



# CNMC COMPETITION

*Antitrust enforcement in Spain*



**CNMC** COMISIÓN NACIONAL DE LOS  
MERCADOS Y LA COMPETENCIA



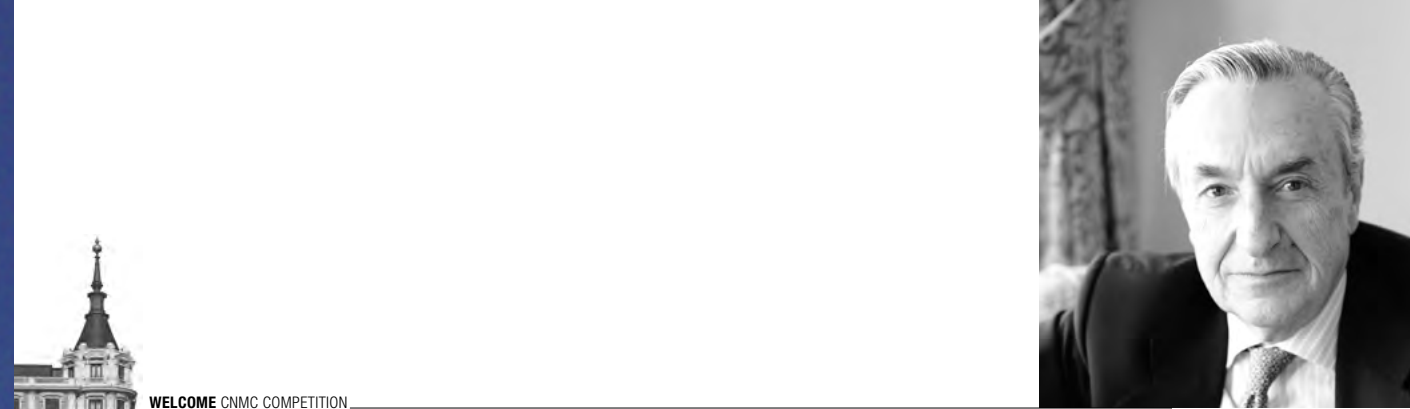
## CNMC COMPETITION

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## Welcome

The Spanish Competition Authority has continuously improved during the last decade all the relevant aspects of its operation that ensure its effectiveness in the preservation of well-functioning markets.

The integration of former competition and regulatory bodies that gave birth to the CNMC in 2013 constituted a new milestone in this positive evolution. The new institutional architecture expands the available tools to preserve and promote competition and efficient economic regulation thanks to the pooling of previous knowledge and experience. The coordination between the different directorates (competition, telecoms, energy, postal and transport services) allows us to build more informed decisions on competition and regulatory issues. Furthermore, its larger size and the greater diversification of its activity constitute a solid safeguard for the independence of the CNMC.

In 2015, the CNMC reaped the fruits of hard work in the competition area during previous years, a work that reflects our commitment to fight cartel agreements as our main priority. A record number of cartel infringement decisions (14) was issued and the amount of fines imposed (€549 million) also established a new record. This result has been achieved thanks to a mix of proactive ex officio work, a well-functioning leniency program and the good results obtained in dawn raids, thanks to the experience of a skilled and thorough team of inspectors working in close contact with our IT experts.

On the merger side, the CNMC's merger review system allows a fast clearance of non-controversial operations and an effective control of those that could raise concerns. Thus, the system delivers outstanding results for the companies involved as well as for competition enforcement. A total of 93 mergers were notified in 2015, a 13% increase vis-à-vis the previous year due to the improvement of the Spanish economy.

Competition advocacy also plays a major role in the work of the CNMC and has a significant impact on the media and public opinion. An increasing number of recommendations to different public administrations on current issues has contributed to the public debate and has drawn the authorities' attention to the need for an improved regulation in order to enhance competition and safeguard the correct operation of markets for the benefit of society. The CNMC uses a wide range of advocacy tools that include the ability to bring potentially anticompetitive or inefficient regulation to the courts.

I trust that the readers will find interesting this small summary of the work carried out by the CNMC to promote and enforce fair competition, and I hope that our current and future work in this area will be a relevant contribution to the welfare of Spanish society.

**José María Marín Quemada**

*President of the CNMC*





# National Authority for Markets and Competition. CNMC

## A Background History

The National Authority for Markets and Competition (Comisión Nacional de los Mercados y la Competencia - CNMC) is a public organisation responsible for the defence and promotion of competition in Spain. In addition, the CNMC oversees the regulation and control of key, regulated economic sectors. Its predecessors are the National Competition Commission (Comisión Nacional de Competencia - CNC) and the former sectorial regulators in telecommunications, energy, transport and postal services.

The Spanish competition policy started with the process of economic reform of the 1960s. The first competition authority was established in 1963 as a result of the implementation of the first domestic law for the protection of free competition. It was created to prevent and tackle monopolies and other activities deemed contrary to economic market flexibility and growth. Spain's entry into the European Community in 1986 paved the way for a new boost of competition policy. In 1989, a new law was approved aligned with European standards, and merger control was introduced. After more than 15 years of effective implementation and with a significant wealth of acquired knowledge and experience, a new law was enacted in 2007, which aside from incorporating enhancements gleaned over the years, created a new independent competition commission. The National Competition Commission was an official body, independent of government, comprising the former Competition Court and the

Competition Service (an investigative body that was part of the Ministry of Economy). Its creation saw the coming of age of the competition enforcement in Spain.

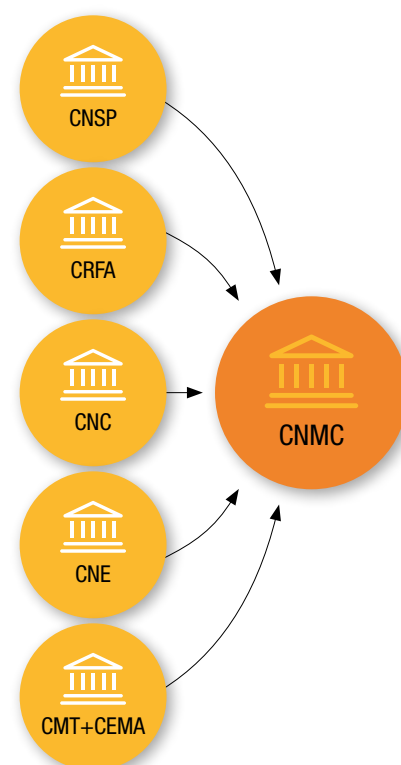
With the advent of the liberalisation of previously regulated market sectors during the mid-nineties, as well as a need to ensure the vertical separation between regulated activities and those that could be open to competition, a series of sectorial regulatory bodies were established: The National Energy Commission and the Telecommunications Market Commission, created in 1995 and 1996 respectively. Three new regulatory agencies joined the fold in 2010: The National Commission for the Postal Sector, the State Board of Audiovisual Media and the Railway Regulatory Committee.

## CNMC

The CNMC was created in June 2013 from the integration of the National Competition Commission (CNC) and the former regulators of several sectors, such as telecommunications (CMT), audiovisual (CEMA), energy (CNE), railways and airports (CRFA), and finally postal services (CNSP). The first goal of this merger of authorities was to bolster legal certainty and institutional confidence by providing markets with clear rules of behaviour and by obviating duplicities and contradictory decisions about the same issues. Additionally, the integration of authorities expected economies of scale to arise from similar functions, methodologies and operating procedures, and to exploit synergies in the use of the cumulated expertise of the former institutions.

The CNMC is set by law to operate independently of the government. At the

*"The CNMC mission is to equip markets with a professional, working model, comprising performance criteria and clear, definite rules for all economic institutions and business, obviating the appearance of potential, unnecessary duplicities and contradictory decisions within a same matter"*







*“The CNMC is responsible for the proper functioning of markets and for guaranteeing, upholding and promoting an appropriate backdrop for effective competition in Spain”*



same time, the CNMC is accountable to the Parliament and subject to judicial review. It is responsible for enforcing both domestic and European competition law, as well as to monitor the compliance with the sectorial legislation of regulated markets nationally.

### Remit and Purpose

The CNMC is responsible for the proper functioning of markets and for maintaining and promoting effective competition throughout the economy. To achieve this, the CNMC is entrusted with the following responsibilities:

1. The monitoring and control of all economic sectors, with particular emphasis in specific regulated areas: electronic and audiovisual communications, the gas and electricity sectors, airport operations and rail transport, and postal services.
2. The resolution of disputes between companies through arbitration.
3. The enforcement of domestic and European competition legislation, especially in two areas:
  - Fighting anticompetitive infringements, whether as a result of collusion between companies, abuse of dominant position or unfair competition.
  - Ex-ante evaluation of mergers.
4. The publication of reports and research studies regarding competition as well as general sectorial reports.
5. Provide advice to the government regarding competition and the correct operation of markets.

### Internal Structure

The CNMC is run by the Chairman and the Board, which can operate in plenary session or separately in two chambers, the Competition Chamber and the Regulatory Supervision Chamber. There are four investigative divisions, the Com-

petition Directorate, the Telecommunications and Audiovisual Sector Directorate, the Energy Directorate and the Transport and Postal Directorate. The CNMC also has a General Secretariat (administration, human resources and IT), an Internal Control Department and the Advocacy Department, all of them reporting directly to the Chairman. The Board Secretariat helps the Board with legal advice and other technical and administrative support.

### The Board

The Board is a collegial decision body. It is made up by the Chairman and other 9 members of acknowledged professional expertise, proposed by the Economy and Competitiveness Minister and appointed by the government after a hearing before the relevant committee of the Spanish Parliament (which has the right to veto the proposed candidates by an absolute majority). Their appointment is for a term of six years that cannot be extended. The Board's plenary session is attended by all its members and presided over by the Chairman of the CNMC (who has a casting vote). It deliberates over general issues such as setting the strategy for the institution, approving annual action plans, setting up internal rules and approving the budget. The Board will also intervene in those cases that might have a particular impact on the level of competition or on the operation of markets. Furthermore, it will intervene when differences of opinion arise internally between the chambers, thus strengthening legal certainty and ensuring the consistency of decisions.

### Chambers

The Competition Chamber comprises the Chairman of the CNMC and four Board members, and is responsible for the ordinary implementation and enforcement of the Spanish Competition Act (Act 15/2007) and of the European competition legislation. In turn, the Regulatory Supervision Chamber comprises the Deputy Chairman of the CNMC

and four additional Board members. Its remit includes the regulatory supervision of the regulated industries and the resolution of disputes in those sectors.

### Directorates

#### Competition Directorate

The Competition Directorate is responsible for disciplinary proceedings involving cartels and other anticompetitive behaviour, as well as merger control. The Competition Director is Eduardo Prieto Kessler.

#### Telecommunications and Audiovisual Sector Directorate

Its remit includes the regulation and monitoring of firms operating in these regulated industries. The directorate also resolves disputes among companies by acting as an arbitrator. The Telecommunications and Audiovisual Directorate is run by Alejandra de Iturriaga Gandini.

#### Energy Directorate

The Energy Directorate is in charge of regulation and regulatory supervision of the firms that operate in some areas of the energy industry (mainly in the electricity and gas sectors) for the benefit of both the firms and its consumers. The Energy Director is Fernando Hernández Jiménez-Casquet.

#### Transport and Postal Directorate

The Transport and Postal Directorate is responsible for the regulation and monitoring of firms operating the railway system, the airports and the postal services. The Director is Ángel Chamorro Pérez.

