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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SPAIN**

-- 2004 --

*This report is submitted by the Spanish Delegation to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 19-20 October 2005.*

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## **Executive Summary**

1. 2004 has been a year of intense activity for the Spanish Competition Authorities. Along with its ordinary functions of instruction and resolution of cases, the activity has aimed at two main objectives: to adapt the new European Community framework of competition and to launch the reform process of the Spanish Competition System.

2. Many resources have been devoted for participating in the process of implementation of the new Regulations of the “modernisation” of the European competition policy. The new framework introduces relevant changes in the field of anti-competitive agreements and practices.

3. Concerning the reform process of the Spanish legislative framework in force since 1989, a White Paper on the Reform of Spanish Competition System has been elaborated and was officially presented at the beginning of 2005. The document has opened a public consultation process which will conclude with the drafting of a new Competition Act.

4. Besides the additional work which these two projects has implied, the Competition Authorities have kept their usual daily pace of work in the resolution of cases, international relations and coordination with the Autonomous Communities.

5. Concerning anti-competitive practices, the number of complaints has increased with regards 2003. Additionally, several proceedings were initiated *ex officio*. As for merger control, the number of notified transaction has increased as well, and the pace on prior consultations and preliminary inquiries were kept the same with respect to the previous years. Finally, the Spanish Competition Authorities have maintained an active participation in the different international organisations and conferences, such as the III Latin-American Competition School (Escuela Iberoamericana de Defensa de la Competencia) in Madrid.

6. Based on these grounds, the Competition policy remains to play a central role in the framework of the domestic economic policy.

### **1. Changes to competition laws and policies, adopted or proposed**

#### ***1.1 Summary of new legal provisions of competition law and related legislation***

##### ***1.1.1 Royal Decree 2295/2004, of 10 December, on the application of Community competition rules in Spain.***

7. This legal provision adapts the former regulation on this matter included in the previous Royal Decree 295/1998 of 27 February 1998, which is now repealed, to the new Community competition legislative framework laid down in Regulation 1/2003 and Regulation 139/2004.

8. In the framework of Competition Act 16/1989, this new Royal Decree gives the state competition bodies the powers and obligations deriving from Community legislation, including the task of cooperating with the Commission, with the national courts and the national competition authorities of other Member States. It also defines the powers of the officials or agents responsible for carrying out inspections in Spain, establishes the system applicable to the secrecy obligation and to confidential information with respect to the activities deriving from this Royal Decree, provides for cooperation with the courts and lays down the rules of procedure that will govern the application of Community rules by the national authorities.

9. In the field of merger control, year 2004 is highlighted by the entering into force of the new EC Regulation 139/2004 concerning merger control, which introduces some relevant legislative changes affecting procedural issues and the substantive test to assess the transactions.

## **1.2 Government proposals for new legislation**

10. A *White Paper on the Reform of the Spanish Competition System* was drawn up in 2004 and officially presented by the Second Deputy Prime Minister and Minister for Economic and Financial Affairs on 20 January 2005. This document is a discussion paper intended to initiate a review of the legislative and institutional competition framework in Spain to ensure that the best instruments and structure are in place to protect effective competition in markets with a view to social well-being and efficient allocation of resources.

11. The White Paper proposes various reform measures affecting the institutional framework of the Spanish Competition Authorities, the fight against anticompetitive practices, the merger control system, the State aids and the advocacy role of the Competition Authority. These measures provide for greater independence for this Authority, strengthening of the antitrust action in particular by means of the introduction of a leniency program, speeding up of judicial review procedures, better coordination with industry regulators and, possibly, the direct application of national competition rules by courts.

12. After public consultation, the drafting of a new Competition Act that will make the necessary legislative changes to the Spanish regulatory and court system has begun.

