparation of reports by the competition authorities on proposed regulations which include measures liable to have an effect on competition.

VI. EXAMPLES OF BREACH OF EFFICIENT REGULATION PRINCIPLES FROM A COMPETITION PERSPECTIVE

The principles set out above should inform the task of legislating and future regulation in general. However, there should in time be a detailed review of existing regulations to help detect any restrictions on competition they may harbour and so that they can be subjected to the tests described. That is undoubtedly a huge task which quite clearly goes beyond the scope of this report. It is true that some of this must be carried out in connection with adaptation of the Services Directive which, as already stated, represents an unmissable opportunity to update a major part of our regulations, but that is no reason not to point out that this Commission (and the Tribunal for Defense of Competition before it) has, when processing applications, detected a good number of regulations which contain and sustain situations restrictive of competition, and they should be highlighted as such.

Accordingly, the second part of this report signals a number of such regulations which, in the opinion of the NCC should be subject to scrutiny, in accordance with the procedure referred to above and, once that has been done, amendments to the regulations are proposed. The list is of course far from exhaustive, and should be understood merely as an example of some of the regulations it would be necessary to change. This does not mean, however, that the work of reform, on those specific points, can be treated as any less necessary.

So, there are described below a series of specific cases of regulations which affect various sectors of the economy and which do not comply with the principles of efficient pro-competitive regulation described above.

RETAIL DISTRIBUTION

Regional licence for opening superstores and the imposition of moratoriums

Description. Under Article 6 of Ley 7/1996 de Ordenación del Comercio Minorista (Retail Commerce Law) of 15 January, the opening of superstores is subject to specific retail licensing by the regional government. The grant or refusal of the regional licence is decided giving particular weight to whether or not there are adequate retail facilities in the area affected by the new site and any effects that site may have on the retail structure of the zone.

By means of this second retail licence, which is superimposed on the municipal licence which must be granted by the corresponding local administration, the regional autonomous communities intervene in the configuration of retail supply, with the aim of attaining certain objectives relating to the organisation of economic activity, or even planning or social objectives, or the protection or promotion of conventional retailing.

With exactly the same aim some autonomous communities have laid down derogations from the processing of such licences, by means of "moratoriums", thereby suspending outright the possibility of opening superstores for a given or, in the most serious cases, indeterminate, period.[18]

As the CC has stated,[19] that second licence is a statutory barrier to entry which limits geographical competition, impeding and, in some autonomous communities -- by virtue of the moratorium -- even preventing the establishment of new superstore outlets, and introduces inefficiencies by distorting the profile of the retail supply, discriminating between formats. Accordingly, the regional licence causes distortions in the implantation and expansion strategies of companies which may prefer to open outlets which, because they have a lower surface area, are available to them without the requirement for a licence, thereby favouring the supermarket format.

In this way regulation gives rise to inefficiencies which may be reflected in higher prices to consumers and income transfers towards small and medium-size retail distributors and to the incumbent major company groups, often with superstore outlets, free of potential competition.

Principles involved. In retail, freedom to conduct business is the general rule and protection of the existing supply in an area represents a limitation on that rule which in our opinion requires due justification. However, the legislation establishing the second licence does not adequately explain the public interest reasons warranting the harm to the efficient functioning of the markets imposed by the restriction, all the more so since the second licence involves a burden additional to that of the municipal licence, giving rise to twofold control over the same activity. From this point of view the second licence infringes the principles of **necessity and proportionality**.

At the same time, although the stated aim of the regional commercial licence is to ensure the viability of traditional forms of commerce, it is debatable whether the fetters imposed on superstores have contributed to their preservation. On the contrary, what seems to be found is that this policy is ineffective, as shown by the poor evolution of the rate at which the latter type of outlet has been eliminated since approval of the Retail Commerce Law. If that is really the aim sought, one should question the instrument chosen, whilst other forms of policies incentivising the conversion of small retailers into more competitive forms may be much more effective. Accordingly, it can be said that

[18] See in particular TDC C95/06 Concentration report MIQUEL ALIMENTACIÓ/PUNTOCASH.