#### General Secretariat

The General Secretariat, headed by the General Secretary, is responsible for the general administration, the budget, human resources and IT at the CNMC.

#### Board Secretariat

The Board Secretariat main responsibility is to advise the CNMC's Board on legal matters and to ensure the legality of its actions.



### CNMC KEY FACTS IN 2015

- President:  
Mr. José María Marín-Quemada.
- Budget 2016: 61 million euros.
- 515 employees.
- 20 trainees.



# Competition

The area of competition at the CNMC comprises the Competition Directorate and the Advocacy Department.

## Competition Directorate

The Competition Directorate is the division charged with maintaining, securing and promoting competition throughout the domestic market, as well as safeguarding the consistent implementation of Law No. 15/2007 on the Defence of Competition (Competition Act) at domestic and European level, through the powers assigned in the aforementioned law.



The Competition Directorate is entrusted with the investigation and prosecution of anticompetitive conducts and the monitoring of mergers between companies. It carries out varying tasks such as analysis, research and direction of formal proceedings independently, presenting its proposals to the Board for their subsequent deliberation and decision.

## Structure

The Competition Directorate comprises 5 divisions of which 3 are sectorial. These are responsible for the implementation of competition legislation within their respective remits: energy and industry, information society and services.

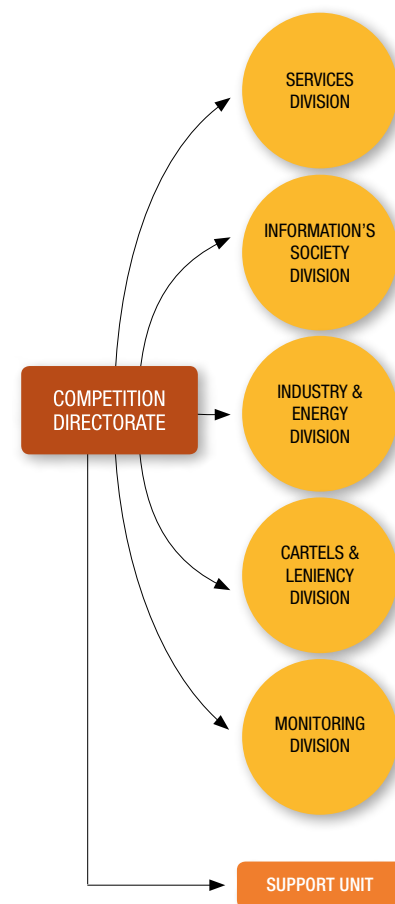
The remaining two are transversal and deal with matters relating to all economic sectors: Cartels and Leniency Division who manages the leniency program and investigate cartels identified thanks to its leniency programme.

The Monitoring Division is entrusted principally with monitoring the implementation and fulfilment of the decisions passed by the Board's Competition Chamber at the CNMC. It also liaises with Autonomous Competition Authorities (ACA).

The Competition Directorate has a support unit, which has an advisory function. It addresses issues concerning: coordination of international operations; training, inspections, classification and assigning of complaints; merger notification and standardisation, and, finally, consolidation of proceedings.

Similarly, it acts as a point of contact for other CNMC divisions for day-to-day horizontal issues such as, human resources, training activities, IT, judicial matters, etc.

*"The Competition Directorate is entrusted with the investigation and prosecution of anticompetitive conducts and the monitoring of mergers between companies"*



## The tasks of the Competition Directorate include

### Enforcing the ban on cartels

The CNMC actively prosecutes illegal cartels and can impose heavy fines (up to 10% of the volume of sales) on those companies responsible.

The fight against cartels is the Competition Directorate number one priority in competition enforcement. Between 2009 and 2015 43 cartels were discovered and sanctioned in Spain, with total fines above 1 billion €.

### Merger control

Spain has a compulsory notification system for mergers with two alternative thresholds based on market share (30% or more of the national market or "define" geographic market) and turnover (aggregate turnover exceeding 240 million euros).

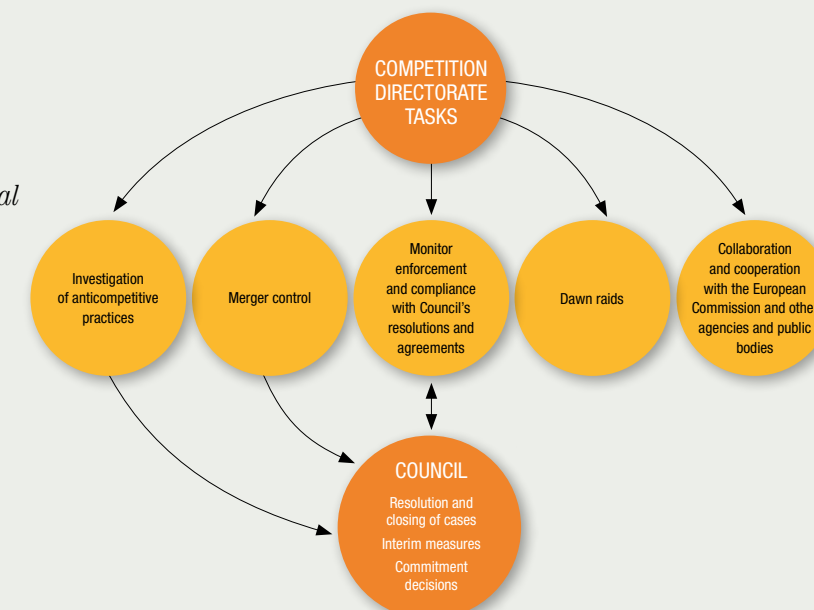
*"The fight against cartels is the Competition Directorate number one priority in competition enforcement. Between 2009 and 2015 43 cartels were discovered and sanctioned in Spain, with total fines above 1 billion €"*

The substantive test for clearance is whether "the transaction may prevent the maintenance of effective competition in whole or part of the national market". In weighing up the feasibility of a merger, the CNMC looks at the effects that it may have on competition. A merger project can be prohibited or cleared subject to certain conditions. The negative effects must not prevail over that of the positive effects.

### Control of Abusive Practices by Dominant Companies

A business which holds a dominant position within a given market is unlikely to be sufficiently compromised by competitive pressures, and, therefore, may lead to complacency in terms of their approach to day-to-day operations. Such organisations enjoy a large scope within which they are able to act independently with scant regard for their competitors, purchasers or suppliers.

Being in a situation of economic strength is not forbidden per se, however, the abuse of such market power is proscribed. For this reason, the CNMC will prosecute abusive practices committed by dominant companies.



## COMPETITION - KEY INFORMATION 2015

- Director of the Competition Directorate: Eduardo Prieto Kessler.
- Budget 2016: 13 million euros.
- 163 employees:
  - Of which 106 are non administrative staff:
    - 35% legal experts.
    - 31% economists.
    - 33% other.
  - 8 interns.
- Female / male non-administrative staff ratio: 60/40 percent.







## DIVISION

## Industry and Energy

The Industry and Energy Division is responsible for the investigation and prosecution of restrictive practices and merger control in the industry sector. It covers, among others, the following sectors; the extractive, chemical and pharmaceutical industry, manufacturing and construction, agriculture and energy sector.

Since its creation, the work carried out by the Division, particularly in the energy sector, has been exhaustive and prevailing. With an ever-present market liberalisation of this sector, the Competition Authority has had to exercise tight control in order to guarantee a level playing field in terms of competition. Abuse of dominant position, anticompetitive agreements, cartels and unfair competition practices are just some of the issues within the gas and electricity sector, where the Division has been visible in undertaking formal procedural inquiries against major sector suppliers and installers.

The Division's on-going initiative has also been particularly successful in the food industry, where a large number of formal proceedings have been undertaken. Noteworthy of mention are the agreements involving grape and wine-pricing policy, particularly those products with denomination of origin. Another relevant case involved a market sharing agreement of the canned mussel industry, all of which had been on-going for 10 years.

With regard to mergers, the following acquisitions were significant: Unión Fenosa by Gas Natural; Chevron España by Cepsa both in the energy sector; the acquisition of SOS operations by EBRO in the rice industry, and, finally, the acquisition of Hojiblanca's olive oil packaging and distribution operation by Deoleo. All of the above were authorised subject to remedies.

Below are some of the more significant cases handled in recent years.

### Agreements in the fuel sector

A series of complaints and reports highlighted a lessening of competition in the automotive fuel industry in Spain and evidenced high retail prices compared to that of other countries. In 2013, several on-site inspections were carried out at the head offices of Repsol, Disa, Meroil, AOP (Spanish Association of the Petroleum Products Industry), Cepsa and BP. The information gathered as a result of the on-site inspections and the subsequent inquiries led to two related procedural investigations being undertaken.

The first case dealt with horizontal agreements among the cited companies for having entered into process of bilateral agreements between 2011 and 2013. This provided for the exchange of price-related information and non-aggression pacts. These 5 providers made up more than 60% of the market share in terms of the number of service stations in Spain as of January 2015; Repsol being the market leader with a 34% share, followed by Cepsa with 15%. In February 2015, the CNMC imposed fines of more than 20 million euros against the aforementioned companies and against

*"The Industry and Energy Division, responsible for the investigation and prosecution of restrictive practices and merger control in specific industry sectors, has done a relevant contribution to the introduction of competition in the energy markets, both through merger control and competition cases"*



Galp for the cited, anticompetitive conduct. The second case involved an inquiry into agreements between Repsol and several of its service stations managed under its corporate logo. The agreement, which had been on-going since the end of 2012, provided for the exchange of strategic information and colluding to fix retail prices in specific geographical areas. In July 2015, the CNMC imposed fines of 22.5 million euros on Repsol and several of its service stations for anticompetitive conduct.

### Dairy industry cartel

In 2012, formal proceedings were opened against 9 of the most important dairy companies in Spain and two regional industry associations for alleged practices which led to the lessening of competition over a ten-year period. Throughout the investigations, on-site inspections were carried out at several of the implicated companies. The inspections evidenced the existence of a cartel, whose tenet was the exchange of sensitive information, which provided for a collective business plan encompassing commercial strategies and market control relating to the supply of untreated cows' milk. The aforementioned strategies included: fixing the price at which milk was purchased from farmers; exchanging information pertaining to milk surplus and proposals to withdraw milk from the market collectively. In 2015, CNMC imposed fines in excess of 88 million euros on 9 companies and two industry associations.

### Market sharing and price fixing in the paper and corrugated cardboard industry

In January 2013, an ex officio inquiry was set up involving the paper and corrugated cardboard industry following a series of press releases highlighting sharp increases in the price of paper. The increases had a direct impact on end-price products passed on by the

cardboard and paper industry. As a result of the information gathered from on-site inspections at leading paper and cardboard manufacturers in Spain, such as Cartisa, Europac, Lantero Cartón and Cartonajes Petit, it was possible to prove the existence of geographical and sectorial market sharing of clients in the corrugated cardboard business between 2002 and 2013. Exchanges of commercially-sensitive information among the sector, which were encouraged by the industry association, were also brought to light. Additionally, the association also colluded in recommending across-the-board paper price increases.

As a result of this evidence, the Board imposed fines in excess of 57 million euros on 18 companies within the trade. This included all of the inspected companies and other key figures, including Saica Pack S.L. and Smurfit Kappa España S.A.

### Gas Natural/Unión Fenosa merger

One of the most important mergers evaluated by the Division, due to its inherent complexity and its potential impact on the sector, concerned Gas Natural and Unión Fenosa. This merger transaction was cleared in September 2008 at second phase and subject to remedies.