## **2. Enforcement of competition laws and policies**

### **2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions**

a) *Summary of activities of:*

a).1 Competition authorities

Servicio de Defensa de la Competencia (SDC)

13. The number of cases opened in 2004 were 91 (69 in 2003), of which 75 in response to complaints (53 in 2003), 8 in 2004 were initiated ex officio (none in 2003), 8 were individual authorisation proceedings (16 in 2003). During 2004, 80 cases were completed (117 in 2003). Most of them were shelved or dismissed (60). The *SDC* decided to proceed in 20 cases (34 in 2003) and were forwarded to the *Tribunal*, of which were 7 individual authorisations (13 in 2003) and 13 sanctioning files (20 in 2003). At the end of 2004, 75 cases remained open (64 in 2003).

14. Concerning sanctioning proceedings, the *SDC* initiated 31 (43 in 2003) actions against anticompetitive practices, of which 15 (23 in 2003) were prohibited agreements (infringement of article 1 of Competition Act 16/1989), 11 (13 in 2003) were abuse of dominance (infringement of article 6 of Competition Act 16/1989) and 5 (7 in 2003) were unfair acts of unfair competition (infringement of article 7 of Competition Act 16/1989).

15. Most cases have arisen in the service sector (29). In particular, the following are the most significant: 3 in production and distribution of electricity, gas and water; 6 in fuel sell for automobiles; 3 in wholesale and retail distribution; 5 in transports and communications; 8 in financial services; 7 related to activities of the Public Administration; 9 related to health and social assistance; 4 in sports and cultural activities and 10 concerning funeral services.

16. During 2004, SDC officials have carried out 3 inspections in premises of undertakings (travel agencies) in the framework of one proceeding. Additionally, enforcing EC Regulation 1/2003, the SDC carried out one inspection in a food company on behalf of the Italian Competition Authority.

Tribunal de Defensa de la Competencia (TDC):

17. The TDC issued a total of 119 resolutions in 2004: 22 sanctioning resolutions; 40 individual authorisations (15 new requests, 23 renewals and 2 changes); 43 appeals against decisions issued by the SDC; 2 appeals against acts and resolutions of the TDC and 12 incidental resolutions. The range of sectors in which the TDC resolutions took place is very wide: energy, maritime transport, postal services, telecommunications, pharmaceutical.

18. The fines imposed by the TDC in 2004 amounted up to 78, 7 Million Euros. This figure represents a historical record for the TDC and it is 10 times the amount of the previous year.

a).2 Courts

19. During 2004, the Audiencia Nacional has issued 50 judgements concerning appeals against resolutions of the TDC: among them 43 were rejected, 3 were admitted and 4 were partially admitted.

20. In its turn, during 2004, the Tribunal Supremo has issued 30 judgements concerning appeals against judgements of the Audiencia Nacional against resolutions of the TDC: 2 of them were admitted and 28 judgements were dismissed. Additionally, the Tribunal Supremo issued a judgement partially admitting an appeal against the Decision of the Council of Ministers concerning the conditions to clear a merger.

21. According to EC Regulation 1/2003, since 1 May 2004 Member States should send to the European Commission the judgements concerning the application of EC competition rules by national courts.

22. In accordance with this obligation, the SDC has sent to the Commission six judgements on proceedings before civil courts brought by service stations against oil companies.

23. Nevertheless, since 1 September 2004, the newly created Commercial courts (by Act 8/2003), have become the specialised competition courts with the competence to fully apply the EC competition rules. Thus, during 2004, the SDC has received five communications from the commercial courts concerning the admission of complaints on the application of Community rules.

24. Finally, in 2004 19 *pre-judicial questions* and 77 appeals before the First Instance Court and/or Justice Court of the European Community were submitted to the knowledge and study of the SDC. In the field of State aids, Spain has decided to take part in one appeal before the First Instance Court, brought by a Spanish company against a Decision of the European Commission.

b) *Description of significant cases, including those with international implications*

25. The most significant cases, among the 119 resolutions that the TDC has issued in 2004, might be the following.

ASTEL/TELEFONICA (Case n° 557/03)

26. Astel lodged a complaint against Telefonica on November 22, 2001. Astel reported that Telefonica was lessening the competition in the market mainly through discriminatory treatment to the preallocation requests. On April 1, 2004 the TDC considered that Telefonica was implementing a strategy

to prevent the entrance of new operators in the telephone basic service market. The TDC considered this conduct was specially harmful in the context of the liberalisation of the fixed telecommunication network. The aim of the strategy was to confuse the end-user with publicity campaigns that made him understand that the security and quality of the communications services could be lessened if he'd choose any alternative preallocated carrier. Finally, the TDC imposed the largest fine in the Spanish history of Competition Law: 57 million euros.

