

Spain

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Mergers, acquisitions and certain types of joint ventures are subject to merger control. Merger control is regulated by:

- Articles 14 to 18 of Law 16/1989 of 17 July 1989 on the Defence of Competition (*Ley de Defensa de la Competencia*) (LDC).
- Royal Decree 1443/2001 of 21 December 2001, which sets out the procedural rules for the control of economic concentrations.
- Royal Decree 1197/1991 of 26 July 1991 which contains special provisions that regulate concentrations carried out through public takeover bids.

Article 14 of the LDC also applies to acquisitions of joint control in cases where two or more independent entities exert control over a company. However, unlike in EC competition law, no concentration arises if the joint venture has as its object or "fundamental effect" the co-ordination of the behaviour of the controlling parent companies (see *Question 33*).

Regional anti-trust authorities cannot deal with merger control filings. Therefore, merger control regulations are exclusively applied by the central competition authorities. These are:

- The Service for the Defence of Competition (*Servicio de Defensa de la Competencia*) (SDC), which is a department of the Ministry of Economy.
- The Minister of Economy (Minister).
- The Court for the Defence of Competition (*Tribunal de Defensa de la Competencia*) (CDC), which is an independent administrative body.
- The Council of Ministers (*Consejo de Ministros*).

(See box, *The regulatory authorities*.)

The SDC receives the notification and performs the first-phase assessment. Formally, transactions are cleared in the first-phase

investigation by the Minister. It is also the Minister who decides, on the basis of the analysis and recommendations of the SDC, whether to send a case file to the CDC for a second-phase investigation (see *Question 4*).

In second-phase investigations the CDC issues a non-binding report which is forwarded to the Council of Ministers. The Council of Ministers is the competent body to grant (with or without conditions) or deny the authorisation for a transaction which has had a second-phase analysis.

2. What are the relevant jurisdictional thresholds/triggering events?

Article 14(2) of the LDC applies to concentrations, which include:

- The merger of undertakings.
- The acquisition of control of the whole, or parts, of one or more undertakings by contract or by any other means.
- The creation of a joint venture and, in general, the acquisition of joint control over an undertaking which:
 - performs, on a lasting basis, all the functions of an autonomous economic entity; and
 - does not give rise to the co-ordination of the competitive behaviour of undertakings which remain independent.

Internal restructuring within groups does not lead to a concentration under merger control rules and therefore no notification duty arises.

If a transaction falls within the scope of Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (Merger Regulation), the Spanish merger control procedure will not apply and the European Commission will have jurisdiction.

In the event that a transaction qualifies as a concentration in the terms already discussed and the EU thresholds are not fulfilled, the Spanish authorities need to be notified of the transaction if it exceeds either of the thresholds set out in Article 14 of the LDC:

- If as a result of the concentration a market share of 25% or more in the Spanish market or in a defined geographical area therein is acquired or increased.

- The combined aggregate turnover in Spain of all undertakings concerned is more than EUR240,404,841.75 (about US\$291,490,871), provided that the aggregate Spanish-wide turnover of each of at least two of the undertakings concerned is more than EUR60,101,210.44 (about US\$72,872,718).

3. Please give a broad overview of notification requirements. In particular:

- **Is notification mandatory or voluntary?**
- **When should a transaction be notified?**
- **Is it possible to obtain formal or informal guidance before notification?**
- **Who should notify?**
- **To which authority should notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**
- **Is there an obligation to suspend the transaction pending the outcome of an investigation?**

- **Mandatory or voluntary.** Notification is mandatory for concentrations which meet one of the thresholds set out in Article 14 of the LDC (see *Question 2*).
- **Timing.** Companies can file the notification at any time once they have reached an agreement that evidences their will to carry out the transaction (*LDC*). In practice, the SDC accepts notifications once the parties have concluded a memorandum of understanding or a letter of intent. The LDC does not provide a deadline to notify the transaction after the conclusion of the agreement. However, in practice, concentrations are notified shortly after the agreement is signed.

There is a specific procedure for the notification of the acquisition of listed shares pursuant to a mandatory public bid under Article 60 of the Spanish Securities Act (*Article 15(6), LDC*).