Gas Natural, Spain's gas provider leader and the fourth largest supplier of electricity acquired exclusive control of Unión Fenosa the third largest electricity provider behind Iberdrola and Endesa. The integration of two, close competitors involved in the retail supply of gas and electricity, coupled with the strong, simultaneous presence in the gas and electricity market of Gas Natural, and, not least, the overlap in both gas and electricity distribution networks, provided for a lessening of competition. With the above in mind, Gas Natural proposed specific remedies in order to overcome the issues concerning competition. These remedies were instrumental to the merger being finally cleared.

### SPANISH FUEL SECTOR

- Number of refineries in Spain: 9.
- All of them belong to just 3 oil and gas companies: Repsol, Cepsa and BP, which are active in both the wholesale and retail markets.
- The five biggest wholesalers: (Repsol, Cepsa, BP, Galp and Disa) hold together a market share of around 70% in the retail sale of automotive fuel market (in terms of service stations).
- Number of service stations in Spain: 10,833.
- In recent years, there has been an increase in the market share of independent service stations: 35% in 2015 vs. 17% in 2008.
- Spanish legislation guarantees independent, transparent and non-discriminatory access to oil pipelines and storage facilities.

Source CNMC.







## DIVISION

## Information's society

The Information's Society Division is responsible for prosecuting antitrust cases and merger control in sectors such as telecommunications, intellectual property, sports, audiovisual markets, online platforms, postal and motor vehicles. It is also responsible for bid rigging cases.

One of the Division's specific areas of attention since its creation in 2007 has been the telecommunications industry.

The Division has been active in both in formal proceedings, particularly the mo-

bile phone market <sup>1</sup> and the transportation of television signal, and in the area of mergers. The Division has also been instrumental in compiling best-practice guidelines of the sector's ex-ante regulation.

Another important area is audiovisual. Since 2010, multiple mergers between leading providers of free-to-air television and pay-TV have been closely monitored. The mergers were authorised subject to a series of remedies and thorough, multifaceted controls.

Intellectual property has also been a particularly active area of work, resulting in numerous proceedings against IP Rights Management Societies involved in abuse cases.

Up until the recent reform of intellectual property right legislation, which came into effect in 2015, the Competition Authority – de facto- has formed the sole system of administrative control over companies' day-to-day activities, many of whom have operated freely as a monopoly in the sector.

As regards mergers, the acquisition of DTS by Telefónica is worthy of mention.

Some of the most important cases of recent years are outlined below:

### Waste management cartels in Spain

The above case gave rise to the CNMC imposing a fine of nearly 100 million euros in 2015 on 39 companies operating in the waste management business in Spain.

<sup>1</sup> The 2012 decision in relation to short mobile-phone messages, where fines totalling 100 million euros were levied for abuse of individual and collective dominant position in various sectors and excessive wholesale prices in relation to short mobile phone messages was important.

*"The Information's Society Division has been particularly active in the area of telecoms where apart from overseeing the merger between the main telecommunications and pay-TV providers in Spain, it has also provided important guidance on the sector's ex-ante regulation. Investigation of important bid rigging cases and monitoring of football rights tender has been also a relevant contribution of the Division in preserving competition in the areas of its responsibility"*



Key evidence was gathered through a series of on-site inspections at the premises of the offending companies. The information evidenced the existence of a global protocol regarding market sharing that provided for the mutual respect for each other's clients, as well as colluding to share new business opportunities.

This global protocol involving market sharing affected multiple sectors of the waste management industry, such as manufacturing, paper and cardboard recycling, urban waste and (public tenders) public and private sector clients. The key industry players were the visible common denominator in this sector.

### Abuse of dominant position in the intellectual property rights sector in Spain

The investigation began at the end of 2013, following a complaint by the principal Spanish Commercial Radio Broadcasting Association.

The complaint brought to light the vague, discriminatory and biased tariffs that AGEDI (Artist's and performers' intellectual property rights management society) and AIE (same for phonogram producers) had established.

The CNMC was of the view that the sharp increase in charges that AGEDI and AIE wanted to levy against private, commercial radio broadcasters was excessive.

Furthermore, it felt that both providers had failed to provide a suitable, objective motive for such rises. A fine totalling nearly 3 million euros was set for having implemented a discriminatory and unfair system of charges for the public broadcasting of phonograms on the radio.

### Merger of pay-TV providers

#### Telefónica / DTS

Following a six-month-long investigation, the CNMC cleared the merger of Telefónica/DTS at second phase with remedies. The merger involved Telefónica and DTS, two of the main pay-TV providers in Spain.

As a result of the concentration, Telefónica enjoyed an increased market share in excess of 70%, both in terms of revenue and subscriptions.

The Telefónica/DTS merger also had an impact on the competitive dynamics of the electronic communication market in Spain, where Telefónica is the principal provider, due to the growing emergence in Spain of commercial package offers in mobile, landline and pay-TV.

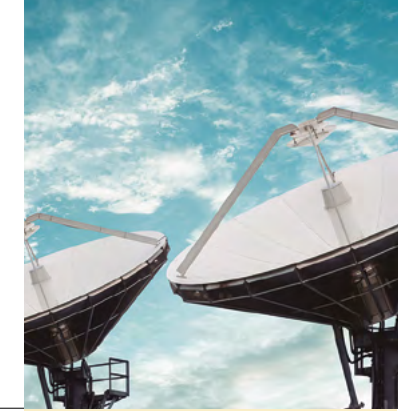
When examining the merger, the CNMC took into account two points: the competitive weakness that DTS would encounter moving forward given its satellite technology costs; its inability to market electronic communication and pay-TV convergent products, and, lastly, the potential competitive pressure that emerging internet pay-TV providers (OTT), who were beginning to appear on the Spanish market, may pose.

The merger was subject to some comprehensive and complex remedies. Noteworthy of mention is Telefónica's growth in the area of wholesale, pay-TV offers providing 'premium' content, such as football, films and new TV series premiers. The 'premium' content boasts cost-orientated pricing and is subject to specific economic replicability tests. Of equal importance are the limitations involving (acquired exclusive broadcasting rights) affecting audio visual content in Spain that the merged entity could enter into.

Among them: limits on the duration of the contract; a ban on film exclusives and video-on-demand (VOD) catalogues, and, finally, assurances about access and capacity reserves of Telefónica's internet supply that favours other internet pay-TV providers (OTT).

### TWO-SIDED MARKETS

- In recent years, the Competition Direction has analysed several merger cases in so called two-sided markets involving online platforms such as Schibsted / Milanuncios or Just Eat / La Nevera Roja.
- Two sided-markets have experienced rapid development due to the recent proliferation of intermediary online platforms.
- Broadly speaking, a two-sided market is one in which :
  - two sets of agents interact through an intermediary or multi-sided platform (MSP), and
  - the decisions of each set of agents affect the outcomes of the other set of agents, typically through an externality.
- Two-sided markets can be found throughout many industries, sharing market space with traditional product and service offerings: credit cards composed of cardholders and merchants; operating systems (end-users and developers); recruitment sites (job seekers and recruiters) and search engines (advertisers and users) among others.
- Benefits to each group are interdependent and exhibit network effects. In the case of a successful payment-card, it requires both consumer usage and merchant acceptance, where both consumers and merchants value each other's participation.







## DIVISION

## Services

The CNMC Services Division is responsible for the investigation and prosecution of restrictive practices and merger control in a variety of market sectors, such as construction, real estate, transport, commercial distribution, financial services and insurance, professional services, health services, catering, tourism and leisure.

One of their main areas of focus has been in the transport sector where several infringement proceedings have been undertaken.

One such case centred on several maritime transport companies for entering into agreements to fix interchange fees on the coastal-trade lane between Algeciras and Ceuta, for which the implicated companies were fined. Another involved a cartel created by land-transport companies in the Port of Bilbao that was set up in order to restrict access to port infrastructure.

Impetus at the CNMC as regards professional associations has also been thorough. The enactment of the Services Directive paved the way for an open, free market. Worthy of mention are the many proceedings that have led to many legal and administrative barriers to trade being removed that were previously set in place by specific professional bodies.

The following proceedings involving bank mergers, which were carried out under the framework of restructuring in the Spanish financial system, were important in terms of their activity around merger control: Banco de Valencia by Caixabank; Catalunya Banc by BBVA; and the fusion between Redsys and Redy which involved the integration of its card processing operation associated

with Servired and 4B networks. The latter, was cleared at second phase with remedies. The importance of other mergers of recent years involving the retail distribution and health sector should not be overlooked.

Among the cases dealt with in recent years the following are noteworthy of mention:

### Cartel of shipping companies

In November 2012, the CNMC fined a cartel for price fixing and for setting trading, schedule and market-sharing conditions concerning passenger and cargo maritime transport routes that join the Spanish Peninsula with Morocco. 12 maritime transport companies were fined a total of 102 million euros for undertakings involving restrictive practices between 2002 until 2010.

### Agreements within the Professional Services Sector

As a result of an ex officio investigation, the Competition Authority evidenced single and continued infractions by the Professional Association of Civil Engineers (CICCP Spanish Acronym) between 2006 and 2011 consisting of several anticompetitive practices ,and, secondly, by the Spanish Association of Engineering Companies (Tecniberia) between 2007 and 2011.

The aforementioned associations were complicit in discreetly making references, via a variety of publications, alluding to price structuring calculation methods within the Spanish Civil Engineering sector.

The CNMC was of the view that the publications disseminated among the companies and professional bodies

*“The CNMC Services Division is responsible for the investigation and prosecution of restrictive practices and merger control in a variety of sectors, such as construction, real estate, transport, commercial distribution, financial services and insurance, professional services, health services, catering, tourism and leisure.*

*Impetus as regards professional associations has led to many legal and administrative barriers to trade being removed in the area of liberal professions”*



led to standardisation in the costing and calculation of prices for services provided by the civil engineering sector as well as generally discouraging a reduction in costs.

Upon imposing an appropriate penalty, the CNMC took into account the downturn in demand throughout the sector, which could have diminished the capacity of the sanctioned, anticompetitive conduct, in terms of its potential effect and backdrop for sectorial companies to become involved. As a result, both associations were fined 200,000 euros each.

### Dia / Eroski merger

DIA, the second largest commercial retailer distributor of everyday consumer goods in Spain, acquired exclusive control over 160 outlets operating under the EROSKI group.

The Division identified certain risks associated with the merger: the brand reinforcement of DIA in the retail distribution sector at national and autonomous level (particularly in Extremadura and Castilla León); the existence of overlapping at a local level in 49 communities with market shares exceeding 30%, and, finally, the merger's impact, above all in 3 areas of influence in and around 3 towns where the overall market share would exceed 50% of the market.

With regard to the three cited examples, the operation entailed the union of the second and third largest provider in the affected area, exceeding the overall market share of the main competitor by more than 20%, thus significantly driving out competitive pressure in the sector.

With the aim of overcoming the potential, commercial risk posed by the

merger, the parties concerned undertook to divest each of the local markets affected of an operating outlet. The CNMC finally cleared the merger at first phase subject to the fulfilment of remedies: EROSKI were to divest themselves of two outlets and DIA one.

### Merger in the hospital sector

The above operation involved the acquisition and exclusive control of Policlínica Guipúzcoa by Idc Salud, which was approved in February 2015 at first stage and exempt of remedies.

The operation involved the amalgamation of a general hospital situated in the city of San Sebastian consisting of 160 beds and a medical centre in Éibar with the medical care provided by Idc Salud.

The acquisition coupled with the assets that the group owned in the province of Guipúzcoa, represented a market share exceeding 50% in terms of bed capacity.

