

The Legal Regime of Competition in Spain

Lecturer **Ovidiu-Horia MAICAN¹**

Abstract

Two models for the objectives of competition law are typically proposed. The first is considering competition law as being solely concerned with economic efficiency. The second is viewing the objective of the law to maximise the "public interest". The public interest is defined as including economic efficiency, consumer welfare, a balanced development of the economy and perhaps maintaining employment, technical progress and exports. The main difference is between the law having multiple objectives (broad public interest) or a single objective such as maintaining the efficient operation of markets (or free competitive markets). Arguments exist for each model. Experience of many economies says that the culture and legal forms of each individual economy will determine the institutions and institutional structure that work best in each situation.

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JEL Classification: K33

1. Introduction

Spain's first competition law was enacted in 1963.

It contained standard prohibitions against multilateral and unilateral anti-competitive conduct and created a specialized administrative body (Tribunal de Defensa de la Competencia - TDC) responsible for enforcing these prohibitions.

Investigations into the violations were conducted by a unit of the Ministry of Economy (Servicio de Defensa de la Competencia - SDC).

The fines were proposed by the TDC but would need to be approved by the government.

After Spain joined the EU in 1985, a new competition law was introduced in 1989.

The mechanisms for implementing the law have not changed significantly.

It was still a divided administrative system with limited independence from the government.

In addition, the TDC was empowered to impose fines and sanction any violation of EU antitrust prohibitions.

Spain's competition law and institutional enforcement mechanisms underwent three major reforms:

First was the creation of regional bodies to protect competition. Several regional competition authorities were established and empowered to enforce national anti-competitive measures in their respective territories. Regional authorities have no authority to implement the EU competition rules.

The second was strengthening and modernization of systems. The TDC and

¹ Ovidiu-Horia Maican - Law Department, Faculty of Law, Bucharest University of Economic Studies, Romania, ORCID Number: 0000-0001-8929-7936, ovidium716@gmail.com.

SDC merged in 2007 to create a single independent administrative law body, the National Defence Commission (CNC), responsible for enforcing both national law and the EU law. The CNC was also given the power to enforce antitrust law in sectors subject to sectoral regulation (energy and telecommunications), but it had some clashes with regulators (the National Energy Commission/CNE in the electricity and utilities sector and the Comisión las Telecomunicaciones/CMT in the telecommunications sector) regarding the performance of its mandate in these industries.

In 2013, the National Competition Bureau and several independent regulators merged to form the National Market Competition Commission (CNMC).

The creation of the CNMC was justified by saving resources and preventing conflicts between competition authorities and regulators.

2. General aspects

Competition, as the main idea of any market economy, is a crucial element in our society's way of organizing the economy. In the realm of personal freedoms, it is the primary and most important way in which business freedom is used and shown. So, based on the needs of the overall economy and possibly planning, competition defense should be seen as a duty for the government, directly linked to article 38 of the Constitution.

The current law was created to achieve this specific goal: to guarantee enough competition and safeguard it from any actions that go against the public interest. It aligns with other laws that govern the market based on legal or economic requirements, whether they are public or private. The law is based on the strong foundations of expertise.

On the other hand, it is influenced by the community (european) rules on competition policy, which have had a crucial role in establishing and running the common market.²

However, this law is created to correct the mistakes that prevented the complete enforcement of Act 110/1963, dated July 20, on the Elimination of Anti-competitive Practices, which is now abolished. Under the initial heading, "Free competition", the opening section, "Restrictive or abusive agreements and practices" establishes a framework for adaptable monitoring of agreements that restrict competition in the local market, prohibiting the misuse of economic power and one-sided behavior that could distort competition through dishonest methods.³

The second section, "Economic gatherings", sets up a way to regulate the gatherings that could change the layout of the country's market in a negative way because of how significant and influential they are. The third section, "State aids," sets up a method for evaluating them based on the standards

The Act is used to ensure the constitutional economic order in the market economy and protect public interests.

The following administrative bodies are responsible for enforcing the Act under the second title: the Competition Court (Tribunal de Defensa de la Competencia) responsible for legal rulings and, in some cases, making proposals; the Competition

² Competition Act 16/1989 of 17th July, "Official State Gazette" No. 170, of 18th July 1989, p. 2.

³ Competition Act 16/1989. Explanatory Statement, p. 2.

Service (Servicio de Defensa de la Competencia) responsible for conducting proceedings.

The second option means granting special status in proceedings because the issue is very complex and the system needs to be independent from the government, while still being legally supervised.⁴

The relevant process, outlined in the third section, follows the principles of saving time and resources, and ensures that the rights of the involved parties to defend themselves are protected. It involves the specific procedures needed because of its nature, sometimes requiring involvement from the Autonomous Communities and the Council of Consumer Associations.

Ultimately, a system of penalties is established to guarantee that the formal and substantial parts of the Act are followed.⁵

The restructuring of the governmental enforcement of competition laws in Spain in 2013 begins with the establishment of the new National Markets and Competition Commission (NMCC) coincided with the effective legal cancellation of numerous penalties enforced by its previous entity (the National Competition Commission or NCC). Since March 2013, the National Court (Audiencia Nacional) has canceled many of the fines imposed by the NCC, stating that the way they were calculated did not align with the principles and boundaries set by Spanish constitutional law for the exercise of punitive authority by administrative bodies. This has had a significant effect on the launch of the new NMCC, which remarkably continued to approve violations of competition law. The 2007 Spanish Competition Act prohibits actions that restrict competition and offenders can be fined. Depending on how serious they are, the violations can be small, significant, or very significant.

Cartels are considered to be very serious violations.⁶

The primary legal regulation for financial penalties sets the fines at the following levels.

Minor violations carry a fine of up to 1% of the total turnover of the offending company in the year before the fine is imposed.

Major violations may result in a fine of up to 5% of the total revenue of the company in the year before the fine is imposed.

Severe violations can result in a fine of up to 10% of the total turnover of the offending company in the year prior to the fine being imposed.

This rule categorizes the company's turnover into three intervals (0.1% to 1%, 1% to 5%, and 5% to 10%), which determine the extent of the authority's power based on the severity of the violation.

In addition, the Competition Act also sets out a list of factors that can be used to determine the fines, including factors that make the situation worse or better. The competition authorities have a lot of flexibility in determining the amount of the fine under this system. They are expected, though, to encourage and explain their decision and the fairness of the punishment imposed based on the severity of the violation in

⁴ Competition Act 16/1989. Explanatory Statement, p. 2.

⁵ Competition Act 16/1989. Explanatory Statement, p. 3.