- **Formal/informal guidance.** If the undertakings involved in the concentration have doubts as to whether the thresholds are met, they can hold a pre-notification meeting with the competition officials or send a formal written inquiry to the SDC. Pre-notification meetings are not foreseen in the LDC, but in practice are frequently held.
- **Responsibility for notification.** The following parties must notify a transaction:
 - in a merger between undertakings: all the parties participating in the merger;
 - when all or part of an undertaking or a group of undertakings is taken over: the purchaser;

- whenever a joint venture is being formed or a company is jointly taken over: all the parent companies acquiring joint control.

- **Relevant authority.** Notification must be made to the SDC.
- **Form of notification.** The notification must be filed using the official form contained in the Annex of Royal Decree 1443/2001.
- **Filing fee.** There are four levels of fees:
 - EUR3,005 (about US\$3,644) when the aggregate turnover of the undertakings concerned in Spain does not exceed EUR240,404,841.75 (about US\$291 million);
 - EUR6,010 (about US\$7,287) when the aggregate turnover of the undertakings concerned in Spain ranges from EUR240,404,841.75 to EUR480.8 million (about US\$583 million);
 - EUR12,020 (about EUR14,574) when the aggregate turnover of the undertakings concerned in Spain ranges from EUR480.8 million to EUR3 billion (about US\$3.6 billion);
 - EUR24,000 (about US\$29,100) when the aggregate turnover of all the undertakings concerned in Spain exceeds EUR3 billion, plus EUR6,000 (about US\$7,275) for each additional EUR3 billion up to a maximum of EUR60,000 (about US\$72,750).
- **Obligation to suspend.** Transactions which meet one of the thresholds set out in Article 14 of the LDC must be suspended until an authorisation, either tacit or express (see *Question 4*), is obtained from the competition authorities. Parties can request the lifting of the suspension in their notification. The Minister has the discretion to lift the suspension if it decides to send the case file to the CDC for a second-phase investigation.

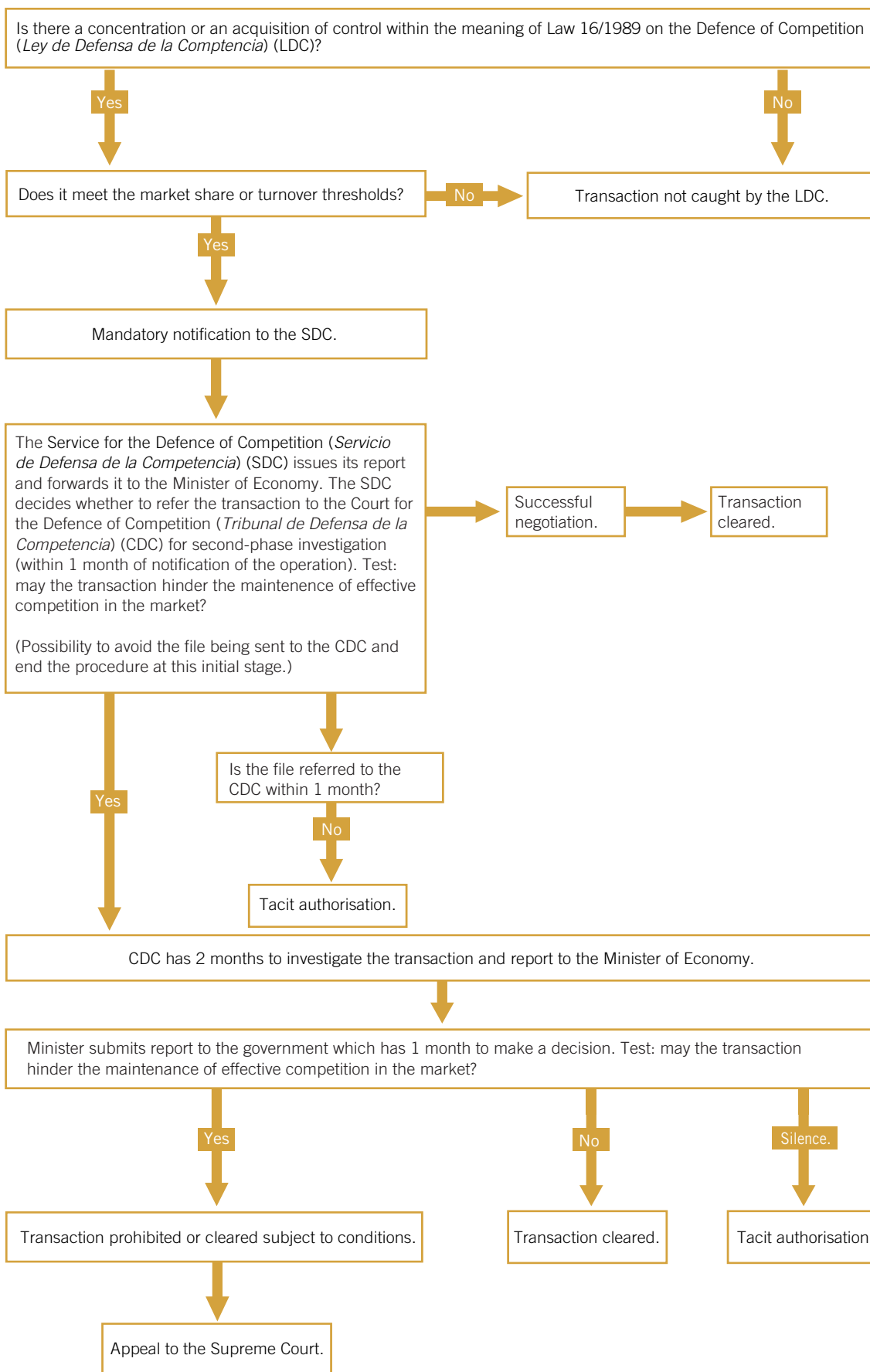
4. Please set out the procedure and timetable.

