



# COMPETITION SERVICE

Annual Report 2004



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Y HACIENDA

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ESTADO DE ECONOMÍA

DIRECCIÓN GENERAL  
DE DEFENSA  
DE LA COMPETENCIA

COMPETITION  
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# PRESENTATION

The Spanish Competition Service was extremely active in 2004. In addition to its inherent function of carrying out preliminary and main investigations into cases, it concentrated on two long-term objectives, namely adaptation to the new EC antitrust framework and the beginning of the process of reforming the Spanish system.

## **a) Adaptation to the new EC framework**

Over the course of the last financial year, the Directorate-General allocated substantial resources to active participation in the process of starting up the new EC antitrust system, in accordance with the new regulations and communications which came into force on 1 May.

Specifically, the two main areas in which the Competition Service worked in 2004 were the creation of the European Competition Network (ECN), in which respect it played an active role, and the starting up of new mechanisms for cooperation and coordination within the EU.

As far as the ECN is concerned, the creation of mechanisms for cooperation, coordination and the

distribution of proceedings between the competent national authorities in the EU and the European Commission is unquestionably essential to guarantee consistency as regards the decentralised application of articles 81 and 82 of the EC Treaty, which prohibit anti-competitive agreements and the abuse of dominant positions.

Frequent meetings geared to the launch of the network and the establishments of procedures for the application of the new Commission communications in the area in question were thus attended in 2004. Furthermore, procedures for exchanging information with other authorities were defined.

As regards the starting up of new mechanisms for cooperation and coordination, Spain has pioneered the application of some of the most recent instruments, such as company inspections performed by other competition authorities and, as regards the merger control, the referral of cases during the pre-notification stage.

## **b) Preparing the white paper**

Secondly, the work of the Competition Service in 2004 was influenced by the launch of an in-depth review of Spain's regulatory framework, which has been

in force since 1989. In June, the Directorate-General began to prepare a white paper for the reform of the Spanish antitrust system.

A considerable effort was made to have a document ready for the end of 2004, working on the basis of input from the many seminars and specialized publications on the subject. The experience built up over the last 15 years and informal suggestions from other governmental bodies were also of greatest interest.

The white paper was eventually presented at the beginning of 2005. The reform process began after public inspection and will culminate in a new law being drawn up.

### **c) Application of the Antitrust Law**

Both the aforementioned challenges, which are of unquestionable importance, were tackled against a backdrop of a complete change of the managerial team of the Competition Service. Furthermore, none of the routine work arising from preliminary investigations into cases was neglected.

Aside from the extra work entailed by the ongoing projects previously referred to, the Competition Service maintained its usual workload in terms of preliminary investigations into cases, representation in international forums and legally prescribed tasks involving coordination with Spain's autonomous communities.

On that subject, it must be pointed out that no appreciable workload reduction was noted in 2004 as a result of the application of the Antitrust Law.

The number of complaints received about conducts with restrictive effects on competition rose in comparison with the previous financial year.

Furthermore, various proceedings were initiated on the Competition Service own initiative and a major effort was made to bring the files of pending cases up to date by closing those that began prior to the year 2000.

In terms of merger control, the number of operations for which notification was given also increased. The volume of prior queries received and preliminary proceedings undertaken on the initiative of the Competition Service remained the same as in previous years.

Lastly, the Competition Service continued to participate actively in the various international conferences and forums, as to do its utmost to work on consolidating a suitable framework for the autonomous communities to develop competence in the aforementioned area.

All the above factors contributed to reinforce the role of the Competition Service as a champion of fair trading in Spain and consolidate its status as a leading authority in the international arena.

### **d) Challenges for the future**

The main challenges for the immediate future still involve EC and Spanish regulatory reforms.

Regulation 1/2003 is raising important issues that are yet to be put in practice (for example, in relation to cooperation with other national competition authorities, the sharing of jurisdiction with the European Commission and direct application by judges in commercial courts). Those issues will continue to require special attention from the Competition Service.

As far as the national framework is concerned, the short-term future will undoubtedly revolve around the process of developing the new law, which will probably give rise to new medium-term challenges. They notably include likely institutional reform and, specifically, the creation of Spain's new competition authority, the National Competition Commission.



Headquarters of the Directorate-General  
for Competition  
Ministry of Finance and Economy





# I. REGULATORY ACTIVITY

## I.1. Regulatory changes

The year 2004 saw the conclusion of the adaptation of Spain's legislation to the changes to EC legislation arising from the new regulations on the application of articles 81 and 82 of the EC Treaty and on the control of concentrations<sup>1</sup>.

Specifically, Royal Decree 2295/2004 of 10 December, on the application in Spain of EC competition regulations, was published in the Official State Gazette of 23 December.

The purpose of the royal decree referred to above was to adapt Royal Decree 295/1998 of 27 February, which had previously governed the aforementioned area and has now been abrogated, to the new EC regulatory framework, incorporating the new jurisdictions and duties assigned to state Competition bodies.

Two of the new developments introduced are particularly noteworthy:

- a) Tasks involving working with the European Commission, national courts and the national competition authorities of other European Union Member States.

- b) New mechanisms that enable national authorities and the European Commission to refer cases related to concentrations between undertakings to each other (during the pre-notification stage in particular).

## I.2. White paper for the reform of the competition system

As mentioned previously, the Directorate-General of Competition spent 2004 working intensely in 2004 on the production of a white paper aimed at reviewing the Spanish competition system and laying the foundations for the preparation of a



<sup>1</sup> Established in (EC) Regulation n°. 1/2003 of the Council, of 16 December 2002, and in (EC) Regulation n°. 139/2004 of the Council, of 20 January 2004, on the control of concentrations between undertakings (known as the "EC Merger Regulation").

draft bill to replace Law 16/89, which currently regulates competition.

The Second Vice-President of the Government and Minister of Finance and the Economy oversaw the public presentation of the document in question on 20 January 2005.

The white paper is a working document that examines and reviews the Spanish institutional and regulatory framework for competition.

Along with an analysis of the current model, with its pros and cons, and of the most representative systems in the international arena, the white paper contains proposals for reform affecting the institutional framework, the struggle against restrictive practices, the system for the merger control, public aid and social awareness of competition.

The ultimate aim is to guarantee the availability of instruments and an optimal structure to safeguard effective competition in markets and, thus, the efficient allocation of resources and social welfare.

Following the publication of the white paper on the website of the Competition Service, a two-month period of public inspection and notification began. That period ended on 20 March 2005.

### **I.3. Advocating competition: reports on regulatory projects**

As in previous years, the Competition Service played an active role as regards advocating competition, fundamentally



by producing reports on regulatory projects (bills, royal decrees and ministerial orders) generated by other units of the Spanish government. In all, approximately 50 regulatory projects were analysed.

Additionally, reports were written on regulations related to competition in markets and passed by Spain's autonomous communities.

The reporting activity focuses on an analysis of the content of the relevant project from the point of view of competition. A particular effort has been made to highlight regulations that lead to markets becoming closed off through the establishment of barriers to entry.

A wide range of subjects have been reported on. Of particular note were reports on energy, consumers and users, telecommunications, intellectual and industrial property, national trade, insurance, distribution of tobacco products, professional guilds, budgetary issues, medicine, transport sector and the environment.

## II. MERGER CONTROL

### II.1. Introduction

Viewed from a comprehensive perspective, the last financial year was influenced by the implementation of the new EC Merger Regulation, which came into force in May 2004.

Essentially, the regulation in question entails substantial changes in three areas:

- a) *Jurisdictional area.* The procedures for the referral of proceedings between authorities have become more flexible and the possibility of such referrals taking place during the pre-notification stage has been introduced.
- b) *Substantive area.* A new test to identify “significant hindrance to effective competition, particularly as a result of the creation or consolidation of a dominant position” has been established with a view to analysing restrictive effects on competition.
- c) *Procedural area.* In general, the deadlines for notification, submission of commitments, negotiation and adopting decisions have been rendered more flexible.



IGNACIO MEZQUITA PÉREZ-ANDÚJAR  
Deputy Director General for mergers

The new system is completed by a series of regulations geared to development and interpretation<sup>2</sup>.

In terms of the activity of the Competition Service as regards the merger control, 2004 saw an increase in the number of operations analysed. Work related to investigations undertaken on the initiative of the Service itself continued through

<sup>2</sup> (EC) Regulation no. 802/2004 of the Commission, of 7 April 2004, whereby Regulation 139/2004, the Commission guidelines on the evaluation of horizontal mergers and the new communications on the simplified procedure are applied to the directly related restrictions necessary for concentration operations and to referrals made during the pre-notification stage and once notification of operations has been provided.

preliminary action. Various penal proceedings were dealt with, the number of prior queries made by companies rose and reports were produced on the subject of jurisdictional reviews.

## II.2. Mergers analysed

### a) Notifications

Table 1 contains general statistics on the merger control from 1990 to 2004. The criterion used in the table is the same as that adopted in the report on the financial year 2003, meaning that every act related to a notification is shown as corresponding

to the year in which proceedings began, although subsequent procedures or acts<sup>3</sup> may have taken place in the following year.

Following the stabilisation recorded during the previous financial year, the number of cases analysed in 2004 rose to 94.

It must be noted that 46 of the 94 notifications provided in Spain were also issued in other EU countries.

### b) Referral of proceedings to and from the European Commission

Table 1 also shows the use of the mechanisms envisaged in the EC Merger Regulation for the referral of

**Table 1**  
**STATISTICS OF THE MERGER CONTROL IN SPAIN**

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04
Notifications	8	11	17	15	13	20	23	19	31	51	93	76	100	79	94
Multiple Notifications <sup>1</sup>	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	30	30	32	31	46
No referral to the CC	5	11	10	12	10	14	20	9	19	34	81	65	83	72	86
Referral to the CC	3	0	7	3	2	5	2	7	7	14	11	7	9	5	5
Agreement of Council of Ministers	3	0	7	3	2	5	1	7	6	14	11	7	9	4	5
Disposal	0	0	0	0	1	1	1	3	5	2	1	3	7	1	3
Referrals <sup>2</sup>	0	0	0	0	0	0	0	0	0	1	1	-1	2	-1	1
Preliminary proceedings	0	0	0	11	16	8	27	27	27	32	45	17	45	52	44
Prior queries	0	0	0	0	0	0	0	0	0	13	24	12	12	14	16

<sup>1</sup> Mergers of which notification was given in Spain and other EU Member States.

<sup>2</sup> Referrals from the European Union to Spain (articles 4.4. and 9 of Regulation 139/2004); referrals from Spain to the European Union (articles 4.5. and 22 of Regulation 139/2004) appear with a minus sign.

<sup>3</sup> Authorisation, disposal, referral to the Competition Court (CC) or agreement of the Council of Ministers.

proceedings between the European Commission and the Member States.

On the matter in question, the entry into force of the new mechanism for referring cases during the pre-notification stage should be noted<sup>4</sup>.

Spain has participated actively in the promotion of the procedures for the referral of cases between national authorities and the European Commission.

Ten proceedings were thus referred to the European Commission during their pre-notification stage in 2004. However, no operations of which notification was given in Spain were referred to the European Commission in application of article 22 of the EC regulation.

On the other hand, in 2004 the Competition Service requested that a merger case of which the European Commission had been notified be referred to Spain, by virtue of article 9 of the regulation<sup>5</sup>, in order to analyse the operation in accordance with the national rules on the merger control.

Lastly, it is necessary to highlight the considerable amount of work undertaken in a range of formal and informal forums with a view to improving the development of procedures for the joint referral of operations of which notification is given in various Member States.

That work initially took the form of certain agreements related to the ECA (European Competition Authorities) as

regards the procedure to be followed in terms of operations of which notification may be given in various Member States, so as to render control more effective and minimise the costs incurred by companies as a result of the existence of different systems within the European Union. In 2004, the ECA principles were updated to cover the application of the new procedure of referral during the pre-notification stage.

In addition, work was carried out within the European Union over the past financial year to prepare a European Commission communication on referrals, by way of a complement to the aforementioned ECA principles.

### c) Conclusion during first stage

As far as the conclusion of proceedings is concerned, the vast majority of operations are authorised during the first stage, as can be seen in Chart 1, within a period of a month.

The percentage of proceedings referred to the Competition Court (CC) actually fell from 6.3% in 2003 to 5.3% in 2004.

Three proceedings were disposed of, two of them due to the relevant mergers not falling under the jurisdiction of the Competition Act (CA)<sup>6</sup> and the third due to the parties involved waiving their action<sup>7</sup>.

Lastly, it should be noted that the conventional termination procedure envisaged in article 15.b of the Competition Act was not employed.

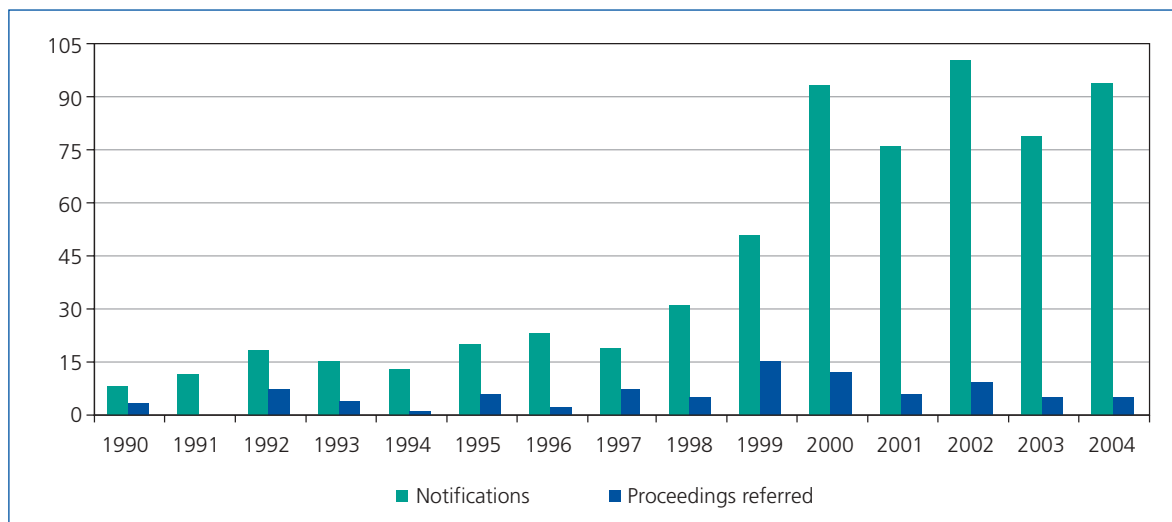
<sup>4</sup> Article 4 of (EC) Regulation no. 139/2004 of the Council, of 20 January 2004, on the control of mergers between companies (referred to as the "EC Merger Regulation").

<sup>5</sup> 3275 SHELL ESPAÑA/CEPSA/SIS JV, which gave rise to the national proceedings N-04088 SHELL ESPAÑA/CEPSA/SIS JV.

<sup>6</sup> N-04012 AMG-AUTOTRACTOR/FINANMADRID-PRUMBAO-AUTOPARK and N-04044 INTUR.

<sup>7</sup> N-04019 DUNLOP/CENTRAX.

**Chart 1**  
**MERGERS THAT WERE THE SUBJECT OF NOTIFICATION AND THOSE REFERRED TO THE COMPETITION COURT**



**d) Mergers analysed by operation type and sector**

It is possible to identify five groups of operations of which notification is liable to be provided, based on **operation type**. Those groups are acquisitions of exclusive control (or acquisitions), mergers, joint control operations, takeovers and others.

