

– Rafael Frutos Vivar[†] and Diana Montero Melis^{††}

Spain is situated in the Iberian Peninsula in Southwest Europe and borders France and Andorra to the North and Portugal to the West. Spain joined the European Union in 1986.

Economy

Following the decline of its empire in the 17th century, and with a late industrial revolution, Spain's economic growth was thwarted. Whilst economic and political developments took place, its political ascendancy in the world was no longer significant. Subsequent to the Spanish Civil War (1936-39) and the dictatorship of Francisco Franco, Spain entered a phase of autarky. However, after Franco's death and the 'Transición', which started in 1977, Spain's economy has developed rapidly. Membership of the EU and the unprecedented expansion of the services sector, which accounts for over 60 percent of GDP has contributed to making Spain one of the largest economies in Europe. Since the mid-1990s, Spain's economic growth is above the European average.

Competition Evolution and Environment

Spain, like all other Western European countries is a market economy. Competition among firms in this system supposedly guarantees the necessary incentives for the best and most efficient allocation of resources. However, efficiency gains cannot be achieved by leaving the markets function freely alone. An adequate regulatory system is required for competition to be effective. For this purpose, the Spanish public authorities have several instruments, one of them being the laws in defence of competition.

The first steps towards the creation of the Spanish market economy were not taken until the late 1950s following the exhaustion of the autarkic model imposed by the military

PROFILE	
Population:	41,1 million
GDP (Current US\$):	838,7 billion
Per Capita Income: (Current US\$)	17.040 (Atlas method) 21.460 (at PPP)**
Surface Area:	506.000 sq. km
Life Expectancy:	79.2***
Literacy (%):	97.7*** (of ages 15 and above)
HDI Rank:	20
Sources:	
- World Development Indicators Database, World Bank, 2004	
- Human Development Report, UNDP, 2003	
(**) For the year 2002	
(***) For the year 2003	

dictatorship.¹ The first Competition Law was adopted in 1963. Notwithstanding minor liberalisation attempts, the Spanish economy continued to be comparatively closed and traditionally interventionist. Ideas of development planning were of great importance and direct or indirect State control was considered essential in some key sectors (e.g. energy, telecommunications, and transport).

A full-fledged market economy was finally established in the late 1970s, following the return of democracy in 1977 and the new Constitution of 1978.² However, during the first half of the 1980s, the management of the petroleum crises, which in Spain was faced with some delay, was the public authorities' first priority; whilst the liberalisation and competition processes were set aside. During that time, arrangements for accession to the European Economic Community (EEC) started. Spain joined the EEC in 1986.

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1 Franco's military dictatorship lasted from 1939 until 1975. The autarkic model was maintained until the approval of the *Ley de Nueva Ordenación Económica*, the so-called Stabilisation Plan in 1959

2 Specifically Article 38 reads: "Free enterprise within the framework of a market economy is recognised. The public authorities guarantee and protect its exercise and the defence of productivity in accordance with the demands of the general economy, and as the case may be, in keeping with planning".

Shortly before this date, economic growth set off following structural reforms undertaken in previous years. Integration into the EEC gave a new impulse to growth and a new dynamism for more open and competitive markets. The current Competition Law of 1989³ was drafted during this period, taking European norms of competition policy as a reference.

The 1990s were crucial in Spain as in Europe for two reasons. On the one hand, the technological advances affecting some sectors traditionally controlled by the State (e.g. energy, telecommunications, and air transport) led to substantial changes in the regulation of these sectors. Market deregulation ensued and new agencies in charge of the supervision and control of new firms in the market were created.⁴

On the other hand, the move towards the Single European Market gave competition problems a new perspective since some of them were now beyond the reach of nation states. Moreover, the deregulation of the markets, which in Spain had been previously overseen by the State, had now to be coordinated with the other EU Members. In the majority of cases, the impulse for new regulations concerning more open and competitive national markets came from the European authorities.

In Spain, during the first part of the 1990s one of the bodies in charge of competition, the Tribunal (Court for the Defence of Competition) played a dynamic role in advocating for increased competition. In 1993 it established guidelines for lifting barriers that had historically persisted in some sectors of the economy. The Tribunal carried out an advocacy campaign on the advantages of competition as well as its principal obstacles.⁵ This move was due to the new technological circumstances and the necessity of fulfilling European norms, but it also tried to end the privileges some producers had maintained in certain markets that had not been liberalised.