The merger control procedure is usually initiated by the submission of a compulsory notification form to the SDC by the parties to the concentration. If after one month of filing the notification the Minister has not referred the file to the CDC for a second-phase investigation, the operation is considered to be tacitly authorised.

The LDC entitles the Ministry of Economy to request the parties to submit (within one month) commitments or undertakings to overcome the obstacles to competition that the anti-trust officials may have identified during the initial stages of a first-phase investigation (*LDC*). In this scenario the transaction cannot benefit from the one-month period for tacit authorisation. If the undertakings are accepted then the file is not sent for an in-depth investigation.

Whenever the case file is sent to the CDC for a second-phase investigation, the CDC has two months to submit to the Minister a non-binding report on its opinion of the transaction.

SPAIN: MERGER NOTIFICATIONS



Country Q&A

The CDC report is submitted by the Minister to the Council of Ministers, which then has one month to issue a final decision on the transaction. If after the one-month period the Council of Ministers has not adopted a final decision, the transaction is considered tacitly approved.

5. How much publicity is given about merger enquiries? Can the parties request that certain information is kept confidential?

Publicity

Once a transaction is notified, the SDC publishes a short notice on its web site containing the date of the notification, the name of the parties and the type of transaction. While interested parties are not requested to submit comments, they can do so, although the authorities are not obliged to respond to them or take them into account.

Confidentiality

The SDC file (including the notification form and its annexes) is confidential, in relation to third parties, during first-phase proceedings. Rights of third parties, however, are different in second-phase procedures (see *Question 6*).

The final reports issued by the SDC and the CDC must be published (*LDC*). However, the parties can request that certain information be kept confidential (for example, prices, customers, market shares, terms and conditions of the deal, and duration of the non-competition clause) (*however, see Question 6*).

6. Can third parties make representations and, if so, how?

Third parties are not entitled under the *LDC* to make representations in first phase proceedings. However, they can submit their opinion on the transaction once the notification is made public.

The rules governing submissions in second-phase proceedings distinguish between two categories of third parties (*Royal Decree 1443/2001*):

- **Affected parties.** The CDC sends a brief note setting out the details of the transaction to those parties which it considers will be affected by the transaction (for example, competitors, the Consumers' Council and consumers' associations), so that they can submit their views. This note is first sent to the notifying parties so that they can request, within two days, that information containing business secrets is kept confidential.
- **Interested parties.** Third parties can also apply to become interested parties. This status allows them to:
 - make further representations;
 - be included in the procedure;
 - have access to a non-confidential version of the file;

- receive official communications concerning the investigation.

7. What is the substantive test?

The substantive test is whether the transaction may hinder the maintenance of effective competition in the market.

This test is similar that contained in the Merger Regulation (that is, significantly impeding effective competition), and that goes beyond the traditional test based on the creation or strengthening of a dominant position.