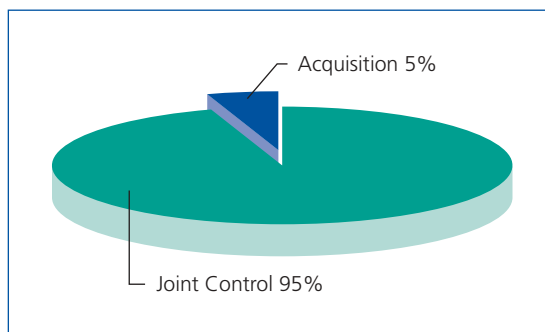
As has been the case in the past, most of the mergers of which notification was issued in 2004 involved one company taking exclusive control of another.

Unlike previous years, no merger or takeover operations were analysed in 2004.

Chart 2 breaks down the operations of which notification was given in the financial year 2004 into percentages, on the basis of the type thereof.

Chart 3 shows the **sectors** in which most operations took place. Of particular note is the predominance of

**Chart 2**  
**MERGERS OF WHICH NOTIFICATION WAS GIVEN IN 2004, BY OPERATION TYPE**

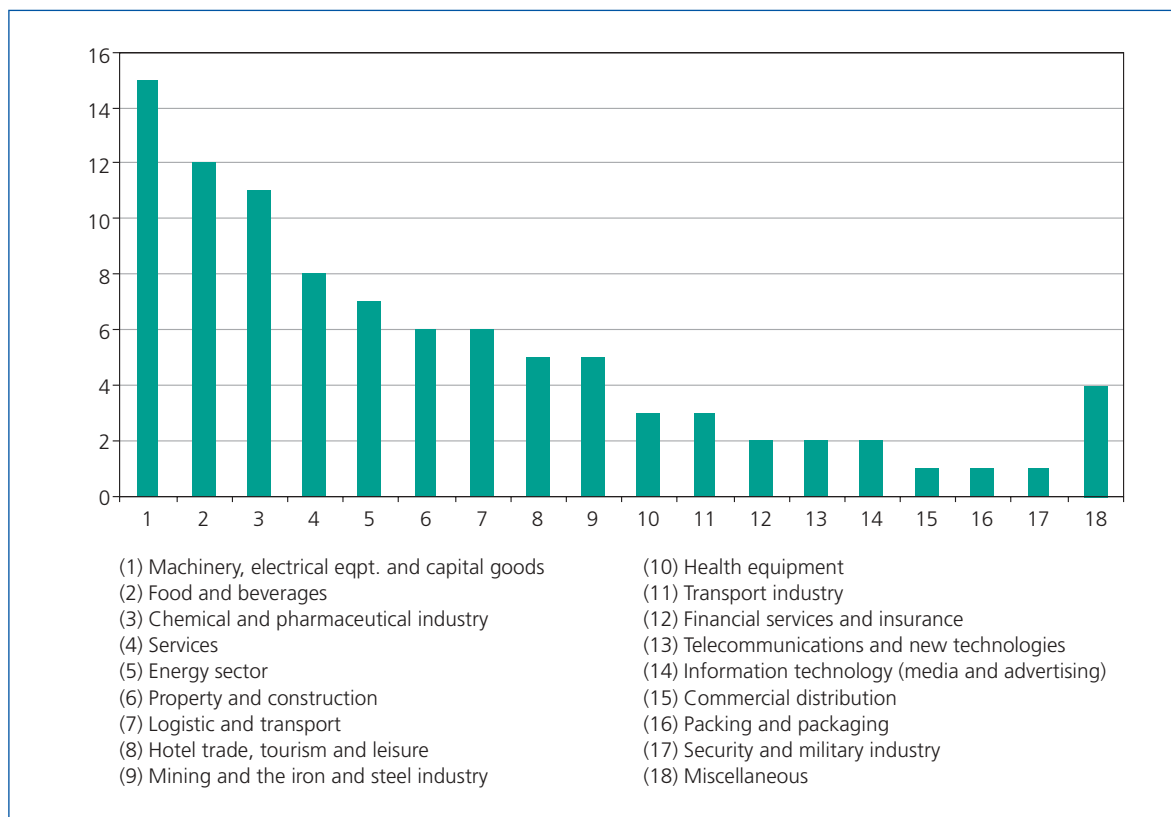


the machinery, electrical equipment and capital goods sector in 2004, with 15 operations analysed, followed by food and beverages and the chemical and pharmaceutical industry.

**II.3. Operations referred to the Competition Court**

Over the course of 2004, the Competition Service referred five

**Chart 3**  
**OPERATIONS OF WHICH NOTIFICATION WAS GIVEN IN 2004, BY ACTIVITY SECTOR**



operations to the Competition Court, in order for the latter to report thereon.

The Council of Ministers granted conditional approval for four of those five operations<sup>8</sup>. The fifth was unconditionally authorized<sup>9</sup>.

### 1. N-04006 BALEARIA/UMAFISA

On 21 January 2004, notification was given that the BALEARIA group had taken control of UNIÓN MARÍTIMA DE FORMENTERA E IBIZA, S.A. (UMAFISA).

The operation was referred to the Competition Court, which, in its report,

<sup>8</sup> N-04006 BALEARIA/UMAFISA, N-04046 INTUR/EURO STEWARD, N-04073 DISA/SHELL PENINSULAR/SHELL ATLANTICA and N-04088 SHELL ESPAÑA/CEPSASIS JV.

<sup>9</sup> N-04083 AREHUCAS/ARTEMI.

stated that the merger did not distort competition where most of the lines encompassed by the route from mainland Spain to the Balearic Islands were concerned, nor with regard to those corresponding to traffic between the various islands.

Nonetheless, the Court deemed it necessary to analyse the transport of passengers and cargo in two markets, Levante (namely the east coast)-Ibiza and Ibiza-Formentera lines, where BALEARIA would obtain substantial market shares.

With regard to Ibiza-Formentera, those market shares would stand at 100% in the case of goods and 70% in that of passengers. Selecting a different means



**Table 2**  
**PROCEEDINGS REFERRED TO THE COMPETITION COURT (2004)**

Proceed. N°	Merger	CC Report	Agreement of Council of Ministers
N-04006	Control taken of UNIÓN MARÍTIMA DE FORMENTERA E IBIZA, S.A. (UMAFISA) by the BALEARIA group	No opposition, subject to adherence to conditions	Conditional authorisation
N-04046	Control taken of EURO STEWART ESPAÑA, S.L. by INVERSIONES TECNICAS URBANAS, S.L. (INTUR)	No opposition, subject to adherence to conditions	Conditional authorisation
N-04073	Acquisition of SHELL ATLÁNTICA, S.L. and SHELL PENINSULAR, S.L. by DISA CORPORACIÓN PETROLÍFERA, S.A.	No opposition, subject to adherence to conditions	Conditional authorisation
N-04083	Control taken of FÁBRICA DE LICORES ARTEMI, S.L. and DISTRIBUIDORA ARCHIPIELAGO CANARIO, S. L. by DESTILERÍAS AREHUCAS, S.A.	No opposition	Authorisation
N-04088	Start-up of the joint venture SPANISH INTO-PLANE SERVICES, S.L., controlled by SHELL ESPAÑA, S.A. and COMPAÑÍA ESPAÑOLA DE PETRÓLEOS, S.A. (CEPSA)	No opposition, subject to adherence to conditions	Conditional authorisation

of transport would not be an option as Formentera does not have an airport.

In its report, the Court felt that there was no reason to oppose the operation that was the subject of the notification, on the condition that “in the case of the goods transport service provided via the Ibiza-Formentera line, a structural measure be taken to prevent the establishment of a de facto monopoly; or, failing that, that rules of conduct be established prior to the merger to ensure that service provision conditions remain the same on the line in question”.

Given that it was impossible to impose structural measures, the Council of

Ministers decided on the latter of the options suggested by the Court. The operation was authorized, subject to the conditions of the goods transport service provided on the Ibiza-Formentera line being kept as they were prior to the merger. A procedure was established for monitoring compliance with that obligation.

## 2. N-04046 INTUR/EURO STEWART

On 9 July 2004, and at the request of the Competition Service, notification was given of a merger whereby INVERSIONES TÉCNICAS URBANAS, S.L.

(INTUR) had taken control of EURO STEWART ESPAÑA, S.L. in February 2002.

The case was referred to the Competition Court, which criticized the funeral service deregulation process and, specifically, the existence of inconsistent and anti-competitive regulation at state, autonomous community and local levels.

The Competition Court identified funeral services, chapels of rest and cremation services as the relevant markets, and the sphere of influence of a municipality, based on the communication routes existing therein, as the relevant geographical area.

The Competition Court concluded that the operation gave rise to problems in the cremation services market, as taking control of EURO STEWART had resulted in INTUR owning all the operative cremation furnaces on the island of Gran Canaria.

The insularity of Gran Canaria aggravated the de facto monopoly situation, as access to other, similar facilities was impossible.

The Competition Court consequently considered that the operation could be authorized, subject to conditions involving INTUR transferring ownership of one of its crematoriums in Las Palmas and providing third-party access to its crematoriums under fair, transparent, non-discriminatory conditions, in case of such a transfer of ownership taking place.

In line with the proposal of the Competition Court, the agreement of

the Council of Ministers of 19 November 2004 ruled that the divestiture should go ahead, and offered the possibilities of the facilities to be transferred, being sold or assigned to a third-party for the operation thereof, so as to facilitate the entry of new operators to the Las Palmas incineration market.

Additionally, the submission of an action plan by INTUR was envisaged, along with authorisation from the Competition Service for the buyer or assignee and a review mechanism to cater for the possibility of the competent local authority approving the entry to the market of another operator prior to the deadline established for INTUR to effect the transfer.

Lastly, the agreement of the Council of Ministers established the need to reduce the duration of the period covered by the non-competition clause signed by the parties.

### **3. N-04073 DISA/SHELL PENINSULAR/SHELL ATLÁNTICA**

On 24 September 2004, the Competition Service was notified of a merger consisting of the acquisition of the entire capital of SHELL ATLÁNTICA, S.L. and SHELL PENINSULAR, S.L. by DISA CORPORACIÓN PETROLÍFERA, S.A.

The case was referred to the Competition Court, which identified the market of fuel retail distribution through service stations, various oil

product wholesale markets, the oil product storage service market, the refined product first sale or supply market and the lubricant retail distribution market as relevant product markets.

Apart from the last of those markets, in which case definition of a geographical area was deemed unnecessary due to an absence of competition-related problems, the Court identified Ceuta, Melilla, the Canary Islands and mainland Spain as relevant geographical markets.

The Court felt that the merger gave rise to incentives for an agreement between DISA and CEPSA in the service station fuel sales market in the Canary Islands.

The Court thus proposed that a series of conditions be applied to the merger, such as the prohibition of cross-holdings in the executive and managerial bodies of both companies, limits on increases in the number of service stations in the DISA network in the Autonomous Community of the Canary Islands, restrictions on the use of the CEPSA insignia at service stations in the Canary Islands (with a view to DISA developing an insignia of its own) and the monitoring by the Competition Service of retail prices at service stations in the Canary Islands, and at those of the DISA network in particular.

In its agreement, the Council of Ministers followed the recommendations of the Court.

#### 4. N-04083 AREHUCAS/ARTEMI

On 16 November 2004, notification was given of a merger project involving DESTILERÍAS AREHUCAS, S.A. taking exclusive control of FABRICA DE LICORES ARTEMI, S.L. and DISTRIBUIDORA ACHIPIELAGO CANARIO, S.L.

The case was referred to the Competition Court, which, in its report of 9 March 2005, stated that:

- The product market consisted of that of the production and distribution of rum, while the relevant geographical market was that of the Canary Islands.
- In that context, the merger entailed the main local competitor of AREHUCAS being removed from the market and the buyer obtaining a market share of over 65%, which had been reduced over recent years.
- The special tax system applicable to rum in the Canary Islands was discriminatory and distorted the market. In specific terms, the excise tax on imports and the delivery of goods (AIEM) in the Canary Islands provided almost exclusive protection for the two companies that were the object of the merger, and was an obstacle to the free operation of the market. The Court added, however, that “on the other hand, it must be taken into account that other barriers to entry (such as advertising or the portfolio effect, etc.) clearly favour the competitors of the notifying party”.

- There were elements that counteracted the excessive concentration of the supply, namely the compensatory power of the demand, and that of superstores in particular, along with the economic and financial power of all the other competitors of the notifying party in the Canary Islands and mainland Spain, and the high level of income elasticity of the demand for the brands of the companies that were the object of the merger. It was also necessary to consider the substantial level of competition from imported rum and the growing importance of the in-house labels associated with the major distributors.

The above factors would serve to offset a high concentration of the supply and would influence the conduct of the companies that were the object of the merger. It was thus felt that it was impossible for the operation in question to hinder effective competition in the market.

The Competition Court decided, by a majority, that it would be fitting to declare the operation in question to be appropriate<sup>10</sup>.

In its meeting on 8 April 2005, the Council of Ministers agreed to endorse the report of the Court and to refrain from opposing the operation.

## 5. N-04088 SHELL/CEPSA

On 1 October 2004, the European Commission was notified of a merger

<sup>10</sup> However, there was a dissenting opinion, expressed by two members of the Competition Court, to the effect that the Court should have recommended that the government declare the merger to be inappropriate, at least until such time as the AIEM was removed, as it was undoubtedly a tariff barrier.

consisting of the start-up of the joint venture SPANISH INTO-PLANE SERVICES, S.L., jointly controlled by SHELL ESPAÑA S.A. and COMPAÑÍA ESPAÑOLA DE PETRÓLEOS, S.A. (CEPSA). The joint venture was geared to the provision of aviation fuel refilling services in airports in mainland Spain and the Balearic Islands, and had been awarded contracts for the airports of Alicante, Malaga and Seville (case M.3275 SHELL/CEPSA).

The Spanish authorities requested that the proceedings be referred to them. That request was granted by the European Commission on 23 November 2004, giving rise to national proceedings N-04088.

The proceedings were referred to the Competition Court, which, in its report of 9 March 2005, ruled out competition-related problems in the refilling services market and recognised that the complementary nature of CEPSA and SHELL with regard to those services could produce levels of efficiency that would, if applicable, compensate for any potential restrictive effects on competition.

Nonetheless, the Competition Court deemed it necessary to ensure that SIS would only market kerosenes and lubricants to cater for the technical requirements of the service, thus preventing coordination between the notifying companies and the possibility of preferential treatment for their members in relation to third parties in the refilling services market.

*The Council of Ministers authorised the merger, subject to the conditions directly related to the conduct of the*

parties in the operation, as proposed by the Competition Court.

In that respect, the agreement of the Council of Ministers of 8 April 2005 ruled that it was necessary to modify the operational and constitutional agreements of SIS, so as to restrict its activities in the kerosene and lubricant sales markets to catering for essential technical needs.

It also established that it was necessary to eliminate any possible preferential treatment for the parent companies in comparison to third parties as regards obtaining refilling services from SIS, so as to ensure that the service would be provided objectively, transparently and in a non-discriminatory fashion.

#### II.4. Other action

Along with the operations of which notification was given, the number of prior queries received rose slightly in 2004 in comparison with the previous year.

In 2004, 16 queries<sup>11</sup> were made to the Competition Service prior to the submission of a notification. The Service responded thereto by indicating

whether or not, on the basis of the information provided, it was necessary to provide notification due to exceeding the minimum thresholds legally established to that end. Table 3 shows a breakdown of the results of the queries made during the financial year in question.

It should also be noted that notification was given of two operations in 2004 as a result of prior queries resolved during the financial year.

On the other hand, the number of preliminary proceedings fell as a result of action taken on the initiative of the Competition Service<sup>12</sup>. The appropriate requests for information gave rise to seven operations of which notification was given in 2004 at the bidding of the Competition Service, due to the legally established thresholds having been exceeded.

Lastly, as regards penal proceedings related to the merger control, four proceedings were initiated in 2004 due to violations of article 15.2 of the CA. The total sum of the penalties imposed in the financial year in question<sup>13</sup> was €1,225,000.

