

GCP

THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

The New Spanish Competition System

Carlos Pascual Pons

National Competition Commission, Spain

The New Spanish Competition System

Carlos Pascual Pons*

I. REASONS FOR REFORM

The new Spanish Competition Act (Act 15/2007 of July 3, 2007 or the “Act”), which was unanimously approved by the Spanish Parliament and came into force on the first of September 2007, introduces significant modifications to the system applied to date. This Act builds on the system designed by the 1989 Act,¹ largely drawing on the experience gained at the Community and national level during the last two decades.

The reform stems from the need to face national and European legislation changes. At a national level, a number of complementary regulations had been enacted, such as the Act 1/2002, dated February 21, concerning the Coordination of the Competences of the State and the Regional Governments on antitrust matters. This Act was the result of a Constitutional Court Ruling,² and sets an allocation scheme of responsibilities where no overlapping is allowed.

* The author is General Director for Investigations at the National Competition Commission, Spain.

¹ NATIONAL COMPETITION COMMISSION, SPAIN, THE COMPETITION ACT 16/1989 (Jul. 17, 1989).

² Constitutional Court Ruling, November 11, 1999, in which it is acknowledged that the defense of competition is not expressly attributed to the State by the Constitution, and therefore, it may be exercised by the autonomous communities by virtue of their respective statutes. The Court considers in its ruling that the “interior trade” includes the competence related to “defence of competition” and due to the fact that the regional statutes have regulated this matter, they also have attributions in issues related to the defense of competition, although restricted to the executive level, being the legislative and coordination levels a competence of the State.

Moreover, over the last few years, a significant reform has taken place in the EU antitrust framework which has resulted in the new Council Regulation (EC) No. 139/2004, of January 20, 2004, on merger control and, above all, in the modernization of the fight against anticompetitive practices based on the Council Regulation (EC) No. 1/2003, of December 16, 2002, and on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The latter set up a new distribution of responsibilities among the European Commission, national authorities, and national courts (national judicial bodies). On the other hand, the modernization brings about a new legal exemption system that substitutes the former regime of individual authorizations.

In this context, the reform takes into account the evolution of the Spanish economy marked by a significant transformation of its market structure, from certain public monopolies to free competition, after a process of privatization, liberalization, and deregulation, in order to achieve a competitive environment. To achieve effective market competition, the role played over the last fifteen years by the competition authorities has been vital. This role has operated through a dual and complementary approach. On the one hand, a certain deterrent capability has been created either by sanctioning anticompetitive practices, mainly after parties' complaints, or by hindering the appearance of anticompetitive market structures, through the blocking or conditioning of relevant concentrations. On the other hand, authorities had somehow pursued an offensive advocacy approach³ when it came to the design of the liberalization processes and the guarantee that these processes were correctly directed towards free competition.

³ At this respect, the former Competition Tribunal exercised a decisive influence in the 1990's liberalization processes throughout its reports. *See* COMPETITION TRIBUNAL, POLITICAL REMEDIES THAT

The reform is also the result of an intense consultation exercise with regards to the drawbacks and achievements of the system based on the previous Act. Although globally the valuation of the previous system has been positive, the model showed some weaknesses which shed light on the need of reform. Thus, similar to the systems applied by other countries, a reform of the institutional framework to ensure the promotion of effective competition in every area of society was needed to allow authorities to focus their activities in the fight against the more harmful anticompetitive practices.

In order to achieve this goal, the new Act provides new tools and strengthens the mechanisms which already existed. It is guided by major principles such as: the guarantee of legal certainty, independence, transparency and responsibility, efficiency in the fight against anticompetitive practices and the quest for coherency throughout the system, and, in particular, the adequate coordination of the different interacting institutional instances.