⁶ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, IE Law School Working Paper, 2015, p. 18, <https://cee.ie.edu/wp-content/uploads/sites/568/2022/10/AJ8-220-1.pdf>.

each situation.⁷

In addition to imposing fines on the companies that break the rules, the 2007 Spanish Competition Act also allows public enforcers to punish the legal representatives or members of their management bodies) and also sets guidelines for the fine amount when it's not possible to calculate the turnover of the infringing company.

The fines will be determined based on factors such as the size and qualities of the market impacted by the violation, the percentage of the market that the company or companies control, the extent of the violation, the length of the violation. the impact of the violation on the rights and legal interests of customers or on other businesses, the illegal gains acquired as a result of the violation and the factors that make a situation worse or better for each of the responsible parties.

When determining the fines, the following factors, including but not limited to, will be considered, such as repeatedly committing violations defined in this Act, the role of the leader in or initiator of the violation. the implementation of measures to enforce the behavior that constitutes the violation and the absence of teamwork or blocking of the inspection task, despite the potential classification as a separate violation.

When determining the penalty amount, the following factors, including others, will be considered: taking actions to stop the violation, tyhe successful avoidance of the prohibited behavior and the carrying out of actions aimed at fixing the harm done.⁸

The National Competition Commission collaborates actively and effectively outside of exemption cases and fine reduction cases regulated by authorities responsible for enforcing competition law in Spain, including both the NMCC and regional competition authorities.

However, they also regulate the enforcement of punishments by Spanish officials for breaking TFEU articles 101 and 102. National Competition Authorities (NCAs) do not have a consistent penalty system for violating EU competition rules, and each Member State has its own rules based on their national laws (procedural autonomy).⁹

According to article 23 of Regulation 1/2003, Member States are not required to adopt the penalty system used by the European Commission.

The Spanish national competition regulations partially align with the EU regulations in this aspect, as they also mention the 1%, 5%, and 10% of the total turnover of the guilty company as key aspects of the system of financial penalties in the 2007 Competition Act. However, the wording is different. In EU Law, these three criteria are considered as maximum fines to be imposed and not as part of a penalty scale like in the Spanish national legal regulations.

However, as stated in the introduction of the 2007 Competition Act, this recent rule about financial penalties represents a major improvement in legal clarity. It

⁷ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 19.

⁸ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 19.

⁹ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 19.

categorizes different violations and specifies the highest possible fines for each type, based on a percentage of the offender's total revenue.¹⁰

Likewise, the rules that will decide the exact penalty in each situation are outlined, following the latest developments in Europe. Evidently, the new regulations calmed the worries about the legality of the fine system outlined in the 1989 Competition Act.

The Act had stated that economic agents, businesses, associations, unions, or groups that intentionally or carelessly violated articles 1, 6, and 7, or failed to meet a condition or obligation in Article 4.2 could be fined up to 150,000,000 pesetas. Spain has a decentralized enforcement system for its competition rules, in which regional authorities have jurisdiction "when such conduct, without impacting a sphere larger than an Autonomous Community or the national market, affects or could affect free competition within the respective Autonomous Community."¹¹

From 1989 to 2007, this was the only significant rule governing fine amounts (alongside a list of criteria for the Court to consider in their calculation): a maximum of 10% of the infringing undertaking's turnover in the year before the fine was imposed. Because it was so unclear, there was debate about whether it followed the legal and standard regulations for violations and penalties outlined in the Spanish Constitution. During that period, it could be argued that this system went against the fundamental needs of clear legal descriptions and certainty of punishments and penalties under Spanish punitive law.

The Supreme Court's decision on the appeals filed by the NCC against the National court judgments annulling its fines was eagerly anticipated, given the described situation. There were possibly discussions of the European Commission appearing as a friend of the court in some of these cases. The Supreme Court's decision on June 29, 2015, came at the perfect moment. It clears up the enforcement capabilities of the competition authorities and establishes the principles and boundaries they must adhere to when determining the fine amount.

The Supreme Court has contradictory rulings. It agrees with the National Court's decision about the competition authorities' methodology being unconstitutional. However, it changes the National Court's decision to limit fines to only 10% of the infringing company's sales in the affected market.¹²

The NCC Guidelines create a method for determining the fine amount that includes elements from the 2007 Competition Act and additional factors not explicitly supported by the 2007 Competition Act, but inspired by the European Commission's Guidelines.

Since the beginning of 2014, it started using them again, but it always did so with the disagreement of two members of the Competition Chamber. Refer to the ruling of the Supreme Court on June 29, 2015. As per the Supreme Court, the determination of the Base Amount of the Fine (BAF) has no legal basis and is not

¹⁰ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 21.

¹¹ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 20.

¹² Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 21.

subject to any set scale. It could amount to as much as 30% of the affected turnover of the violating business. The BAF will be adjusted based on the aggravating or mitigating circumstances, which may increase the BAF by an additional 5-15%.

After completing these two steps, the maximum limit of 10% set by article 63.1 of the Competition Act becomes applicable.¹³

The Supreme Court believes that this process goes against the fairness of the proportionality principle, favoring an increase in the fine amount. The NCC Guidelines are believed to have the wrong approach because the three fine intervals set out in article 63.1 of the Competition Act establish the highest possible fines to be applied based on the severity of the violation.

According to the Supreme Court, "each of these three percentages, due to their role as a limit or maximum sanction for the most serious violation in each category, should be used as a starting point to calculate the fine for other offenses, starting from these percentages and decreasing downwards."¹⁴

According to the Supreme Court, the flexible system created by the Competition Act should be the initial basis and structure for determining the fine amount, and it should always be included in the calculation methods used. It cannot be, as stated in the NCC Guidelines, that the legal framework is only considered as an external limit that applies to the penalties once the correct fine amount is determined using their specified method.¹⁵

This can be a legitimate process under EU law as per article 23 of Regulation 1/2003, which only establishes the maximum fine amount. Nevertheless, the Spanish Supreme Court believes that this cannot be the answer under Spanish Law. The authorities imposing penalties must adhere to the essential principles and constraints of criminal law.

The Supreme Court is correct in stating that EU Law does not mandate Member States to standardize the penalty system for breaching competition laws.

The Spanish government can choose a different punishment approach than the one used in Regulation 1/2003 when creating its own laws for competition.¹⁶

TFEU articles 101 and 102 must be enforced by NCAs using the same methods as violations of domestic law (article 5 of Regulation 1/2003). In addition, as long as the penalties are effective, proportional, and serve as a deterrent, there can be no objection to the sanctions imposed according to domestic rules. The mention of setting fines relates to the overall revenue of the company that committed the violation. Although section 63.1 of the 2007 Competition Act clearly states that the "total turnover of the infringing undertaking" should be used to determine the fine amount, the National Court has surprisingly stated in numerous rulings that it is actually the "turnover in the market affected by the infringement" that should be the focus.