**Table 3**  
**PRIOR QUERIES**

N.º of queries	Notification required			Notification not required	Dismissal
	Total	14.1. a)	14.1. b)		
16	3	1	2	13	0

<sup>11</sup> Envisaged in article 15.5 of the CA.

<sup>12</sup> In application of article 15a.4 of the CA.

<sup>13</sup> In application of article 18.4 of the CA.

# III. ACTION RELATED TO RESTRICTIVE PRACTICES AND AGREEMENTS

## III.1. Introduction

The year 2004 saw a rise in the number of cases dealt with by the Competition Service as part of the struggle against anti-competitive practices. That increase was due to the greater quantity of complaints received and the Competition Service undertaking proceedings on its own initiative, which offset a fall in individual authorization requests.

Specifically, 138 briefs were received in relation to potentially anti-competitive conduct. Of those, 49 were disposed of as the matters involved did not come under the jurisdiction of the Competition Act. Four others were disposed of due to them not meeting the minimum requirements for consideration and the complainants failing to respond to requests to rectify the relevant documentation.

Additionally, 12 queries were made and 27 preliminary inquiries carried out with a view to verifying the existence or otherwise of prohibited practices and, if applicable, to the Service subsequently beginning the corresponding proceedings on its own initiative. Of the 27 inquiries, 15 led to proceedings being undertaken, while a further 7 were still awaiting a decision at the end of 2004.

In addition, the Competition Court returned six proceedings after admitting the appeals lodged against the disposal thereof by the Competition Service.

In 2004, 91 proceedings were thus generated in the Competition Service, 75 of which corresponded to complaints, 8 to cases taken up on the initiative of the Service itself and the remaining 8 to individual authorisation requests.

80 proceedings were concluded over the course of 2004. The majority of them were disposed of or dismissed, with 20 proposals and reports being referred to the Competition Court.

Lastly, 33 reports on appeals lodged before the Competition Court as a result of different proceedings of the Service



JOSÉ MANUEL RODRÍGUEZ DE CASTRO  
Deputy Director General for Anti-competitive  
Conducts

were issued in 2004. The Court rejected 14 and admitted 4 of them. On 31 December 2004, a decision was pending on the remaining 15 appeals.

Table 4 and Charts 4 to 6 show the most significant aspects of the activity of the Competition Service in the field of anti-competitive conducts.

Specifically, they reflect the volume of proceedings received by the Competition Service and those concluded, either during the first stage when being studied by the Service itself or through the referral of the corresponding pro-posal and report to the Competition Court.

In the case of incoming proceedings, a distinction is made between those initiated in previous years and still awaiting a decision (referred to as the

initial balance) and those received by the Competition Service over the course of the financial year in question. Within the category of new incoming proceedings, a breakdown is given of the complaints submitted, the proceedings initiated on the initiative of the Competition Service and the authorisation requests made each year.

Taking the cases received and concluded over the course of the financial year into account, the total number of proceedings underway on 31 December 2004 (i.e. the initial balance for the financial year 2005) stood at 75. The initial balance at the beginning of 2004 had been 64 cases.

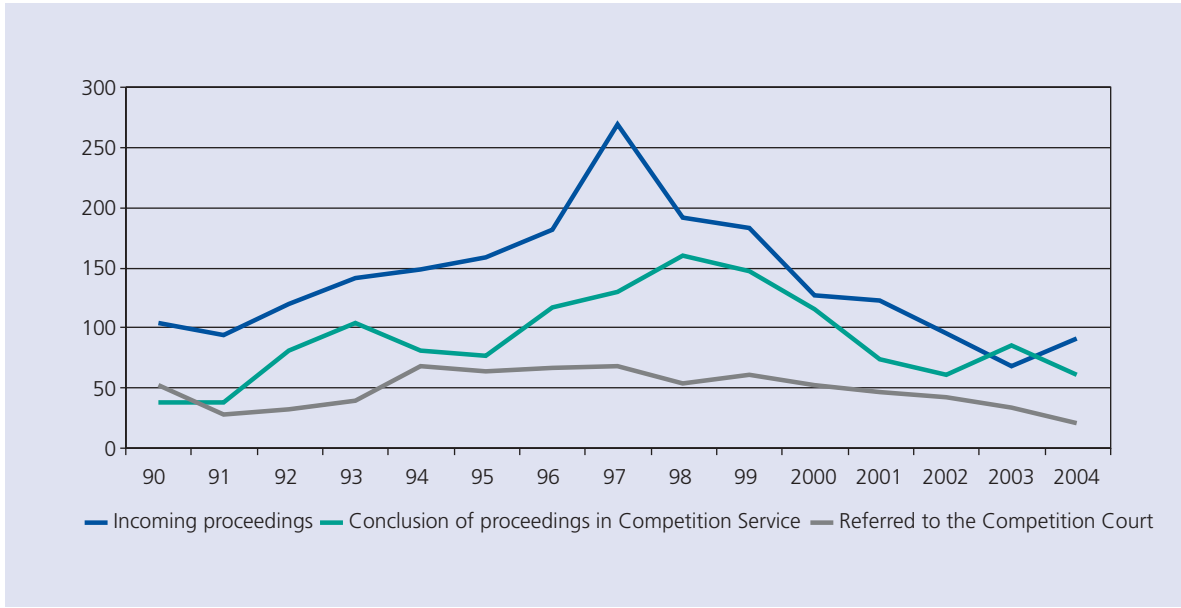
Lastly, Chart 6 identifies the different ways in which proceedings were concluded:

<b>Table 4</b>															
<b>STATISTICS ON PROCEEDINGS RELATED TO RESTRICTIVE PRACTICES AND AGREEMENTS</b>															
	90	91	92	93	94	95	96	97	98	99	2000	2001	2002	2003	2004
Initial balance	59	74	104	112	111	111	130	129	201	181	158	119	122	113	64
<b>Incoming proceedings</b>	<b>104</b>	<b>94</b>	<b>119</b>	<b>141</b>	<b>148</b>	<b>158</b>	<b>181</b>	<b>268</b>	<b>191</b>	<b>183</b>	<b>127</b>	<b>122</b>	<b>95</b>	<b>68</b>	<b>91</b>
Complaints	80	74	95	99	94	86	120	214	146	145	99	95	70	52	75
Own initiative	4	11	11	9	5	13	15	14	12	9	3	1	2	0	8
Authorisations	20	9	13	33	49	59	46	40	33	29	25	26	23	16	8
<b>Proceedings concluded</b>	<b>89</b>	<b>64</b>	<b>111</b>	<b>142</b>	<b>148</b>	<b>139</b>	<b>182</b>	<b>196</b>	<b>212</b>	<b>206</b>	<b>166</b>	<b>119</b>	<b>102</b>	<b>118</b>	<b>80</b>
<b>Conclusion of Competition Service proceedings</b>	<b>37</b>	<b>37</b>	<b>80</b>	<b>103</b>	<b>80</b>	<b>76</b>	<b>116</b>	<b>129</b>	<b>159</b>	<b>146</b>	<b>115</b>	<b>73</b>	<b>60</b>	<b>85</b>	<b>60</b>
Disposed of	26	17	39	58	59	55	79	95	119	111	82	53	39	61	42
Annexed	6	12	20	15	2	5	13	15	10	9	6	4	4	0	3
Conventional complaints	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0
Dismissed	5	8	21	30	19	16	24	19	30	26	27	16	17	23	15
<b>Referred to the Competition Court</b>	<b>52</b>	<b>27</b>	<b>31</b>	<b>39</b>	<b>68</b>	<b>63</b>	<b>66</b>	<b>67</b>	<b>53</b>	<b>60</b>	<b>51</b>	<b>46</b>	<b>42</b>	<b>33</b>	<b>20</b>

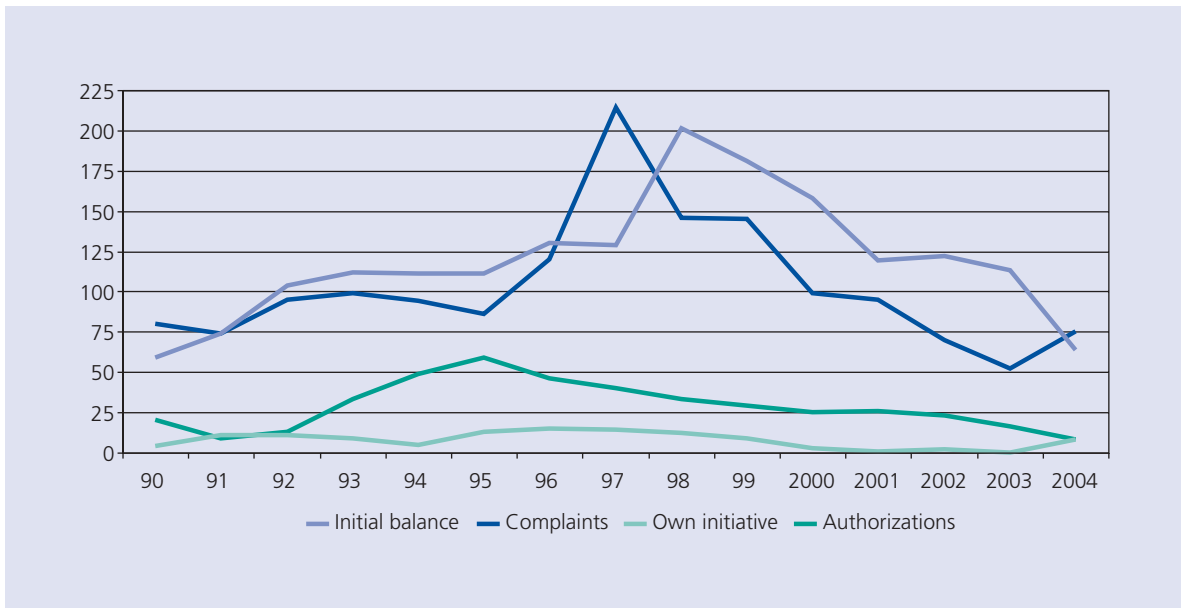
— Through disposal, dismissal or annexation in the Competition Service, or

— Through referral to the Competition Court.

**Chart 4**  
**STATISTICS ON PROCEEDINGS RELATED TO RESTRICTIVE PRACTICES AND AGREEMENTS**

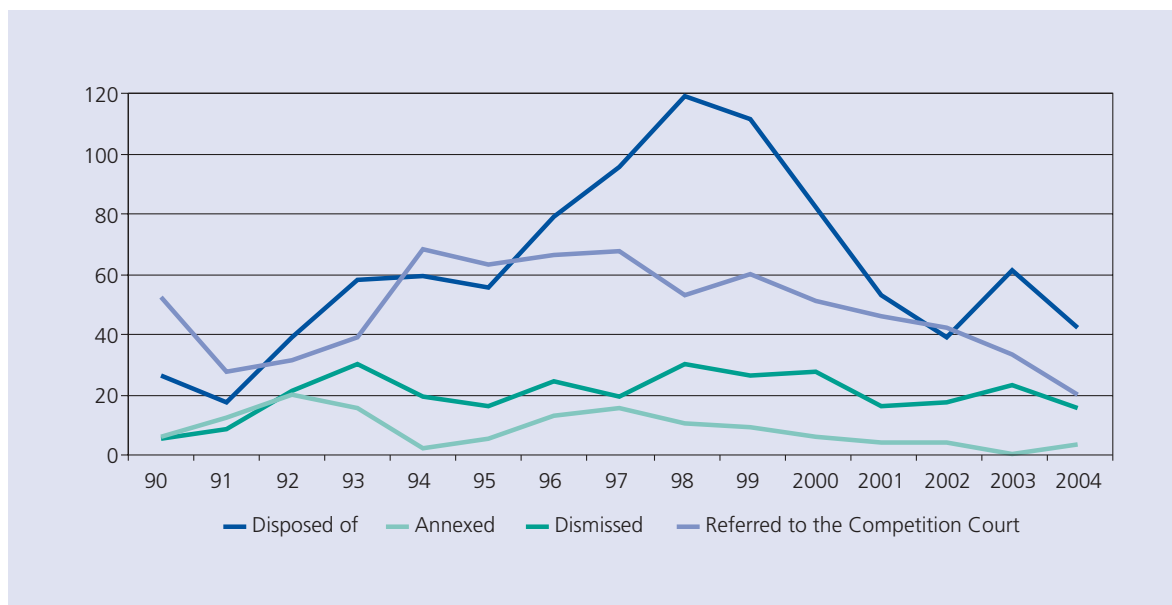


**Chart 5**  
**INCOMING PROCEEDINGS**





**Chart 6  
PROCEEDINGS CONCLUDED**



### III.2. Sanctioning proceedings heard in 2004

#### a) Proceedings initiated

In 2004, 31 proceedings were initiated on the grounds of prohibited conduct. Of those, 18 were the result of the admission of the corresponding complaint, while 6 were returned by the Competition Court and 7 were undertaken on the initiative of the Competition Service.

As regards distribution by sectors, Chart 7 shows the predominance of the service sector (29 proceedings) in comparison with the industrial sector. Of the two proceedings initiated in the latter sector, one involved the food and beverages industries and the other concerned the manufacturing and distribution of machines.

**Chart 7  
PROCEEDINGS INITIATED BY SECTORS**

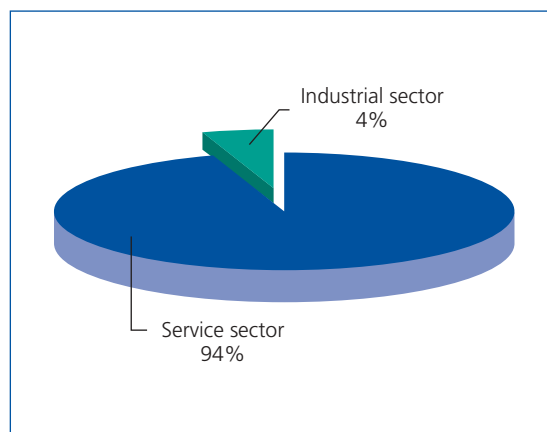
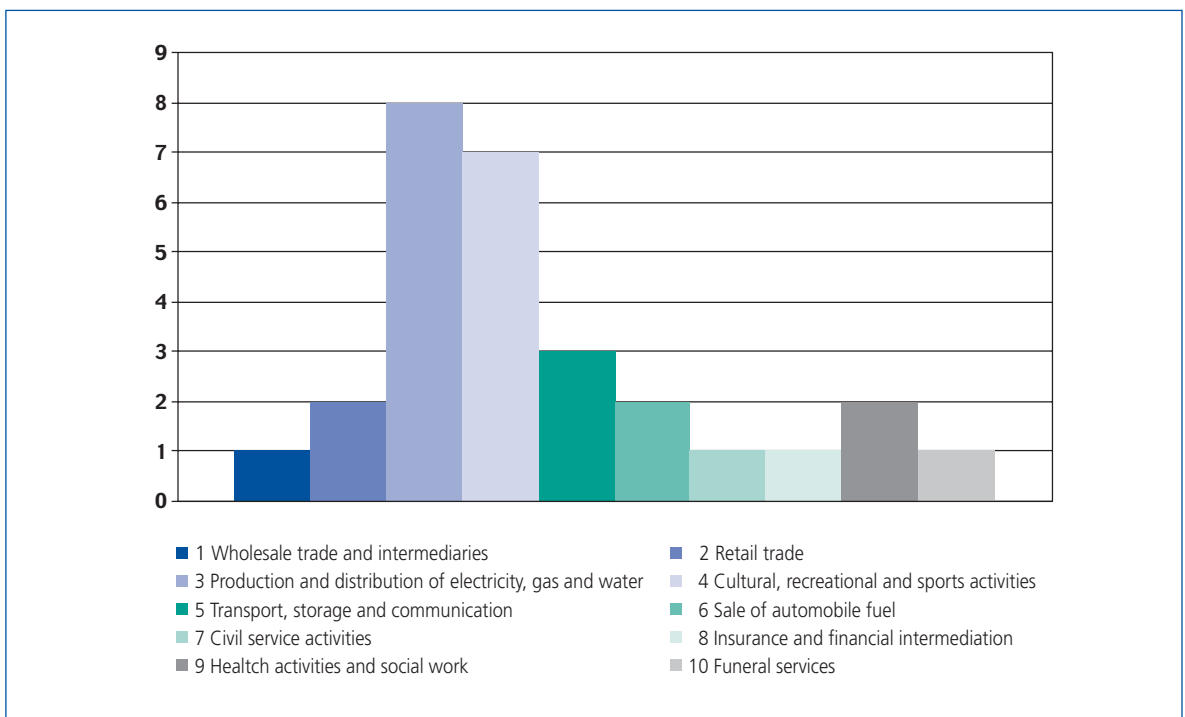


Chart 8 distinguishes between the various proceedings initiated in the financial year 2004 involving the service sector.