II. KEY CHANGES

A. Institutional Reform

The keystone of the reform is the integration of the two institutions that until that time had been responsible for the public enforcement of competition law: the Competition Service (“Servicio de Defensa de la Competencia” or “SDC”) and the Competition Court (“Tribunal de Defensa de la Competencia” or “TDC”). These two bodies are now merged into a single authority: the National Competition Commission (“Comisión Nacional de la Competencia” or “CNC”).

MAY FAVOR FREE COMPETITION IN SERVICES AND MAY HELP TO TACKLE THE DAMAGES CAUSED BY THE MONOPOLIES (1993) and THE COMPETITION IN SPAIN: SITUATION AND NEW PROPOSALS (1995), *available at* <http://www.cncompetencia.es>.

The creation of a unified institution, as it has been the case in a large number of EU members, provides many advantages in the efficient use of public resources and helps to optimize synergies. The new model, however, maintains the separation between the investigation phase and the decision-making phase of the proceedings. The Directorate of Investigation of the CNC assumes responsibility for the investigation phase, whereas the Council of the CNC remains responsible for making the final decisions. The Council has seven members, the Chairman and six members, who are elected for a non-renewable term of six years.

The model guarantees the independence from the government when making decisions. The involvement of the Government in the new procedure, especially in merger control, has been almost eliminated. Under the previous model, the Minister of Economy (first phase) or the Council of Ministers (second phase) were responsible for merger control. Now, these responsibilities are delegated to the Council of the CNC and the role of the Council of Ministers is limited to modify second phase prohibited or conditioned decisions,⁴ but its intervention must be based on general interest criteria and not on competition arguments. The new system takes into account all of the administrative bodies with competences to apply the new Act. Responsibilities of the regional competition authorities have been enlarged, with the capacity to release a non-binding compulsory report, in the case of a merger with a significant impact in their respective territory. But, undoubtedly, the essential difference of this Act is that the civil

⁴ This is provided that there has been a previous compulsory, but non-binding ruling by the Competition Court. Nevertheless, the jurisprudence emanated from the Supreme Court established that if the Council of Minister does not respect the Competition Court ruling, it has to motivate its decision

courts have been empowered to apply Articles 1 and 2 of the Act.⁵ Previously, judicial bodies could only admit damages claims under national competition law once the administrative resolution was definite.⁶

Although the involvement of administrative and judiciary bodies could amplify the risk of contradictory decisions, it also may help to improve the efficiency of the whole system, since each body, given its situation and resources, can focus on those cases for which it is better placed. Therefore, the scarce resources can be easier applied to the cases with a major impact in the market.

In any case, the Act designs coordination mechanisms to minimize this divergence risk. In particular, the new Act clarifies the participation of national and EU competition bodies as “amicus curiae” in judicial proceedings where competition law is applied. The new model also provides for the possible suspension of the judicial proceedings when the court becomes aware of the existence of an administrative proceeding before the European Commission, the CNC, or the competent bodies of the regional competition authorities, and when the judge deems it necessary for its decision to know the decision of the administrative body.⁷

Thus, the new model provides efficiency and coherence to the system, as well as the adequate coordination of the different institutional levels interacting in this field.

⁵ These articles are equivalent to Articles 81 and 82 of the EC Treaty.

⁶ Courts were nevertheless empowered by the EC Council Regulation No. 1/2003 to apply Articles 81 and 82 of the EC Treaty.

⁷ Under EC law, Council Regulation No. 1/2003 calls on the national judiciary courts to avoid adopting resolutions that are incompatible with decisions already adopted by the Commission.

B. Substantive Aspects

The new Act seeks to reform the Spanish antitrust system with the aim to endow it with the optimal tools necessary to protect effective competition in the markets, improving the capabilities of the authorities to battle against the most harmful practices.