There was no reason for that interpretation, whether literal, historical,

¹³ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 22.

¹⁴ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 23.

¹⁵ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 23.

¹⁶ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 26.

systematic, or teleological.¹⁷

Thankfully, the Supreme Court's decision on January 29, 2015 corrects this error by stating that the legislative intent was very clear in including the entire turnover of the infringing business.

Even though the Supreme Court emphasizes the important deterrent effect of penalties for breaking competition laws, its decision shows that it is limiting the use of economic analysis to create a new method for calculating fines if it is not specifically stated in the Competition Act.¹⁸

Naturally, economic analysis can effectively demonstrate the reasons behind fines and their fairness in each case (which will be reviewed by the courts), but the Competition authorities cannot create their own rules for determining the fines if the law does not allow it. And even if authorities were given the ability to create rules on how fines are calculated – which they are not – the law itself should include the basic principles, parameters, and steps that need to be followed. The structure of the punishment system must be reflected in the law, and only small changes within the "legal framework of penalties" can be determined and carried out by the authorities responsible for enforcement. They are unable to choose to construct extensions to the legislative layout.¹⁹

In short, according to the Spanish Supreme Court, competition authorities should be closely bound when using their punishment (sanctioning) powers, and there should be some flexibility but only within the list set by the law.

Maintaining a sense of balance is the primary consideration for authorities when using their punishment powers.²⁰

In 2023, the CNMC conducted nine surprise inspections in eight instances.

Four cases were related to suspected violations of Article 1 of the Spanish Competition Act and/or Article 101 of the TFEU, while four cases involved alleged breaches of Article 2 of the Spanish Competition Act and/or Article 102 of the TFEU.

Altogether, twenty buildings were examined. The inspections were conducted to investigate reported violations in both horizontal and vertical markets, abuses of dominant positions, and compliance with a previous decision.²¹

Furthermore, Spanish officials participated in two early morning raids coordinated by the European Commission. In 2023, the Spanish competition authority enforced four fines for forbidden actions (such as anti-competitive agreements and the abuse of a dominant position) and two cases were completed using the commitment procedure. In conclusion, the CNMC adopted twenty-two non-punitive decisions. Three of the penalties are connected to Article 1 of the Spanish Competition Act and Article 101 of the TFEU. Two of them were recognized as cartels and one related to

¹⁷ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 26.

¹⁸ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 26.

¹⁹ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 29.

²⁰ Francisco Marcos, *Blowing hot and cold: The last word of the Supreme Court on setting fines for Competition Law infringements in Spain*, p. 29.

²¹ Organisation for Economic Cooperation and Development, *Annual Report on Competition Policy Developments in Spain*, 2023, p. 7, [https://one.oecd.org/document/DAF/COMP/AR\(2024\)33/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2024)33/en/pdf).

bid manipulation in public contracts.

The final decision involved Article 2 of the Spanish Competition Act and Article 102 of the TFEU.²²

Furthermore, the CNMC also approved three other penalty resolutions regarding different practices (violation of obligations).

In 2023, the CNMC gave the go-ahead for the Annual Report on State Aid in Spain (IAP/CNMC/001/23). The report examines the financial assistance provided by the government in Spain and other EU countries in 2021. It also covers the key changes in rules, management, and legal matters related to state aid in 2022.

In 2023, the CNMC released 20 reports on ongoing regulatory regulations. The amount of reports in this group is a little greater than in 2022. Draft regulations are most commonly analyzed in the fields of waste management, professional services, industry, social economy, and the transport sector.

In Spain, the laws for buying goods and services for the government have changed a lot because they had to follow the rules from the European Union.

This happened when they made the Law 9/2017.

The various stages planned are planning, options to public contracts, preparation and design of the procedures, awarding, execution, and ex-post evaluation. The law highlights the importance of proper planning in handling government purchases and the advantages in terms of effectiveness and competitiveness.

Specifically, planning encourages openness and makes it easier for operators (specifically small and medium-sized enterprises) to access bids. It also supports the use of transparent and fair award processes that encourage rivalry.²³

Nevertheless, there is an exception to this rule when it comes to contracts awarded to related companies whose main function is to provide services to their own group, rather than selling their services to the public. Therefore, this exemption allows for the direct granting of contracts between related businesses. It still depends on certain conditions.

One reason is that directly awarded contracts do not disrupt competition in the market.²⁴

This rule is connected to the concept of fair competition, as its goal is to let public sector companies compete equally with private market businesses when they are doing commercial activities. Competition worries may arise if public sector companies also engage in non-commercial activities.

In this situation, the company may receive benefits or perks (such as payment for completing public service duties) that could unfairly affect competition in the open market. Considering this situation, the CNMC will evaluate whether there is a potential risk of transferring funds from non-commercial activities to commercial ones in an open market, as well as whether high standards of governance, transparency, and

²² Organisation for Economic Cooperation and Development, *Annual Report on Competition Policy Developments in Spain*, p. 7.

²³ Organisation for Economic Cooperation and Development, *The Promotion of Competitive Neutrality by Competition Authorities – Contribution from Spain*, 2021, p. 14, https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/11/the-promotion-of-competitive-neutrality-by-competition-authorities_f82583c2/8383be43-en.pdf.

²⁴ Organisation for Economic Cooperation and Development, *The Promotion of Competitive Neutrality by Competition Authorities – Contribution from Spain*, p. 15.

accounting separation are being followed.

The CNMC has examined how the exclusion mentioned affects competition within contracts between business groups.²⁵

Those reports specifically mention the principle of fair competition (and the OECD Recommendation on the subject).

CNMC uses another tool to advocate for fairness in public procurement called reports on competition-related aspects of draft tender procedures. These reports are requested by procurement bodies at all levels of government (national, regional, and local). The CNMC evaluates certain tender processes as a competitive advisory body.²⁶

The majority of CNMC's viewpoints pertain to the bidding papers for centralized procurement of a diverse range of products and resources (such as office supplies, vehicles, furniture, audio-visual equipment, and computers). These documents are created before the purchasing process begins, with the goal of encouraging competition beforehand. The CNMC opinions have strengthened the relationship with the authorities responsible for large contracts, such as framework agreements.