Table 5 gives a breakdown of the penal proceedings initiated in the financial

**Chart 8**  
**SERVICE SECTOR PROCEEDINGS IN 2004**



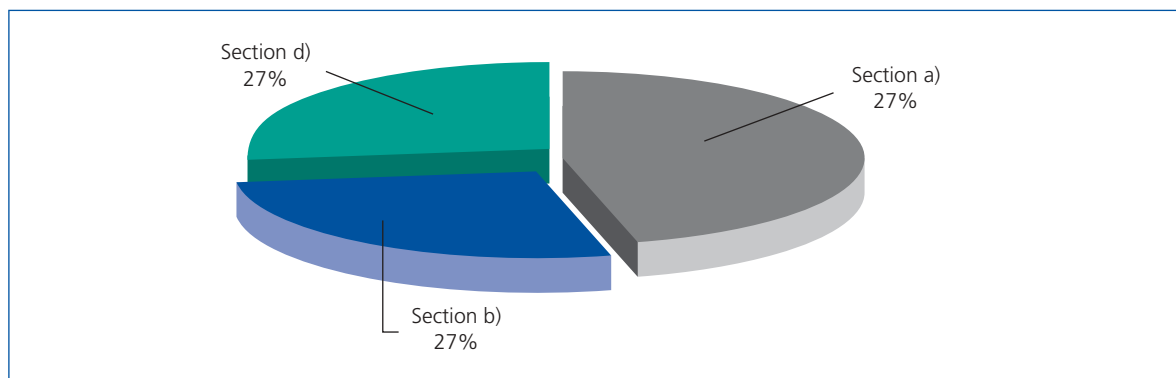
year 2004 in terms of the articles of the CA violated. Charts 9 and 10 cover

breaches of articles 1 and 6 of the CA respectively.

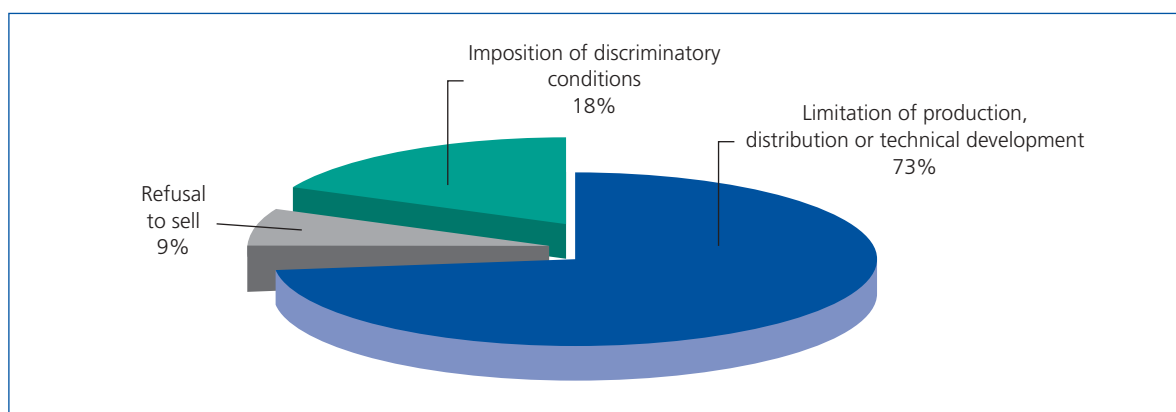
**Table 5**  
**BREAKDOWN OF PROCEEDINGS INITIATED FOLLOWING COMPLAINTS, IN TERMS OF THE CA ARTICLE VIOLATED**

Article and section violated	Proceedings n°
<b>ARTICLE 1 (totals)</b>	<b>15</b>
— Section a) Fixing of prices and commercial conditions	7
— Section b) Limitation of production	4
— Section d) Discriminatory conditions	4
<b>ARTICLE 6 (totals)</b>	<b>11</b>
— Section a) Limitation of production, distribution or development	8
— Section b) Refusal to sell	1
— Section d) Imposition of discriminatory conditions	2
<b>ARTICLE 7 (totals)</b>	<b>5</b>

**Chart 9**  
**BREAKDOWN OF PROCEEDINGS INITIATED DUE TO A BREACH OF ARTICLE 1**



**Chart 10**  
**BREAKDOWN OF PROCEEDINGS INITIATED DUE TO A BREACH OF ARTICLE 6**



As stated previously, six of the proceedings initiated in 2004 by the Competition Service were the result of them being returned by the CC after it had admitted appeals lodged against disposal or dismissal agreements.

Two of those six proceedings were concluded in the Competition Service in 2004 and are consequently analysed in the section on appeals lodged before the Competition Court.

The following is an analysis of the four remaining proceedings, which were returned by the CC in 2004 and were

the result of cases concluded by the Competition Service in previous years:

**1. r 599/03 Ambulancias Orense**

In accordance with the proposal of the Competition Service in the appeal report, the Competition Court stated that it was necessary to investigate the complaint made about the Orense Ambulance Group, which had been disposed of without information requested from the complainant having been received and without the complainant having been advised of that possibility.

**2. r 568/03 Floristerías Tanatorios Castellón**

The Competition Court stated that it was necessary to investigate whether or not the funeral companies about which a complaint had been made held a dominant position in the Castellón funeral service market, and whether any such position had been abused in the related funereal floral adornment market.

**3. r 580/03 Supermercados**

The Competition Court stated that it was necessary to begin the corresponding penal proceedings against Alcampo, Carrefour, Mercadona and El Corte Inglés due to the agreement that they had signed to impose an anti-theft security system on the food and beverage industries, regardless of whether or not the agreement had actually been implemented.

**4. 558/03 Ayuntamiento Alcantarilla y otros**

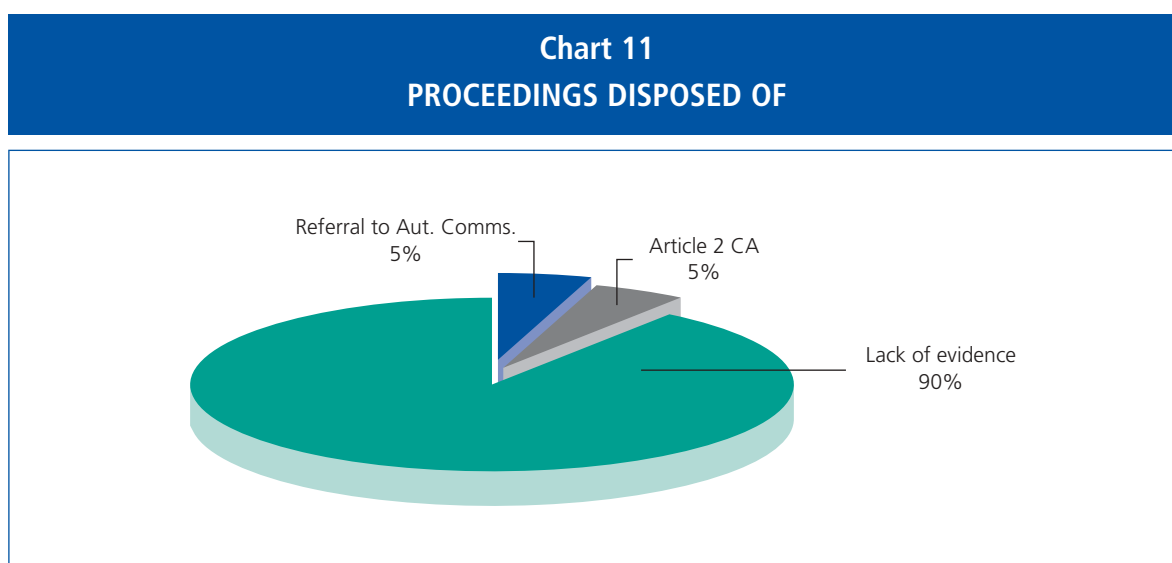
The Competition Court stated that it was necessary to return to the point in the proceedings at which the list of established facts was formulated, so as to notify the company Pescamurcia thereof.

**b) Proceedings concluded**

The Competition Service concluded 80 proceedings in 2004. Of those 80, 42 were disposed of, 15 dismissed, 3 annexed and 20 referred to the Competition Court.

**i) Proceedings disposed of and dismissed**

As shown in Chart 11, the 42 proceedings disposed of can be broken down as follows:



- a) Two were referred to the Catalan Regional Government, in application of Law 1/2002.
- b) Two were disposed of by virtue of article 2 of the CA.
- c) The others (38) were disposed of due to there being insufficient evidence of any violation to begin the corresponding proceedings.

Along with the disposal of the aforementioned proceedings, the Competition Service adopted 15 dismissal agreements during the financial year 2004.

**ii) Appeals lodged before the Competition Court against disposal and dismissal agreements**

Appeals were lodged before the Competition Court against 14 agreements to dispose of proceedings. The Court has already issued a ruling on eight of them. A further ten appeals were lodged against the relevant dismissal agreements, five of which have already been the subject of a ruling from the Competition Court.

The next section of this document indicates the nature of the rulings already adopted by the Competition Court at the time of writing of this report as regards the appeals in question. A more in-depth analysis is given of the rulings issued on the merits of the cases in question, stating whether the appeals were rejected or admitted and subsequently returned to the Competition Service in order for it to investigate the case:

- a) Court rulings related to appeals against Competition Service proceedings disposal agreements:
  - One ruling admitting an appeal, ordering that the proceedings be returned for preliminary investigation (R607/04 Productos Lácteos).
  - Two appeals rejected due to inappropriate timing.
  - Five rulings rejecting appeals due to concurrence with the analysis of the Competition Service.

- b) Court rulings related to appeals against Competition Service dismissal agreements:
  - One ruling admitting an appeal, ordering that the proceedings be returned for preliminary investigation (R605/04 ASEMPRE/CORREOS).
  - Four rulings rejecting appeals due to concurrence with the analysis of the Competition Service.

**1. R 605/04 ASEMPRE/Correos**

In its ruling on the appeal lodged against a dismissal agreement, the Competition Court stated that it was necessary to go into greater depth in the preliminary investigation into the case, in order to determine whether Correos had applied predatory prices, on the basis of cross-subsidies.

**Table 6**  
**APPEALS AGAINST ACTION OF THE COMPETITION SERVICE (2004)**

Name of proceedings	CS nº	CC nº	Action appealed against	Status of proceedings before the CC
ASEMPRE/CORREOS	2458/03	R 605/04	Dismissal agreement	Admitted (returned to the CS for preliminary investigation)
Telecomunicaciones Castilla-León 2	2241/01	R 606/04	Dismissal agreement	Rejected
Productos Lácteos	2463/03	r 607/04	Disposal of complaint	Admitted (returned to the CS for preliminary investigation)
Ediciones Musicales	2420/03	R 609/04	Dismissal agreement	Rejected
Spain Pharma/Glaxo	2023/99	R 611/04	Dismissal agreement	Rejected
Agerull	2489/03	r 612/04	Agreement to the dispose of proceedings	Rejected
Aviación comercial	2525/04	R 615/04	Agreement refusing recognition as involved party	Rejected due to inappropriate timing
Estibadores Cádiz	2480/03	r 620/04	Agreement to the dispose of proceedings	Rejected
UCOES/WARNACO	2488/03	r 623/04	Disposal of complaint	Rejected
Análisis Químicos Murcia 2	2294/01	R 627/04	Dismissal agreement	Rejected
Ariauto/Toyota	2497/03	r 628/04	Agreement to the dispose of proceedings	Rejected
SGAE/ASIMELEC	2511/04	r 631/04	Disposal of complaint	Rejected due to inappropriate timing
Race Car/Hyundai-Cofiber	2508/04	r 636/04	Acuerdo de Archivo de Actuaciones	Rejected

Specifically, the Court referred to the analysis of the number of postal dispatches of lesser weight, as well as economies of scale and the incidence of the delivery fee in invoicing for postal dispatches of advertising material and periodicals.

**2. R 606/04 Canal Brugos, S. A./ Sociedad Operadora de Telecomunicaciones de Castilla y León**

In its ruling, whereby it rejected the appeal against a dismissal agreement,

the Competition Court stated that as the party against which the complaint had been made did not hold a dominant position in the subscription television market, article 6 of the CA could not have been breached, and that the installation anomalies that were the subject of the complaint were peculiarities with minor repercussions.

**3. R 607/04 Productos lácteos**

The Competition Court admitted the appeal against the disposal of the complaint and stated that it was

necessary to begin the corresponding proceedings to investigate the case as a contentious procedure rather than in the context of classified information, as had been done previously.

**4. R 609/04 Editoras musicales/SGAE**

In its ruling, whereby it rejected the appeal lodged against a dismissal agreement, the Competition Court established that the SGAE (Spanish Society of Authors, Composers and Publishers), which holds a dominant position, had acted within the limits of indispensability and proportionality in relation to its objectives. Furthermore, its involvement in the music publishing market had not been accredited and the same was consequently true of any abusive behaviour or discriminatory conduct as regards subedition contracts and advances.

**5. R 611/04 Spain Pharma/Glaxo**

In its ruling, whereby it rejected the appeal lodged against a dismissal agreement, the Competition Court indicated that, as had been stated in other rulings, the pharmaceutical product market was divided at national level on the basis of the therapeutic purpose of such products; that it was not possible to regard the licensor and the licensees as a collective unit, as each of them acted independently; and that there was no scope for price-fixing.

As the laboratory about which the complaint was made did not hold a dominant position, it was not possible for article 6 CA to have been breached.

**6. R 612/04 Agerull**

In its ruling, whereby it rejected the appeal lodged against an agreement to dispose of proceedings, the Competition Court stated that only independence of conduct as regards competitors, suppliers and customers could lead to a dominant position in a market. It concluded that Grupo Árbol did not have purchasing power in the market in which everyday consumer products are acquired for subsequent distribution, and that it would thus be inappropriate to apply article 6 CA.

**7. R 620/04 Estibadores Cádiz**

In its ruling, whereby it rejected the appeal lodged against the disposal of proceedings, the CC stated that the requisite of bilaterality for the application of article 1 of the CA to the agreements adopted within a company had not been met, and that establishing a bonus as a condition for new partners did not, in principle, constitute discrimination against partners of longer standing, as discriminatory treatment must be held to entail unjustified inequality.

**8. R 623/04 UCOES/WARNACO**

In its ruling, whereby it rejected the appeal lodged against disposal, the Competition Court stated that none of the requisites for the refusal to sell to entail a breach of the CA had been met, given that there was no agreement between competitors and no complaint

regarding the conduct of a company in a dominant position, as the brand did not constitute a separate market.