#### ASEMPRE/CORREOS (Case nº 568/03)

27. ASEMPRE, a professional association of postal services firms, made a complaint against Correos (the former state monopoly and largest postal operator) for a breach of articles 1 and 6 of the Spanish Competition Law and 82 EU.

28. The TDC considered that the incumbent had abused its dominant position in the reserved market of postal services to deter the entry of new operators in the liberalised segment of the postal services market. In fact, Correos had agreed, since 1999, with the most important postal services customers substantial rebates (up to 80%) related to the exclusive provision by Correos of all of their postal service requirements both in the reserved and in the liberalised markets.

29. The TDC imposed a fine of 15 million euros upon Correos for the infringement of Arts 6 of the Spanish Competition Act and 82 of the EC Treaty.

#### EMPRESAS ELECTRICAS (Case nº 552/02)

30. The sectoral regulator, Comisión Nacional de la Energía, sent a report to the SDC on November 26, 2001 indicating that there might have been an infringement of articles 1 and 6 of the LDC and 81 and 82 EU in the electricity generation market by the 4 largest operators: Endesa, Iberdrola, Unión Fenosa and Hidrocarbónico.

31. The TDC considered that these firms offered unusually high prices, on certain days, on the wholesale electricity market conscious that they would not match at the spot market. At exceptional situations like this, generating firms are requested to provide the excess of demand by means of the technical restrictions mechanism in the areas where they have a monopolistic power and therefore are able to charge a higher price. The TDC imposed a fine of 901.518,16 Euros upon each of the abovementioned undertakings.

#### LINEAS MARÍTIMAS DEL ESTRECHO (Case nº 555/03)

32. The TDC considered that 6 ferry operators, specialised on passengers and cargo routes between Spain and Morocco, had infringed art. 1 of the LDC by agreeing identical tariffs. The undertakings had also extended certain conditions (mainly interchange ability of tickets) exceptionally authorised during summer, for which is the period when maximum traffic Africa-Spain is registered, thorough out the rest of the year. The TDC imposed a fine of 300.000 Euros on each of the four companies with largest turnovers and 150.000 Euros to the other two.

#### UNI2/TELEFÓNICA MÓVILES (Case nº 571/03)

33. The fixed operators Uni2 and MCI Worldcom made a complaint against Telefónica Móviles, Airtel Móvil and Amena before the SDC. The SDC decided to break down the file into three different cases. In the case against Telefónica Móviles, the SDC considered that Telefónica might have abused its dominant position in the form of: a margin squeeze generated by a disproportion between wholesale

charges and retail charges for access to its mobile network, thus breaching articles 6 of the LDC and 82 UE and different wholesale charges applied to other mobile operators for access to its mobile network.

34. The TDC considered that it was not possible to undertake a price squeeze test as it was not possible to break down the different costs due to the fact that the calls from fixed network to mobile network are only a small percentage of the services provided by Telefonica. The TDC also considered that it could not be tested that the objective of charging lower interconnection rates to business users was to expel fixed operators out of the market. The TDC concluded it could not be proved the infringement of art. 6 LDC and 82 UE.

## 2.2 *Mergers and acquisitions*

a) *Statistics on number, size and type of mergers notified and/or controlled under competition laws;*

35. After the stabilisation in the number of notified concentration in 2003, year 2004 has registered an increase on the mergers assessed by the SDC, reaching to the figure of 94. Along with this, the number of prior consultations (16) has increased with respect to the previous years (14 in 2003). On the contrary, preliminary inquiries (44) were decreased (52 in 2003)

36. On the other hand, the enlargement of the scope of control, the dimension and the complexity of the notified transactions has been maintained since 1999 when the new system of compulsory notification entered into force.