[19] Concentration reports C52/00 CARREFOUR/PROMODES; C70/02 CAPRABO/ENACO; C78/03 LEROY MERLÍN/BRICO; C79/03 DÍA/EL ÁRBOL, C83/03 CAPRABO/ALCOSTO, C92/05 DINOSOL/MERCACENTRO, C95/06 MIQUEL ALIMENTACIÓ/PUNTOCASH, C100/06 CARREFOUR/DINOSOL and C106/07 EROSKI/CAPRABO; TDC Report on conditions of competition in the retail distribution sector dated 4 June 2003.

the second licence fails to comply with the principles of **least distortion** and of **effectiveness**.

Nor can this policy for the organisation of retail commerce be described as **transparent**. The disparity between regional regulations and the ambiguity in the application of requirements and procedures for awarding licences depending on the autonomous community in question impose information and transactions costs which may likewise have a negative effect on companies' investment decisions.

Furthermore, when moratoriums are used, not by reference to a specific period of operation but where their period is subject to the approval of implementing regulations under the Retail Law of the moment, this also infringes the principle of **predictability**, since it increases the uncertainty of the possibility that economic operators will be able to establish hypermarkets in a specific territory.

Recommendation Taking advantage of the context of transposition of the Community Services Directive, the NCC again stresses, as the Tribunal for Defense of Competition has been doing in the past, that this licence should be eliminated outright, or at least that the requirements and procedures for its grant laid down in the various regional bodies of legislation should be brought in line with the aforementioned principles of efficient regulation so as to reduce their effects as a barrier to entry. Additionally, as regards the setting of moratoriums, the NCC is of the view that, given the fact that they represent a total restriction, they should not be set as a general rule and, where exceptionally they may exist, they should contain a specific period of operation, and express justification of the general interest reasons why it is necessary to impose the harm on free competition which such mechanisms cause.

COLLECTIVE-BARGAINING

Terms relating to conditions of commerce in collective agreements

Description. In theory, collective agreements are intended to regulate conditions of work and productivity, as well as industrial relations, and in particular safeguards for workers of the salary terms laid down in the agreement itself. However, in certain sectors a number of collective agreements regulate ultra vires stating expressly that the terms agreed in the collective agreement will impact on the prices for services, and treat as "unfair competition" the supply of products and services by companies below the employment costs laid down in the collective agreement.

Another example of where certain collective agreements go beyond regulating employment conditions to set commercial terms arises where such agreements establish exactly the opening hours which companies have to observe. This pre-

determines the opening hours of all competitors in the sector, restricting the freedom of action of operators to whom the collective agreement applies.

Principles involved. Inclusion of this kind of term contravenes the principle of **necessity and proportionality** because it involves exceeding the right to industrial collective bargaining between representatives of workers and employers laid down in Article 37.1 of the Spanish Constitution, in such a way as may infringe the principle of freedom to conduct business in the sector to which the agreement relates. Where the collective agreement elects to set the minimum prices per hour for the service in question, this restricts freedom of action between competitors, who will be unable to reduce the prices of their services below that laid down in the agreement. What this produces therefore is an agreement to fix the minimum prices of goods and services supplied. This was stated by the former Tribunal for Defense of Competition in its Resolution 607/06 *Ayuda a Domicilio*, when it stated that the setting of such minimum prices amounted to an intention to regulate business profits and thereby to eliminate price competition in the market. In the same way, setting commercial opening hours removes the possibility that the various businesses may, on the basis of setting the number of hours of working time, differentiate the product and services they supply thereby setting up competition in opening hours.

Terms of this kind agreed in industrial collective bargaining are also far from complying with the principle of **least distortion**. If the interest being protected is the salary and working time conditions of workers, this can be achieved directly by regulating the salaries and minimum working time which the signatory companies to the collective agreement must guarantee to their workers. This would amount to an alternative mechanism – which in some cases exists already – for achieving the aim sought, without involving so direct a distortion of competition.