Finally, it should be noted that the CNMC puts a lot of work into training programs for government officials responsible for purchasing goods and services at every level of the government in Spain. It has trained over 40 government agencies and approximately 2,500 officials since 2014.²⁷

The CNMC is able to create reports about public assistance and make suggestions to the Public Administration to uphold strong levels of competition as stated in Article 11 of the Spanish Competition Act. The CNMC, either on its own initiative or at the request of the Public Administrations, can examine the standards for granting public assistance and how it might impact competition in the markets. It can publish reports and submit suggestions to the government in order to uphold competition.²⁸

3. Practical aspects

The emergence of new technologies and digitalization in recent decades has changed the way markets work, bringing both advantages and challenges in terms of competition. Owing to the unique characteristics of digital markets (benefits of size and range, along with the impacts of network effects boosted by the importance of data as a valuable resource), worries have emerged about the notable centralization of market dominance. Markets could lean towards a few powerful platforms that can use data and network effects to suppress competition and solidify their positions in the market.²⁹

²⁵ Organisation for Economic Cooperation and Development, *The Promotion of Competitive Neutrality by Competition Authorities – Contribution from Spain*, p. 15.

²⁶ Organisation for Economic Cooperation and Development, *The Promotion of Competitive Neutrality by Competition Authorities – Contribution from Spain*, p. 15.

²⁷ Organisation for Economic Cooperation and Development, *The Promotion of Competitive Neutrality by Competition Authorities – Contribution from Spain*, p. 16.

²⁸ Organisation for Economic Cooperation and Development, *The Promotion of Competitive Neutrality by Competition Authorities – Contribution from Spain*, p. 16.

²⁹ The 22nd Intergovernmental Group of Experts on Competition Law and Policy, 2024, p. 1,

In this situation, the constantly changing digital environments need a proactive method for enforcement to keep up with technological advancements and maintain fair and efficient competition. Additionally, there is a requirement for global collaboration and teamwork among competition regulators to adequately deal with competition problems that span across different countries.

As a result, regulators have difficulty adjusting antitrust laws for the digital age, placing pressure on established frameworks to accommodate the unique characteristics of these markets.³⁰

The Spanish National Competition Authority (CNMC) has used its set of policies to address potential risks related to merger control and antitrust issues. After this opening part, the next part explains CNMC's method for enforcing competition in the digital industry, discussing the most important antitrust cases.

It is important to note that the CNMC is currently looking into investigations about Booking.com and Google for potential abuses of dominant position (Article 102 of the Treaty on the Functioning of the European Union and Article 2 of the Spanish Competition Act) and unfair practices (violations of the unfair competition act) that impact the public interest by distorting competition (Article 3 of the Spanish Competition Act).³¹

The "Booking.com" case is about potentially unfair and exploitative behavior by online travel agencies (OTAs) in their dominant role as intermediaries for hotels.

This behavior includes imposing unfair conditions and commercial policies on hotels, which may have exclusionary effects and take advantage of the economic dependence of hotels. The CNMC is investigating whether Google is abusing its dominant position by imposing unfair commercial conditions on press publishers and news agencies related to copyrighted content. This could distort fair competition and infringe on intellectual property rights by taking advantage of their economic dependence.

This is known as "Google related rights".³²

Until very recently, Spanish courts' authority in the antitrust field was limited to assessing the decisions of regulatory authorities and determining legal and private effects following a declaration of unlawfulness by the Commission or the Spanish Court for the Defence of Competition. Legal decisions and laws from the community regarding the enforcement of Articles 80 and 81 TEC caused a significant change to this situation.

Although the Spanish legal system was initially hesitant, it eventually acknowledged the Community court's points about the immediate impact of competition regulations, the public nature of the provisions, and the advantages of court involvement. The commercial courts in Spain started using Articles 80 and 81 TEC for competition and added ways for the courts to work with regulators into the country's laws.³³

<https://indico.un.org/event/1005239/attachments/16829/48438/2407419E.pdf>.

³⁰ The 22nd Intergovernmental Group of Experts on Competition Law and Policy, p. 2.

³¹ The 22nd Intergovernmental Group of Experts on Competition Law and Policy, p. 2.

³² The 22nd Intergovernmental Group of Experts on Competition Law and Policy, p. 2.

³³ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, 2012, p. 3, <https://www5.poderjudicial.es/CDA2012/CDA2012-03-ENG.pdf>.

The 1993 CAMPSA ruling by the Supreme Court is a prime example of when courts were not allowed to use Community rules. The Spanish legal system did not allow the direct use of national competition laws, even though Community case law acknowledged the direct impact of Community competence rules and gave the responsibility of ensuring the effectiveness of the provisions to the national courts.

The Supreme Court decision on December 31, 1979 (Asociación de Agentes Mayoristas de Vizcaya) stood out because it declared a contract void due to being against economic public order and having an unlawful purpose, despite the defendant's opposition.³⁴

An important instance of complete refusal to apply Community law by the judiciary during this time was the Supreme Court decision on May 18, 1985, which confirmed the court's lack of authority and the exclusive authority of administrative authorities in applying Community law. Following the Supreme Court decision on November 4, 1999, a wide interpretation of Article 13.2 of Act 167/1989 concluded that the need for an administrative decision beforehand applied to civil liability claims by offenders and also to cases seeking a ruling that a legal transaction was void from the beginning. The Supreme Court's understanding of the article was that the administrative statement of illegal behavior was only needed for compensating losses.³⁵

The scientific theory criticized the system of having two separate administrative and judicial procedures and proposed other ways to make it easier for the courts to get involved in enforcing antitrust laws. These alternative options include the Law on Unfair Competition, specifically Article 15.2 which deals with unfair competition through violation of laws, and Article 4 which addresses infringement of the general clause prohibiting unfair behavior and conduct.³⁶

When Regulation 1/2003 was enforced, it became clear that the Spanish legal system's inconsistency in terms of the authority of national courts to enforce antitrust laws. The contradiction was that business courts could use Articles 80 and 82 TEC and state the legal and personal consequences of breaking them, but they were unable to directly use national laws. Only administrative authorities had the power to do this, which meant that they needed to make a decision before taking any action. In reality, violation of Community law was often claimed to gain access to private enforcement of Community competition law and its related advantages.

The introduction of the current Defence of Competition Act (DCA) resolved the issues caused by the courts' inability to enforce national antitrust laws.³⁷

The first added section of the act specifically acknowledged that the commercial courts have the authority to use Articles 1 and 2 DCA. Afterwards, the Organic Act 137/2007, passed on 19 November, changed Article 86-ter-2-f of the Spanish Organic Law of the Judiciary. This amendment now allows commercial courts to handle "cases related to the enforcement of the rules stated in the Defence of

³⁴ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 3.

³⁵ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 3.

³⁶ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 4.

³⁷ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 4.

Competition Act." Commercial courts can now enforce regulations on collusive agreements and unfair practices, whether as the main issue or as a secondary matter. At present, they have the authority to declare violations, stop certain behaviors and nullify any results that go against the public good.

They can also invalidate collusive agreements and contracts from the beginning and hold offenders responsible.