1. Prohibited practices

Battling against prohibited conducts implies that the authorities' actions have to fulfill two complimentary objectives: to deter future anticompetitive practices and to mitigate the negative effects of past practices. Nevertheless, to deter anticompetitive practices, the authorities encountered some obstacles, in particular when detecting, prosecuting, and sanctioning those practices. Given its experience in the application of the former Act and with the experiences of other EU Member State authorities in mind, Spanish authorities decided to allow for a more efficient use of their resources and actions towards the persecution of the most harmful practices, gaining certain capacity to set priorities. One step in this direction has been the move from a regime of individual authorizations towards a legal exemption system. This new system excludes from the prohibition those agreements which meet certain requirements, so it entails self-assessment by the companies to evaluate whether their agreements meet those requirements, abandoning the previous bureaucratic and burdensome authorization procedure. The reform has also introduced the direct exemption of "de minimis conducts," understood to be those which, due to their minor importance, are not likely to affect competition. Among these conducts, the Act identifies:

- (a) conduct between competing companies, when the combined market share does not exceed 10 percent in any affected relevant market; and
- (b) conduct between non-competing companies, when their individual market shares do not exceed 15 percent in any affected relevant market.

Given that one of the main obstacles faced by the competition authorities is to prosecute or to prove the existence of illicit facts, the investigative powers of the CNC have been considerably increased. Now, the authority's inspectors have the right to request access not only to an investigated company's premises, but also to the private homes of managers when there is significant likelihood of finding evidence to prove serious or very serious infringements.

The reinforcement of inspection capabilities has been followed by an increase in the investigation work of the CNC, fostering ex-officio investigations and launching more dawn raids.

The introduction of a leniency procedure is perhaps the most important novelty of this reform. The new leniency system came into force in February 2008 and is modeled according to the ECN Leniency Programme already in force in many EU Members States. It provides for the exemption of the payment of the fine for those undertakings which, having formed part of a cartel and meeting certain requirements, are the first to acknowledge its existence and provide substantive evidence for the authorities to carry on an inspection or to prove an infringement of Article 1 in connection with that cartel. Likewise, the amount of the fine may be reduced for those undertakings which, even

though they do not meet the requirements for total exemption, collaborate and provide evidence of significant added value in the terms regulated by law.

The introduction of a leniency procedure entails a significant step forward concerning evidence gathering by competition authorities, since reduced sanctions attract offenders to provide valuable information, and thus inspections are better oriented.

Complementary to the leniency program, the sanctioning regime has been improved: transparency with regard to potential fines has been increased, the different types of infringement have been precisely defined, and the sanctions have been proportionately graduated on the basis of the gravity of the infringement. The maximum fine remains at 10 percent of the total turnover of the infringing undertaking.

Besides the leniency and sanctioning activities, authorities seek to mitigate the damage caused by a harmful practice to competition and to restore previous competition conditions. Although a damages compensation system is the most common mechanism to restore the damage caused, only judicial courts can apply it.⁸ The new law improves the role and capabilities of courts when awarding damages on competition law. However, authorities may use other tools to restore competition situation, such as interim measures, commitment decisions, or structural conditions, which are instruments that the reform has enhanced. With regard to interim measures, the reform introduces flexibility and speeds up the system for their adoption, which may take place at any moment of the proceedings and without a maximum duration requirement.

⁸ EUROPEAN COMMISSION, WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES, COM(2008) 165 final (Apr. 3, 2008), *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

The commitment decision proceeding has also been improved. This mechanism implies the termination of the sanctioning proceedings when the alleged offenders propose commitments that resolve, in the opinion of the authority, the anticompetitive effects on competition derived from the conduct and the public interest is sufficiently guaranteed. Although the Act sets that the commitments have to be communicated to the interested parties for them to be able to comment on, the fact is that the proceeding gains flexibility as the proposal for resolution may be adopted without the need to have the agreement of all interested parties.⁹

Imposing structural remedies for the infringement is also a new feature of the reform. Following the example of the Council Regulation (CE) No. 1/2003, the reform gives behavioral remedies preference over structural ones. Structural conditions may only be imposed in the absence of other equivalent effective behavioral conditions or when, despite the existence of these, they would be more burdensome for the undertaking in question than a structural condition.