Recommendation. It would be beneficial to competition regulation if collective agreements did not contain this kind of term, because they are foreign to the inherent subject-matter of those agreements. It is also necessary, where it is attempted to include them, that the employment authority, in exercise of its powers to oversee the legality of collective agreements, should be under an obligation to exclude such terms. The foregoing should be without prejudice to the fact that the embodiment of pricing agreements in collective agreements may be the subject-matter of investigation by the national and regional competition authorities, on the grounds that they may amount to breaches of competition rules.

PROFESSIONAL SERVICES

The setting of guideline fee scales by professional bodies

Description. Ley 7/1997 de medidas liberalizadoras en materia de suelo y de colegios profesionales (Law on liberalisation measures relating to property and to professional bodies) removed the right of professional bodies to set minimum fees, but introduced the right for those bodies to approve guideline fee scales. However, as the Tribunal for Defense of Competition itself stated in its 1992 report,[20] the setting of guideline tariffs is what is understood in competition law terms to be "consciously concerted practices" with ultimate effects similar to price fixing.

Principles involved. The existence of guideline fee scales contravenes the **necessity and proportionality, least distortion** and **effectiveness** principles of efficient regulation**.**

Indeed, although not clearly stated, it can be understood on the face of it that the purpose of the statutory authorisation for setting guideline fee scales was to benefit consumers by offering them guidance so that they could detect abuses, at least temporarily after removal of minimum fees.

However the fee scales have proved, on the one hand, to be real restrictions on the freedom for the providers of professional services to set prices, whilst price is a key factor for the development of effective competition in the market. At the same time, consumers have been and continue to be able to exercise their freedom of choice in markets for professional services where there are no guideline fee scales, and there are no particular reasons why they should be maintained in some cases

Further, there are other measures which could, where necessary, properly satisfy the objective of protecting consumers (or requests for information from the justice system, as the case may be) such as an obligation to submit budgets, freedom of advertising, or the ex post preparation of statistics or price surveys. Lastly, there is no clear evidence that this mechanism has in fact served to protect consumers from alleged abuses.

Recommendation. The NCC again stresses, in line with the European Commission, that's the power of the professional bodies to set guideline fee scales should be removed.

PROFESSIONAL SERVICES

Imposition of fee scales or fixed prices on the work of court attorneys (procuradores)

[20] *El libre ejercicio de las profesiones* (Free exercise of professions), CC, 1992.

Description. Traditionally, work done by court attorneys has been governed by fee scales or prices set by central Government by royal decree. In recent years, however, various regulatory changes have favoured introduction of the beginnings of competition in the provision of these services, by enabling application of certain discounts, although these discounts are not totally free (they are capped at 12%)[21].

Principles involved. Setting fee scales or fixed prices infringes the efficient regulation principles of **necessity and proportionality** and of **least distortion**. On the one hand, the Tribunal for Defense of Competition[22] has regarded fee scales as factors which seriously disrupt free competition. Indeed, by not allowing free price formation on the market, price ceases to be a competitive factor in the market and at the same time cannot be an economically coherent reflection of the service which consumers receive in return, nor of its quality or reliability. Price freedom enables consumers to obtain appropriate prices for the services offered to them, whilst the service provider can innovate and be imaginative in order to offer services more in keeping with the quality-price ratio.

On the other hand, if what is sought is to ensure the provision of services and their quality, that aim can be regarded as being met by the manner in which the providers of services are eligible to enter the profession, without any need for greater restrictions on competition in the form of setting the price to the consumer.

Recommendation. In keeping with the foregoing, the NCC can merely reiterate the recommendation to remove the fee scales or fixed prices governing the work of court attorneys. Alternatively, the application of discounts should at least be liberalised so that the fee scales or fixed prices act as maximum prices.