Another distinctive factor in Spain was the progressive decentralization of the State's administration, which had started in 1978. Because of this process, Spain became a quasi-federal state in the 1990s, where the 17 regions (*Comunidades Autónomas*⁶) obtained increasing responsibilities in the competition field. Today, Spanish

markets can be supervised from the sub-national, national and European level.

Competition Law⁷

Spanish Competition Law is contained in Law 16/1989 on the Defence of Competition, which came into force in August 1989.

Since April 1999, important amendments have been gradually introduced into the Competition Act. They include significant changes, both in substance and procedure, to the merger control rules and, to a lesser extent, to the restrictive practices rules, contained in the Competition Act.

The main objective of the Spanish Competition Law⁸ is to 'guarantee the existence of sufficient competition and protect it from any assault contrary to public interest.' The Law identifies five threats to competition:

- Agreements between firms and restrictive practices;
- Abuse of dominant position;
- Distortion of free competition through unfair acts;
- M&As; and
- Public subsidies that may hamper competition and cause injury to the general interest.

The first three activities are to be prosecuted. The two latter actions are to be analysed with to assess their possible negative impacts on competition. This gives the Law a preventive character also. Analysts have pointed out that this is the major difference with the Competition Law of 1963, which had a more repressive character.

Concerning the first two threats, the Law prohibits 'every agreement, decision or collective recommendation, or concerted practice' whose goal is to restrict or prevent competition. It also specifically bans the 'abusive use of one or more firms of its dominant position in a part or all of the national market'. Activities to be prosecuted include: fixing prices, limiting production (output) or distribution of products thereby harming competitors, distribution of the market amongst competitors (dividing markets), or imposing clauses in commercial agreements whose objective is to put a competitor at a disadvantage. However, some of these practices can be authorised if considered to be in public interest. Activities promoting technological progress, for example, may be justifiable.

3 The Law's official name is Law for the Defence of Competition (*Ley de Defensa de la Competencia*); however, for clarity it has been defined in this text as 'Competition Law'.

4 In Spain, the two regulatory bodies created so far are the National Energy Commission and the Commission of the Telecommunications Market, mentioned below.

5 See Tribunal de Defensa de la Competencia (1993): 'Remedios políticos que pueden favorecer la libre competencia en los servicios y atajar el daño causado por los monopolios', TDC, Ministerio de Economía y Hacienda, Madrid; also *Tribunal de Defensa de la Competencia* (1995): '*La Competencia en España: balance y nuevas propuestas*', TDC, Ministerio de Economía y Hacienda, Madrid. Both documents are available at www.tdcompetencia.es.

6 Comunidades autónomas means literally autonomous communities.

7 In January 2005, a White Paper (Libro Blanco) was published, that foresees new changes in the law. However, these have so far not been implemented.

8 The Law and all related legislation are available at <http://www.mineco.es/dgdc/sdc/legislacion.htm>.

One characteristic of the Spanish Competition Law, different to the legislation in the majority of European countries, is the inclusion of ‘distortion of free competition through unfair acts’ as an act to be prosecuted.⁹ The idea behind this is to extend regulation to those cases where, even though the firm may not be in a dominant position in the market, it is behaving in a manner that distorts competition. One example is predatory pricing by non-dominant firms.¹⁰

Concerning mergers (concentrations), the Law establishes that before undertaking any such operation, the Ministry of Economy and Finance can request a report from the Tribunal in order to determine whether the new firm may represent an obstacle to competition in the market. Once the report has been issued, the Ministry of Economy and Finance decides whether the merger can take place or what conditions need to be fulfilled for it to take place.

In practice, the Ministry of Economy and Finance requests a report only in rare occasions, since internal analyses usually suffice. This situation and the fact that these procedures are very complex have led the Ministry to develop certain guidelines to be followed in the analysis of mergers.¹¹ The objective is to make the decisions of the Ministry transparent and forestall uncertainty and lack of information for all interested parties. This way of acting is customary in Anglo-Saxon countries with longer traditions of antitrust policies.

The Law allows the Tribunal, at the request of the Ministry of Economy and Finance, to examine public subsidies given to firms and their possible effect on competition in the markets where the firms operate. If the report given by the Tribunal concludes that the subsidies cause some prejudice to the competitive performance of the markets, the Minister of Economy and Finance must suggest the necessary changes for restoration of competition.

Institutions and its Competencies

For the implementation of the legislation, two bodies have been established:

- *Servicio de Defensa de la Competencia* (Service for the Defence of Competition-SDC); and
- *Tribunal de Defensa de la Competencia* (TDC).