Concerning the effectiveness of remedies, the reform brings about a significant improvement of the sanctioning system, because the non-fulfillment or compliance of obligations, resolutions, or commitments is now considered a very serious infringement, and the authority may impose a fine up to 10 percent of the total turnover of the infringing undertaking.

⁹ Under the previous regime, the agreements had to be adopted by the Director of the Competition Service and all of the interested parties.

Finally, the duration of the sanctioning proceedings has been reduced to a maximum of eighteen months (as opposed to twenty-four months under the previous system), which also speeds up the proceeding.

2. Merger control

With respect to merger control, the reform aims to clarify the previous toolkit and streamlines the proceedings in line with EU best practices. Thus, the Act unifies the assessment of joint ventures of a concentrative or cooperative nature. Moreover and with regards to the treatment of takeover bids, the new Act establishes that the suspension obligation only applies to the exercise of voting rights, and not to the own execution of the bid, allowing the offer to be launched and exercised.

The Spanish merger control system provides for a dual threshold: market share and turnover. In this respect, the market share threshold has been revised upwards from 25 to 30 percent, whereas the amount of the turnover threshold has been maintained.¹⁰ Nevertheless, a mechanism for the update of both thresholds is foreseen in the law. Moreover, a simplified and accelerated notification system is introduced with a reduced fee for the following cases:

- when no horizontal or vertical overlapping exists;
- when the combined market share is below 15 percent;
- when the individual or combined market share is below 25 percent in vertically related markets;
- when a party acquires the exclusive control of one or more undertakings or parts of an undertaking over which it already has joint control; or

¹⁰ Global turnover in Spain for all of the participants in the last accounting year exceeds the amount of EUR 240 million, providing that at least two of the participants achieve an individual turnover in Spain of more than EUR 60 million.

- when, given that it is a joint venture, it does not carry out nor does it plan to carry out activities in Spain or when these activities are marginal (below EUR 6 million).

The reform introduces and encourages, in line with the Community practice, the possibility to formulate prenotification contacts, prior to the filling of the notification, in order to clarify formal or substantive questions.

Furthermore, the reform clearly specifies the criteria of substantive assessment to be taken into account by the CNC to evaluate the notified operations. Undoubtedly, this helps to reinforce legal certainty. In the same way, the new Act also specifies the criteria of general interest, other than protecting competition, on which the Council of Ministers intervention may be based, in particular, defense and national security, protection of public security or public health, free movement of goods and services within the national territory, environment protection, and promotion of research and development.

A further improvement consists of the possibility to clear transactions subject to commitments proposed by the parties, in the first or the second phase in order to minimize the risk attached to merger control decisions and to increase its effectiveness. On the other hand, this possibility could also favor a reduction on the number of disputes and appeals to be brought up by notifying parties.

In contrast to remedies in relation to anticompetitive practices, no preference is set between structural or behavioral remedies; however, structural remedies may be more suitable in most merger cases. In any event, the assessment has to be done on a case-by-case basis, and it has to be guided by the proportionality rule, and by the following basic

requirements: it has to remove completely and efficiently detected obstacles and be applicable in a short period of time. Given the risks attached to the design and execution of the remedies, the CNC follows the models and guidelines for disinvestments and trustee appointments as adopted by the European Commission.

In line with the Community proceeding, the reform introduces the obligation for the CNC in phase II to specify the obstacles to competition derived from the merger in a statement of objections which must be communicated to the interested parties. This implies an increase of transparency and legal certainty since undertakings will know the preliminary assessment before the final decision is made.

3. Promotion of competition

Promotion of competition (typically called “advocacy activities”) is another area where more new tools and responsibilities have been introduced, providing the competition authorities with a more proactive approach. The advocacy activities will be exercised through, among others, the traditional instruments such as market studies and state aid reports. The Act has even empowered the CNC with the legal capability to bring actions before the competent jurisdiction against any administrative acts and regulations which may involve restrictions to competition.