Furthermore, none of these rulings are based on a previous administrative decision.³⁸

The knowledge of Spanish courts in implementing laws on free competition In general, based on the direct impact of Community laws, most of the rulings issued after the Disa ruling acknowledge that Spanish courts have the authority to apply Community laws on competition. Most of these decisions are about complicated contracts for commercial distribution agreements (concessions, distribution, and agencies), as well as sales, usufruct, and leases related to service station operations.

These contracts are between fuel producing companies and their lessees, agents, and resellers. Ordinarily, legal action in these instances deals with two things, the type of agreement (agency contract or no agency contract) and whether the actions and agreements made are legal, such as non-competition clauses, exclusivity agreements, clauses setting reseller prices and exemptions under a REC 2790/1999. Many rulings agree that free competition laws should not be used to get out of contracts or violate their terms.³⁹

The following sequence in reasoning is often found in many cases:⁴⁰

First, examining compliance when Community law applies.

Second, verifying if the behavior can be classified as restrictive in these cases.

And finally, determining if the behavior can be considered exempt or not.

Next, the legal and personal outcomes resulting from the illegal behavior are established. There are fewer guidelines on how to use national competition laws because the commercial courts' particular expertise in that area was only defined up to the adoption of the current DCA. Sometimes problems occurred due to the lack of impartial skills when a lawsuit for contract performance was taken to a lower court and when a challenge was made regarding the contract's violation of antitrust laws with an objection or opposing claim. Recent decisions regarding the unfair use of strong market positions by businesses that were once the only ones in their industry (Commercial Court decision [SJM] Barcelona-2 of 20 January 2011 and SJM Madrid-8 of 24 March 2010), and that are currently the only ones in their industry (SJM Alicante-3 of 26 March 2012) are important to note.⁴¹

The recently introduced Spanish Competition Act (Act 15/2007 of July 3, 2007 or the "Act"), which was unanimously approved by the Spanish Parliament and became effective on September 1, 2007, brings about significant changes to the

³⁸ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 4.

³⁹ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 4.

⁴⁰ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 4.

⁴¹ European Judicial Training Network, *Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges*, p. 5.

existing system.

This law expands on the framework created by the 1989 Act, mainly using the knowledge acquired at the local and national levels over the past twenty years.⁴²

The change comes from the necessity to address shifts in national and European laws. At the national level, several additional laws were put into place, including Act 1/2002, which was issued on February 21st, regarding the coordination of the powers of the state and regional governments in antitrust issues.

This law came about because of a decision made by the Constitutional Court, and it establishes a system for assigning duties where there can be no overlap.⁴³

Constitutional Court Decision on November 11, 1999, recognized that the Constitution does not specifically assign the responsibility of defending competition to the State. As a result, autonomous communities have the authority to exercise this responsibility based on their own laws. The court's ruling states that "domestic trade" includes the authority related to "competition defense." Since regional laws have addressed this issue, they also have responsibilities regarding competition defense, but only at the executive level.

The legislative and coordination levels remain the responsibility of the state.

A major change has occurred in the EU antitrust system, leading to the creation of the new Council Regulation (EC) No. 1/2003. The Law 139/2004, dated January 20, 2004, focuses on controlling mergers and updating the fight against unfair business practices as outlined in Council Regulation (EC) No. 1/2003 on December 16, 2002 was adopted and it covers the enforcement of competition rules in Articles 81 and 82 of the Treaty. The second one established a different division of duties between the European Commission, national authorities, and national courts (judicial bodies within each country). However, modernization introduces a new legal exemption system that replaces the old system of individual authorizations.

In this situation, the reform considers the changes in the Spanish economy, including a major shift from government-controlled monopolies to open competition.⁴⁴

This shift occurred through privatization, liberalization, and deregulation, with the goal of creating a competitive business environment.

The establishment of a single organization, as seen in many EU countries, offers several benefits in the effective use of public funds and helps maximize collaborations. The new version, though, keeps the division between the inquiry stage and the decision-making stage of the process. The CNC's Investigation Directorate is in charge of the investigation phase, while the CNC Council is responsible for making final decisions. The Council consists of seven members, including the Chairman and six members, who are chosen for a single term of six years and cannot be re-elected.⁴⁵

The model ensures freedom from government influence when making decisions. Government participation in the new process, particularly in merger control, has been nearly removed.

In the old system, the Minister of Economy (first phase) or the Council of

⁴² Carlos Pascual Pons, „The New Spanish Competition System”, *The Online Magazine for Global Competition Policy*, July 2008, 08(1), p. 2.

⁴³ Carlos Pascual Pons, „The New Spanish Competition System”, p. 3.

⁴⁴ Carlos Pascual Pons, „The New Spanish Competition System”, p. 5.

⁴⁵ Carlos Pascual Pons, „The New Spanish Competition System”, p. 6.

Ministers (second phase) were in charge of merger control. Now, these duties are assigned to the Council of the CNC and the role of the Council of Ministers is only to change second phase prohibited or conditioned decisions, but its involvement must be guided by general interest criteria and not by competition arguments. The new system considers all of the government agencies with the authority to enforce the new law.⁴⁶

Before, damages claims under national competition law could only be admitted by judicial bodies after the administrative resolution was final. Although involving administrative and judiciary bodies could increase the risk of conflicting decisions, it could also improve the efficiency of the entire system, as each body can focus on cases that it is better suited for based on its situation and resources.

Hence, the limited resources can be more easily allocated to the cases with a significant influence on the market. In every situation, the Act creates ways to coordinate and reduce the risk of differences.

The new law explains the involvement of national and EU competition authorities as "amicus curiae" in court cases involving competition law.⁴⁷

The new version also allows for the potential pausing of the legal proceedings if the court finds out about an administrative proceeding before the European Commission, the CNC, or the relevant regional competition authorities, and if the judge believes it is necessary to know the administrative body's decision for their own decision-making. Therefore, the new design offers effectiveness and consistency to the system, along with the proper coordination of the various institutional levels involved in this area. The new law aims to change the Spanish competition system so that it has the best tools to protect fair competition in the markets. It also aims to improve the authorities' ability to fight against harmful practices. Fighting against banned behaviors means that the authorities need to achieve two main goals: to discourage future unfair practices and to lessen the harmful effects of past practices.

However, the authorities faced challenges when it came to preventing anticompetitive behaviors, especially when it came to identifying, prosecuting, and punishing those behaviors.⁴⁸

Because of its familiarity with the previous Act and consideration of other EU Member State authorities' experiences, Spanish authorities chose to use their resources more effectively and focus on stopping the most harmful practices, gaining the ability to prioritize certain actions. One progression in this direction has been the shift from a system of separate approvals to a legal exclusion system. The new system does not include in the ban those agreements that meet specific requirements. It requires companies to assess whether their agreements meet those requirements themselves, instead of going through the previous complicated and burdensome authorization process. The reform has also brought in the direct exemption of "de minimis behaviors," which are considered to be those that, because they are not very important, are not likely to affect competition.⁴⁹

Because competition authorities struggle to prosecute or prove illegal activities, CNC's investigative powers have been significantly expanded. Currently,

⁴⁶ Carlos Pascual Pons, „The New Spanish Competition System”, p. 7.