	1997	1998	1999	2000	2001	2002	2003	<b>2004</b>
Notifications	19	31	51	93	76	100	79	<b>94</b>
Referrals to the TDC	7	7	14	11	6	9	6	<b>5</b>

37. Annualising the cases according to the notification date at the SDC, 86 notified mergers were authorised in first phase. The Minister of Economy, upon proposal of the SDC, referred in 2004 five concentrations to the Tribunal for further investigation. In the five cases after the TDC issued its report, the Council of Ministers adopted its final decision (authorisation in second phase) through an Agreement: four of them were authorised subject to conditions while only one was cleared without conditions. In all this five cases, the Council of Ministers followed the advice of the TDC. Finally, three cases were filing.

Notifications: type of transactions in 2004			
Acquisition	Joint control	Takeover bid	Others
95%	5%	-	-

38. In 2004 an important number of merger assessed were in the machinery, electricity material and equipment sectors, but other traditional sectors remain its leading role as services, food and beverages sector or chemical and pharmacy industry.

b) *Summary of significant cases*

BALEARIA-UMAFISA

39. The transaction consisted of the take over of UNION MARITIMA DE FORMENTERA E IBIZA (UMAFISA ) by the group BALEARIA.

40. The TDC considered that the transaction would not distort the competition in most of the transport lines between the Spanish Peninsula and Balears Islands, neither in the routes included in the traffic between islands. Nevertheless, the TDC considered necessary to analyse the passenger and freight transports services in two relevant geographic markets: Levante-Ibiza e Ibiza-Formentera, where BALEARIA would reach high market shares (100% in freight transport and 70% in passengers in the case of Ibiza-Formentera market).

41. In its report, the TDC considered that there were not reasons for opposing to the transaction, subject to the condition to adopt some behavioural measures in order to guarantee the maintenance of the conditions of the provision of the freight transport service in the line Ibiza-Formentera existed before the notified merger.

42. Following the report of the TDC, the Council of Ministers decided not to oppose the transaction subject to these conditions.

INTUR-EURO STEWART

43. The transaction consisted of the take over of EURO STEWART ESPAÑA S.L. by INVERSIONES TÉCNICAS URBANAS S.L. (INTUR).

44. The relevant markets defined by the TDC were the funerary services, morgue services, and body cremation services.

45. After the transaction, INTUR would hold a *de facto* monopoly in the market of body cremation services in the relevant geographic market , so the TDC considered that the transaction would hinder the effective competition in that market.

46. In its report, the TDC concluded that the transaction could be approved subject to a divestiture condition of certain crematorium and giving access to third parties to its other crematoriums in transparent and non discriminatory conditions.

47. The Council of Minister, following the report of the TDC, decide to clear the transaction subject to the conditions mentioned.

DISA- SHELL PENINSULAR/SHELL ATLÁNTICA

48. The transaction consisted of the acquisition by DISA CORPORACIÓN PETROLIFERA S.A. of the 100% of the capital of SHELL ATLÁNTICA S.L. and SHELL PENINSULAR S.L.

49. In its report, the TDC considered that the transaction would create an incentive to conclude agreements between DISA and CEPSA in the relevant market of fuel retail on petrol stations. The TDC

considered that CEPSA had a dominant position in the oil products sector in the relevant geographic market.

50. Based on these grounds, the TDC concluded that the transaction could be approved subject to several conditions, between them, the prohibition of having cross-holding in the decision and management company's bodies and the limitation to increase the number of petrol stations in the network of the relevant geographic market.

51. Following the advice of the TDC, the Council of Minister decided to clear the merger subject to compliance with these conditions.

#### AREHUCAS-ARTEMI

52. The transaction consisted of the take over of FABRICA DE LICORES ARTEMI S.L. and DISTRIBUIDORA ARCHIPIELAGO CANARIO by DESTILERIAS AREHUCAS S.A, both companies specialised in the production and commercialisation of certain alcoholic drinks, specially rum in the Canary Islands.