[21] Royal Decree 1373/2003 of 7 November approving the fee scale for court attorneys.
[22] Proceedings 477/99, court attorneys.

PROFESSIONAL SERVICES

Restrictions on freedom to advertise laid down by the professional bodies

Description. The legislation and rules of ethics of the majority of professional bodies contain rules which restrict the advertising of professional services, going beyond what is established in Ley 34/1988 General de Publicidad (Advertising Act).

However, restrictions on advertising represent a fetter to free operation of the market, by limiting the ability of consumers to compare the services on offer and by hindering, for new entrants, their establishment in the market, and for the more efficient service providers the task of communicating to consumers the advantages they must offer over less efficient providers. Advertising is therefore a fundamental factor in effective competition.[23]

Principles involved. The restrictions on freedom to advertise laid down by the professional bodies infringe the efficient regulation principle of **necessity and proportionality**, since they are unnecessary for achieving the objective of protecting consumers from potentially unfair advertising practices (misleading advertising, biased comparative advertising, etc.), since the Ley General de Publicidad is a sufficiently broad framework in which to safeguard the interests of consumers as regards advertising in all areas of commerce.

Recommendation. The NCC must, therefore, recommend the removal of all restrictions imposed by professional bodies on freedom to advertise and that the advertising of those professional service providers should be explicitly subject to the general limits laid down in the Ley General de Publicidad, Law 34/1998.

[23] See proceedings 504/2000 C.O. de Abogados de Madrid and 455/1999 Consejo General de Abogacía Española.

PROFESSIONAL SERVICES

Duty lawyers

Description. Regulations governing notaries provide for freedom for clients to choose their lawyer with one exception, which is in the case of public authorities and their agencies. These must submit to a duty system managed by the college of notaries and, therefore, must accept the lawyer on duty at the time. It is sought in this way to prevent any public authority from choosing an "official". On the other hand, in practice this prevents free negotiation between the parties, since the incentives to improve the quality of service or to apply discounts on fee scales are removed.

However, this general principle has already undergone a number of changes prompted by the greater interest of achieving a different objective -- improving the notarial service provided to public authorities, both in terms of quality and of price. Accordingly, in 1987 the "public banks" were excluded from the duty system and in 2007 cases involving large-scale operations were excluded, in which it is possible freely to apply discounts on the fee scales.

Principles involved. Essentially the principle of **necessity and proportionality**, since the intended aim of the duty lawyer system has caused to significant adverse effects for the public authorities themselves, since they cannot enjoy the effects of competition in terms of quality and price (now discounts on the fee scales can be available). This harm is increased when the operation involves individuals who, whilst it is they who are liable to pay the fees of the lawyer, have no freedom in their choice of lawyer, however, because they are subject to the duty system.

Those adverse effects can in our view outweigh the expected positive effects, particularly if we bear in mind that, on the one hand, lawyers are not strictly "officials" and, on the other, the duty lawyer system prevents public authorities from electing lawyers, but allows a "corporation governed by public law" (the college) to choose the lawyer and to introduce uneven allocations of duty work between lawyers and even to exclude a notary from the duty rota.

Recommendation. The NCC advises modification of the regulations to replace the duty lawyer system with a different system operating under the principles of advertising and competition.

ENERGY SECTOR

Access to the seller market in the electricity and natural gas sector

Description. From January 2003 all electricity consumers have been able, if they wish, to change from the regulated tariff system to a market system in which they are free to choose who supplies their electricity. Although the sale of electricity has been liberalised since publication of Ley 54/1997 del Sector Eléctrico (Electricity Sector Law), independent sellers (comercializadores) of electricity not belonging to the corporate groups which operate in other segments of the electricity sector have had serious difficulties in commencing their activity and/or becoming consolidated in the market. These problems have been due in part to the difficulty of obtaining information on the type of supply and the consumption habits of their potential customers. In that regard these operators are at a clear disadvantage compared to sellers linked to the corporate groups which also include the distributors who provide their potential customers with access to the networks.