⁴⁷ Carlos Pascual Pons, „The New Spanish Competition System”, p. 7.

⁴⁸ Carlos Pascual Pons, „The New Spanish Competition System”, p. 7.

⁴⁹ Carlos Pascual Pons, „The New Spanish Competition System”, p. 8.

inspectors from the authority can ask to enter not just the company's buildings, but also the homes of its managers if there is a good chance of finding evidence of serious violations. Improving inspection abilities has led to more investigations by the CNC, including initiating investigations on its own and conducting more surprise raids. Introducing a leniency program is maybe the most significant change in this reform.

The updated leniency system started in February 2008 and follows the same model as the ECN Leniency Programme, which is already in place in several EU Member States. It allows companies that were involved in a cartel to avoid paying a fine if they are the first to admit to the cartel's existence, meet specific criteria, and provide significant evidence for authorities to investigate or prove a violation of Article 1 related to the cartel.⁵⁰

Implementing a leniency program is a big advancement for competition authorities because it encourages wrongdoers to give useful information by offering reduced penalties, which helps inspections to be more focused and effective in gathering evidence. In addition to the leniency program, the system for imposing penalties has been enhanced: there is now more openness about potential fines, the various types of violation have been clearly defined, and the penalties have been scaled according to the seriousness of the violation.

The highest penalty stays at 10% of the total sales of the company that committed the offense.⁵¹

In addition to being lenient and issuing sanctions, authorities aim to reduce the harm caused by an unfair practice to competition and restore competition to its previous state. While a damages compensation system is typically used to fix the harm caused, only courts can enforce it.

The new legislation enhances the function and abilities of courts when granting compensation for violations of competition law. However, authorities may utilize alternative methods to improve competition, such as temporary measures, commitment decisions, or structural requirements, which are tools that the reform has strengthened.

The reform makes interim measures more flexible and speeds up the process for adopting them. These measures can be taken at any point during the proceedings and without a maximum time limit.⁵²

The decision-making process for commitment has also been enhanced. This process involves stopping the punishment process when the accused individuals suggest actions that the authority believes will resolve the harmful effects on competition caused by their behavior, and adequately protect the public interest. Even though the Act states that commitments must be shared with interested parties for their input, in reality, the process becomes more flexible as the resolution proposal can be approved without the agreement of all parties involved.

Additionally, the reform introduces the imposition of structural remedies for the violation.⁵³

In January 2003, the reform prioritizes behavioral solutions over structural ones. Structural requirements can only be enforced if there are no other equally

⁵⁰ Carlos Pascual Pons, „The New Spanish Competition System”, p. 8.

⁵¹ Carlos Pascual Pons, „The New Spanish Competition System”, p. 8.

⁵² Carlos Pascual Pons, „The New Spanish Competition System”, p. 9.

⁵³ Carlos Pascual Pons, „The New Spanish Competition System”, p. 10.

effective behavioral requirements, or if, even with these in place, the structural requirements would be more difficult for the specific company to meet. Regarding the effectiveness of solutions, the reform results in a notable enhancement of the penalty system, as failure to meet obligations, resolutions, or commitments is now seen as a very serious violation, and the authority can levy a fine of up to 10 percent of the total turnover of the offending company. In the past, the director of the Competition Service and all the parties involved had to approve the agreements.

Finally, the length of the disciplinary process has been shortened to a maximum of eighteen months (instead of twenty-four months in the old system), which also makes the process faster.⁵⁴

Regarding merger control, the reform seeks to make the previous toolkit clearer and simplify the procedures in accordance with EU best practices. Therefore, the Act brings together the evaluation of partnerships that are either concentrated or cooperative in type. Furthermore, concerning the handling of takeover offers, the new law states that the requirement for suspension only pertains to voting rights, not the actual implementation of the bid, thus allowing the offer to be made and carried out. The Spanish system for controlling mergers has two main requirements: market share and total sales. The market share requirement has been increased from 25 to 30 percent, but the turnover requirement has stayed the same.

However, the law includes a process for updating both requirements.⁵⁵

Additionally, a simpler and faster notification system is introduced with a lower fee for the following situations: when there is no horizontal or vertical overlap, when the combined market share is less than 15 percent, when the individual or combined market share is less than 25 percent in vertically related markets; when a party gains exclusive control of one or more businesses or parts of a business over which it already has joint control, or the global turnover in Spain for all participants in the last accounting year exceeds EUR 240 million, provided that at least two participants achieve a turnover in Spain of more than EUR 60 million individually.⁵⁶

The reform allows and promotes the option to have preliminary discussions before submitting a notification, following the Community's practice. This is done to address any formal or substantive concerns. In addition, the reform clearly outlines the standards for evaluating notified operations that the CNC must consider during the assessment process. Certainly, this helps to strengthen legal certainty.

Similarly, the new law also outlines the standards of public welfare, aside from safeguarding competition, for which the Council of Ministers can intervene, specifically defense and national security, safeguarding public safety or public health, free movement of goods and services within the country, environmental protection, and advancement of research and development. Another enhancement includes the ability to approve transactions with conditions suggested by the parties in the first or second phase to reduce the risk of merger control decisions and improve their effectiveness.⁵⁷

Alternatively, this option could also lead to fewer disagreements and complaints from the parties involved.

⁵⁴ Carlos Pascual Pons, „The New Spanish Competition System”, p. 11.

⁵⁵ Carlos Pascual Pons, „The New Spanish Competition System”, p. 11.

⁵⁶ Carlos Pascual Pons, „The New Spanish Competition System”, p. 11.

⁵⁷ Carlos Pascual Pons, „The New Spanish Competition System”, p. 12.

Unlike remedies for anticompetitive practices, no bias is shown towards structural or behavioral remedies.

However, structural remedies are often more appropriate in most merger cases.⁵⁸

Even though Spain had put competition laws in place in 1963, the specialized court created to enforce these rules did not take any action during its existence. , also allowing for significant government involvement in any possible enforcement action (fines).

Victims of unfair business practices could only file a lawsuit when a decision by the Competition Defence Tribunal (CDT) was seen as final.⁵⁹

It may take up to fifteen years for an individual filing a private lawsuit to receive a final decision granting compensation for damages resulting from violating antitrust laws.