Promotion of competition is a complementary activity to the reinforcement of transparency and responsibility of the competition authorities for applying the Act with respect to society, leading to an increase in accountability. Thus, the CNC intends to publish all of its resolutions and agreements. This new legal requirement has led to an

increase in the number of decisions and information about CNC's activity being published. Moreover, the Chairman of the CNC must present the basic outlines of its current and future actions, plans, and priorities to Parliament's Finance Commission at least once a year.

III. PRIORITIES AND GOALS FOR 2008-2009 AND FIRST RESULTS

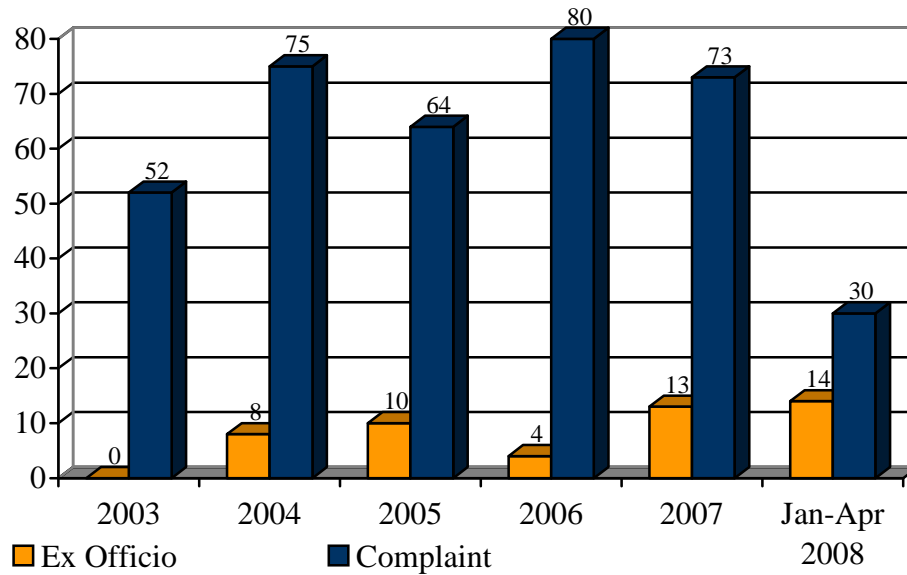
To carry out this mandate, the Chairman of the CNC appeared before the Parliament¹¹ and set out a basic outline of its actions. Afterwards, the outline and actions were gathered together in the National Competition Commission Launch Plan, which lays down the plans and priorities for 2008-2009.¹² Notably, the CNC provides substantial detail on how it plans to put the new instruments to work in its fight against prohibited conducts and in merger control.

Some results of the new Act can be put forward. The program received six leniency applications the first day it came into force and has received more since. On the other hand, there is an upward trend in the ex-officio investigations in contrast with actions initiated after a complaint, as illustrated in Figure 1. In just the first four months of 2008, the number of ex-officio proceedings initiated has exceeded the number of those initiated in 2007, accounting for almost 50 percent of all proceedings.

¹¹ The hearing took place on October 23, 2007, details *available at* <http://www.congreso.es>.