In order to minimise the market failure associated with these information asymmetries, a regulation was published in 2002[24] to set up a disclosure system under which the distributors are obliged to create databases with significant information about points of supply and the consumption profiles of their customers, but limits access by sellers to a limited number of data fields.

Principles involved. The regulation satisfies the principle of **necessity** since it enables there to be a level playing field for all competing electricity sellers, incumbents and potential entrants. It is also justified as a mechanism for pursuing the intended aim, but has proved to be **ineffective** because the number of data fields which sellers can access is insufficient and the procedures for accessing information, which have been left for subsequent implementing provisions, are not precisely defined.

The result has been that sellers have tried to access the databases without success. Those shortcomings, together with certain practices which can be regarded as anti-competitive, have meant that successive amendments of the regulation have been necessary[25] increasing the information available to electricity sellers, obliging distributors to supply the information free of charge, to keep the contents of the database complete and up-to-date, and to avoid another series of conditions restricting access. An imprecise or incomplete regulation which has frequently to be reviewed

[24] Royal Decree 1435/2002 of 27 December governing the basic terms of energy sale agreements and access to low voltage networks.

[25] Royal Decree 1454/2005 of 2 December amending certain provisions relating to the electricity sector, subsequently amended by Additional Provision Three of Order ITC/3860/2007 of 28 December. There has to date been no access to the information because this Order has been appealed to the Audiencia Nacional (National High Court).

gives rise to uncertainty and therefore infringes the principle of **predictability**. Those deficiencies have clearly affected the entry of new operators to the energy markets in question.

Recommendation. When measures are adopted to foster changes of supplier and to make that possibility meaningful by means of access to information, it is necessary to design procedures which detail precisely the contents and manner of access to data and to reinforce the obligation on distributors to provide that access, classifying failure to do so as a very serious offence.

ENERGY SECTOR

Access by natural gas distributors to third party networks

Description. Amongst the many innovations brought about by Ley 34/1998 del Sector de Hidrocarburos (Hydrocarbons Sector Law) of 7 October it is useful to draw attention to that relating to the definition of what comprises a natural gas distribution network. The statute establishes as such networks "gas pipelines with maximum design pressure of 16 bars or less and those others which, irrespective of their maximum design pressure, are intended to carry gas to a single consumer from a gas pipeline forming part of the Basic Network or the secondary transportation network". Accordingly, whilst the conventional distribution networks (at pressure of less than 4 bars) continue to be so defined, there were added to these grouping networks with pressure of between 4 and 16 bars.

So, having regard exclusively for technical pressure characteristics, although networks of between 4 and 16 bars are, under the legislation, distribution networks, their sole purpose is not to take gas to end consumers, in this case industrial consumers, but they also serve as connections to distribution networks, and are therefore operationally equivalent to transportation infrastructure.

A situation could therefore occur in which a distributor has to act as carrier and distributor at the same time. In such cases the definition of a distribution network introduced in the Law is liable to give rise to non-compliance with the vertical separation between activities stipulated in the same statute in order to avoid an integrated operator having a dominant position in relation to its competitors. The concentration of functions in a single operator makes it possible that conflicts of interest could arise when deciding on access to those networks, conflicts which could give rise to practices restrictive of competition by the distributor-carrier.

The regulator has stipulated that, in common with carriers in the strict sense, a distributor which owns this kind of dual purpose of network must allow access to its facilities to third parties, but specifies that the access will be conditional on the

distribution network with maximum design pressure of more than 4 bars having sufficient supply capacity, based on criteria of technical and economic feasibility.

Principles involved. The imperfect and imprecise drafting of a regulation, as may have occurred here, is a factor in the regulation becoming **less effective**, and gives rise to uncertainty, therefore infringing the principle of **predictability**. Such a legal vacuum may prompt the appearance of strategic behaviours which impede effective competition in the markets.

Recommendation. To regulate more precisely the principles which should guide evaluation of sufficient supply capacity, meaning that the variables to be used, and their magnitude, should be specified, so that it can be determined automatically which operator is in the best position to give access, following criteria of technical and economic feasibility.