The CNMC took the following mitigating factors into consideration when weighing up the feasibility of the merger:

1. A need for restructuring within the sector, given the surplus of private hospital providers and scant demand.
2. Accessibility of worthwhile alternatives for those seeking private health care is already present.
3. Idc Salud was not the sole provider of acute care (medical speciality), Non-admission medical centres were also providing care.
4. A strong competitive setting by public health care centres offering certain medical specialities.
5. Appropriate backdrop for insurance companies to be able to bargain.

As regards the above mentioned points, the CNMC felt that the venture would not jeopardise competition. The transaction was authorised at first stage without remedies.

### PROFESSIONAL SERVICES ASSOCIATIONS IN SPAIN

- Being a member of a professional trade association may be a legal requirement for certain professions in Spain to be able to operate.
- In recent years, the CNMC has launched 7 infringement proceedings against varying professional associations.
- Main competition issues regarding professional bodies:
  1. Territorial restrictions.
  2. Recommended fee scales.
  3. Excessive and disproportionate mandatory entry fees and other fees.
  4. Restrictions on professional substitution.
  5. Advertising restrictions.
  6. Compensation mechanisms.
  7. Restrictions on rosters of experts.







## DIVISION

## Cartels and Leniency

The Cartels and Leniency Division is responsible for the investigation and prosecution of cartels that have been detected thanks to a leniency application, and, albeit to a lesser extent, complaints and ex-officio inquiries pertaining to the existence of possible cartels. On-site inspections have been pivotal to the Division's success.

The Leniency program consists of an exemption of payment or a significant reduction in an imposed fine. It is granted to those companies or senior management who cooperate actively and wholeheartedly in the Competition Authority's investigation.

An exemption is awarded to the first leniency applicant who provides concrete evidence giving rise to the investigation of an alleged cartel. Furthermore, a reduction in the fine of up to 50% can be granted for those companies and corporate personnel who provide evidence regarding the existence of a cartel, often already acknowledged by the CNMC, nevertheless, the surrender of such evidence assists the CNMC in actually demonstrating its activity.

Since the Leniency programme came into effect in February 2008, 40 applications for leniency have been submitted. Of the 40 applications, 17 have resulted in a full exemption of the fine (42%) leading to 17 formal proceedings being opened against cartels.

The remaining 23 applications benefited from a reduction in the amount of the fine imposed, of which 11 were granted and the remaining rejected. As a direct result of these decisions a total of 22

cartels have been uncovered and fined throughout several economic sectors. The majority of these operations had been active for considerable time and involved a large number of companies.

During 2015, the Cartels and Leniency Division oversaw a total of 14 formal proceedings. As a result of these formal investigations a total of 6 were fined in that very same year.

Some of the recent landmark cases of the Cartels and Leniency Division are

### Car manufacturer cartel

In July 2015, the CNMC fined 19 leading car manufacturers in Spain a total of 171 million euros for having entered into the exchange of commercially-sensitive information regarding distribution policy and after-sales service of new and second-hand vehicles between 2006 until 2013. Citroën, BMW, Chevrolet, Chrysler, Fiat, Ford, General Motors, Porsche and Peugeot were among the implicated.

This information exchange brought about a lessening in competition during the affected period. Furthermore, this approach was passed down to the end customer in the form of lower discounts, a less-aggressive commercial policy by the car brands and engendered indifference in terms of standing out from other car manufacturers by competing to offer added value.

The implicated companies represented around 91% of the total market including nearly all the generalist brands and some of the 'premium' brands too.

The investigation began in July 2013 following the presentation of a leniency application by Seat S.A. and its subsidiaries. The application sought an ex-

*"The Cartels and Leniency Division is responsible for the investigation and prosecution of cartels that have been detected thanks to a leniency application. Since the Leniency programme came into effect in February 2008, 40 applications for leniency have been submitted. As a result of these, 22 cartels have been uncovered and fined throughout several economic sectors"*



emption of the fine previously imposed for their involvement in the above-mentioned cartel. The application by Seat and its subsidiaries gave way to on-site inspections at the head offices of some of the companies implicated. An exemption was awarded to Seat and its subsidiaries, namely Volkswagen Audi España and Porsche Ibérica.

### Paper envelopes cartel

On 25 March 2013 Competition Authority fined 15 paper companies with over €56 million for running a cartel in the paper envelope industry for over 30 years, starting with the announcement of the first-ever democratic elections in Spain.

The paper manufacturers entered between 1977 and 2010, into price-fixing agreements covering pre-printed envelopes for elections, political parties and large corporate customers. The companies also entered into market-sharing deals for preprinted envelopes and into a technology limitation agreement in the Spanish envelope market.

The Authority exempted one of the companies from payment for having submitted a leniency application which enabled dawn raids. Two other companies benefited from reductions of their fines having submitted leniency applications with significant added value for the purposes of proving the existence of the cartel.

### Modular construction cartel

In May 2013, Algeco submitted an application for leniency in relation to their collaboration in a cartel involving manufacturing, rental and retail modular construction companies.

As a result of the information gathered during on-site inspections it was possible to prove that 7 companies within this sector were involved in rigging the tender processes called for by both public and private companies, in addition to price-fixing in the Spanish manufacturing, rental and retail modular construction market between 2008 until 2013.

The cartel was divided into areas according to the presence of the participating companies in the implicated areas and the agreements entered into involving the distribution of tenders and new customers.

It affected different autonomous regions grouped in the following areas: Levante (Valencia and Murcia), South (Andalusia), Catalonia and Central-North (Galicia, País Vasco, Aragón and Castilla-La Mancha). In December 2015, the CNMC fined the cited companies a total of 9.3 million euros.

### CAR DEALERSHIP CARTELS IN SPAIN

- The automotive sector has great importance in Spain's economy. It represents 10% of Spain's GDP and 19% of total national exports, being Spain the second largest car manufacturer in Europe and eighth worldwide.
- More than 10% of the working population is related in some way to the car industry: 300,000 direct jobs and 2 million jobs indirectly linked to the sector.
- In April 2013 the application for leniency by Seat, gave rise to a series of inspections at some of the head offices of the several car dealerships and associations, as a result of which, cartels in 7 different car brands were uncovered.
- In the case of Audi/Seat/Volkswagen, CNMC fined 110 authorized car dealerships, two consultancy companies and two industry associations with a total of 41.1 million euros for having colluded to fix ceiling discounts and other conditions from 2006 until June 2013.
- Another 7 cartels on Nissan, Toyota, Opel, Land Rover, Hyundai, Chevrolet and Volvo car dealership networks were discovered and sanctioned throughout 2015 and 2016 affecting 27 out of 50 provinces in Spain and 200 dealers. Fines imposed amounted for more than 53 million €.







## DIVISION

## Monitoring

The Monitoring Division carries out two functions assigned to the Competition Directorate:

- monitor the implementation and compliance of the decisions upheld by the Board's Competition Chamber
- and coordinate the State and the regional governments' shared functions with regard to competition defense.

In terms of compliance, monitoring decisions and agreements upheld by the Board in accordance with competition regulation, lies not only in the policing and tracking of companies to secure settlement of imposed penalty fines, but

rather it provides to further strengthen the effectiveness of measures adopted by the Board.

This in turn creates a level playing field for those markets in which competition may have become non-existent or compromised.

Pursuant to CNMC rulings, upheld in accordance with competition law, non-compliance is considered under law as a serious breach that can result in fines being levied of up to 10% on an offending company's turnover; this is calculated on the company's fiscal year, prior to the imposition of the fine.

There are two differing roles carried out within the agenda of the Monitoring Division:

With the premise of working within the validity of a fine uppermost, monitoring their settlement involves a variety of processes, such as confirming settlement of fines within the voluntary payment period, and, where necessary, press for payment of the fine. Once the court ruling is resolute, the corresponding measures are taken to enforce the ruling: demand for payment, recalculate fines, effect refunds for amounts unduly deposited among others.

The Division is also responsible for verifying the fulfilment of the remedies and conditions, as set forth in a board decision, apropos conduct and mergers, precautionary measures, and, finally, commitment decisions.

The monitoring is carried out by means of the corresponding case investigation, which begins from the moment the Board's decision comes into effect. It forms part of a number of necessary steps that are followed with aim of ensuring the following: comprehensive feedback to the Board regarding compliance or non-compliance of a decision;

*"Monitoring CNMC Board decisions is fundamental to the proper functioning of the competition system. The mandate comprises payment of fines, implementation of cease and desist orders, along with the fulfilment of commitments and remedies as set forth in merger and conduct Board decisions"*

suggest, where appropriate, implementing coercive measures defined by law, thus avoiding a market being compromised as a result of non-compliance to a decision under observation; put forward to the Board, albeit ex officio or at the request of the interested party, a review of the imposed commitments and/or remedies resulting from a substantial, permanent change in the circumstances which were taken into account when it was originally implemented.

Monitoring Board decisions to ensure their proper implementation is fundamental to carrying out best-practice in the defence of competition. The mandate comprises settlement of fines, implementation of cease and desist orders, along with the implementation of the assumed commitments and remedies that are required as part of a stipulation for final merger approval.

## Relevant Monitoring Cases

**Repsol / Cepsa / BP  
Collusion involving indirect fixing of  
service station retail prices**

Decisions in January and March 2015 saw the board of the CNMC fine Repsol, Cepsa and BP respectively, for having partially breached a decision of July 2009, in which the CNMC provided proof of indirect retail price fixing by the cited companies and independents operating under their corporate logo. It was

felt that this provided for the lessening of competition among the service stations belonging to their network (intra-brand competition) and with other service stations (inter-brand). The breach resulted in fines of 12 million euros.

**Collusion by travel agencies in  
tenders for holidays for the elderly**

In July 2015, at the behest of the Competition Directorate, the board of the CNMC evidenced signs of a breach of their decision passed in October 2000.

The breach demonstrated the existence of a collusion agreement between Viajes Halcón S.A., Viajes Barceló S.L., Viajes Iberia S.A. and Viajes Marsans S.A. to attend a bidding process of the Institute for the Elderly and Social Services (*Inmerso*), where a programme entitled "Holidays for the Elderly" was to be awarded. In light of this, the CNMC board lobbied the Competition Directorate to open the relevant infringement proceedings with the aim of assessing if the above constituted infringement or not, and, additionally, to gauge its scope.

**Telecinco / Cuatro  
Merger**

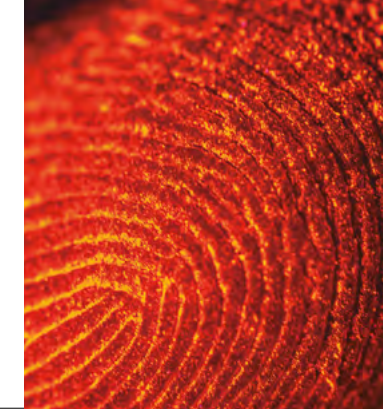
The merger between Telecinco and Cuatro, two of the main television companies in Spain, was authorised in October 2010 subject to a series of specific remedies. As a result of the monitoring process of the agreed assurances, it was possible to issue 3 decisions for infringement of some of the remedies. In July 2011, the board of the then National Competition Commission (CNC) upheld their decision to impose a 3.6 million euro fine on Telecinco for failing to provide a business action plan within a stipulated time period.

In February 2013, Telecinco was fined again, on this occasion for a sum totalling 15.6 million euros, for breach of specific remedies outlined in the agreed action plan.

In September 2015, Telecinco was fined a further 3 million euros for repeated infringement of agreed remedies.