The aggregate market share of the parties in the relevant market is a factor (structural factor) in the evaluation of a concentration but it is not normally crucial, since the Spanish anti-trust authorities also appraise the contestability of the market (dynamic factor). Thus, in analysing a transaction, the Spanish authorities take into account factors such as:

- Entry barriers.
- The countervailing power of demand.
- The structure of the market (for example, concentration ratios and the financial strength of the competitors).
- The evolution supply and demand.
- The geographical dimension of the market.

No public interest test is foreseen in the *LDC* and, therefore, decisions are supposed to be based purely on competition grounds.

8. What remedies can be imposed as conditions of clearance to address competition concerns?

The Council of Ministers can decide:

- Not to oppose the concentration.
- To subject its approval to certain conditions.
- To declare the proposed transaction contrary to the *LDC*, and either:
 - forbid the concentration, if it has not already been carried out;
 - order the parties to adopt the appropriate measures to ensure that effective competition is maintained, including divestiture or cessation of control of assets, or behavioural conditions, such as the termination of exclusivity in supply agreements.

9. Is there a right of appeal against a decision?

The decision of the Council of Ministers ends the administrative part of the merger control procedure. The parties to the transaction or the interested third parties can appeal the decision before the Supreme Court within two months of the date on which they are notified of the decision.

10. What are the penalties for:

- **Failure to notify or a delay in notifying?**
 - **Implementation before approval?**
 - **Failure to observe a decision of the regulator?**
- **Failure to notify.** Failure or delay in notifying can result in a fine of up to EUR30,050.61 (about US\$36,434).
- If a transaction is not duly notified, the SDC can order the companies to submit a notification form within 20 days. If the notification form is not submitted within this term, the SDC can, after hearing the parties, impose a daily penalty of EUR12,020.24 (about US\$14,575) for every day the notification is delayed.
- **Implementation before approval.** See below, *Failure to observe*.
 - **Failure to observe.** Implementation of a transaction before the tacit or express authorisation of the competition authorities, or in breach of the decision of the Council of Ministers, can result in a fine being imposed on each of the companies involved of up to 10% of their turnover in Spain (in the fiscal year in which the transaction took place).

11. If a merger is cleared, are any restrictive provisions in the agreements (such as non-compete covenants) automatically cleared?

Ancillary restraints are analysed together with the transaction. Although the European Notice on restrictions directly related and necessary to concentrations (*OJ 2005 C56/03*) does not bind the Spanish competition authorities, it is consistently used as an authoritative source by the SDC and CDC.

12. Are any industries specifically regulated?

Special rules apply for calculating the turnover of insurance companies and credit institutions (*Article 3.5, Royal Decree 1443/2001*).

Special rules also apply to companies operating in the energy and telecommunications sectors (*Royal Decree-Law 6/2000 of 23 June, as amended by Royal Decree-Law 5/2005*).

RESTRICTIVE AGREEMENTS AND PRACTICES

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

The LDC (*Article 1(1)*) prohibits agreements, decisions, collective recommendations or concerted practices that produce, have as their object to produce or which may have the effect of restricting competition in all or part of the national market (this includes, among other things, price-fixing cartels, market or client sharing, restrictive vertical arrangements, bid-rigging and boycotts).

Restrictive agreements are illegal, unless they are exempted by:

- An individual authorisation granted by the CDC (*see Question 15*).
- Falling within the scope of one of the block exemptions (*Royal Decree 378/2003 of 28 March on block and individual exemptions*) (*see Question 15*).

The SDC may decide not to initiate proceedings against a restriction which, due to its minor importance, is not capable of having an appreciable effect on competition (*Article 1(3), LDC*). Unlike the EU de minimis rule, the Spanish de minimis rule in the LDC only avoids the opening of infringement procedures by the authorities, but does not grant immunity regarding the prohibition of Article 1(1) of the LDC (that is, restrictive agreements caught under the prohibition are still null and void).

Competition rules on restrictive agreements are enforced the SDC and the CDC. The main task of the SDC is to investigate and prosecute alleged infringements. The discovery phase cannot exceed 12 months. If, after the discovery phase, the SDC finds that the conduct subject to investigation may amount to, or does amount to an infringement, it forwards the file, along with a report, to the CDC.

The CDC has the power to:

- Declare an infringement.
- Order the cessation of the conduct.
- Impose fines on the infringing parties.

The complainant and the interested parties can have access to the file but the authorities must maintain the confidentiality of business and trade secrets of the alleged infringing entity.