COMPETITION FOR THE MARKET IN CERTAIN PUBLIC SERVICES

Authorisation arrangements compared to concession arrangements

Description. For the provision of certain public services, the administration responsible elects a formula of indirect management in which it contracts a specific number of operators (in the extreme case, only one) to provide the service in a given geographical area, using the mechanism of a government concession. This means that there is a restriction on access to those activities, controlled by the public authority, which changes the nature of how competition operates from "competition in the market" to "competition for the market".

Various factors, both economic (for example, the cost structure necessary to operate the service, with high fixed costs, may mean it is more efficient for it to be provided by a single operator), or public interest (quality and security of the service, public policy), may lead to the grant of concessions in the form of public procurement contracts.

Principles involved. Under certain circumstances such decisions may not be in line with the principles of **necessity and proportionality**. This occurs where an administration contracts with one operator a service for which there is sufficient demand and whose cost structure allows it to be provided by more than one operator. That is to say, the conditions are present for satisfactory provision of the service in accordance with the free market criteria. In such cases the grant of a government concession gives rise to a distortion of competition which is not necessary to secure the relevant service. This was stated by the NCC Board in its Resolution 613/06, *Servicios Funerarios La Gomera*, in which it held that the award of an exclusive tender contract to a single operator, to supply insurance against funeral costs to the entire population of the island of La Gomera, entailed modification of the structure of supply and the conditions of demand in

a defined geographical area. At the same time, it is possible that consumers are being deprived unnecessarily of the benefits of competition, since the service could be opened up to competition, or the concession broadened to two or even more operators. This solution was already pinpointed, in the context of intercity road passenger transport, in Tribunal for Defense of Competition concentration report C45/99 ALSA/ENATCAR, (in relation, specifically, to the Madrid-Bilbao route).

Further, in situations where public control of entry to the market is justified on quality or security or safety grounds, the choice of an absolute closure mechanism such as grant of an exclusive concession to a single operator is inconsistent with the principle of **least distortion**, since the arrangements could be replaced by a system of administrative authorisation. Under that system, all entities equipped to offer the service are entitled to enter the market, if they wish, subject to complying with set requirements imposed by the administration. This possibility is recognized in the context of road transport, for example, by Article 49 of the Ley de Ordenación de Transportes Terrestres (Land Transport Law).

Recommendation. In relation to public services subject to government concession, there must be a review of the necessity of retaining those management arrangements, and, where the market mechanism can ensure provision of the service, the concession system should be replaced by a system of prior administrative authorisation.

PUBLIC PROCUREMENT CONTRACTS

Obligation under tender specifications to incorporate joint ventures

Description. Ley 30/2007 de Contratos del Sector Público (Law on Public Sector Contracts) of 30 October provides in Article 48 that joint ventures (uniones temporales de empresas – UTEs) incorporated temporarily for the purpose can enter into contracts with the public sector. Regulation of this mechanism is governed by a plethora of rules.[26]

The ability of joint ventures to participate in public procurement procedures may seem to be a good thing, since collaboration between undertakings is, on occasion, the only way to find potential contractors and to enable small and medium-sized businesses to compete with large ones. However, it is also the case that joint ventures can limit

[26] They were initially regulated by Law 193/1963 of 28 December, subsequently repealed by Ley 18/1982 de Agrupaciones and Uniones Temporales de Empresas (Law on Interest Groupings and Joint Ventures) of 26 May, which regulated those forms of business groupings. Law 18/1992 was subsequently amended by Law 12/1991 of 29 April which, although it governed the figure of the Economic Interest Grouping, amended the provisions governing the conventional mechanism of joint ventures, without prejudice to regulation of that figure by the consolidated text of the Ley de Contratos de las Administraciones Públicas (Law on Public Procurement Contracts) and its implementing regulations, which in some aspects differs from or is incompatible with the current tax rules relating to joint ventures.

competition by eliminating possible alternative bids, by the potential coordination which may take place between their members, and the risk that they may introduce protection mechanisms against competitors, all of which have been highlighted by the Tribunal for Defense of Competition in various cases.[27]

It has on occasion been the tender specifications themselves issued by the contracting parties which establish an obligation on the participants to incorporate as joint ventures.