**NETWORK OF REGIONAL  
COMPETITION AUTHORITIES**

- Spain has a system of concurrent competences in application of the Competition Act. The analysis and prosecution of restrictive practices (agreements, abuses, etc.) is shared among central and regional governments depending on the nature of the case.
- Where a competition issue only affects an Autonomous Community or a smaller territory, the Autonomous Community Competition Authority (ACCA) is competent to oversee said case. When it affects more than one region or the whole national territory it will be the competence of the CNMC.
- The 1/2002 Act on Coordination declares the CNMC Competition Directorate to be responsible for:
  1. the allocation of cases between the CNMC and the ACCAs.
  2. conflict resolution.
  3. work alongside autonomous authorities in procedural issues so as to prevent doctrine differences.
- At present, there are 12 ACCAs; Cataluña, Galicia, País Vasco, Andalucía, Valencia, Aragón, Castilla-León and Extremadura with prosecution and decision bodies and Murcia, Canary Islands, Madrid and Navarra only with prosecution.
- Some of the cases prosecuted are related to agreements, decisions or abuses issued by local authorities or agreed by undertakings with regional scope, such as funeral services, decisions by local professional associations, etc. Competition advocacy plays also a relevant role in their activity.
- In 2015, a total of 79 competition decisions were issued by autonomous communities competition authorities.







## Fight against cartels

The on-going fight against cartels is very much at the fore of all competition authorities, not least Spain. The detrimental effects of a cartel's undertakings directly affect the end consumers due to the fact that those companies, who are composite in such undertakings, have little or no incentive to deliver in essential areas, such as improving product and service quality and reducing costs, while at the same time inhibiting business growth for other companies within the same sector.

### BID RIGGING

In 2015, an initiative against bid rigging infringements was launched by the CNMC. It encompassed:

- Training Programmes addressed to procurement officials covering forms of bid rigging, methods of prevention and detection and steps to be taken when bid rigging is suspected.
- Development of awareness materials, like brochures, addressed to procurement officials to be able to identify and flag possible signs of collusive behaviour.
- Initial development of an automatic quantitative analysis IT system which analyses large amounts of online public procurement data and quantifies the likelihood of bid rigging.
- Creation of a whistle-blowing system, allowing individuals and public procurement officials to submit anonymous tip-offs of suspected bid rigging infringements.
- Up until June 2016, 15 Training Programmes have been given to more than 500 procurement officials.

### The CNMC leniency programme

In a period spanning 20 years, from 1990 until 2010, the Spanish Competition Authority was only able to uncover and fine a total of around 10 cartels. The introduction in February 2008 of the Leniency Programme, as well as bestowing the Authority with increased powers with which to carry out on-site inspections, as provided for in the Competition Act changed completely the situation. In the 6 years period between 2010 and 2015 this figure has increased five-fold with a total of 57 cartels being fined a combined total of 1,200 million euros.

22 of these cartels were detected thanks to the leniency application initiative, resulting in fines of almost 700 million euros (56%), while the remaining 35 were uncovered through other means. The remaining 35 cartels received fines of 500 million euros. This figure not only echoes the effectiveness of the leniency programme but also the improved know-how that the Competition Authority has capitalised on in its use of the investigative tools at its disposition.

This shows, on the one hand, the success of the leniency programme, but also the improvements made by the Authority in the use of research tools at its disposal. This highlights the increased powers conferred to the Competition Authority staff as well as the ongoing improvements in their execution through continuous development of new forensic research tools, implementation of tried-and-tested approaches gathered from previous inspections, and, finally the fundamental coordination among all parties involved in the investigations (courts, IT specialists, inspectors and the Competition Authorities). The high number of dawn raids in recent years has enabled the Authority to accumulate valuable experience to progressively

*“Effective cartel detection and punishment has increased fivefold since the introduction of the leniency program in 2008. A total of 57 cartels have been dismantled and fined with a combined total of 1,200 million euros in the last 6 years”*



improve their outcomes. Ex officio investigations, public awareness of a diligent competition authority, who is committed in their fight against cartels, along with efforts to disseminate the role of the CNMC in varying backdrops, such as public tenders, has provided the CNMC with access to pertinent information that has subsequently put the Authority firmly on the trail of cartels. In addition, these on-site inspections have often provided the necessary proof with which to confirm the existence of a cartel.

### Historic fines on cartels in 2015

Moreover, the rate at which the imposed fines are set embodies their effectiveness in terms of a deterrent for those complicit in cartel activity. 2015 saw the Competition Authority impose fines totalling 549 million euros; the highest figure to date. Of the total 549 million euros imposed in fines, 90% (505 million euros)

*“On-going development of new forensic research, implementation of tried-and-tested approaches and the fundamental coordination among all parties involved in the investigations (courts, IT specialists, inspectors and the Competition Authorities) are just some of the investigative methodologies responsible of the successful outcomes”*

involved penalty proceedings against cartels. The CNMC has ruled on 14 decisions against more than 250 companies for having participated in cartels throughout a variety of industry sectors.

The aforementioned illegal undertakings comprised price fixing, market sharing, exchange of commercially-sensitive information and other collusive activity contrary to free competition. In addition to this, the decisions upheld by Spain's Supreme Court *Tribunal Supremo* acknowledge, in the main, the assessments carried out by the Competition Authority in relation to historic fines, which once again, reinforcing their status as an effective deterrent.

One important fact relates to the lengthy periods of time during which the sanctioned cartels have been operational, not least, the elevated number of companies involved. Some cartels started life as far back as 1990. One particular cartel, which involved the envelope industry, began in the 70s.

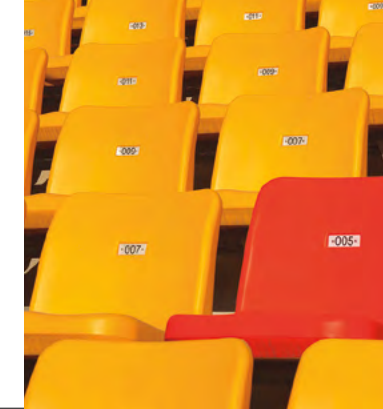
At this point, it is pertinent to address certain factors that will have a bearing on the on-going labours of the CNMC in its initiative against cartels. Firstly, there is the issue of fines imposed on senior management. Legal representatives or personnel who make up the senior management of an implicated organisation, may, according to competition law, be individually fined up to 60,000 euros. This latest drive has just been introduced by the CNMC (Resolution Adult nappy manufacturers June 2016). Secondly, EU Directive 2014/24 February 26 2014 regarding Public Procurement, provided for the possibility to ban those companies, who have been fined for infringements, from attending or taking part in public tenders. The dissuasive effects of such measures could be significant. Finally, the transposition of Directive 2014/104/EU November 26 2014 relating to 'actions for damages under National law for infringements of the competition law', will, in practice, entail a greater involvement between the CNMC and jurisdictional bodies in their fight against cartels.

### CARTEL PROSECUTION - OVERVIEW (2010-2015)

- Fines imposed: 1,209 million euros, of which 506.9 million corresponded to 2015.
- Leniency applications: 40 (arising from 22 cases) .
  - 17 exemptions.
  - 23 fine reduction.
  - 100% of the applications were filed by companies directly involved in a cartel.
- Total dawn raids: 71.
- Sites searched: 228.
- In 2015, 10 dawn raids took place affecting 35 companies and industry associations.
- IT personnel: 12 (4 working exclusively on the task).
- Items of evidence appropriated in 2015: 3.1 Gigabytes (62.5 GB 2010 -2015).

### FINES ON MEMBERS OF EXECUTIVE BODIES: (ARTICLE 63.2 COMPETITION ACT)

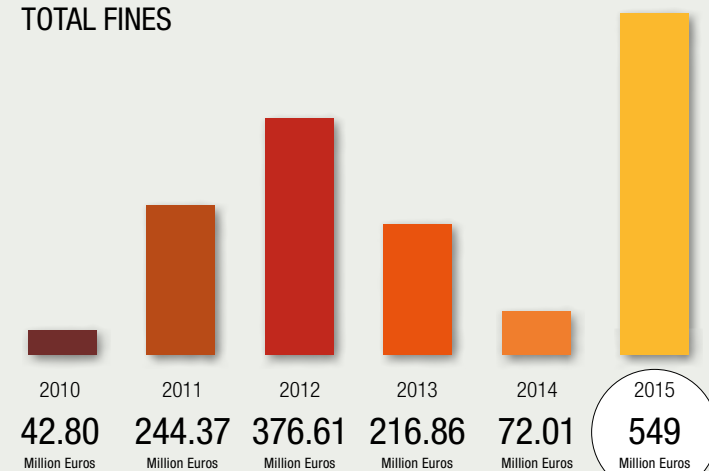
- For the first time since the CNMC was established, it has fined four company and sectorial association executives: case S/DC/0504/14 (Adult nappy manufacturers).
- The CNMC seeks to promote this approach in its fight against cartels.



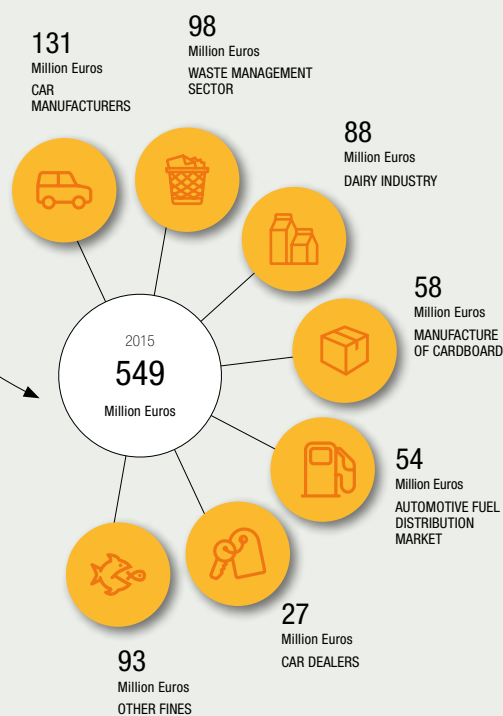
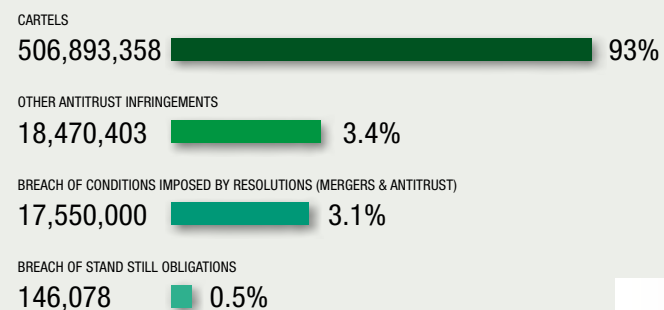


## Antitrust Data and Facts

### TOTAL FINES



### FINES BY TYPE OF INFRINGEMENT 2015



### DAWN RAIDS



### CARTEL FINES



### CARTEL DECISIONS

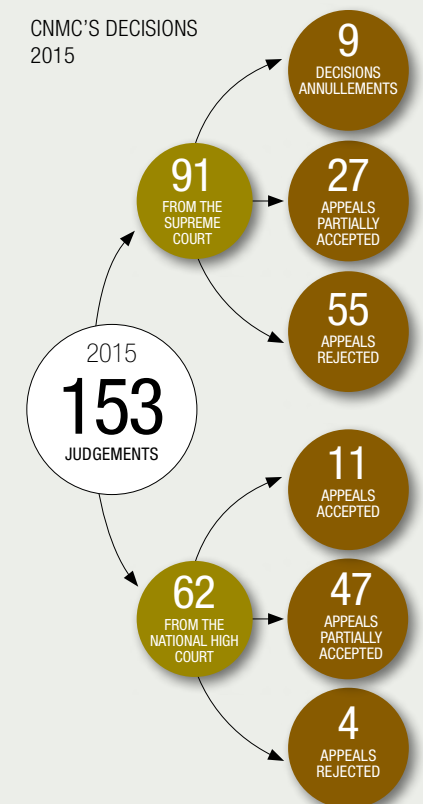


### COMPANIES DAWN RAIDED



### JURISDICTIONAL REVIEW

CNMC'S DECISIONS 2015







## Merger control

The main features of the current system of merger control took shape back in 2007 when the Competition Act came into effect.