This phase before the CDC cannot exceed 12 months.

Spanish regions are also entitled, under certain circumstances, to enforce the CDC's decisions covering restrictive agreements and abuses of dominant positions affecting their respective territories (*Law 1/2002 of 21 February 2002, on the co-ordination of the state and autonomous communities' competences on anti-trust matters*).

Several regions have created their own anti-trust authorities, although the Catalan anti-trust authorities appear to be the only ones that are fully operative to date.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The regulations apply to both formal agreements and informal practices.

15. Please summarise any exclusions or exemptions.

The following exclusions and exception apply:

- **The de minimis rule.** See *Question 13*.
- **The ex-lege exception.** The prohibition of Article 1 of the LDC does not apply to agreements, decisions, recommendations and practices that result from the application of a law.

If the restrictive agreement affects intra-community trade, it will not avoid the application by the Spanish authorities of Article 81(1) of the EC Treaty (*Article 2(1), LDC*). The *ex lege* exception, which is not found in EC competition law, has played an important role in the case law of the CDC.

- **Block exemptions.** There are no specific national block exemptions. The EU block exemption regulations are incorporated into Spanish anti-trust law (*Article 2, Royal Decree 378/2003*).
- **Individual exemptions.** In contrast to EC Competition Law, the LDC still maintains a system of individual exemptions (*Articles 3 and 4, LDC and Royal Decree 378/2003*) (*but see Question 34*). The criteria to grant individual exemptions are similar to those set out in Article 81(3) of the EC Treaty.

16. Is there any formal guidance on product and geographic market definition?

The LDC does not provide any formal guidance, although officials may discuss these matters with parties on an informal basis.

17. Please give a broad overview of formal notification requirements. In particular:

- **Is it possible/advisable to notify?**
- **Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?**
- **Who should/can notify?**

- **To which authority should notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**

■ **Notification.** Those restrictive agreements that do not benefit from a block exemption need to be notified to the Spanish anti-trust authorities unless they fall within the scope of application of Article 81(1) of the EC Treaty and they benefit from an individual exemption under Article 81(3) of the EC Treaty.

■ **Informal guidance/opinion.** Informal meetings with the SDC's officials are possible.

■ **Responsibility for notification.** All the parties to the agreement must sign and submit the notification form. The parties may empower one of them or a third party (that is, a law firm) to represent them before the authorities.

■ **Relevant authority.** Notification forms are submitted to the SDC, although it is the CDC which has the power to grant or deny the individual exemption.

■ **Form of notification.** The application form for an individual exemption is found in the Annex to Royal Decree 378/2003.

■ **Filing fee.** There is no filing fee.

18. Please set out the procedure and timetable.

Once the notification has been duly filed, and within a maximum period of 30 days after receiving the application, the SDC will forward the file to the CDC with a preliminary opinion as to whether or not the notified agreement should benefit from an exemption.

The CDC is supposed to issue a decision, after hearing the parties within six months from the date of notification (*Article 12, Royal Decree 378/2003*). However, this time frame has not always been respected.

19. Are details of any potentially restrictive agreement or practice made public during an investigation? If so, can the parties request that any information is kept confidential?

After the notification is filed with the SDC, a brief notice stating that individual exemption proceedings have been opened is inserted in the *State Official Gazette*. The name of the parties and the type of agreement notified are also indicated. Although the SDC can publish a notice in a national newspapers, or the most widely-read newspaper in the province where the relevant practices were carried out, this rarely happens.

Interested third parties are not expressly entitled to have access to the file, although they may obtain access under the general administrative regulations (*Law 30/1992 of 26 November 1992, on the*

general administrative procedure). In this case, the parties to the agreement are entitled to request that the information that contains business secrets be kept confidential.

20. Can third parties initiate an investigation by making a complaint or make representations during the course of an investigation? If so, how?

Any individual or entity can submit a complaint to the SDC, regardless of whether it has been affected by the alleged anti-competitive practice or not. However, the SDC has full discretion to decide whether or not to open infringement proceedings.