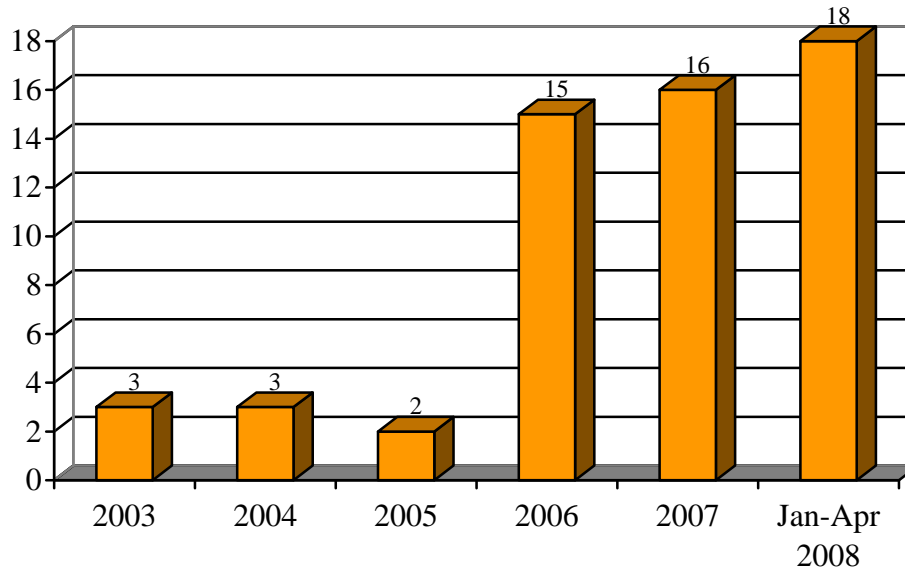
¹² NATIONAL COMPETITION COMMISSION, SPAIN, LAUNCH PLAN (2008), *available at* <http://www.cncompetencia.es>.

Figure 1. Initiated Proceedings



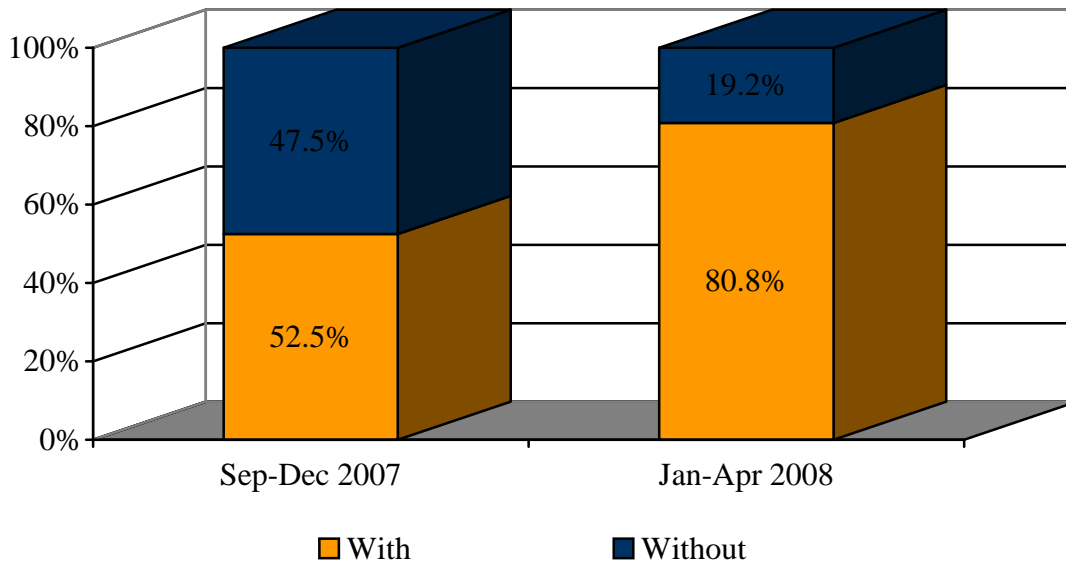
In addition, during the first four months of 2008, eighteen inspections have been carried out, whereas during all of 2007, just sixteen were carried out and eleven of those were under the new Act. Figure 2 illustrates the upward trend of dawn raids since the Act came into force.