Any project or transaction involving an economic concentration of undertakings, which exceeds certain thresholds but does not have European dimension, must be notified to the CNMC prior to completion (*ie.* prior to putting the transaction into effect).

According to the Competition Act, there are two alternative threshold based on market share and turnover:

The market share threshold establishes the obligation of notification when a

share of 30 per cent or more of the national market or a "defined" geographic market within it, of a given product or service, is acquired or increased. This threshold was tightened in 2011 on the grounds that said threshold would not apply if the turnover in Spain of the target or of the target's assets being acquired did not exceed 10 million euros and the individual or combined market share of the parties did not amount to 50 per cent or more in any affected market in Spain or in any defined geographic market within Spain.

The turnover threshold requires the aggregate turnover in Spain of the parties involved to be in excess of 240 million euros provided that the turnover in Spain of each of at least two parties exceeded 60 million euros.

In order to help companies to determine if a particular merger is notifiable to the CNMC, a series of mechanisms of formal ("formal prior consultation") or informal consultation ("pre-notification contacts") have been made available. This reduces the number of yearly notifications to a workable number<sup>1</sup>. Thresholds are designed to capture those mergers that may significantly affect competition in a relevant product market in Spain or Europe.

In fact, as a result of the market share threshold, Spain has been one of the countries of the European Union more active in the requests of referral to the European Commission of mergers that do not have European dimension. It has joined 4 of the 9 referrals that have taken place, in many cases as leader of the initial referral request.

<sup>1</sup> Around 90 mergers are notified in Spain each year.

*"Our merger review system allows for rapid clearance of non-controversial operations and an effective control of those which could raise concern, delivering reasonable good results for companies and competition"*



### Merger Control Procedure

Merger control in Spain employs the test of significant impact to effective competition to assess merger operations towards their potential approval or rejection.

Spanish merger review system allows for rapid clearance of non-controversial operations and an effective control of those which could raise concern, delivering reasonable good results for companies and competition. A merger can either face no competition problems and therefore being swiftly authorized or being subject to an in-depth analysis in case it raises concerns.

One month after filing, the CNMC must reach a Phase I decision, extendible by 10 working days if the parties submit commitments. Within this one month period, the CNMC will carry out Phase I investigations, which will end with non-binding report produced by the Competition Directorate.

On the basis of this report, the Council will decide whether to clear the transaction, to clear it subject to the commitments presented by the parties, to shelve the file, or to open a Phase II investigation if the transaction could impede effective competition.

Phase II investigations can last between two (basic period) to four months (due to the possibility to "stop the clock" in case additional information is required). At the

end of this period, the CNMC can clear the merger, or subject its approval to the fulfilment of specific commitments submitted by the notifying party or settled by the CNMC, or prohibit it.

In cases where the CNMC decides either to prohibit the transaction or to clear it subject to commitments or conditions, the Ministry of Economy may ask the government to decide whether to confirm the CNMC's decision or clear it, subject (or not) to commitments or conditions. In the case of clearance or modification of the commitments, the government's decision must be based on certain specified public interest criteria other than competition (*art. 10.4 CA*<sup>2</sup>).

The dispensation of CNMC judgements is on par with the European Commission average. A total of 93% of mergers are cleared at first stage, of which only between 2 and 3% are approved with remedies.

The mergers that go on to a second phase of assessment represent just 3% of total mergers; again, these are usually subject to a series of commitments or conditions. It should also be noted that 4% of mergers are shelved, in the main, due to withdrawal by the company concerned.

To facilitate the merger applications, the Competition Act introduced the possibility of short-form notification for straight forwarded cases that are unlikely to raise competition issues. It applies to concentrations when: there are no vertical or horizontal overlaps between the parties' activities; the activities carried out by the parties in the market affected by the transaction, due to their minor importance, are not capable of significantly affecting competi-

<sup>2</sup> In particular, the following shall be understood as such: a) defence and national security, b) protection of public security or public health, c) free movement of goods and services within the national territory, d) environment protection, e) promotion of technological research and development, f) guarantee of adequate maintenance of the objectives of sectorial regulation.

### FUNDING THROUGH ADVERTISING IN THE MEDIA SECTOR

In the media sector, advertising plays a significant role in the generation of turnover. The most extreme example are private free-to-air Spanish radio stations and TV channels, which are offered free of charge to the audience and are mostly financed through advertising revenues. On the other hand, pay TV operators have very low level advertisement revenues, as they usually use the lack of advertisement breaks as a marketing tool and their most important source of revenues are subscriptions charges.

In this context, when analyzing mergers that affect free-to-air TV, it is important to study the implications on the demand both of viewers and advertisers.

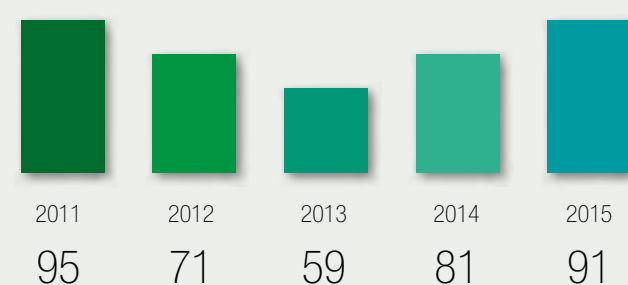
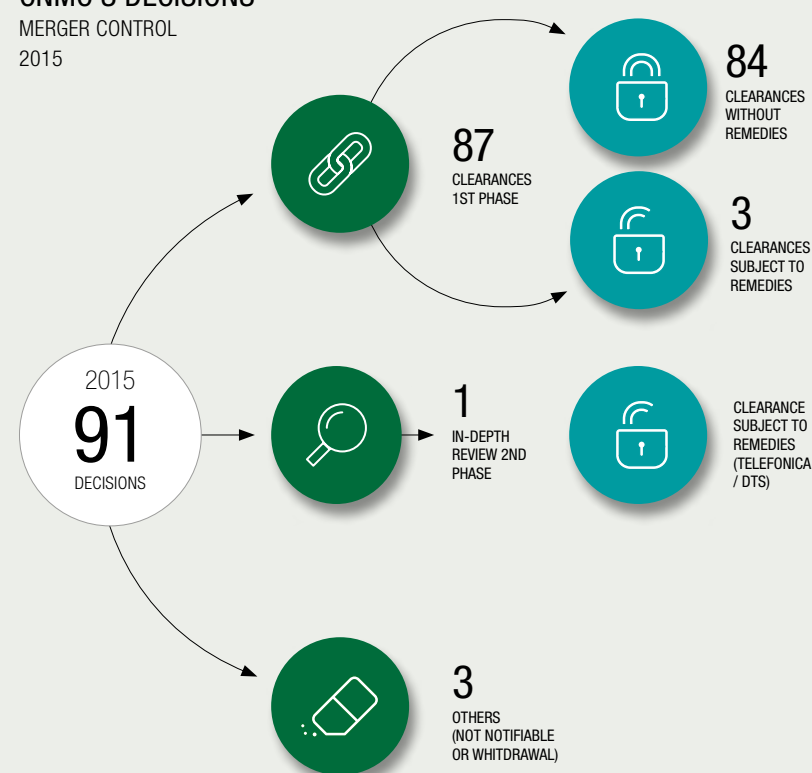
- Net advertising revenue 2014 per advertising medium (Selection).
- TV around 1.96 billion euros, of which less than 50 million euros belong to pay TV operators.
- Dailies around 619 million euros.
- Popular magazines around 250 million euros.
- Online offers over 1 billion euros.

Source: AEDE (National Association of Dailies' Editors), CNMC data and Statista.





## MERGERS NOTIFIED

CNMC'S DECISIONS  
MERGER CONTROL  
2015

tion; there is a change from joint to sole control; or two or more undertakings acquire joint control over a joint venture (provided that the joint venture has no or minimal activity in Spain).

For straightforward cases raising no issues, the CNMC tends to issue a decision prior to the expiry of the one month deadline for Phase I. In fact, the average timeline for a decision to be delivered by the CNMC is 21 days, providing that there are no commitments submitted by notifying parties that need to be assessed.

## Most significant mergers in recent years

Gas Natural/Unión Fenosa was among the more prominent mergers since it had a significant impact upon the Spanish electricity and gas sector. It was cleared at second stage with remedies in 2009.



Abertis/Axión was also worthy of mention in terms of its impact on the Spanish television broadcasting sector. The application was abandoned following its approval at second phase with remedies in 2009.

With regard to the TV advertising sector, the Telecinco/Cuatro merger was of particular relevance. It was authorised at second phase subject to a series of remedies in 2010. Similarly, the Antena 3/La Sexta merger was approved at second phase with remedies in 2012. Antena 3 / La Sexta was the only merger process in which the government used its veto and intervened to temper the remedies imposed by the Competition Authority.

The merger between Telefónica and DTS in the pay-tv sector was also significant. Telefonica's first attempt at joint control over DTS was dropped in 2010 following a series of objections by the CNMC at second phase. That said, Telefonica's sole-control acquisition of DTS in 2015 did go ahead, after being cleared at second phase with remedies set in place by the CNMC.

Moving on to the financial sector, the Redsys/Redy merger was an important transaction in terms of its impact on digital payment services. It was approved at second phase with remedies in 2011.

Other significant merger was Global/Orizonia in the tourist accommodation and transportation sector. This particular merger, however, was discarded at second phase in 2013 following objections put forward by the Competition Authority.

The CNMC also places great importance on the monitoring of commitments or conditions which a merger's clearance has been subject to. Between 2011 and 2015, Telecinco, Antena 3 and Redsys were fined for infringement of some of the previously cited commitments and conditions that they were required to fulfil.

## MERGER CONTROL: EUROPEAN COMMISSION OR CNMC?

- Accountability according to volume of turnover.
- Benchmark: The EU Commission is the competent authority in those cases where the combined turnover of all the companies involved is greater than 5,000 million euros.
- Possible referral in the following scenarios:
  - Commission to Member State: Threat of restriction of competition affects a separate market in the Member State.
  - Member State to Commission: The project would otherwise have to be examined in at least three Member States.







## Advocacy Department

The CNMC aims to provide a backdrop for a competitive environment and to promote efficient economic regulation throughout the diverse economic sectors of the Spanish economy. These accountabilities are carried out by the Competition Advocacy Department through promotion, dissemination, training and analysis, as well as by issuing recommendations for legislative improvements, and, by encouraging public authorities to adopt a pro-competitive stance. The Competition Advocacy Department comprises three Units: Market Studies, Public Aid and Draft Regulation and Economic Analysis Unit. The Competition Advocacy Director is Antonio Maudes Gutiérrez.