Both are attached to the Ministry of Economy and Finance.

The SDC’s principal functions are the preparation of proceedings and reports as well as coordinating its operations with the EC and other international institutions,

whereas the *Tribunal* is in charge of settling the proceedings of law infringement, following the reports prepared by the Servicio; this has, moreover, an advisory role and issues reports.

The Law’s procedure is as follows: The process starts either with the accusation of one firm of the existence of some anticompetitive practice or at the Servicio’s request. The Servicio initiates the infringement proceedings for the Tribunal. In this case, the Tribunal performs a similar role to that of any court of justice. The Law makes it possible to challenge the Tribunal’s verdict as well as those cases where the Service has not deemed it necessary to process an accusation.

Box 95.1: Enquiry into Text Message Pricing

The Competition Defence Service (SDC) has started an enquiry on the three main mobile telephone operators, Telefónica Móviles, Vodafone and Amena, concerning an alleged agreement on the pricing of text messages and multimedia text messages.

The three mobile telephone operators are charging •0.15 for sending a text message since the launch of the service in 2000. The Consumers Association stated that the agreement on prices extends to text messages sent to foreign countries, for which all the three operators charge •0.60. However, the cost of these services is very low for the operators. The operators have based their price policies on calls between users of the same company and fixed subscriptions, but not text messages.

In 2003, 11.753bn text messages were sent through these operators in Spain - twice as many as two years ago and 23 percent more than in 2002. Text messages represented 13.7 percent of the total sales of the sector and balanced the bad results by other data services linked to the GPRS (general packet radio system) technology

Source: *International Law Office*

Regional demands and a legal flexibility in the Constitution, since it did not contemplate the protection of competition to be regulated by the central administration alone, led to a review in the distribution of competencies. Presently, the Law is implemented by regional administrations when the behaviour to be prosecuted is exclusively regional and does

9 However, an increasing number of European countries (e.g. Germany, France, Italy etc.) are adopting this kind of rules about unfair acts like the so-called predatory pricing by non-dominant firms. Since they are sometimes not part of the competition law itself, applying those laws can be positively anticompetitive.

10 These actions are the specific objective of the Unfair Competition Law of 1991 (*Ley de Competencia Desleal*), which complements the Law of Defence of Competition. However, unlike the latter law, the Unfair Competition Law follows the ordinary judicial course.

11 Available at www.mineco.es/dgdc/sdc/guidelines.htm

not affect the markets in the rest of the national territory. If the affected market is supra-regional, the State's central administration is responsible for the implementation of the Law. Moreover, the central administration has to elaborate competition norms and coordinate with international institutions.

Regulatory Framework

Spain has made considerable progress in reforming its regulatory structure over the past years, particularly in the telecommunication and electricity sectors. However, Spain still faces other economic problems, including low innovation and high inflation in services.

Following the transition from direct state monopolies to competition, two regulatory bodies have been created in Spain: the *National Energy Commission* and the *Commission of the Telecommunications Market*¹². The most important objective of these bodies is the achievement of the highest grade of possible effective competition in their respective markets. Both commissions have to inform the SDC, the competition authority, of any anticompetitive conduct.

Telecommunications Sector

The telecommunications market in Spain has been gradually liberalised. The general framework for this liberalisation is set out in the *Telecommunications Act of 1998*, which came into effect in April 1998.

The Telecommunications Act is aimed at promoting competition by applying principles of non-discrimination and transparency to reliable and accurate telecommunications services. The Act also provides a number of safeguard mechanisms to ensure the functioning both of the market and of the services provided.

Energy Sector¹³

There has also been progress in the liberalisation of the gas and oil markets. As a result, Spain is one of the leading countries in energy sector liberalisation in the EU. The objective is to spur competition and allow the market to guarantee quality, distribution, and supply, while respecting the environment, although results so far have been controversial.

Spanish Law 54/1997 for the energy sector, passed in November 1997, specifies the fundamental changes in the system's functions.

The National Energy Commission (*Comisión Nacional de Energía*, CNE), an advisory/regulatory body, deals with some of the regulatory issues in the electricity, gas and oil sectors, although the Ministry of Economy remains the

main regulator. The goals of the Commission are to ensure the existence of effective competition in Spain's energy markets and their objective and transparent functioning for the benefit of all agents operating in these systems and that of consumers.