Figure 2. Dawn Raids



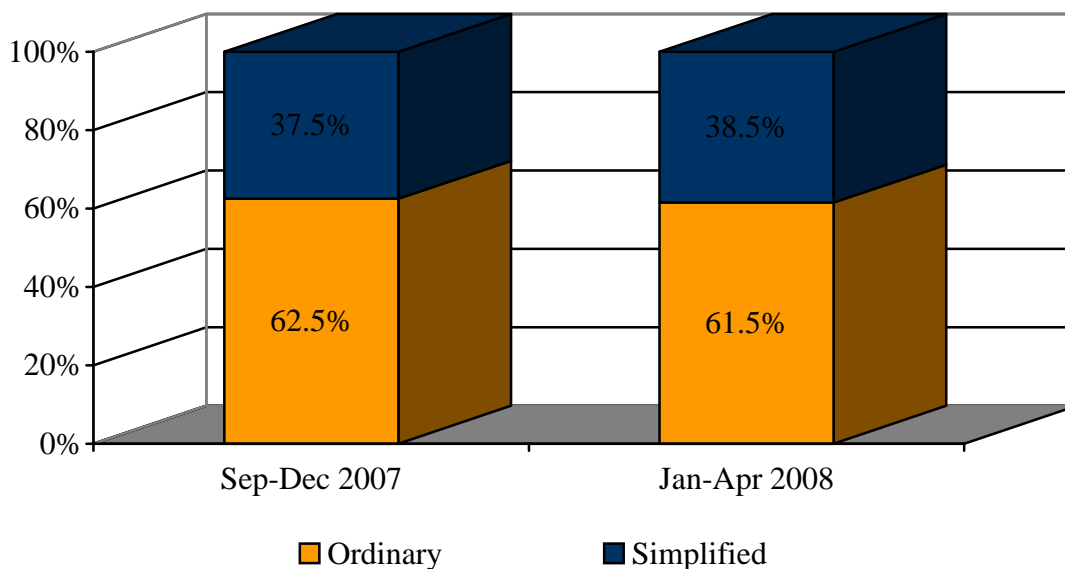
With regards to merger control, prenotifications, introduced in September 2007, have been welcomed by the market. During the first four months of 2008, nearly 81 percent of notified concentrations were preceded by prenotification contacts, as is shown in Figure 3.

Figure 3. Notifications With and Without Prenotification



Likewise, the new simplified procedure has been applied to a large number of notified mergers (see Figure 4), and it has been applied in almost 40 percent of all filled operations.

Figure 4. Ordinary versus Simplified Procedure



IV. SUMMARY AND NEXT STEPS

Going forward, the CNC will allocate its resources taking into account the importance of the problems analyzed according to the harm caused to consumers and the public interest aroused, as well as the relative position of the CNC and the potential impact of its actions in relation to other judicial or administrative institutions. In its initial stage, the CNC will concentrate its attention on the battle against hard-core cartels and on monitoring liberalized sectors, such as energy and telecommunications, the markets for sale-purchase of certain types of audiovisual contents, the markets for liberal professions services, and the markets for certain types of transport services. In addition, it will study

certain public procurement processes which may spawn concerted pricing, and certain regulations on retail activities.

With regards to the promotion of competition, one of the Launch Plan's key objectives is to foster the formation of a genuine culture of competition amongst companies, consumers, public administrations, and society in general. This is deemed to be essential for dissuading anticompetitive conducts and for achieving the necessary social support for competition policies.

The CNC also plans to initiate the drawing up of several communications and guidelines, to facilitate the lodging of complaints, to clarify the proceeding of leniency applications, and to explain how to determine the amount of the fines. Specifically, the CNC intends to develop an active policy of external communication of its actions and decisions. There is already a new communication policy, under which more information about proceedings is being offered, and guidelines on the proceedings for leniency requests and on mergers proceedings have been already published on the CNC's website. The CNC is also considering carrying out ex-post evaluations of its work and is working to identify possible quantitative and qualitative indicators for monitoring its performance in its different areas of action.

In sum, the Spanish competition system is undergoing an intense transformation process of both, its framework and activity, which should place it among the most advance jurisdictions.