#### **9. R 627/04 Análisis Químicos Murcia 2**

In its ruling, whereby it rejected the appeal lodged against a dismissal agreement of the Competition Service, the CC pointed out that it had not been proved that the party against which the complaint had been made had used the subsidies received for purposes other than those envisaged, and that it had not been possible to determine its position in the chemical analysis market. Furthermore, the complainants had not provided any information that could support such a conclusion.

#### **10. R 628/04 Ariauto/Toyota España**

In its ruling, whereby it rejected the appeal lodged against an agreement to dispose of proceedings of the Competition Service, the CC established that the arbitration process had to take place within a reasonable period of time, that failure to meet certain requisites would justify refusal to enter into a contractual agreement and that economic dependency could not be said to exist in the case of alternative options for the development of an activity being available.

#### **11. R 636/04 Race Car/Hyundai-Cofiber**

In its ruling, whereby it rejected the appeal lodged against an agreement to dispose of proceedings, the Competition Court established that it

was not possible to suggest independence of conduct between companies from the same group (a requisite for the application of article 1 CA). Furthermore, the case reported constituted a private conflict of interests and the CA was inapplicable thereto.

#### **iii) Proceedings referred to the Competition Court for a ruling thereon**

Of the 20 proceedings referred to the Competition Court in 2004, 7 were for individual authorisations. In the case of the other 13, the Competition Service recommended a penal ruling in the corresponding proposal and report.

The 13 penal proceedings that, accompanied by the required proposal and report, were referred to the Court for a ruling thereon can be broken down on the basis of the CA and/or EU Treaty article applied, as well as in terms of the sectors involved, as can be seen in the relevant table and charts on the following pages.

Of the 13 penal proceedings referred to the Competition Court in 2004, rulings had been obtained on the 6 set out below at the time of writing of this report:

#### **1. 574/04 Panaderías de Aranda de Duero**

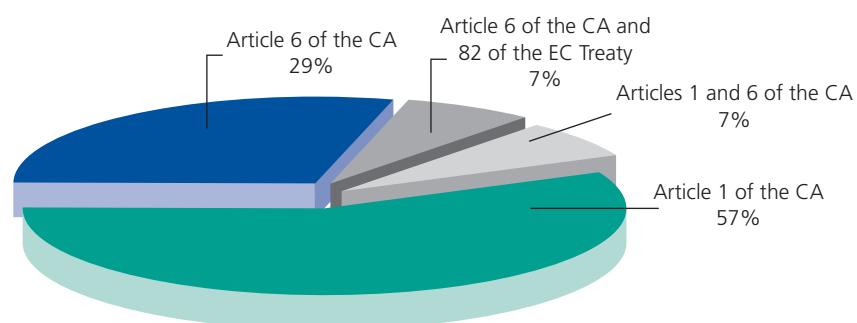
The Competition Court stated that there was proof of the existence of a practice prohibited by article 1 CA, consisting of raising the prices of bread in Aranda de Duero, and identified eight bread manufacturers as the culprits.



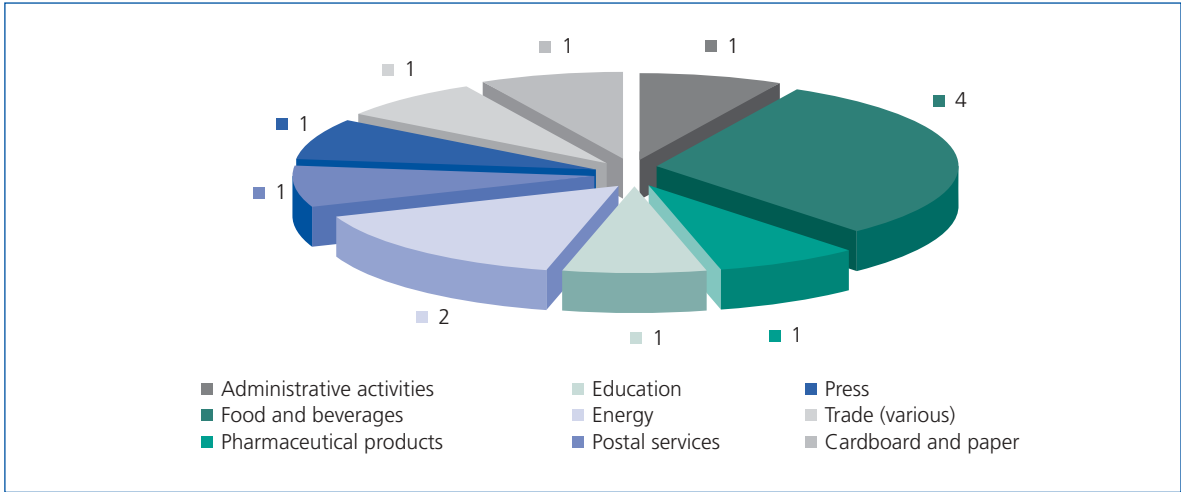
**Table 7**  
**PENAL PROCEEDINGS REFERRED TO THE COMPETITION COURT (2004)**

Name of proceedings	CS nº	CC nº	Status of proceedings before the CC
Mayoristas Pescado Alcantarilla	2257/01	558/03	Proceedings underway
Panaderías Aranda de Duero	2471/03	574/04	Prohibited practice declared to have been accredited
Fabricantes de Cartón-2	2456/03	575/04	Prohibited practice declared to have been accredited
Multiprensa	2439/02	576/04	No acreditada práctica prohibida
Cervezas Canarias	2292/01	577/04	No acreditada práctica prohibida
EKO-AMA/MONDÁRIZ	2465/03	578/04	Prohibited practice declared to have been accredited
Asturcolchón/Tempur	2455/03	579/04	Proceedings underway
Grupo Gas Natural	2430/02	580/04	Proceedings underway
CERAFRUT/BAYER	2336/01	581/04	Proceedings underway
Autoescuelas Extremadura	2337/01	582/04	Prohibited practice declared to have been accredited
Aceites	2411/02	583/04	Proceedings underway
Prensa/Correos	2437/02	584/04	Proceedings underway
Aplicaciones Electromecánicas/IBERDROLA 2	2453/03	586/04	Proceedings underway

**Chart 12**  
**PROCEEDINGS REFERRED TO THE COMPETITION COURT**



**Chart 13**  
**PROCEEDINGS REFERRED TO THE COMPETITION COURT BY SECTORS**



**2. 575/04 Fabricantes de cartón**

The Competition Court stated that the licensing contract signed between the AFCO association and Cartisa, which imposed the obligation to acquire assembly machines from the latter and gave rise to three sublicensing contracts proscribing the manufacturing and marketing of different containers, constituted a prohibited agreement under article 1 CA.

The Court also declared that the same article prohibited the standardisation agreement established by the AFCO association, whereby it forbade other brands that fulfilled the required target conditions to use the seal of quality and vetoed the manufacturing and marketing of other packaging that did not bear the seal in question.

**3. 576/04 Multiprensa**

The Competition Court stated that the decisions taken within the Circulation

Data Office and the Association for Media Investigation in relation to the suspension of the issuing of accreditation of the circulation and distribution of the free daily publication “20 minutos” did not constitute anti-competitive agreements<sup>14</sup>.

**4. 577/04 Compañía cervecera de Canarias, S. A.**

The Competition Court stated that the conduct attributed to Compañía Cervecera de Canarias (CERCASA), which consisted of signing distribution contracts with dealers and allegedly constituted abuse of a dominant

<sup>14</sup> The ruling of the Competition Court included the dissenting opinion of two members thereof, who indicated, as the Competition Service had done in its proposal and report, that the conduct analysed consisted of a collective decision taken with a view to hindering entry to the market for new competitors offering their product free of charge, with the substantial volume of advertising content entailed thereby.

position in the beer market of the Canary Islands, had not been proved.

Nonetheless, in the third of the legal grounds of its ruling, the Competition Court suggested that the Competition Service investigate whether or not the contracts in question contravened articles 1 of the CA and 81.1 of the EC Treaty.

#### 5. *578/04 Eko-Ama/Aguas de Mondáriz*

The Competition Court stated that there was proof of the existence of conduct prohibited by article 1 CA, consisting of the vertical fixing of the retail price in the bottled water market. The Court accepted the argument of the Competition Service in favour of applying the article in question to unilateral imposition by the manufacturer with the tacit acquiescence of the distributor, and identified the manufacturer as the sole culprit.

#### 6. *582/04 Autoescuelas de Extremadura*

The Competition Court declared that there was proof of the existence of a practice prohibited by article 1 CA, consisting of fixing prices for obtaining a type-B driving licence. It identified 13 driving schools from Badajoz and Mérida as the culprits.

The Court also stated that there was a relationship between the practice in question and the recommendation of prices by the Regional Association of Driving Schools of Badajoz, due to the presence in its statutes of a clause on

the recommendation of minimum prices, regardless of whether or not the recommendation had been implemented, something that had not been proved.

#### iv) **Rulings of the Competition Court in 2004 in relation to proceedings referred thereto by the Competition Service in previous years**

In 2004, the Competition Court issued 19 rulings related to proceedings referred thereto by the Competition Service in previous years. Table 8 shows the nature of those rulings, the most relevant of which are outlined below:

##### 1. *563/03 Panaderos de Burgos*

Court ruling of 21 December 2004, in which it was stated that the practice of establishing an agreement on bread prices in Burgos had not been proved, contrary to the assertions of the Competition Service in its proposal and report<sup>15</sup>.

**Table 8**  
**RULLINGS OF THE CC IN RELATION TO PROCEEDINGS REFERRED THERETO BY THE CS IN PREVIOUS YEARS**

Breach of article	Proceedings nº
Article 1	10
Article 6	3
Article 7	1
Practice have not been proved	5

<sup>15</sup> The ruling of the CC included a dissenting opinion, registered by three members thereof.

**2. 569/03 Semillas de remolacha**

Court ruling of 23 November 2004, in which it was stated that there was proof that Ebro Puleva and the agricultural organisations ASAJA, CNCRA, COAG and UPA had engaged in anti-competitive conduct, consisting of limiting the points of sale of beet seed. The CC ordered the cessation of the practice and the publication of its ruling.

**3. 570/03 Gas Extremadura**

Court ruling of 4 October 2004, whereby the conduct of Distribución y Comercialización de Gas Extremadura, consisting of imposing facility monitoring and maintenance along with the supply of gas, as well as of sharing certain information with particular installation companies and withholding it from others, was declared to be prohibited under article 1 CA (it should be an error and be declare to be prohibited under article 6 CA), as the Competition Service had stated in its proposal and report. The CC fined the company €450,000.

In 2004, the CC imposed fines in 16 of the proceedings on which it issued rulings, with 46 companies being charged a total of €78,677,554.40.

**III.3. Individual Authorizations**

There has been a qualitative and quantitative change over recent years, where individual authorisation request procedures are concerned.

The approval of Royal Decree 378/2003 of 28 March, which amended the regulations on block exemptions, individual authorisations and registering competition, incorporated the new EC regulations and, thus, the new philosophy implicit therein into Spanish legislation.

That new philosophy has been embodied in a major change of orientation in the EC policy on exemption, which, in the interests of giving companies that do not have substantial market-altering power greater freedom to operate, has switched from formal analysis to analysis that places greater emphasis on economic aspects, thus offering a focal point for the action of the authorities in cases involving greater economic repercussions.

The above has entailed an increase in queries from operators as regards how their conduct may be classified or whether or not they are covered by exemption regulations. At the same time, it has brought about a significant reduction in individual authorisation requests.

Eight individual authorisation requests were received in 2004, half as many as in the previous financial year.

Three of them corresponded to records regarding delays, representing a further fall in the quantity thereof, following on from previous years. Other requests referred to a wide range of agreements, from model distribution contracts to franchise contracts.

The following requests were particularly noteworthy:

## 1. Organización Interprofesional Láctea

The Organización Interprofesional Láctea requested authorisation to produce and publish a quarterly index of dairy product market trends in Spain.

In its ruling of 25 June 2004, the Competition Court stated that it felt that the implicit recommendation in the index “would have clearly negative consequences, as it would render it possible to standardise the behavioural models of the processing sector, within which there is a high level of concentration and few companies with substantial purchasing power, thus reducing competition to extremes that would be detrimental to the general interests of the sector”. On that basis, the Court declined to grant the requested authorisation.

## 2. ECOVIDRIO

ECOVIDRIO requested authorisation for various agreements and practices related to the operation of the comprehensive management system for glass packaging waste. At the time of writing of this report, the Competition Court has not yet ruled on the case.

### III.4. Monitoring and Implementation

In 2004, 33 new proceedings were initiated in relation to the monitoring of compliance with the rulings of the Competition Court. Of those, 24 corresponded to prohibited conduct and 9 to individual authorisations.

Meanwhile, 53 proceedings were concluded over the course of the year (20 corresponding to prohibited conduct and 33 to authorisations). The year consequently ended with a total of 217 proceedings, of which 119 corresponded to prohibited conduct and 98 to individual authorisation.

In relation to the proceedings in question, 250 requests for information were processed, including repetitions. Furthermore, 52 reports were issued to the Competition Court, notably including the following:

1. Those arising from the expiry of deadlines granted for various authorisations for which extensions had been requested by the parties involved. As far as renewals of records regarding delays are concerned, the Competition Service issued three types of reports:
  - Unconditional extension proposal for the fulfilment of requisites, without any alterations to the initial conditions envisaged in the authorisation.
  - Proposal to hear proceedings geared to renewal, due to the detection of evident non-compliance or discrepancies between initial authorisations and the current doctrine of the Competition Court in the area in question.
  - Proposal for various modifications as regards the way in which the records in question function when, due to questions of procedural economy, the modifications are not deemed to be sufficiently relevant to give rise to the hearing of new proceedings.

In all the aforementioned cases, the Competition Court issued rulings in accordance with the appraisals and proposals of the Competition Service.

2. Those arising as a result of the parties involved expressly waiving the individual authorisations granted for the use of different records regarding delays, or as a result of tacit waivers due to failure to request extensions to such authorisations in the due time and manner. The Competition Court did not issue rulings on the reports in question.

3. Those issued in relation to the monitoring of compliance with the instructions given by the Competition Court in proceedings involving proven prohibited conduct.

At this point, it should be noted that 2004 saw definitive rulings issued by contentious administrative courts on some of the appeals lodged against various decisions of the Competition Court in penal proceedings. Those rulings will be analysed in greater depth in the section on jurisdictional activity in this report.

As a consequence of those rulings, the Competition Court contacted the Competition Service to make the latter aware of the procedural situation and to suggest that it issue a report on the level of compliance with each of the rulings involved.

Doing so brought about a greater level of dynamism as regards the monitoring of rulings of the type in question than in previous years.

Once their contentious administrative appeals had been rejected, which was generally the case, and the penal rulings consequently confirmed, the companies involved responded quickly to requests from the Competition Service for information, giving rise to the greater level of efficiency referred to above.

Aside from those cases, monitoring reports were issued in cases in which the complainant contacted the Competition Service to report alleged non-compliance with the relevant rulings.

### **III.5. Investigation and inspection activity**

In 2004, the Competition Service performed three on-site inspections in the headquarters of different travel agencies in order to obtain information as part of a national penal case.

Additionally, in application of article 22.1 of EC Regulation 1/2003, the Competition Service inspected a company that manufactures baby food, acting on behalf of the Italian competition authority.



## IV. RELATIONS WITH THE AUTONOMOUS COMMUNITIES

### IV.1. Introduction

The Act 1/2002 regarding co-ordination of the state and Autonomous Communities which came into force in 2002, entailed the start-up of the legislative framework for the exercise of joint jurisdiction between the Spanish State and the Autonomous Communities, for the purpose of the application of CA articles 1, 4, 6 and 7 on restrictive conduct.