The 1989 law updated Spanish Competition Law and signaled the beginning of enforcement actions. The enforcement of Competition Law in Spain started when the country became a member of the European Economic Community (EEC) and the EEC Treaty regulations on competition became immediately enforceable. The 1989 Defense Competition Act was passed, and the main way the competition rules were enforced was through public enforcement. While the 1989 Act was active, the Competition Defense Tribunal (CDT) issued the initial penalties to companies for engaging in anti-competitive behavior. Nevertheless, courts later reevaluated many of these decisions concerning the specified fine. Just like in other European countries at that time, government officials had the job of enforcing the EEC Treaty and laws against competition within Spain.

This was overseen by either the European Commission or the Spanish Competition Defense Tribunal (CDT).⁶⁰

Up until 2007, people could only enforce their rights under domestic competition law through private means after the CDT decision was settled and definitive. "Injured parties can request compensation for the prohibited illegal actions under this law, once a final administrative decision and, if necessary, a court ruling have been made. The regulations for compensating damages will remain consistent with those outlined in the civil law, regardless of the time that has elapsed since it was established." Section 13.2 of the 1989 Defense Competition Act. Section 13.2 of the 1989 Defense Competition Act.

Additionally, the requirement for a final determination from the DCT before a civil legal action for compensation can be initiated appeared to be contradictory with the power that the DCA recognizes as belonging to the judicial courts in declaring the nullity of agreements or actions that disobey its regulations.⁶¹

Definitely, if the courts could make the decision, individual claims for payment under the country's competition rules were not feasible. This regulation caused a

⁵⁸ Carlos Pascual Pons, „The New Spanish Competition System”, p. 12.

⁵⁹ Francisco Marcos, „Competition Law Private Litigation in the Spanish Courts (1999-2012)” (June 26, 2013). *Working Paper IE Law School AJ8-202*, Available at SSRN: <https://ssrn.com/abstract=2351770> or <http://dx.doi.org/10.2139/ssrn.2351770>, p. 1.

⁶⁰ Francisco Marcos, „Competition Law Private Litigation in the Spanish Courts (1999-2012)”, p. 2.

⁶¹ Francisco Marcos, „Competition Law Private Litigation in the Spanish Courts (1999-2012)”, p. 3.

significant issue and extended the time for people who were affected by a violation of the competition rules to submit a claim for compensation. As a result, there were only a small number of individual cases filed under local competition laws (all subsequent actions). Actually, some of the first successful competition damage claims under Spanish Law were based on the 1991 Unfair Competition Act, which forbids business behavior that goes against market legal regulations (such as the competition rules). Unfair competition claims were made to request payment for unfair business practices, either as the primary legal argument or as an addition.

The Insolvency Act of July 9, 2003, created new commercial courts in 2004.⁶²

These courts have the power to make rulings on articles 101 and 102 of the Treaty.

Furthermore, the 2007 Competition Act eliminated the necessity for a prior ruling by the CDT for courts to make decisions regarding claims for damages in domestic competition law.

Certainly, the new rules specifically acknowledged the courts' authority to hear cases about alleged competition rule violations brought by the parties.⁶³

4. Specific cases

On December 18th, 2013, the European Commission declared the start of a formal inquiry into purported unlawful State aid on favorable property transfers given by the Council of Madrid to Real Madrid following multiple citizen complaints. Surprisingly, no country in the EU has ever been punished for supporting a sports organization, and the European Courts have never had to make a decision on this issue. Nevertheless, while government officials struggle to gain public approval for investing taxpayer funds in sports facilities, the amount of grievances from citizens about assistance in the sports industry has increased.

Soccer is more than just a competition between athletes vying for a medal.

Soccer is the most popular sport globally and is also a major industry, generating billions of Euros.⁶⁴

In recent years, there has been a shift in how financial support is provided to sports organizations by the government. The Commission has handled 13 different State aid cases related to sports. The Commission received complaints from investors and shareholders of certain European football clubs about potential State aid to Spanish football clubs because of preferential corporate tax treatment.

In three other cases, including the Real Madrid case, local citizens filed the complaints.⁶⁵

This shows that the 'sports sector' is different from other sectors because the State aid complaints were made by unhappy citizens rather than competing companies. Despite not analyzing the details of the State aid cases related to sports, especially football, it can already be concluded that the complaints were made by dissatisfied

⁶² Francisco Marcos, „Competition Law Private Litigation in the Spanish Courts (1999-2012)”, p. 5.

⁶³ Francisco Marcos, „Competition Law Private Litigation in the Spanish Courts (1999-2012)” p. 5.

⁶⁴ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?” *Competition Law Review*, Volume 11 Issue 1, 2015, p. 83.

⁶⁵ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?”, p. 86.

citizens. In the situation involving Real Madrid, the environmental group 'Ecologistas en Acción' believed that the deals to redevelop the government-owned land near the Real Madrid stadium 'Santiago Bernabéu' violated EU State aid regulations.

Even though 'Ecologistas en Acción' has a lot of experience in standing up for its beliefs in court, in the Real Madrid case, the group had to consider a new aspect in the legal process: the political influence of football in Spain. On 29 July 2011, the Council of Madrid and the soccer team Real Madrid reached an official agreement called the 'Convenio suscrito con fecha 29 de Julio de 2011 entre el ayuntamiento de Madrid y el Real Madrid CF, de regularización de los compromisos derivados de los convenios suscritos entre el ayuntamiento de Madrid y el Real Madrid CF de fecha 29 de Mayo de 1998 and 20 de diciembre de 1991' (hereafter: Agreement of 29 July 2011).

This agreement formalizes two previous agreements between the Council and the football club from 1991 and 1998.

The involved parties did not uphold the promises made in those agreements.⁶⁶

The initial agreement, starting on 20 December 1991, required Real Madrid to construct an underground parking facility and a walkway near the Bernabéu stadium. In exchange, the city was required to help pay for the construction.⁶⁷

However, Real Madrid did not uphold their end of the deal (they never built the parking area), which allowed the city to also not fulfill their obligation to the agreement. Real Madrid was in breach of the contract.

On 29 November 1996, Real Madrid made another agreement with the Council. The club plans to give up 30,000 square meters of land from the 'Ciudad Deportiva' (Real Madrid's previous training grounds in the city center, where four skyscrapers were later constructed), and in return, the Council would give Real Madrid some public land, which would be decided later. The environmental group gave the Commission details about the agreement on July 29, 2011, which confirms the complete advantage given to Real Madrid at the expense of the municipality.⁶⁸

This information is very important for their case against the 'Bernabéu-Opañel' project.