21. What are the regulator's enforcement powers and what are the other consequences of implementing a prohibited restrictive agreement or engaging in a prohibited practice? In particular:

- **What orders can be made and fines imposed?**
- **Is it possible to obtain immunity/leniency from any fines?**
- **Can an entire agreement be declared void (that is, not only any restrictive provisions)?**
- **Can personal liability (civil or criminal) attach to individual directors or managers?**
- **Can third parties bring claims for damages?**

- **Orders and fines.** The CDC can order the parties to (*Article 9, LDC*):

- terminate an infringement;
- eliminate the effects of an infringement (if applicable).

In addition, the CDC can impose fines of up to EUR901,518.16 (about US\$1 million) on infringing parties which either:

- intentionally or negligently infringe Articles 1, 6 or 7 of the LDC (that is, unfair acts which cause a serious distortion on competition and affect the public interest);
- fail to comply with a condition or obligation set out in a decision granting an individual exemption to a restrictive agreement.

This amount can be increased by up to 10% of the infringing entity's Spanish turnover for the fiscal year preceding the CDC decision.

In addition to ordinary fines, the CDC can impose penalty payments ranging from EUR60.10 (about US\$73) to EUR3,005.06 (about US\$3,644) per day, to oblige businesses to (*Article 11, LDC*):

- stop the prohibited conduct;
- remove the anti-competitive harm caused by the infringement;
- to comply with the undertakings given in case of early termination of the proceedings.

- **Immunity/leniency.** It is not possible to obtain immunity or leniency from any fines (*but see Question 34*).

- **Impact on agreements.** Unless they fall within a block exemption or benefit from an individual exemption, prohibited restrictive agreements are null and void.

- **Personal liability.** A fine of up to EUR30,050.61 (about US\$36,436) can be imposed on the legal representative or the members of the management bodies that participated in the agreement or decision. These individual fines have only been imposed in very few cases.

Criminal sanctions are not foreseen under Spanish anti-trust regulations, although there had been several unsuccessful attempts to apply Articles 281 and 284 of the Spanish Criminal Code (dealing with restrictions on the supply of raw materials causing scarcity and price alterations achieved through false information, violence, threat, or use of privileged information).

- **Third party claims.** An action for damages can be brought by those who believe they have suffered a loss as a result of the anti-competitive conduct (*Article 13, LDC*). Given that actions for damages cannot be initiated until the decision of the CDC is final (that is, no further appeals are possible), these actions have been very rare (*see Question 34*).

22. Is there a right of appeal against a decision of the regulator? If so, please give details.

A decision of the SDC, which directly or indirectly decides the merits of the case (for instance a decision to dismiss a complaint or to close proceedings), can be appealed to the CDC within ten days of the parties' notification.

Decisions of the CDC on the merits of the case can be appealed before the National Court (*Audiencia Nacional*) within two months of the interested parties being notified of the CDC's decision. The filing of the appeal does not suspend the execution of the decision. However, it is possible to request interim relief before the National Court. Decisions of the National Court can be appealed before the Supreme Court. Third parties showing a legitimate interest may have *locus standi* to appeal against a decision of the CDC.

23. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

The SDC's officials have broad powers of investigation and inspec-

tion. All natural persons and legal entities must provide the information and documents requested by the SDC within ten business days of receiving the request.

Anti-trust authorities are also empowered to investigate premises with or without previous notice (dawn raids are used). Access to the premises can be obtained with the consent of the occupants. If the occupants refuse to grant access, then the inspector may gain access with a search warrant granted by an administrative judge that can be obtained in less than 48 hours.

During the course of the inspections, the inspectors of the SDC may:

- Request information from the employees and directors of the company related to the investigation.
- Examine, obtain copies of, and take extracts from books and documents, including accounting documents and, if necessary, retain them for a maximum period of ten days.
- Ask any questions related to the investigation and request oral answers on the spot about the information found in the course of the inspection.

The SDC also has the following enforcement powers:

- Failing to provide information and documents requested by the SDC can be punished by the Director of the SDC with a fine of between EUR60.10 (about US\$73) and EUR3,005.06 (about US\$3,644) per day of delay in complying with the request.
- If a company hinders the inspection of its premises, the SDC can impose a fine of up to 1% of the infringing company's Spanish turnover during the preceding fiscal year.

In addition, the CDC can impose fines of up to approximately EUR30,000 (about US\$36,375) if the parties acted in bad faith or with gross negligence in relation to the activities carried out by the anti-trust authorities.

24. How is Article 81 of the EC Treaty enforced by your jurisdiction's national competition authority and courts in accordance with Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Modernisation Regulation)? Are there any differences between the enforcement of Article 81 and the enforcement of your jurisdiction's national competition laws? (EU member states only.)