Principles involved. The requirement on bidders to adopt the legal vehicle of a joint venture infringes the principle of **least distortion**, in that the objective of encouraging the submission of bids by small businesses could be achieved simply by providing for the mere possibility of incorporating a joint venture.

At the same time, the dispersal of regulations governing joint ventures, and the specific contradictions there may be as a result of such dispersal, means that the legal treatment of joint ventures is not in line with the principle of **transparency**.

Recommendation. Whether or not joint ventures are incorporated should, where applicable, be left to the free choice of participants. Once that form of cooperation has been chosen by one or more groups of companies in the context of a specific public tendering procedure, it should be the relevant contracting body which supervises whether or not the collaboration put in place distorts competition unnecessarily in the context of the procedure. If this recommendation is not taken up, in those tender specifications where the obligation is imposed, detailed reasons for it should be given.

Further, a legislative initiative should be promoted intended to structure unitary, cohesive and systematic regulation of the legal, administrative and tax provisions governing joint ventures, repealing earlier legislation, subject to retaining Article 48 of Law 30/2007, for reasons of structural coherence.

PUBLIC PROCUREMENT CONTRACTS

Criteria for the award of contracts

Description. Ley 30/2007 de Contratos del Sector Público of 30 October provides in Article 134 that the award of contracts in public tendering procedures must be based on criteria directly linked to the subject-matter of the contract, and it is for the tender specifications to establish the bid assessment criteria for the purposes of making the award decision.

The specifications are the principal competitive factor in these processes, of the utmost importance in preserving competition in access to public tendering procedures and for

[27] 476/99, *Agencias de Viaje*, 504/01 *Terapias Respiratorias Domiciliarias* and 590/05 and 595/05 *Ambulancias Orense and Conquenses*.

efficient award of contracts. Similarly, the weight given to each valuation criterion in the grading of bids is at the discretion of the contracting authority and is considered crucial to ensuring that the contract is genuinely awarded to the most competitive bidder.

However, some of those tender specifications sometimes set out the award criteria imprecisely, with the effect that they are insufficiently clear. On other occasions factors are included as technical solvency criteria, required for participation in the process, which can at most be described as assessment criteria. Similarly, geographical criteria are in some cases unjustifiably laid down, understood as those which give particular weight to the connection between the bidders and the human or economic resources of the area in which is the subject-matter of the contract is to be carried out. Finally, in many tender specifications the contracting authorities give excessive weight to criteria such as experience in performing similar work to that being tendered, which afford a certain advantage to an operator who has held the contract in earlier periods.

Principles involved. In general, where award criteria are drafted defectively as described above, they depart from the clarity and suitability to the subject-matter of the contract which are desirable in specifications and can, in particular, amount to a source of unfairness and unjustified discrimination between bidders. Accordingly, tender specifications which include such characteristics quite clearly, in our view, undermine the entire competitive public procurement process. First, they infringe the principle of **transparency**, since the vagueness and excessive complexity of the assessment criteria can give rise to restrictions on entry at the moment of designing and implementing the specifications, contrary to the pro-competitive spirit of the Ley de Contratos.

On certain occasions assessment criteria relating to particular experience and geographical criteria can for their part be discriminatory and superfluous if what is being judged is a project for the performance of works or the provision of a service, since it has already been determined that the bidders comply with certain solvency criteria which serve as evidence for the bidder's suitability to perform the contract, should it be awarded. Accordingly, this infringes the principle of **least distortion**, imposing on certain operators restrictions which, even if justified, are already addressed under the solvency requirements.