53. In its report, the TDC considered that the relevant product market was the production and distribution of rum and the geographic market was the Canary Islands. The TDC also considered that even though the merger would eliminate the main local competitor of AREHUCAS and the Canary tax regime could be discriminatory and distorted the market, there were other elements which counter the excessive concentration of the supply, as the demand countervailing power, specially, of the large retail outlets (hypermarkets) and the financial and economic strength of the other competitors in the Canary Island and in the Spanish Peninsula, between others.

54. The TDC concluded that the transaction would not hinder the effective competition in the market and could be approved. Following the advice of the TDC, the Council of Ministers decides not to oppose the concentration, clearing it without conditions.

#### SHELL-CEPSA

55. The transaction consisted of the creation of a joint venture "SPANISH INTO-PLANE SERVICES S.L.", joint controlled by SHELL ESPAÑA S.A. and COMPAÑIA ESPAÑOLA DE PETROLEOS (CEPSA), for the provision of into-plane aviation fuel in the airports of the Spanish Peninsula and the Baleares Islands.

56. In its report, the TDC did not find competition problems in the relevant market of into-plane services and considered that due to the fact that CEPSA and SHELL are complementary in the provision of those services, this could create some efficiencies which could counter the possible restrictive competition effects. Nevertheless, the TDC considered that it was necessary to introduce some conditions concerning the commercialisation of fuel in order to avoid the coordination between the parties in the concentration.

57. Following the advice of the TDC, the Council of Ministers decided to clear the merger subject to the conditions proposed.

### **3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

58. As in the past years, the SDC has developed an important activity in the field of advocacy by means of the participation in the legislative process. Thus, the SDC issues reports concerning the draft versions of regulations affecting the conditions of competition in the markets. It has been analysed a total

of 50 draft regulations from the Ministry of Economy or other ministerial departments. Additionally, reports concerning regulations approved by the regional governments have been issued.

59. Special attention was paid to these regulations which have the effect of market foreclosure by means of establishing entry barriers in different activities. During 2004, the analysis has been focused notably on energy, retailing sector, insurance, distribution of tobacco products, professional services, budget subjects, medicaments, transport and environment sectors.

#### **4. Resources of competition authorities**

60. Over the last years, the Spanish agencies, in a framework of public budget balance, have increased its resources substantially. Concerning the **SDC**, and in accordance with the Royal Decree 777/2002, of 26 Of July, a new General Directorate –the *Dirección General de Defensa de la Competencia*- has been created with the incorporation of a Director, exclusively dedicated to competition, which also has an additional support unit.

61. This General Directorate, which exerts all the functions that the Competition Act 16/1989, of 17<sup>th</sup> July, have entrusted to the Servicio de Defensa de la Competencia (SDC), is organised in three units that configures the SDC: the Deputy General Directorate for Mergers, the Deputy General Directorate for Anticompetitive Conducts and the Deputy General Directorate for Legal Affaires and Institutional Relations, created in 2001.

62. The SDC has at present a staff of 95 people: of which 17 economist, 22 lawyers and 20 other professionals, and the rest support staff.

63. Concerning the distribution of the human resources, 45% are applied to enforcement against anticompetitive practices, a 40% to merger review and enforcement and a 15% to advocacy efforts.

64. The Annual budget in 2004 has increased reaching the amount of 2.843.510 euros, which means a 7% of increase with respect 2003.

65. As for the TDC, its Annual budget for 2004 reached the amount of 5,37 million Euros. This amount represents an increase of 16% over the previous year. The number of people currently working in the TDC is 63. 10 out of them are economists, 10 out of them lawyers, 7 other professions and 36 administrative staff.

#### **5. References to new reports and studies on competition policy issues**

66. Finally, complying with its advisory role in the opening of new hypermarkets, the TDC issued 106 reports on this subject and 3 reports (among them one related to the Vehicles Technical Inspections) requested by the Government or other public or private competent bodies (according to articles 2 and 26 of the Competition Act).