The SDC is responsible for investigating and prosecuting infringements of Articles 81 and 82 of the EC Treaty, and the CDC for declaring and imposing fines for those infringements (*Royal Decree 2295/2004 of December 10*). In principle, Spanish courts are not competent to apply the LDC in private disputes. However, they are competent to adjudicate claims based on Articles 81 and/or 82 of the EC Treaty.

MONOPOLIES AND ABUSE OF MARKET POWER

25. Are monopolies and abuses of market power regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

The abusive exploitation by one or various companies of a dominant position in all or in part of the national market is prohibited (*Article 6, LDC*). This prohibits not only the abusive exploitation of a dominant position, but also the abusive exploitation by one or more businesses of a situation of economic dependence (that is, where their clients or suppliers do not have any equivalent alternatives for carrying out their activities). Therefore, Article 6 seems to go beyond the prohibition set out in Article 82 of the EC Treaty.

26. How is dominance/market power determined?

Spanish competition authorities have endorsed the definition of dominant position established by the case law of the European Court of Justice. The Spanish anti-trust authorities apply a dynamic analysis of the markets to determine when a company is dominant in the relevant market and do not presume that a company holds a dominant position on the basis of its high market share, although market shares above 80% in practice can lead to this presumption.

27. Are there any broad categories of behaviour that may constitute abusive conduct?

By way of example, Article 6(2) of the LDC provides that an abuse may consist of:

- Imposing abusive terms and conditions.
- Limiting production.
- Refusals to deal.
- Discriminatory practices.
- Tying and bundling practices.
- Termination, without a reasonable cause, of a previous commercial relationship (even partially) without six months' written and precise notice.
- Obtaining or attempting to obtain, under the threat of breaking off business relations, terms and conditions not included in the general sales conditions agreed.

28. Are there any exclusions or exemptions?

No block exemptions or individual exemptions are provided for abuses of dominant positions. However, the SDC can dismiss complaints related to alleged abuses of dominant positions on the grounds that, due to their minor importance, they are not capable of having an appreciable effect on competition.

29. Is it possible to notify the conduct to obtain guidance or clearance from the regulator? If so, please set out briefly the procedure.

It is not possible to notify for clearance or guidance.

30. Please summarise the regulator's powers of investigation.

The powers of the SDC's officials are the same as those for restrictive agreements (see *Question 23*).

31. What are the penalties for abuse of market power?

The fines are the same as those set out in the LDC for restrictive agreements (see *Question 21*).

32. How is Article 82 of the EC Treaty enforced by your jurisdiction's national competition authority and courts in accordance with the Modernisation Regulation? Are there any differences between the enforcement of Article 82 and the enforcement of your jurisdiction's national competition laws? (EU member states only.)

The position is the same as that relating to Article 81 of the EC Treaty (see *Question 24*).

JOINT VENTURES

33. Please explain how joint ventures are analysed under competition law.

Concentrative joint ventures are analysed under the Spanish merger control rules (see *Question 1*).

Joint ventures which do not qualify as "concentrations" are analysed under Article 1 of the LDC and, to the extent that they amount to a restriction of competition, can benefit from an individual or a block exemption if they fulfil certain requirements.

PROPOSALS FOR REFORM

34. Please summarise any proposals for reform.

On 20 January 2005 a White Paper on the Reform of the Spanish System for the Defence of Competition was published. The most significant amendments proposed by the White Paper can be summarised as follows:

- Institutional and jurisdictional reforms.** The reform proposes the creation of a single and independent competition authority, the National Commission for the Defence of Competition (*Comisión Nacional de Defensa de la Competencia*) (CNDC). This body would replace the two current competition authorities.

Another significant reform refers to the private enforcement of the LDC. At present, the LDC seems to exclude its application to judges in disputes between private parties and this seems to have been confirmed by the Spanish Supreme Court. Under the new system, the judges would be empowered to apply competition rules, declaring agreements that are contrary to Spanish anti-trust regulations null and void and, if requested, awarding compensation for damages without having to wait for a final decision of the CDC.

- Procedural and substantive reforms.** The reform proposes, in line with Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, the elimination of the individual exemption system, and its replacement with a self-examination system.