Over the course of 2004, three Autonomous Communities established their own competition bodies and each of them opted for a different model of institutional organisation. Details of those autonomous community competition bodies are given below, in their chronological order of creation:

— In Decree 13/2004 of 13 February, the **Autonomous Community of the Region of Murcia** assigned antitrust functions and created the Regional Competition Service. Murcia opted to create a body to deal with preliminary investigations only. That body did not begin operating in 2004, and the Competition Court will have to take care of the ruling stage of any proceedings dealt with thereby.



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Deputy Director General for Legal Affairs  
and Institutional Relations

- In Act 6/2004 of 12 July, whereby its competition bodies are governed, the **Autonomous Community of Galicia** created the Galician Competition Service and Competition Court. In Decree 277/2004 of 25 November, it appointed the president and members of the Court. The Service has yet to be established.
- In Act 6/2004 of 28 December, the **Autonomous Community of Madrid** created the Competition Court of the Community of Madrid, a single body with internal divisions to ensure that the preliminary investigation and ruling stages are dealt with separately.



Despite the progress made in 2004 as regards the configuration of the map of bodies with jurisdiction over competition, only those of the Autonomous Community of Catalonia are currently fully operative.

#### **IV.2. Activity within the context of Act 1/2002**

The cooperation and coordination-oriented mechanisms of the Autonomous Communities and the State General Administration, as established in Act 1/2002, functioned normally in 2004.

The annual Competition Council session corresponding to 2004 was actually held in January 2005, with a view to the Council being the first body to which the white paper for the reform of the Spanish Competition system was presented. All the members supported the delay, the motive for which was fully justified.

There was a virtually full turnout at the Council, providing clear evidence of the interest that Competition arouses at all levels.

There was no need for the Advisory Board that deals with conflicts to meet,

as there had been no conflicts for it to deal with. The Board has been fully operative since the appointment of its Chairman.

The mechanism for designating a competent body was activated eight times in 2004, all of which involved the Autonomous Community of Catalonia. On six of those occasions, the Catalan authority was deemed to be competent.

Finally, with the series of informative seminars on the Spanish Competition system having come to an end and in accordance with the commitment made to training by the Competition Service, 2004 saw the authorities of the autonomous communities being offered the possibility of training sessions for staff who were to work on the preliminary investigation of cases within their Autonomous Community.

In June, staff from the Autonomous Community of Madrid attended the sessions in question, which were adapted to meet their specific training requirements, just as the competition bodies of the Autonomous Community of Catalonia had previously received similar training.

# V. STATE AID

## V.1. Introduction

Within the process of modernising and simplifying the regulations that govern competition in the European Union, a major reform is still due as regards state aid. Nonetheless, certain measures were taken in that respect in 2004. The measures in question were basically geared to three different aspects.

Firstly, there were measures oriented to the adoption of new notification exemption regulations for types of aid, as a consequence of the European Commission having sufficient experience and information to be able to establish a clear framework for the evaluation thereof. Specifically, various exemption regulations were adopted, affecting the agricultural and fishing sectors and small and medium-sized enterprises (SMEs) in particular.

Secondly, there were measures that focused on reviewing and updating certain current EC regulations.

Lastly, there was a third group of measures for the purpose of developing procedural aspects related to notifying the European Commission of aid.

### a) Exemption regulation

Following the experience that European Commission gained through the application of the general regulation on the exemption of aid for SMEs, adopted in 2001<sup>16</sup> and which excluded certain sectors, the European Commission has adopted specific exemption regulations for SMEs that produce, process and market agricultural products<sup>17</sup> and for their counterparts in the fishing industry<sup>18</sup>, which complement, extend and facilitate the monitoring of aid, without detriment to the rigour required in that process.

Secondly, the regulation on de minimis aid in the agricultural and fishing sectors<sup>19</sup> is also an important new measure. Designed to prevent potential distortions of competition, it is a highly flexible instrument that is very simple to apply and is particularly useful in situations of difficulty which require rapid action.

<sup>16</sup> Commission Regulation (EC) n° 70/2001 of 12 January 2001, on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises.

<sup>17</sup> Commission Regulation (EC) n° 1/2004 of 23 December 2003, on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products. The regulation came into force on 3 January 2004 and will remain valid until 31 December 2006.

<sup>18</sup> Commission Regulation (EC) n° 1595/2004 of 8 September 2004, on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products. The regulation came into force on 1 November 2004 and will remain valid until 21 December 2006.

<sup>19</sup> Commission Regulation (EC) n1 1860/2004 of 6 October 2004, on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the agriculture and fisheries sectors. The regulation came into force on 1 January 2005 and will remain valid until 31 December 2008.

In specific terms, the regulation in question provides exemption from the need to issue notification of aid that does not exceed a threshold of e 3,000 per farmer or fisherman over a three-year period. That sum is lower than that of €100,000 over three years established in the general de *minimis* regulation<sup>20</sup>.

The regulation also differs from the general de *minimis* legislation in that an overall limit on aid, roughly equivalent to 0.3% of fishing or agricultural production, is established for each Member State.

Thirdly, Regulation 364/2004<sup>21</sup> extends the general exemption from the need to provide notification of aid granted to SMEs to aid for research and development. It provides a new instrument designed to facilitate the granting of aid to SMEs and encourage the use thereof for R&D activities, which are particularly important due to their contribution to economic growth and in terms of reinforcing competitiveness and promoting employment, in accordance with the mandate of the Stockholm Council to direct aid towards horizontal objectives.

A further point of note was the extension of the temporary defence mechanism for shipbuilding until 31 March 2005, in anticipation of a decision on how to resolve the conflicts reported to the WTO by the European

Community as a result of the anti-competitive conduct of the Republic of Korea in that sector.

#### b) Guidelines review

The relevance of the review of the EC guidelines on state aid for rescuing and restructuring companies in difficulty should be highlighted.

With a view to catering for the urgency of the action of which aid of this kind is part, a faster, more transparent procedure for the granting thereof has been established.

The monitoring of aid in the fishing sector has been complemented by the adoption of guidelines for state aid in the fishing and agricultural sector, in which the various types of aid are systematised, compatibility criteria defined and procedural aspects regulated.

#### c) New procedural developments related to notification

As far as the procedural aspect is concerned, attention should be drawn to the adoption of Regulation 794/2004<sup>22</sup>, which covers the various standardized notification forms or documents required for advising the European Commission of any public aid project.

<sup>20</sup> Commission Regulation (EC) n° 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de *minimis* aid.

<sup>21</sup> Commission Regulation (EC) n° 364/2004 of 25 February 2004, amending Regulation (EC) n° 70/2001 as regards the extension of its scope to include aid for research and development.

<sup>22</sup> Commission Regulation (EC) n° 794/2004 of 21 April 2004, implementing Council Regulation (EC) n° 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

As regards regulatory projects, 2004 saw the European Commission begin a review of the EC guidelines on regional aid, to be applied as of 2006.

## V.2. Competition Service activity

### a) At EC level

The Service participated in the debates on all regulatory projects and documents related to state aid.

Given its special importance and impact as regards regional economic development, it is worth highlighting the review of EC guidelines on regional aid, which, on the occasion in question, involved the added complication of the participation of the ten new Member States. That factor entailed an alteration to the reference framework and a need to assess and bear in mind the consequences of the economic data of the new Member States, in terms of the indicators used to identify regions as recipients or non-recipients of aid.

### b) CIAVE State Aid Working Group

In 2004, the Service took part in 3 meetings of the Interministerial Commission of Affairs for the EU (CIAVE According to the Spanish Acronym), in which 51 aid projects were analysed for the purposes of notifying the European Commission thereof and subsequently obtaining authorization for them, in accordance with the EC Treaty.

Table 9 shows the total number of aid projects of which Spain has notified the European Commission. A breakdown is given of the number of projects analyzed by the ICAEU group for the purpose of *ex ante* notification, and of the aid granted under the different exemption regulations, for which *ex post* notification is required.

In the light of the data, it can be concluded that, in Spain, the number of occasions on which aid is granted (requiring notification of some kind) is stabilising.

However, an increase can be observed in the number of aid projects that are

**Table 9**  
**STATE AID IN SPAIN**

	2001		2002		2003		2004	
	N.º	%	N.º	%	N.º	%	N.º	%
CIAUE projects	134	80,7	107	75,9	50	68,5	51	64,6
Exemption regulations)	26	15,7	28	19,9	20	27,4	28	35,4
No notification	6	3,6	6	4,3	3	4,1	—	—
<b>Total</b>	<b>166</b>	<b>100</b>	<b>141</b>	<b>100</b>	<b>73</b>	<b>100</b>	<b>79</b>	<b>100</b>

SOURCE: Competition Service database.

covered by exemption regulations and which, due to the nature thereof, therefore entail less detriment to conditions of competition, as they are geared to horizontal objectives.

As far as the granting and management of aid is concerned, Table 10 shows that the European Commission is notified of three times as many aid projects by the Autonomous Communities than by Spain as a state.

The Autonomous Communities that provided most project notifications in 2004 were:

- Cataluña (15.2% of the total).
- Cantabria (10%).
- Castilla-León (10%).
- País Vasco (10%).
- Madrid (5%), and
- Murcia (5%).

Each of the other autonomous communities accounted for less than 4% of the total number of projects of which notification was given.

Table 11 and Chart 14 reflect the main objectives to which state aid projects were geared in 2004. A distinction is made between horizontal and non-horizontal objectives.

On the basis of a comparison with previous years, the volume of aid for horizontal objectives continued to increase in 2004. In fact, 2004 was the first year in which levels of such aid outstripped aid of a sectorial nature.

Where distribution by sectors is concerned, Table 12 shows that agriculture is still the sector in which most aid notifications are generated, although the new technologies sector is also beginning to feature strongly.

It should be pointed out that distributing aid by objectives or sectors is not a straightforward task, as a single aid project is often geared to various objectives or sectors. The situation becomes even more complicated when aid also has an objective related to regional development. In any case, an effort has been made to classify aid on the basis of the sector and/or objective most relevant thereto.

### c) Reduction and reallocation of State Aid

The agreements of the EU Council, geared to a smaller quantity of better-

**Table 10**  
**STATE AID. PROJECT DISTRIBUTION BY TYPE OF MANAGEMENT**

	Year 2001		Year 2002		Year 2003		Year 2004	
	N.º	%	N.º	%	N.º	%	N.º	%
State	44	26,5	36	25,5	20	27,4	20	25,3
Autonomous community (*)	122	73,5	105	74,5	53	72,6	59	74,7
<b>Total</b>	<b>166</b>	<b>100</b>	<b>141</b>	<b>100</b>	<b>73</b>	<b>100</b>	<b>79</b>	<b>100</b>

(\*) Includes local aid

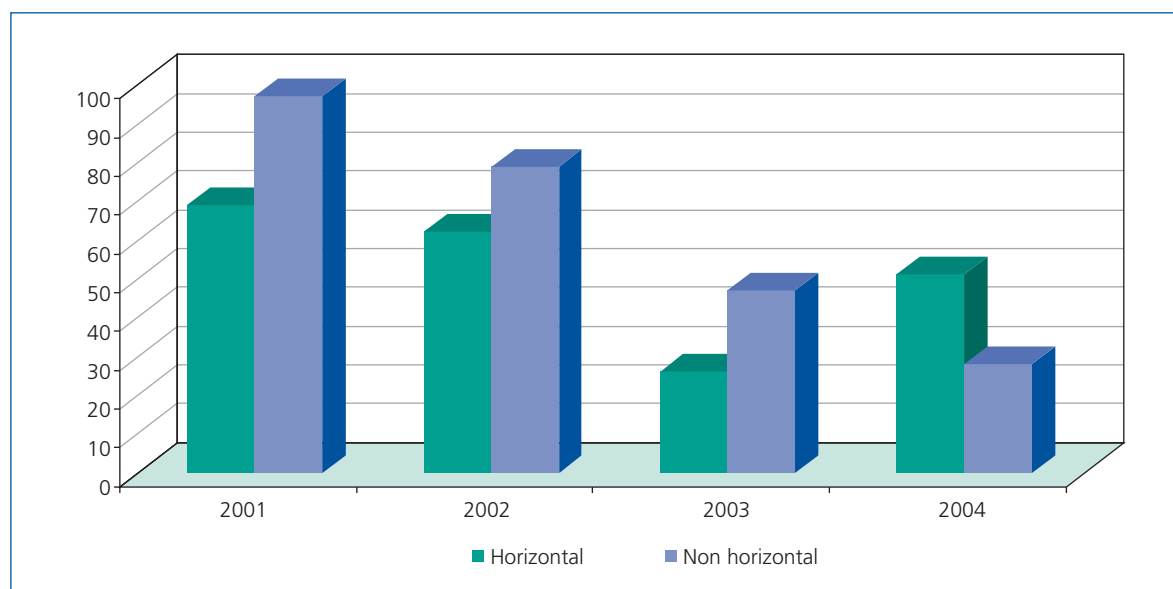
SOURCE: Competition Service database.

**Table 11**  
**STATE AID. DISTRIBUTION BY OBJETIVES**

	Year 2001		Year 2002		Year 2003		Year 2004	
	N.º	%	N.º	%	N.º	%	N.º	%
Horizontal	69	41,6	62	44	26	35,6	51	64,6
SMEs	28	40,6	25	40,3	12	46,2	25	49,0
R+D+I	12	17,4	5	8,1	7	26,9	15	29,4
Employment	13	18,8	4	6,5	2	7,7	5	9,8
Environment	2	2,9	5	8,1	1	3,8	5	9,8
Training	14	20,3	23	37,1	4	15,4	1	2,0
Non-horizontal	97	58,4	79	56	47	64,4	28	35,4
<b>Total</b>	<b>166</b>	<b>100</b>	<b>141</b>	<b>100</b>	<b>73</b>	<b>100</b>	<b>79</b>	<b>100</b>

SOURCE: Competition Service database.

**Chart 14**  
**STATE AID. DISTRIBUTION BY OBJETIVES**



quality aid being granted, constitute important elements within the new focus of the European Commission, which consists of a "proactive

competition policy for a competitive Europe". In that respect, in 2003 each Member State was supposed to have reduced the volume of aid granted in

**Table 12**  
**STATE AID. DISTRIBUTION BY SECTORS**

	Year 2001		Year 2002		Year 2003		Year 2004	
	N.º	%	N.º	%	N.º	%	N.º	%
Agriculture (1)	48	28,9	38	27,0	25	34,2	29	36,7
Other sectors	11	6,6	4	2,8	0	0,0	10	12,7
New Technologies (2)	1	0,6	0	0,0	2	2,7	5	6,3
Energy	5	3,0	6	4,3	2	2,7	4	5,1
Culture and media	3	1,8	3	2,1	0	0,0	3	3,8
Land transport	6	3,6	3	2,1	0	0,0	3	3,8
Shipbuilding	1	0,6	3	2,1	0	0,0	2	2,5
Fishing	26	15,7	15	10,6	3	4,1	1	1,3
Aeronautical construction	0	0,0	3	2,1	2	2,7	1	1,3
Other aid	65	39,2	66	46,8	39	53,4	21	26,6
<b>Total</b>	<b>166</b>	<b>100</b>	<b>141</b>	<b>100</b>	<b>73</b>	<b>100</b>	<b>79</b>	<b>100</b>

(1) Includes food sector.

(2) Include information technology.

SOURCE: Competition Service database.

relation to its GDP per inhabitant and to have demonstrated that the aid in question was being redirected towards horizontal objectives.

On the basis of the values recorded in previous years, it can be deduced that, in the case of most Member States, there has been a fall in terms of the overall volume of aid and the redirection thereof towards the objectives agreed upon.

According to the aid scoreboard of the European Commission, Spain's

fulfilment of its commitments in 2002 can be summarised as follows:

- In keeping with the decline experienced by the European Union as a whole, Spain reduced its total volume of aid by €400 million in comparison to 2001. In relative terms, aid represented 0.68% of the GDP, compared to 0.74% in 2001.
- Aid continued to be redirected towards horizontal objectives.