Recommendation. The contracting parties should be very mindful of the principles of efficient pro-competitive regulation when drafting the criteria for assessing bids and including them in their tender specifications.

PUBLIC PROCUREMENT

Subsequent modifications to the contract

Description. Ley 30/2007 de Contratos del Sector Público of 30 October provides in Article 202 that amendments can only be made to a contract for public interest reasons and solely to address unforeseen circumstances, with their necessity being duly justified in all cases in the file relating to the procedure, and such changes may not affect the essential terms of the contract.

It is appropriate that the authority has this right to vary the contract, given the many unforeseeable circumstances which can arise subsequently to its initial award, which can affect its terms, and it is desirable to restore the balance between the contracting parties quickly and effectively.

However, this statutory right to amend contracts can, if misunderstood, give rise to abuses which may detract from the competitive nature of the original tendering procedure. In all too many cases this is the route taken simply to make additions to the project which could and should have been provided for in the original project. Furthermore, on many occasions the circumstances alleged arise from technical reports by the original contractor itself, which is attempting, using the amendment, to ensure the profitability of a contract for which, initially, it bided low in order to be the successful bidder. This restricts the possibility for potential bidders other than the original successful bidder to compete.

Principles involved. Such practices of amending contracts infringe the efficient regulation principles of **necessity and proportionality**, since in many cases provision of the service could be put out to a new tender process, since the circumstances alleged are very rarely genuinely unforeseen. In fact, on occasion the subject-matter of the contract could originally have been divided up, giving rise to various independent tender processes. Instead of this, the original terms for the tender procedure (those known to all bidders at the time of the process) are altered, subsequently, which amounts to an infringement of the principle of **transparency**. Finally, exercise of this right is **unpredictable** for bidders at the time of the original tender procedure, with the ensuing distortion of competition, since at that time it is difficult for each participant to anticipate whether the other competitors are taking into account in their decision-making strategies when submitting bids the possibility that the contract could be amended after the event.

Recommendation. The NCC recommends that amendments to contracts should only be permitted where it is amply demonstrated that it is completely impossible to achieve the objective of the amendments by means of a new tender procedure.

VII. CONCLUSIONS

The new Ley de Defensa de la Competencia, Law 15/2007 of 3 July, has strengthened the role of advocacy as a tool of competition policy. Accordingly, the Law assigns to the NCC, alongside the work of combating and monitoring anti-competitive practices, that of promoting effective competition in the markets at national level.

In line with this the NCC Plan de Lanzamiento (Launch Plan) for 2007-2009 has sought to set out clearly the new challenges and objectives emerging in this field and has set out the tasks to be performed in the next few years, in particular, those relating to analysis of existing legislation, draft regulations and acts by public authorities, to ascertain whether they give rise or could give rise to adverse consequences for competition. It has also included amongst the institution's aims that of promoting the creation of a genuine competition culture in, amongst other places, public authorities.

The NCC has therefore found it appropriate to produce this report, containing a study of the significance of "good regulation" from a competition perspective and, on the basis of that study, defining the principles of efficient pro-competitive regulation.

It seeks in this way to provide a "methodology" for assessing rules and regulations, from a competition perspective, which can only be useful in two areas.

On the one hand, in the reports and surveys to be produced by the NCC in performance of its functions and, in particular, of the consultative role contained in Article 25 of Law 15/2007. In this regard, this report is at this stage supplemented by a series of examples containing recommendations of regulatory reform for better competition, which apply the evaluation principles described above.

On the other hand, in promoting a culture of competition, since it is proposed that a "competition report" be prepared as part of the process of preparing draft regulations, which would enable the principles of good regulation to be taken into account from the outset of drafting regulations thereby avoiding regulations which lay down unjustified or disproportionate restrictions on competition.

It should be pointed out lastly that, in this report, the NCC is joining the trend initiated by neighbouring countries, and by institutions such as the OECD or the European Commission itself, to foster better regulation, better regulation relating, in our case, to the sphere of competition.

Madrid, 18 June 2008