In relation to the handling of procedures, the creation of a single entity in charge of both the enquiry and the decision phase would remove the current internal appeal processes (that is, the CDC can currently review actions taken by the SDC on certain issues such as the dismissal of complaints or the closing of proceedings). The CNDC's decisions would be appealed directly before the judicial courts.

The White Paper also proposes the introduction of a leniency policy in line with those existing at EU level and in other European countries.

- Reform of merger control provisions.** Under the system proposed by the White Paper, final merger decisions would be adopted by the CNDC (not by the Council of Ministers) exclusively on the basis of competition criteria. However, the Government would retain a right to clear or block mergers in exceptional cases which could affect public interests such as public safety, plurality in the media, protection of the environment or competitiveness of national industries.

THE REGULATORY AUTHORITIES

NATIONAL LEVEL

The Competition Service (*Servicio de Defensa de la Competencia*) (SDC)

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Outline structure. The SDC, which is part of the Competition Department (*Dirección General de Defensa de la Competencia*) of the Ministry of the Economy, is an administrative body.

Responsibilities. The main functions of the SDC are:

- Investigating and prosecuting alleged infringements of the LDC, and of Article 81 and 82 of the EC Treaty.
- Conducting first-phase merger control proceedings.
- Supervising compliance with CDC decisions and decisions of the Minister of Economy or the Council of Minister in relation to mergers.
- International co-operation with foreign bodies and international institutions on competition matters and co-operating with the European Commission on the application of EC competition law in Spain.

Procedure for obtaining documents. Agreements, decisions, and recommendations authorised by the SDC can be obtained from the Competition Registry. Third parties do not have access to documents that have been declared confidential.

The Court for the Defense of Competition (*Tribunal de Defensa de la Competencia*) (CDC)

Head. Mr Luis Berenguer Pastor (President) (*Presidente*)

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Outline structure. The CDC is a separate administrative body that does not form part of the judiciary. It exercises its functions independently and has jurisdiction throughout Spain. Its activities are controlled by the Ministry of the Economy. It has a president and eight members who hold their posts for a term of five years.

Responsibilities. The CDC can:

- Declare the existence or absence of any of the prohibited conducts by the LDC.
- Require the cessation of the prohibited conduct.
- Impose fines and periodic penalty payments.
- Adopt, at the request of the SDC, interim relief measures.
- Authorise agreements, decisions, recommendations and practices that are referred to in Article 1, in the conditions provided for in Articles 3 and 4 of the LDC.
- Enforce Articles 81 and 82 of the EC Treaty.
- Issue reports recommending reforms to the government in order to foster competition in a specific sector, or the withdrawal of state aids.
- Inform on economic concentrations with an EU dimension forwarded to it by the Commission.
- Prepare reports for judges on compensation for damages.

Procedure for obtaining documents. Agreements, decisions, recommendations and practices authorised or prohibited by the CDC must be registered, and can be obtained from the Competition Registry.

REGIONAL LEVEL: CATALONIA

The General Directorate for the Defence of Competition (Direcció General) (General Directorate)

Head. Mr Arseni Gibert i Bosch (General Directorate for the Defence of Competition)

Contact details. Gran Via de les Corts Catalanes 639
08010 Barcelona
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Outline structure. The General Directorate is part of the Ministry of Economy and Finance of the Regional Government of Catalonia.

Responsibilities. Both the Catalan competition authorities have jurisdiction to deal with proceedings involving Articles 1, 6 and 7 of the LDC affecting the region of Catalonia.

Procedure for obtaining documents. All agreements, decisions, recommendations and practices authorised or prohibited by the Tribunal must be registered. They can be obtained from the Competition Registry.

The Catalan Competition Court (Tribunal Catalán de Defensa de la Competencia) (Tribunal)

Head. Mr Lluís Franco i Sala (Tribunal)

Contact details. The Catalan Competition Court
Gran Via de les Corts Catalanes 639
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Outline structure. The Tribunal is an autonomous administrative body within the Regional Government of Catalonia.

Responsibilities. Both the Catalan competition authorities have jurisdiction to deal with proceedings involving Articles 1, 6 and 7 of the LDC affecting the region of Catalonia. The Catalan Tribunal can also grant individual exemptions.

Procedure for obtaining documents. All agreements, decisions, recommendations and practices authorised or prohibited by the Tribunal must be registered. They can be obtained from the Competition Registry.

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