## VI. ACTIVITY BEFORE THE COURTS

### VI.1. Action of the Spanish Courts

In 2004, the Competition Service continued to work with the Spanish courts in relation to the appeals lodged against rulings of the Competition Court, agreements of the Council of Ministers and other administrative acts involved in the application of Spanish competition regulations.

Thus, the corresponding administrative proceedings were referred, reports were produced upon the request of the various courts and the different appeal proceedings were monitored.

Of particular note among the rulings pronounced in 2004, in the field of mergers, was the **Judgment of 29 March 2004, passed by the Third Section of the Chamber for Contentious Administrative Proceedings of the Supreme Court.**

The ruling partially admitted the appeal lodged by Sociedad Cooperativa General Agropecuaria (ACOR) against the agreement of the Council of Ministers of 25 September 1998, whereby certain conditions were applied to a merger consisting of a merger between Sociedad Azucarera

de España S.A. and Ebro Agrícolas Compañía de Alimentación, S.A., the fruit of which was Sociedad Azucarera Ebro Agrícolas, S.A.

In relation to the aforementioned appeal, the Supreme Court decided to refer a question to the Court of Justice of the European Communities for a preliminary ruling<sup>23</sup>.

Specifically, the question posed was whether EC regulations would allow a Member State authority, seeking to control a merger operation between undertakings and, for reasons related to competition, deeming a new distribution of sugar production quotas among the companies established in its territory to be necessary, to order that a payment be required for such a transfer or reassignment, rather than it taking place without charge, and that the process be carried out through public adjudication.

On 20 November 2003, the Sixth Chamber of the Court of Justice of the European Communities ruled as follows:

«1) *If, in the exercise of its power of administrative review of a merger of undertakings, the competent authority of a Member State deems it necessary*

<sup>23</sup> Order of the Supreme Court of 3 October 2001 (C-416/01).



*to redistribute sugar production quota among undertakings situated in its territory in order to safeguard competition, the provisions of Council Regulation (EEC) No. 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector and council Regulation (EEC) No. 193/82 of 26 January 1982 laying down general rules for transfers of quotas in the sugar sector preclude that authority from stipulating that such a transfer or reallocation of quotas should be for value.*

*2) The entry into force of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector does not alter the interpretation of Community law.*

In keeping with the provisions of the Judgment of the Court of Justice of the European Communities, on 29 March 2004 the Third Chamber of the Third Section of the Supreme Court passed a ruling<sup>24</sup> whereby it rejected the petition of the appellant as regards the nullity of the agreement of the Council of Ministers. However, it also stated that conditions two and six of the agreement of the Council of Ministers of 25 September 1998 were partially void.

Specifically, the following were declared null and void:

- The phrase “free of charge”, which appeared in the first paragraph of condition two.

<sup>24</sup> Contentious administrative appeal n° 547/1998.

- The passage “With a view to the quota reassignment being determined by means of market mechanisms, the price of the quota to be transferred and the distribution thereof shall be decided through the public adjudication of up to 30,000 MT of quotas A and B assigned to Azucarera. The Ministry of Agriculture, Fishing and Food must submit the specifications for the adjudication to the Competition Service prior to the publication thereof, in order for the latter to indicate its conformity with the content thereof”, which corresponded to the second paragraph of condition two.
- The phrase “by means of an adjudication procedure” in condition six.

The ruling was implemented through the agreement of the Council of Ministers of 24 July 2004.

Specifically, the agreement of the Council of Ministers established that the Ministry of Agriculture, Fishing and Food should reassign the quota without charge and to take effect as of the 2005 season.

## VI.2. Action of the EC courts

In the context of proceedings before the Court of Justice of the European Communities and related to state aid granted in Spain, in which the country is involved as an intervener, the Competition Service worked with the

Legal Service of the Ministry for Foreign Affairs and Cooperation in the first hearing on case T-141/03 before the Court of First Instance of the European Union, in relation to the appeal lodged by SNIACE, S.A. against the decision of the European Commission of 11 December 2002, in which it was stated that the participating loan granted to the company in question by Caja Cantabria classed as state aid. The first hearing took place on 15 September 2004.

In addition, the possibility of involvement in 77 appeals lodged before the EC courts and in 19 questions for preliminary rulings was analysed.

### **VI.3. Action within the context of EC Regulation 1/2003**

As stipulated in article 15.2 of EC Regulation 1/2003, Member States have been obliged, since 1 May 2004, to notify the European Commission of rulings of their national courts concerning the application of articles 81 and 82 of the EC Treaty.

In Spain, the Competition Service is responsible for notifying the European Commission of such rulings<sup>25</sup>.

In fulfilment of its duties, the Competition Service has informed the European Commission of five rulings since May 2004. One of those rulings was a decision on a claim lodged before a Court of First Instance, while the others dealt with appeals against rulings passed in courts of first instance.

In each case, the proceedings involved had begun prior to the entry into force of EC Regulation 1/2003 and had been initiated by service stations against oil companies with a view to contracts being declared to be null and void.

Additionally, five notifications were received from commercial courts regarding the admission of complaints in application of articles 81 and 82 of the EC Treaty, based on EC Regulation 1/2003, so that the EC or national competition authorities could submit written observations to the courts.

<sup>25</sup> In accordance with the stipulations of the Sole Additional Provision of Act 16/1989, introduced by Act 62/2003 of 30 December.



## VII. INTERNATIONAL ACTIVITY

### VII.1. European Union

#### a) Participation in the EU regulatory process

In 2004, the Competition Service participated in numerous meetings of experts and working groups geared to the implementation of the new EC competition model and the launch of the European Competition Network (ECN), which incorporates the European Commission and the national competition authorities of the EU Member States.

Council Regulation (EC) 1/2003 and the legislation that develops it introduced two main new developments:

- A switch to a self-evaluation system where agreements are concerned and the disappearance of the “individual authorisation” model.
- The total decentralisation of the application of article 81 of the EC Treaty by the administrative authorities and national courts of Member States.

Six plenary sessions of the ECN were held in 2004, basically focusing on the implementation of the new regulation. Representatives of the Competition Service attended all the sessions in question.

The ECN set up various working groups and subgroups in order to examine different aspects of implementation in greater depth and to facilitate discussions.

The Service also participated in various meetings of experts and advisory boards with a view to dealing with different projects related to Commission communications in the fields of mergers and restrictive conduct (involving file access, referrals, case assignment, simplified procedure and ancillary restraints), as well as projects related to block exemption regulations in two areas:

#### 1. Maritime consortiums

A review was instituted of Regulations 823/2000 and 4056/1986 in relation to the application of articles 81 and 82 to agreements between shipping companies.

#### 2. Technological transfer

The new Commission Regulation (EC) no. 772/2004, of 27 April 2004, on the exemption of technological transfer agreements was approved, along with the corresponding guidelines. Its effect has been to simplify the regulatory framework through a more economic approach.

## b) Meetings of Directors General for Competition

In 2004, the European Commission called just one meeting of Directors General for Competition, which took place on 22 September.

In previous years, two such meetings had been held annually. However the creation of other forums, such as the ECA, seems to have brought about a reduction in that respect.

The 2004 meeting of Directors-General for Competition was the first since the expansion of the European Union to encompass 25 Member States and the enforcement of the “modernisation” of EC competition regulations. The main topics examined at the meeting were:

- Abuse of dominant positions (the European Commission proposed the possibility of preparing some guidelines).
- Initial experiences as regards the application of the new procedures for queries and coordination within the ECN.
- The presentation of studies on competition in the telecommunications sector and private action in Europe.
- The announcement by the European Commission of its intention to continue carrying out comparative sectorial studies with a view to detecting competition-related problems of a general nature in the European Union and which could give rise to regulatory reforms or procedural recommendations for national authorities.

## c) Meetings of ECN (European Competition Network) groups

Ever since it was created, the Competition Service has participated in the various working groups and subgroups of the ECN:

### — Payment Cards and Competition Group:

Held in June 2004 on the initiative of the European Commission, the aim of the meeting was to begin a debate geared to developing a consolidated approach to the application of competition law in relation to interconnection fees and other rules applicable to card networks, in the context of international payment networks operating in the European Union.

### — Competition in the European Securities Markets Group:

The second meeting of the group took place in Brussels in June 2004. There, the European Commission presented the final version of the London Economics report on the organisation of the securities markets in the 25 European Union member states, entitled “*Overview of EU 25 securities trading, clearing, central counterparties and securities settlement*” (February 2004). With a view to keeping the report up to date and exchanging information on the topics in question, it was agreed to start up the web-based network CIRCA in the context of this working group.

At the meeting, the DG for the National Market presented the content of the European Commission Communication of 28 April 2004 on clearing and settlement in the European Union. The communication contained a plan indicating all the different initiatives necessary to obtain an efficient, integrated clearing and settlement environment for the trading of securities in the European Union, based on equal conditions for the various service providers.

The DG for Competition presented a document entitled *"Exclusive arrangements in the EU securities sector. Some preliminary considerations"*, in which it examined the possibility of exclusive agreements and raised questions on the potential positive and negative effects thereof as regards competition.

Lastly, two Member States presented their national experiences where competition in the securities market is concerned.

#### — Insurance Sector Network Group:

This group held its second meeting in Brussels in October 2004. The topics examined included the exchange of information between insurance companies with a view to agreeing upon insurance prices and conditions, the role of intermediaries in the insurance market and, in particular, the system used by insurance

brokers and intermediaries to charge fees.

In addition, the European Commission gave a presentation on the current state of development of the European insurance market, which is still highly fragmented due to the lack of standardisation of national legislation.

#### — Railway Group:

Created in 2003 within the ECN, this group is made up of experts from national and EC competition authorities.

Its aim is to support the sector's deregulation process, ensuring that competition rules are applied and that there is cooperation between competition authorities and sector regulators.

The group held its second meeting in 2004, at which the main problems and obstacles to competition following deregulation were discussed, along with cooperation between competition authorities and sector regulators.

#### — Energy Subgroup:

"Energy Day" took place in September 2004. The European Commission, national competition authorities and regulators marked the occasion by analysing various issues related to the energy markets in the EU. They also agreed to create a subgroup within

the ECN, which would henceforth be responsible for analysing the energy sector from the perspective of competition.

The first meeting of the subgroup took place in Brussels on 10 December 2004. The objectives and future work of the body were debated, along with long-term contracts in the gas sector, sector-specific investigations and communication via CIRCA.

In summary, in the first year of its operation as a framework for the exchange of information and assistance between Member States, in terms of studying and investigating cases, the efficacy of the ECN has been clearly proven, as has the importance of it having the legal cover that the new Regulation 1/2003 provides by facilitating and protecting confidential exchanges of information of the type in question.

There has been smooth, ongoing contact within the ECN, with a view to exchanging experiences as regards different issues related to the application of EC competition regulations and the various national legislative frameworks.

#### d) Hearings and Advisory Committees on EC proceedings

The Competition Service is responsible for monitoring EC proceedings in the areas of anti-competitive conduct and the merger control, as well as for cooperating with the European Commission in that respect and representing Spain at hearings and on

advisory committees prior to the approval of decisions by the collage of Commissioners.

**Table 13**  
**CS ATTENDANCE AT HEARINGS AND ON**  
**ADVISORY COMMITTEES**

Merger control
Advisory Committee COMP M.3255 Tetra Laval/Sidel
Advisory Committee COMP M.3440 EDP/ENI/GDP
Advisory Committee on referral notification
Advisory Committee on file access
Advisory Committee on notification of simplified procedures and ancillary restraints
Hearing COMP M.3216 Oracle/Peoplesoft
Hearing COMP M.3333 Sony/BMG
Hearing COMP M.3255
Anti-competitive practices
Advisory Committee COMP/37.792 MICROSOFT
Advisory Committee COMP/38.284 AIR FRANCE-ALITALIA
Advisory Committee COMP/32.448 CEWAL
Advisory Committee COMP/38.096 CLEARSTREAM
Advisory Committee COMP/37.980 SOURIS BLEUE
Advisory Committee COMP/38.549 ORDEN ARQUITECTOS BELGAS
Advisory Committee COMP/38.069 COPPER PLUMBING TUBES
Advisory Committee COMP/37.750 FRENCH BEER
Advisory Committee COMP/36.756 GLUCONATO DE SODIO
Advisory Committee COMP/38.238 RAW TOBACO
Advisory Committee COMP/38.662 GAZ FRANCE
Advisory Committee COMP/38.338 NEEDLES
Advisory Committee COMP/37.533 CHLORINE CHLORIDE
Advisory Committee COMP/37.773 MCAA
Advisory Committee on notification of assignment of
Advisory Committee on notifications of file access
Hearing COMP/38.354 INDUSTRIAL BAGS
Hearing COMP/38.606 GROUP.CARTES BANCAIRES
Hearing COMP/38.238 RAW TOBACO
Hearing COMP/38.126 GEMA

In 2004, the Competition Service continued to play an active role in the monitoring of the proceedings in question and has participated in the hearings and advisory committee meetings convened, as can be seen in Table 13.

Furthermore, over the course of the year there was abundant correspondence with the DG COMP for the purpose of queries related to the issues dealt with by the national and EC competition authorities, as well as in the investigations that the European Commission instituted in different sectors.

## VII.2. The ECA (European Competition Authorities)



The ECA (European Competition Authorities) is an informal forum that brings the competition authorities of the European Union Member States, the EEA and the European Commission together to discuss the main topics of mutual interest thereto, with a view to reinforcing cooperation.

The Directors-General of the ECA hold a meeting every year. The 2004 meeting took place on 6 May in Luxembourg and Trier, and focused on three issues:

- a) Presentation of the work report of the ECA Air Traffic Working Group.
- b) Generalised support for exchanges of civil servants between national authorities.
- c) Review of the working principles of the ECA as regards multiple notifications concerning mergers.

The work of both the **ECA sectorial working groups** currently in existence is of note:

### a) Air Traffic Working Group:

This working group was created in 2002 and studies experiences and the application of competition regulations in the air traffic sector, given the interest of all the competition authorities in the structural transformations (mergers and alliances) taking place therein.

The Competition Service participated actively in the five meetings held by this group in 2004, at which the topics examined included airline loyalty programmes, the review of the EC regulations on block exemptions for air traffic (IATA conferences) and the project of the European Commission for the modification of the current regulations for the administrative assignment of slots, which is geared to such assignment being carried out using market mechanisms.



### b) ECA Energy Subgroup:

The ECA Energy Subgroup was created at the meeting in Trier. The first meeting of the subgroup itself took place on 28 October 2004 in Lisbon.

Formed by Spain, Portugal and the European Commission, the subgroup worked on the preparation of a document on competition issues in the energy market. The document was presented at the meeting of Directors-General of the ECA in London in April 2005.

### VII.3. The OCDE

In 2004, the Competition Service took part in the meetings of the Competition Committee and its working parties on competition and regulation (WP2) and cooperation and enforcement (WP3), as well as in the meetings of the Joint Group on Trade and Competition, held in the headquarters of the OECD in Paris.

The Service also participated in the meetings corresponding to the 4th Global Forum on Competition, which took place in Paris in February 2004.

#### a) Competition Committee, WP2 and WP3

As in previous years, the Competition Committee, WP2 and WP3 staged three meetings in 2004, in February, June and October respectively.

The main points on the agenda were round tables on specific issues and an examination of competition policy in the member countries. Working on the basis of the *Background Paper* of the Secretariat and the contributions of the delegations, the following topics were discussed at round tables:

- Competition and regulation in the water sector.
- Intellectual property and competition policy, focusing on the biotechnology industry.
- Market activities carried out by the public sector.
- Competition and regulation in agriculture: purchasing power and joint selling.
- The use of economic analysis in the merger control procedure.
- Competition in health professions.
- Raising awareness of the harm done by cartels.
- Predatory prices.
- Private application of competition law.