### Sector Inquiries

Since 1989, the CNMC has been able to conduct so-called sectorial inquiries in order to further examine the status quo of competition throughout individual sectors and branches of the economy, irrespective of on-going individual proceedings. Sectorial studies and reports are not targeted at individual companies, nor do they follow up on specific leads alluding to the existence of a cartel. Their remit is that of gathering comprehensive information throughout the markets concerned.

The above reports bring together a policy framework and an evaluation of company conduct and economic factors within the implicated sectors. Its premise is to impart advice to public administration and sectorial representatives so as to foster competition and a more efficient best-practice, in turn benefitting the end customer. The CNMC can suggest regulation changes and reviews, put forward explanations and pertinent advice to the relevant economic representatives and public administration sectors. The aim of the initiative is that of eradicating obstacles, brought about by the very sectorial rep-

resentatives and administrative bodies that may compromise competition. Furthermore, the greater understanding of the market through the varying sectorial investigations is also invaluable to the CNMC in other proceedings.

Three sectorial reports were published in 2015.

### Recommendations and Guidelines

The recommendations and guidelines are aimed at the public administration, economic entities, industry and the end consumer. They are designed to be a clear, concise, accessible document covering specific aspects regarding the defence of competition, and, at the same time, geared towards being educational, promotional and informative.

### Draft regulation reports

Draft Regulation Reports (Informes sobre Proyectos Normativos –IPN) look at the effects of legal and statutory rulings affecting competition. Usually, the analysis of such rulings is carried out prior to their final passing (prior verification, by means of a Draft Regulation Report). Additionally, the CNMC occasionally assesses the potential impact of the legislation, which has already been passed through the Position Reports (Propuestas de modificaciones normativas- PRO), in terms of its impact on competition. Through these reports, the CNMC is able to evaluate, and where appropriate, propose more favourable alternatives for the effective function of competition and economic regulation.

### Challenge in administrative proceedings

The CNMC Board, at the proposal of the Advocacy Department, is empowered to contest certain governmental administrative acts and regulations before an administrative judiciary, should they be deemed a compromise to healthy competition in the marketplace.

*“The Advocacy Department is entitled to foster a competitive environment and to promote efficient economic regulation through promotion, dissemination and analysis, as well as by issuing recommendations and encouraging public authorities to adopt a pro-competitive stance”*







## Legal Department

The Legal Department is the CNMC's internal and horizontal legal advisory unit. It operates under the CNMC Board's authority and reports directly to the Board Secretariat. Given the complexity and scope of the CNMC the function, its in-house legal department provides an extensive horizontal service as adviser, not only in areas of competition but also in sectors such as Energy, Telecom, Audiovisual, Transport, Postal Service and Unity Market issues.

It is split into different areas of expertise that either directly support a specific CNMC directorate or support CNMC activities as a whole.

### Internal Legal Advice

The Legal Departments major function is to provide legal counsel to the CNMC Board, the Competition Directorate, and other CNMC directorates.

The provision of such legal advice safeguards the legitimacy of CNMC decisions and plays a key role in preventing or reducing the risk of further annulments of CNMC's decisions. The Legal Department advises the CNMC and its staff on issues pertaining to law and competition policy, thus ensuring CNMC compliance with statutes and regulations, such as the *Administrative Procedure Act*, the *Freedom of Information Act*, *Public Procurement Act*, and the CNMC *Internal Rules of Procedure*, and, finally, the *Competition Act*.



Other key functions within the Legal Department remit is that of providing advice and compiling proposals concerning the resolution of appeals against administrative acts and CNMC decisions, mainly from the Competition Directorate. Furthermore, it plays an important role in ensuring appropriate and fair conduct in terms of infringement procedure.

Aside from the above, the Legal Department deals with a variety of CNMC internal legal affairs: procurement procedures initiated by the CNMC; contracts and collaboration agreements concluded by the CNMC, tort claims lodged against CNMC Board acts or decisions, as well as arbitration.

*"The Legal Departments major function is to provide legal counsel to the CNMC Board, the Competition Directorate and other CNMC directorates in order to safeguard the legitimacy of CNMC decisions"*

### The CNMC and the Courts

The Legal Department coordinates CNMC's relations with the Courts. That said, it does not represent the CNMC in court, due to the fact that the Public Counsel Office/State Legal Service oversees all litigation issues involving the CNMC.

The Legal Department does, however, cooperate closely with the State Legal Department with regard to upholding CNMC decisions. Given the complexity and innate expertise of the Legal Department as regards CNMC decisions, and applying Competition Law, it is able to provide the Public Counsel Office with comprehensive reports on any given case, specifically those of a more complex nature, and, with particular emphasis on those elements of a case that all go towards providing a better defense of CNMC decisions before Administrative Courts.

In some appeal cases, the intervention of the legal department has been pivotal in terms of their support of the CNMC, especially where the outcome of a particular case has been critical for the CNMC.

The Legal Department supplies advice and assistance in other litigation activities, in direct cooperation with Courts, including actions for damages for infringements of competition laws and preparing *amicus curiae* briefs authorized by the CNMC Board.

### Collaboration with EU Institutions

The Legal Department plays a key role in assisting the CNMC in notifying the EU Commission of relevant matter in accordance with Article 101 or Article 102 of the Treaty, in the framework of Article 11.4 of Regulation 1/2003. The Legal Department is also in charge of providing the EU Commission with a copy of the non-confidential version of any national court judgment in the application of Article 101 or 102 TFEU.

The Legal Department manages the CNMC position as regards preliminary rulings of the ECJ (European Court of Justice) in their close ties in matters concerning Competition Law, both detecting cases of interest for the CNMC and compiling drafts that outline the CNMC position within the legal framework that also provides for the intervention by the Kingdom of Spain in the above procedures.

### Other

The Legal Department is responsible for keeping abreast of legislation pertaining to the CNMC and Competition Law and proposing the necessary amendments within the CNMC scope of responsibilities.

The Legal Department is required to issue a legal report on proposals both for internal instructions and guidelines for market operators.

In addition, the Legal Department handles issues relating to the Freedom of Information Act (appeals): requests by courts and third parties for access to non-public documents; requests for the confidential handling of sensitive documents or data submitted to the CNMC Board.

The Director of the Legal Department is appointed by the CNMC Board, at the behest of the President. The Legal Department is currently chaired by Joaquim Hortalà i Vallvé.

### RULING BY THE SUPREME COURT ON CNMC GUIDELINES FOR SETTING FINES. (29TH JANUARY 2015)

- Pursuant to the Competition Act, serious undertaking infringements may be liable for of up to 10 % of the combined turnover of the undertaking concerned.
- The National High Court (Audiencia Nacional) maintains that 10% of a company's turnover, upon which Spanish law sets the maximum fine, must be calculated on the actual turnover within the affected market in question.
- The Supreme Court remedied the aforementioned position maintaining that the aforesaid 10% must be calculated on the total turnover of the implicated company.
- Furthermore, the Supreme Court specified that the amount of the fine must be calibrated and calculated using a penalty scale, as provided for in law, which ranges from zero to 10% of the implicated company's total turnover.
- As a result, the Supreme Court was of the view that the guidelines used by the CNMC for calculating fines strays from this legal base, and therefore, are not valid.
- Notwithstanding, the Supreme Court stressed however, the importance of the fines, insofar as their effectiveness as an on-going tool of deterrence. It went on to state that infringements should be counterproductive and highlighted the value of exploring other preventative channels open to authorities. (Fines on executives or claims for damages).







## Judicial review

Undertakings have several opportunities for appeal or judicial review of all decisions on competitive matters. Decision of the Competition Directorate can be appealed to the CNMC Board (provided that certain conditions are met), and decisions of the CNMC Board can be challenged before the National High Court (Audiencia Nacional).

### Appeals before the Courts

The CNMC Board Decisions can be challenged on the following grounds: through an ordinary administrative procedure for any contestation arising from judicial error or on protection of citizens' fundamental rights through special civil proceedings.

Similarly, appellants have additional legal recourse, insofar as they can appeal CNMC decisions, which have been upheld by the National High Court, before the Supreme Court (Tribunal Supremo) (reviewed in cassation).

Appellants can also ask for the suspension of the CNMC's resolution execution, a request that is usually admitted by the courts, exclusively, in respect of fulfilment of the fine and usually subjected to sufficient guarantee. This means that, in general, the fines imposed for breach of Competition Law in Spain are not usually paid by the undertakings until a period of two to four years has passed (approximately the same amount of time that the judicial review process takes) from the moment the CNMC adopts a penalty resolution.

Decisions adopted by the Competition Directorate (accountable body for overseeing formal proceedings) can be appealed before the CNMC board in those cases where an irreparable damage or grounds for legal defencelessness exist. In such cases, an appellant may also challenge a CNMC board resolution before the National High Court.



### Judicial Review results

Over recent years, the majority of CNMC decisions, which have come before the Supreme Court or the National High Court, have generally been confirmed.

Furthermore, the judicial review of the CNMC's work regarding competition enforcement during 2015 resulted in the Supreme Court pronouncing on 91 judgements arising from a total of 39 Competition Authority decisions. The Supreme Court has overruled 9 of the 91 cases (10%). It should be mentioned that the majority of the nullified or amended CNMC's resolutions referred to the quantification of fines; shortcomings with regard to on-site inspections; and, more recently, annulments due to the expiry of procedures.

Conversely, the existence of the anti-competitive infringements and accountability of those committing them, as well as CNMC procedural issues are usually acknowledged by the appeal courts.

*"The majority of CNMC decisions, which have come before the Supreme Court have generally been confirmed"*







## International cooperation

CNMC international cooperation activity has been primarily focused on fostering relations with neighbouring and Latin American counterparts.

Within the European Union, it is important to mention the vital role of the European Competition Network (ECN) and the European Competition Authorities' framework (ECA), a discussion forum for competition authorities across Europe.

As part of the CNMC's on-going international partnerships, the bilateral relations with European counterparts also forms a key part of international activity. In this respect is worth mentioning the *Iberian Competition Forum*, an annual meeting between the CNMC and the Portuguese Competition Authority in operation for more than ten years, and, more recently the bilateral meeting with our French counterparts, launched in 2015.

Beyond the European Union, the CNMC is actively involved in other international forums, such as the Organisation for Economic Co-operation and Development (OECD), International Competition Network (ICN), and the United Nations Conference on Trade and Development (UNCTAD).

The CNMC also works closely alongside other competition authorities in areas where Spain has enjoyed close, historic ties, such as Latin America, organising training courses (*Escuela Iberoamericana de Competencia* -Latin American School of Competition); attending and taking part in conferences; or bilateral technical assistance programmes.

Through this active participation, it has been possible to strengthen partnerships and exchange best-practice methods between our counterparts.

### European Union

#### European Competition Network

Aside from setting forth the varying functions of the CNMC, article 19 of the CNMC organic regulation also encompasses the working partnership with the European Commission (EC) and member-state competition authorities of the European Union. It involves congregating various groups in a variety of settings: assisting committees, working groups and meetings of assembled professionals, pursuant to Council Regulation (EC)n° 139/2004 of January 20 2004 in relation to Merger Regulation and (-EU) Regulation n° 1/2003 December 16 2002 on implementation of articles 101 and 102 of the Treaty (TFEU). Within this setting, the CNMC has been ever present in European endeavours throughout 2015.

The European Competition Network (ECN) is an important bridge that offers a working partnership between the European Union competition authorities, including the European Commission (EC). The ECN strives to harmonise the implementation of competition legislation, working procedures, communication methods and information systems.