On July 31, 2014, the High Court of the autonomous region of Madrid upheld the group's appeal to enforce Article 108(3) TFEU, which states that the Member State involved cannot put its proposed measure into effect until a final Decision has been made.⁶⁹

The Madrid High Court stated that it was not responsible for deciding right now if the land swap is illegal State aid. However, the inclusion of the land in the "Bernabéu-Opañel" project under the current terms is enough evidence to show a direct link between the Commission's investigation and the subject of the appeal. So, the disputed assistance plan, which, as determined by the Madrid High Court, also includes the building work related to the 'Bernabéu-Opañel' project, will be put on hold until the Commission makes a final decision. As mentioned earlier, the Commission is solely responsible for determining if a specific action qualifies as unjustified assistance under

⁶⁶ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 90.

⁶⁷ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 90.

⁶⁸ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 91.

⁶⁹ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 92.

Article 107 and 108 TFEU.

Additionally, Article 108(2) TFEU states that the Commission will decide that the State in question must get rid of or change the aid within a timeframe set by the Commission.⁷⁰

Additionally, Regulation 659/1999 Article 14(1) states that the Commission must decide for the Member State in question to take all required actions to retrieve the aid.

Interpreted in a different way, these rules give the Commission the choice to decide if a penalty should be given to a Member State and what that penalty involves. Considering the uncertainty about what the Commission is investigating in the Real Madrid case, and how a potential penalty could impact the football club, keeps us in mind.

Benefit to the receiver compared to its rivals As mentioned by the Commission in paragraph 21 of its Decision: "Real Madrid seems to have a financial benefit because a piece of land, which was worth €595,194 when it was purchased, is now valued at over €22 million 13 years later in a transaction to settle shared debts."⁷¹

Additionally, there are also questions about whether the lands transferred in the 'Bernabéu-Opañel' operation comply with market standards. To decide if an aid measure gives an advantage to the recipient compared to its competitors, the Commission uses the 'market economy' According to Deloitte Football Money League, January 2014, Real Madrid earned €480 million in 2011, €513 million in 2012, and €519 million in 2013.

When the government wants to sell public property to private investors, it needs to ensure that the money made from the sale is similar to the market value.⁷²

The Land Sale Communication offers guidelines for EU Member States to assess land sale transactions under competition rules. It aims to ensure that when public authorities sell land, they do not provide State aid to the buyer.

According to the Commission, to prevent the buyer from gaining an unfair advantage over competitors, public authorities should use either the unconditional bidding procedure or have the land valued by independent asset valuers before negotiating the sale.⁷³

Regulatory authorities have also been involved in overseeing the Spanish power industry. Recent important events include the review of the proposed merger of Gas Natural and Endesa (in late 2005/early 2006), and the four decisions on high pricing in the electricity congestion market made by the Competition Tribunal (now Competition Commission) from late 2006 to mid-2008.⁷⁴

Regularly enforcing merger regulations in the Spanish energy industry has been inconsistent in the past few years. Mergers with smaller competitors such as Unión Fenosa and Hidrocarburo were completely prohibited, while mergers like Gas Natural and Iberdrola were blocked due to ambiguous regulatory reasons. This trend continued with the assessment of the merger between Gas Natural and Ende sa. The

⁷⁰ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 93.

⁷¹ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 94.

⁷² Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 104.

⁷³ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 95.

⁷⁴ Oskar Van Maren, „The Real Madrid case: A State aid case (un)like any other?“, p. 95.

industry overseer and competition enforcers had different opinions about the merging of companies. The industry overseer recommended approving the agreement with numerous stipulations, while the competition authorities sought to fully prevent it (even though there were potential structural remedies). The Spanish government, with the ultimate authority over merger decisions, approved the CNE's recommendations, making some adjustments. Subsequent bids from E.On and Enel/Acciona for Endesa have led to the termination of the Gas Natural agreement and any associated activities.⁷⁵

The European Court of Justice, following the Endesa case, determined that the CNE's regulatory authority over mergers, which was increased by the Spanish government in February 2006, was not in line with European law as it did not adequately ensure supply security. This decision came at the request of the European Commission. The case of the bids for Endesa showed a possible contradiction that can occur when foreign government-owned companies acquire private firms. For example, Spain may decide to privatize a company like Endesa for efficiency purposes, but then it might end up being owned by a foreign government in the future. This can happen without breaking any European competition laws, according to the E.C. Agreement is unbiased regarding the type of assets of companies.⁷⁶

The question is whether there is fair competition in the European market for company ownership when state-owned companies are involved. The suggested combination of Gas Natural and Unión Fenosa (announced in August 2008) will be another significant example for the use of merger control in the Spanish energy industry. The Spanish authority for competition recently imposed a penalty on Viesgo, Iberdrola, and Gas Natural for unfairly dominating the market for managing traffic jams on the electricity transmission network. These choices show that the Spanish government is ready to use rules against unfair control in the energy industry, even when dealing with the challenging and controversial issue of "overly expensive" prices according to Article 82 of the European Treaty. Nevertheless, the characteristics of the congestion management market are quite unique, and applying these decisions by the competition authority to the larger wholesale electricity market (or other energy markets with dominant firms) is difficult.⁷⁷

5. Conclusions

The alignment of Spanish Tort Law with the European Commission proposals can be accomplished by the mere action of Spanish courts when given the opportunity to resolve damages claims for the breach of Competition Law.

For 2024, the CNMC is continuing along the same lines set out in its 2021-2026 Strategic Plan.

⁷⁵ Giulio Federico, Xavier Vives, *Competition and Regulation in the Spanish Gas and Electricity Markets*, Public-Private Sector Research Center, IESE Business School. With the collaboration of: Natalia Fabra, Universidad Carlos III de Madrid November, 2008, p. 7, <https://www.iese.edu/media/research/pdfs/ESTU-DIO-93-E.pdf>.

⁷⁶ Giulio Federico, Xavier Vives, Natalia Fabra, *Competition and Regulation in the Spanish Gas and Electricity Markets*, p. 7.

⁷⁷ Giulio Federico, Xavier Vives, Natalia Fabra, *Competition and Regulation in the Spanish Gas and Electricity Markets*, p. 7.

This Strategic Plan is setting - up the objectives lines of action for the consolidation of a Culture of Competition and Good Regulatory Practices.

The CNMC is expected to keep the focus on the promotion of competition regarding key areas for the improvement of the functioning of markets for the welfare of consumers, such as transport and postal services, telecommunications and audiovisual media, and the energy sector.

Over the past year, the CNMC has formally initiated a few disciplinary proceedings related to hydrocarbon wholesale distribution, wholesale and retail marketing of professional hairdressing products and publishers of press publications and news agencies.

The CNMC is currently investigating alleged anti-competitive practices in a number of different sectors, the markets of rail freight transport and rail traction services, supply of digital pharmaceutical logistics tools for pharmacies, electricity sector, travel agencies and installation of equipment and provision of electricity metering services.

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