Box 95.2: Tribunal Fines *Telefónica* for Abusing its Dominance

Spain's telecommunications sector has exhibited several cases of abuse of dominance.

In one such case, *Telefónica*, the main telecommunications firm in Spain, was found abusing its dominant position in the market by awarding a temporary privileged indirect access to the local loop to its subsidiary, *Telefónica Data*. Moreover, the contract for its ADSL service *Megavía* contained certain clauses, which could lead clients to choose their services instead of those provided by competitors. The Tribunal fined *Telefónica* 900,000 euros.

Source: OECD (2003) *Annual Report on Competition Policy Developments in Spain (2002)*, DAF/COMP(2003)15/06

Another case relates to denial of access by *Telefónica* to companies providing enhanced services. One of the competing providers, *3C Communications España*, planned to introduce credit card public telephones. In applying for authorisation from the telecom regulator, *3C* described these units as modems. But when *Telefónica* learned that they were actually used as public telephones, it rejected or delayed the new lines, particularly in airports.

The Tribunal ruled that refusing service to *3C* was abusive on the grounds that *Telefónica* could not unilaterally cut off, reject or delay telephone lines without approval from the regulatory authority, which it did not have. The Tribunal's remedies included orders protecting *3C's* access and a fine of 124 million Pesetas.

Source: *Regulatory Reform in Spain: The role of Competition Policy in Regulatory Reform*, OECD, 2000

Consumer Protection¹⁴

Article 51 of the Spanish Constitution deals with basic consumer law and defends consumer rights:

"The public authorities guarantee the defence of consumers and users, protecting by means of effective procedures their security, health, and legitimate economic interests".

12 Further information related to these bodies is available at www.cne.es and www.cmt.es.

13 www.tradeport.org/cal_spain/spain_energy_efficiency.pdf

14 Information for this section is based on (i) *Balancing the Scales Part III: Consumer Protection in Greece and Spain*, Consumer International, April 2000; (ii)

“The public authorities will distribute information and provide education to consumers and users, will promote consumer organisations, and will consider their requirements within the framework of established Law”.

A specific Consumer and User Protection Law was approved on July 19, 1984 enacting the constitutional mandate.

Before this, Municipal Consumer Information Offices (OMICs) were created in 1983 and established throughout the country. These offices distribute general consumer information, advise consumers on specific products and services, and assist in the formal presentation of consumer complaints to guide them through the Consumer Arbitration system. The Consumer Arbitration System is an extra-judicial method, which is rapid, effective, and economic, allowing conflicts between buyers or users (final destination of product or service, excluding professionals, associations, and traders) and sellers or service providers to be resolved in a voluntary manner. This consumer complaints system was started on an experimental basis in 1986, and its regulations were promulgated by Royal Decree on May 03, 1993.

The National Consumers Institute, an independent body of the Ministry of Health and Consumers Affairs, together with the Directorate General of Consumer Affairs of the Autonomous Communities is in charge of the functions of promotion and development of consumers and users right. The National Consumers Institute carries out investigations and studies of consumer relevance, such as analyses and tests of the quality and safety of consumer and user goods and services. Its functions also include informing, training and educating consumers, for which the INC has an Information and Documentation Centre.

The Law on the Defence of Competition, and the Unfair Competition Law form the principal legislative framework for the free market in Spain. Consumer interests are protected in terms of unfair competition by permitting the consumer associations prosecute criminal cases of unfair acts and cases, and rectify misleading information

Concluding Observations and Future Scenario

Over the last few decades, there has been a notable advance in the promotion of competition in Spain. This development is evident in several fields. There is a general agreement on the appropriateness of policies that encourage competition in the markets. There is also a better theoretical and judicial preparation to prosecute anticompetitive practices, and there are rigorous analyses and controls of mergers.

However, problems common to the rest of Western European countries remain. The processes of globalisation and the growing power of multinational enterprises impose the analysis of competition at a supra-national level.¹⁵ In principle, it is preferable to shift decisions on competition away from the firms involved in order to prevent what is known as ‘regulatory capture problem’. However, this can conflict with states’ interests, preoccupied with defending their ‘national’ champions thus neglecting interests that are more general. The Spanish Government has often insisted in defending national champions whenever liberalisation has ‘threatened’ them.

Box 95.3: Merger Cleared on Efficiency Grounds

This merger involved the integration of DTS *Distribuidora de Televisión Digital S.A.* (Vía Digital) with Sogecable S.A., the two leaders in the Spanish pay TV market. Together their market share would account for 80 percent. Sogecable would become the only satellite television platform in Spain and would only compete with cable operators in certain geographical areas of Spain.