The CNMC participates in preliminary works alongside the ECN in areas including the assessment of EC directives regarding the implementation of competition legislation and the modification of Commission legislation and proceedings. Recently, the CNMC has co-operated with the Directorate-General for Competition at the EC (DG-COMP) as part of a preliminary steering group in the compilation of a draft for subsequent public consultation entitled '*Empowering the National Competition Authorities to be more effective enforcers*', launched by DGCOMP in November 2015.

*"CNMC international competition activity has been primarily focused on fostering relations with European partners (ECN) and Latin American counterparts, playing an active role in international forums such as OECD and ICN"*



### Latin America

The CNMC is actively engaged in this region through its presence at the Latin American Competition Forum (*Foro Latinoamericano de Competencia*), a joint collaboration between the OECD (Organisation for Economic Cooperation and Development) and the Inter-American Development Bank (IDB). It seeks to drive policy implementation apropos the defence of competition in Latin America and the Caribbean.

Following shortly after the Latin American Forum, the CNMC and the Portuguese Competition Authority typically hold the Iberoamerican Competition Forum, dedicated to strengthening ties with the Latin American authorities.

One area in which the CNMC has had a particular impact in this region is through the Iberoamerican Competition School (*Escuela Iberoamericana de Competencia*).

The School was launched in 2001 with the aim of being a backdrop for the technical training of civil servants working in competition authorities in Latin America. In 2016, the XIII Conference of the Iberoamerican Competition School was held, co-hosted by the Inter-American Development Bank.

Throughout these events, more than 500 competition authority professionals from the region have been trained and professional and human interactions have been forged among them. This has resulted in a smoother, more coordinated involvement in what is considered a key, economic policy tool for the countries involved.

### Additional Activity

#### International Competition Network (ICN)

At international level the national competition authorities work together within the International Competition Network (ICN). With almost 130 competition

authorities it is the most important association of competition authorities worldwide. The CNMC has actively participated in the different workshops and activities organised by the ICN along the years, sharing its experience with other member authorities.

#### OECD

CNMC has actively participated in the activities of the OECD Competition Committee and its working groups.

This committee aims to protect and promote competition as a guiding principle of all modern economies and allows the meeting of the competition authorities of the 34 OECD member countries along with the EC.

At the June 2015 meetings of the Committee and its working groups the CNMC participated with a presentation of its 2014 annual report and written contributions on "Competitive Neutrality" and "Liner Shipping".

### Others

Additionally, the CNMC has carried out several actions aimed at strengthening bilateral ties with other competition authorities as well as CNMC cooperation with multilateral organizations and contributing to the international dissemination of best practices in competition.

Below are some examples of these CNMC's activities:

- Joint organisation of the second workshop on "Investigative Techniques in Competition and Consumer Protection" in Cartagena de Indias, Colombia, along with the Spanish Agency for International Cooperation (AECID) and the COMPAL/UNCTAD.
- Workshop on mergers organised by CADE and the European Commission.
- MOU between CNMC and the Inter-American Development Bank (IDB).

### COOPERATION WITH EUROPE IN FIGURES

- Prior to December 2015 the ECN Network was informed of 2,066 cases, of which 907 were NCA's envisage decisions cases. Among them, 101 were CNMC's cases.
- In 2015 the CNMC ruled on 8 sanctioning decisions pursuant to articles 101/102 TFEU in conjunction with art. 1/2 LDC (Spanish Competition Law).
- Total fines imposed in 2015 pursuant to articles 101/102 TFEU: 368 million euros.
- Official assistance in 153 cases (Art. 101/102).
- Exchange of confidential information in 6 cases (Art. 101/102) in 2014-2015.
- Up until 2015, the CNMC has taken part in 14 DGCOMP dawn raids. The CNMC has requested other NCAs for simultaneous dawn raids on their respective territories on two occasions and has been requested once.
- In 2015, around 165 mergers were examined by several national authorities. The authorities kept one another informed of notification dates, as well as sharing contact details of individual case supervisors. The CNMC was involved in around 19 cases.







## Information Technology

The Information and Communications Technology Department is a specialised, information technology unit that provides support to all CNMC departments. The unit is responsible for the implementation and on-going support of all the Competition Authority's IT in-



### SOFTWARE APPLICATIONS FOR DAWN RAIDS

Aside from in-house applications, the CNMC also uses commercially-designed programs, thus providing a two-pronged approach in their use. In this way, the CNMC develops applications, employing them alongside tried-and-tested commercial operating systems: indexing systems, search and filter engines, text recognition and other applications that are accessed via APIs (Application Programming Interfaces). This in turn further enhances and tailors those commercial software functions that are best suited to the Competition Authority's investigative and inspection procedure.

frastructure, such as data processing centres, data bases, server storage facilities, perimeter security, printing and supply store of portable devices (tablets, laptops and PDA's).

The unit is also entrusted with the development and maintenance of all the software applications that are used within the CNMC.

### Support in Dawn Raids

With regard to the impressive efforts employed by the CNMC in their fight against cartels and other anticompetitive undertakings, the IT support unit works very closely with the Competition Directorate during on-site inspections. The unit provides, on average, two IT specialists to work alongside an assigned inspection team. Through this, the specialists are able to get an understanding of the case in question and participate in preliminary meetings about a company earmarked for inspection.

The IT unit and the Competition Directorate jointly compile a catalogue of search criterion to be used during inspections alongside software tools specifically designed for such purposes.

Between 2013, when the CNMC first emerged, and 2015, the IT unit has dawn raided a total of 88 companies in collaboration with the Competition Directorate.

*"The IT support unit works very closely with the Competition Directorate during on-site inspections. It uses various forensic examination tools, some of which are available on the market, and others which are developed in-house by the IT Department, all tailored to meet the needs of the inspection procedure and the legalities that such operations entail. These applications are developed in close collaboration with the competition inspectors"*

During these inspections, the IT unit uses various forensic examination tools, some of which are available on the market, and others which are developed in-house by the IT department, all tailored to meet the needs of the inspection procedure and the legalities that such operations entail.

These applications are developed in close collaboration with the competition inspectors.



### WECO: A powerful programme for digital handling of files

Aside from the integration of technology within the CNMC and the close collaboration among the different departments, the IT unit also oversees the running of a powerful programme (WECO) for digital handling of files.

This program is fully capable of processing up to 60,000 documents digitally that can encompass some 100 implicated companies or more belonging to a case. It handles confidential information, digital signature, online notifications and automated document templates and deadline/term calculation.

Furthermore, it provides digital access to any party concerned wishing to view a case online.

### CNMC "Virtual Office"

The CNMC has an operational web-based platform that allows businesses 24-7 digital access in order to streamline administrative procedures for the general public.

It enables anyone in possession of an electronic user certificate (identity) to present a document digitally before the Competition Authority.

It guarantees both the CNMC and the registrants a record of the day, hour, an identity of the person presenting a document and the nature of the communication.

It is designed as a fast-track process, for administrative procedures such as merger notifications, responses to requests for information, and submission of leniency applications.

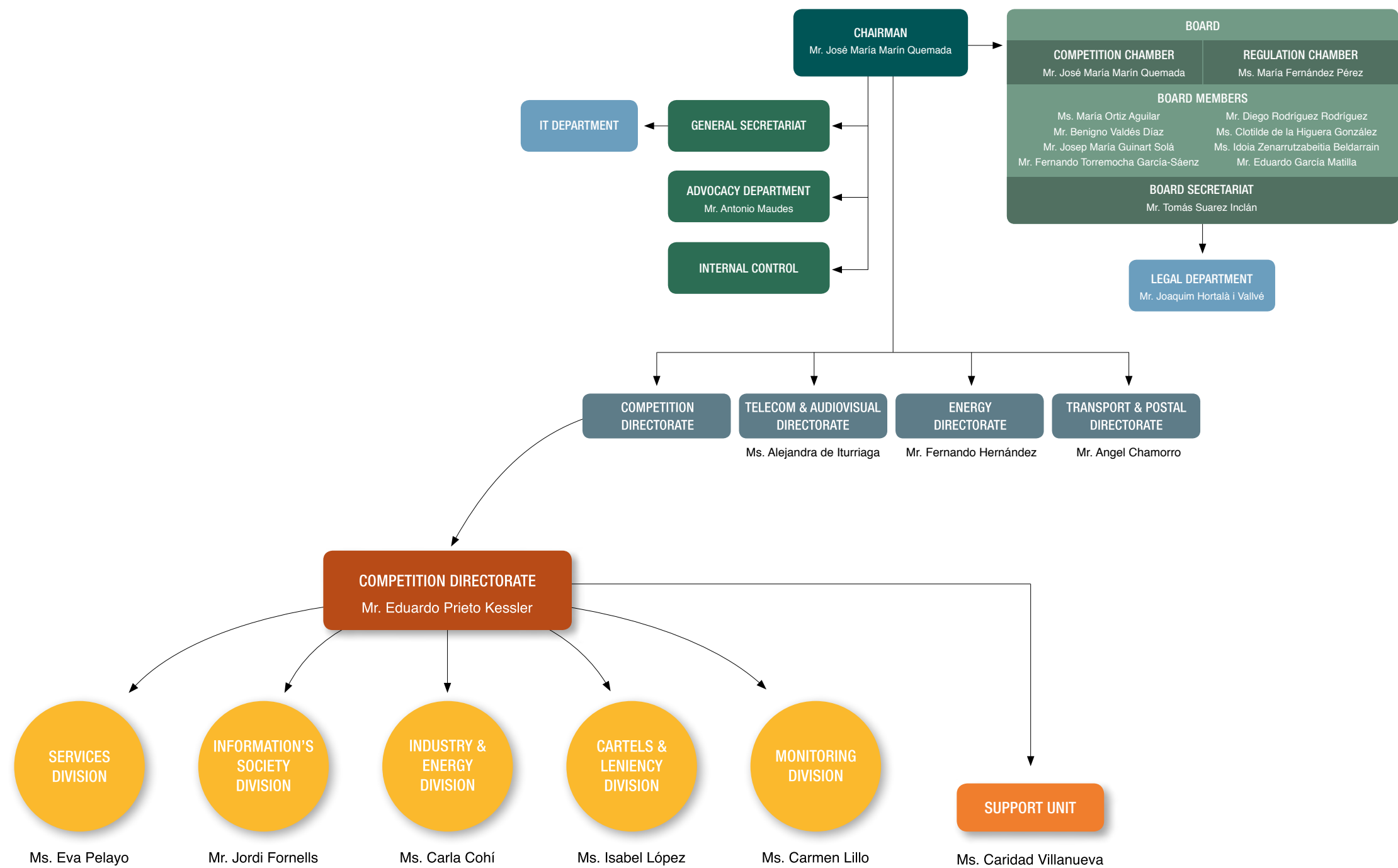
### WECO

The CNMC has developed a system for handling competition proceedings and the relevant documentation it generates in order to ensure that they are carried out with due diligence. The software, which was originally designed to store all documentation pertaining to a procedural case, is constantly evolving, and currently meets the CNMC's IT needs in a variety of ways:

- Auto - document search by subject.
- Deadline or term calculation.
- Publication on the web of reference cases in real time.
- List and export data electronically all accessible documentation for a particular company (according to confidentiality limitations).
- Auto - generation of specific documents.
- Compilation of time series reports, statistics and charts.
- The sending of key, up-to-date information via a system of message alerts to inspectors as an on-going case develops.



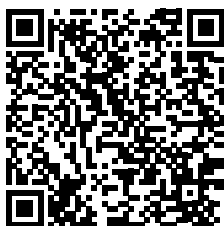
# Organisation Chart



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MERCADOS Y LA COMPETENCIA