The main risks this merger presented were in the upstream markets of rights acquisition for premium contents (football, premiere films, thematic channels). With reference to the football events, the merger would have a negative impact on consumers, since it would effectively prevent competition. Regarding the telecommunication services markets, since *Telefónica* manages Vía Digital, its participation in Sogecable, would signify the company’s control of the main contents of pay TV, as well as its activity as a provider of fixed telephone services, broadband Internet access and television through ADSL, thus creating anticompetitive effects in those markets.

Despite these and several other negative consequences, the Tribunal decided in favour of the merger on the grounds of economic efficiencies. The new entity would be able to transfer these efficiencies to consumers through lower prices and improved contents. The Council of Ministers cleared the merger conditional on observance of certain provisos and clauses in relation to the aforementioned markets following the Tribunal’s advice.

Source: OECD (2003) Annual Report on Competition Policy Developments in Spain (2002), DAF/COMP(2003)15/06

15 For examples of anticompetitive practices at the supra-national level see Public Service Privatisation Research Unit (1996): *The Privatisation Network*, PSPRU, London

The role of the independent regulatory bodies and their coordination with the public authorities remains inadequate. In principle, these bodies were supposed to be independent of any interest that was not in defence of consumers, assuming that the public authorities had the same objective. Experience has shown that in conflicts between the regulatory bodies and the public authorities, the former have often lost out against the latter.

In the case of Spain, there is still resistance to greater openness leading to competition in the markets, even from the consumers' point of view. This is rather odd taking into consideration that consumers have seen a reduction of prices after the liberalisation of some sectors.¹⁶

Perhaps an explanation can be found in the fact that the public authorities seem to lack the definite will to defend competition other than through 'formal' demonstrations. In this context, it is important to examine some of the performance of the Government since the beginning of the privatisation and deregulation processes. The Government has often intervened in the activity of privatised firms; appointing persons close to it for management posts, and regulating in favour of privatised firms that continued to enjoy a dominant position. For this reason, some doubts have been raised about the political will to legislate in favour of consumers.

Some of the decisions taken around the regulation of some previously monopolised sectors have allowed some incumbent firms to extend their power in other markets.

This was for example the case in the electricity sector. Firms that had previously invested in capacity building and could see their activities under-utilised with the new regulation were entitled to reparations. The way in which these funds were managed allowed these firms to extend their influence to other sectors that were starting their liberalisation process (e.g. gas). The effect has been the amalgamation of interests in several markets and has resulted in a slower than expected liberalisation process.

Regions appear to have inherited some of the shortcomings of the central administration. In many cases, regional governments have legislated in favour of the regional producers (their 'national' competitors), even at the consumers' disadvantage. The regional as well as the local administration, constrained by financial limitations, see in the monopolisation of certain markets a way of acquiring higher profits. This distorts and leads to delays in the development of some sectors (e.g. cable television) or higher prices (e.g. housing).

One sign of the several deficiencies affecting competition in Spain is the two-track increase of prices. Whereas under competition the prices of industrial goods grew by 9.1 percent in 1998-2003, services prices grew by 21.5 percent. Indeed, a good measure of this difference can be attributed to problems of a more general nature, for example, the historical unresponsiveness of supply in the Spanish economy to changes in demand. However, without any doubt, a great deal of responsibility lies with the insufficient promotion of competition by the public authorities.

¹⁶ In the electricity and telecommunications, the first sectors to benefit from liberalisation, prices have decreased around 10 percent since 1998. Considering that over the same period the general price index grew by 20 percent, in real terms the electricity and telecommunications prices have registered a notable reduction.

✦ Spain's Council of Ministers has given nod to an entirely new competition regime, based on a single, commission-style competition agency. Consequently, the National Competition Commission will replace the existing Competition service and competition tribunal. The law is expected to be operative with effect from January 2007 bringing in amendments to certain key provisions such as adoption of leniency programme; higher thresholds for merger control; and a short-form notification procedure for no-issue mergers.
(Source: *Global Competition Review*, 25th August 2006)

Suggested Readings

Comprehensive overview of Spain's Competition Law: *OECD (2001) "Regulatory Reform in Spain: The Role of Competition Policy in Regulatory Reform"*, OECD, Paris.

See also the OECD's Annual Report on Competition Policy Developments in Spain.

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