Peer reviews of the competition policy of the member countries constitute one of the most relevant aspects of the activity of the groups in question. It is a line of work based on a monitoring system operated by the member countries of the OECD and to which they voluntarily submit, with a view to reaping the benefits to which the critical analysis involved gives rise.

Analyses are carried out under the supervision of two examining countries and are based on a document drafted by the Secretariat. The examiners pose questions to the country being assessed and delegations are given the opportunity to intervene. The process ends with a series of final recommendations being made to the country examined.

The countries examined in 2004 were Mexico and Japan.

In that context, Spain gave a verbal presentation of its Annual Report on Competition Policy in 2003 (reports are prepared annually, but are only presented every two years).

The **Competition Committee** and the **Consumer Policy Committee** held a joint meeting, at which the identification and management of market malfunctions was the first topic dealt with, through presentations on legal professions and funeral services, given by delegations. The second topic examined was cooperation as regards the cross-border application of legislation, to which end experiences in consumer protection and competition cases were presented.

Other relevant issues dealt with by the Competition Committee and its working parties in 2004 included a review of the experiences of Member States as regards the application of the 2001 Council recommendation on structural separation; the preparation of a Council recommendation on the merger control; and beginning a debate geared to drafting a Competition Committee text on

recommended practices for the formal exchange of information related to the investigation of international cartels.

#### **b) The IV Global Forum on Competition (GFC)**

The IV GFC meeting was held on 12 and 13 February. The forum is part of a broader OECD activity initiative involving non-member countries and has a clear focus on the relationship between competition and development.

An interesting study of the competition legislation and policy of the Russian Federation was carried out in the Forum.

#### **c) Join Group on Trade and Competition**

The mandate of this working group, issued by the Competition and Trade Committee, revolves around examining the topics envisaged in the working agenda on competition policies, as approved by the Fourth Ministerial Conference of the WTO, held in Doha on 14 November 2001.

Its objective was to prepare the position of the members of the WTO with regard to the possible initiation of negotiations on the Multilateral Competition Agreement, a matter that was to be decided upon at the Fifth Ministerial Conference, scheduled to take place in Cancun in September 2003.

Following that conference, and in light of the lack of consensus on the possibility of opening negotiations geared to the aforementioned agreement, it was suggested that the mandate of the working party should be renewed, along with the content of its work programme, if applicable.

Given that the Ministers reaffirmed the content of the Doha Declaration in the Cancun Declaration and restated their commitment to working with a view to the full implementation thereof, it was agreed to extend the mandate of the working group by a period of two years. By way of a work programme, a decision was made to focus on the analysis of regional trade agreements including provisions on competition, and to work on competition case studies as a means of raising awareness of the economic benefits of an effective competition policy among developing countries.

The Joint Group on Trade and Competition met twice in 2004 and has continued to reflect on interaction between trade and competition in the context of the approved work programme.

#### **VII.4. The ICN (*Internacional Competition Network*)**

The ICN (International Competition Network) is an informal forum of competition authorities from developed and developing countries. It was created in 2001 with the aim of improving the application of the competition policy in the global market in order to benefit consumers and companies.

It undertakes its activity through working groups specialising in different areas of competition, namely mergers, competition policy in regulated sectors, implementation in developing countries and cartels.

In 2004, the Competition Service participated actively in two of the working groups of the ICN and was involved in the numerous meetings and teleconferences held. The working groups in question were the Notifications and Procedures Subgroup (part of the Mergers Group) and the Cartels Group. The Service also monitored the activities of all the other groups.

The Notifications and Procedures Subgroup concluded four recommended practices in 2004 and began work on two new ones, specifically on remedies and agency powers.

Additionally, the Competition Service took part in the Annual ICN Conference, which was staged in Korea in April 2004. One of the highlights of the event was the creation of the working group on cartels. The importance of greater participation among developing countries was emphasised and various reports on difficulties, limits and experiences as regards the application of competition policy in regulated sectors were debated.

#### **VII.5. Bilateral cooperation**

As in previous years, close bilateral contact was maintained with the Member States of the European Union, in the fields of restrictive conduct and mergers alike, and fundamentally with

a view to exchanging experiences on and approaches to different issues.

Of particular note as regards bilateral relations with Competition Authorities from countries from outside the European Union were the visits paid by a delegation from the Antitrust Commission of the Republic of Armenia, by the Chairman of the Peruvian Competition Authority and by representatives of the Directorate-General for Economic Control and the Restriction of Fraud of the Algerian Ministry of Trade.

#### **VII.6. Iberian-American Competition Forum**

The Competition Service participated in the various activities undertaken as part

of the Iberian-American Competition Forum. Specifically, the third Iberian-American School event took place in June. A base and financing for that event were provided by the Spanish Competition Court. Those who participated in the event visited the Competition Service.

#### **VII.7. Technical assistance**

In 2004, the Competition Service continued to provide technical assistance in a range of contexts.

Of particular note was its participation in the Regional Programme for the Promotion of Euro-Mediterranean Market Instruments and Mechanisms, funded by the MEDA Programme of the EU.



# VIII. ORGANIZATION AND HUMAN RESOURCES

## VIII.1. Administrative organization

Article 4.1 of Royal Decree 562/2004 of 19 April (Official State Gazette no. 96 of 20 April), whereby the basic organic structure of the ministerial departments is established, stipulates that, among other administrative bodies, the Directorate-General for Competition, which takes on all the functions assigned to the Competition Service under Competition Act 16/1989 of 17 July, is answerable to the State Secretariat for the Economy.

The Director-General for Competition is thus also the Director of the Competition Service.

The Directorate-General for Competition is divided into three Deputy Directorates-generals plus a Directorate-General Support Unit:

— The Deputy Directorate-General for Mergers exercises the functions attributed to the Competition Service as regards the merger control and is responsible for relations with the European Union in that area.

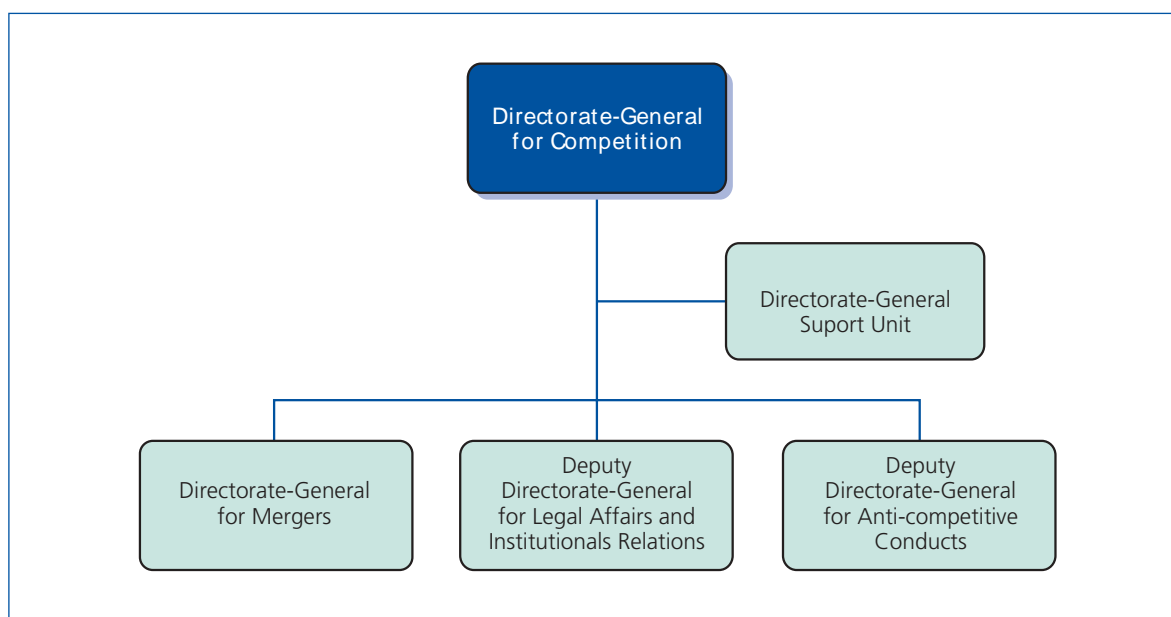
- The Deputy Directorate-General for Anti-competitive Conducts exercises the functions attributed to the Competition Service as regards restrictive or abusive practices and agreements, and is responsible for relations with the European Union within the field in question.
- The Deputy Directorate-General for Legal Affairs and Institutional Relations is assigned the functions of legal advice with regard to the application and development of competition regulations; cooperation and collaboration with Autonomous Communities, sector-regulating bodies, foreign organisations and international institutions; and those that Competition Act 16/1989 of 17 July, attributes to the Competition Service where studies and reports are concerned.

The organisation chart on the next page shows the institutional structure of the Competition Service.

## VIII.2. Human Resource

The year 2001 saw the creation of the Deputy Directorate-General for Legal Affairs and Institutional Relations,

**Chart 15**  
**ORGANIGRAMA DE LA D. G. DE DEFENSA DE LA COMPETENCIA**



following the creation of the Directorate-General for Competition<sup>26</sup> itself and its Support Unit. Since then, staffing levels at the Directorate-General have risen by 18% and have remained constant over the last 2 years.

That increase was reflected in the budget of the Directorate-General for 2004, which totalled € 2,843,510, representing a 7% rise in comparison to the previous financial year. Of that amount, € 2,546,000 (89% of the total) corresponds to staffing costs.

**Table 14**  
**SSTAFF ATTACHED TO THE COMPETITION SERVICE**

Group	D. G. and Support Unit	Deputy DG Mergers	Deputy DG Anti-competitive Conducts	Deputy DG Legal Affaire and Institutional Relations	Total
A	3	11	14	4	32
B	1	10	14	2	27
C	0	1	8	3	12
D	4	7	10	3	24
<b>Total</b>	<b>8</b>	<b>29</b>	<b>46</b>	<b>12</b>	<b>95</b>

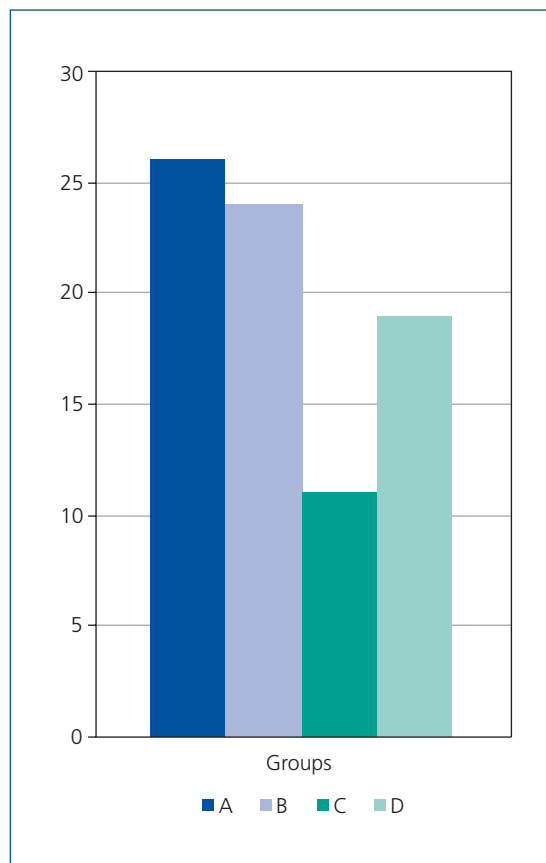
<sup>26</sup> Article 1.1 of Royal Decree 777/2002 of 26 July, whereby the basic organic structure of the Ministry of Economy is established.

The average age of the civil servants working in the Directorate-General is 39, and the average amount of time spent working therein is 6 years. Females account for 82% of the staff of the Directorate-General.

As can be seen in Chart 16, civil servants from groups A and B feature prominently in the Directorate-General and account for 63% of all the positions effectively occupied. That is due to the work involved in preliminary investigations into antitrust cases requiring a high level of professionalism and technical preparation.

Most of the specialised staff of the Directorate-General (groups A and B) have a legal or economic background, or both. They are incorporated into the various units that make up the Directorate-General, as shown in Table 15.

**Chart 16**  
**POSITIONS OCCUPIED IN THE D.G.,**  
**BY GROUPS**

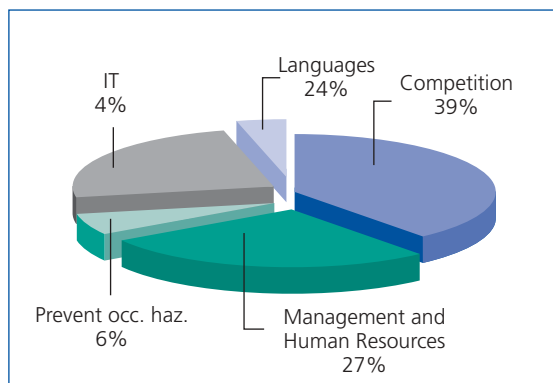


**Table 15**  
**D.G. FOR COMPETITION. PROFESSIONAL TRAINING**

	D. G. and Support Unit	Deputy D.G. Mergers	Deputy D.G. Anti-competitive Conducts	Deputy D.G. Legal Affairs and Institutional Relations	Total
Economic training	1	6	7	3	17
Legal training	3	4	11	4	22
Other advanced degree holders	1	4	8	2	15
Intermediate degree holders	0	2	2	1	5
<b>Total</b>	<b>5</b>	<b>16</b>	<b>28</b>	<b>10</b>	<b>59</b>



**Chart 17**  
**COURSES BY TRAINING AREAS 2004**



### VIII.3. Training activities

In 2004, the training of the staff attached to the Directorate-General for Competition was characterised by its combination of two elements, namely the Ministry of Finance and the Economy staff training programmes on one hand, and specific courses on Competition training or closely linked to the activities undertaken in the Directorate-General on the other. The specific courses are given in university centres or other postgraduate institutes.

Specifically, staff attached to the Directorate-General participated in a total of 49 courses, occupying 162 places thereon overall and thus matching the investment in training of previous years.

Chart 17 shows the subjects covered by the main training activities in 2004.

Additionally, 2004 saw civil servants from the Directorate-General taking part in month-long exchange programmes with the Directorate-General for Competition of the European Commission.

### VIII.4. The website: <http://www.mineco.es/dgdc/sdc/>

The Competition Service uses its website to inform citizens of regulation, criteria and activities undertaken as regards Competition. The website also facilitates contact with citizens, via IT-based means of communication, in accordance with the general criteria of the Ministry of Finance and the Economy.

The process of constantly updating and reviewing the website continued in 2004. Examples of the services available via the website are the application of the procedure for the submission of self-assessments and the presentation of the conditions for the online payment of the fee for analysing and studying mergers, as well as the publication of a weekly newsletter related to Competition.

The Competition Service has also used its website for the purpose of public viewing procedures when undertaking projects for regulatory changes and has advised of the Spanish position in certain international forums thereon.

Table 16 and Chart 18 contain data on general activity on the website. The following chart identifies the most active visitor sessions and the most popular file downloads in 2004.

The file most frequently downloaded from the website in 2004 was a report related to an investigation into the distribution chain of certain fruits and

**Table 16**  
**ACTIVITY SUMMARY YEAR 2004**

Average numbers of visit on working days	604
Average numbers of hits on working days	3,984
Average numbers of visit at weekends	474
Average numbers of hits at weekends	2,105
Day of the week with highest level of activity	Tuesday
Day of the week with lowest level of activity	Saturday
Day with highest level of activity in the site's history	January 20
Number of hits on day with lowest level of activity	14,619
Day with lowest level of activity in the site's history	January 01
Number of hits on day with lowest level of activity	5
Time of day at which most site activity is logged	12:00-12:59

**Chart 18**  
**VISITOR SESSIONS (1 YEAR PERIOD)**



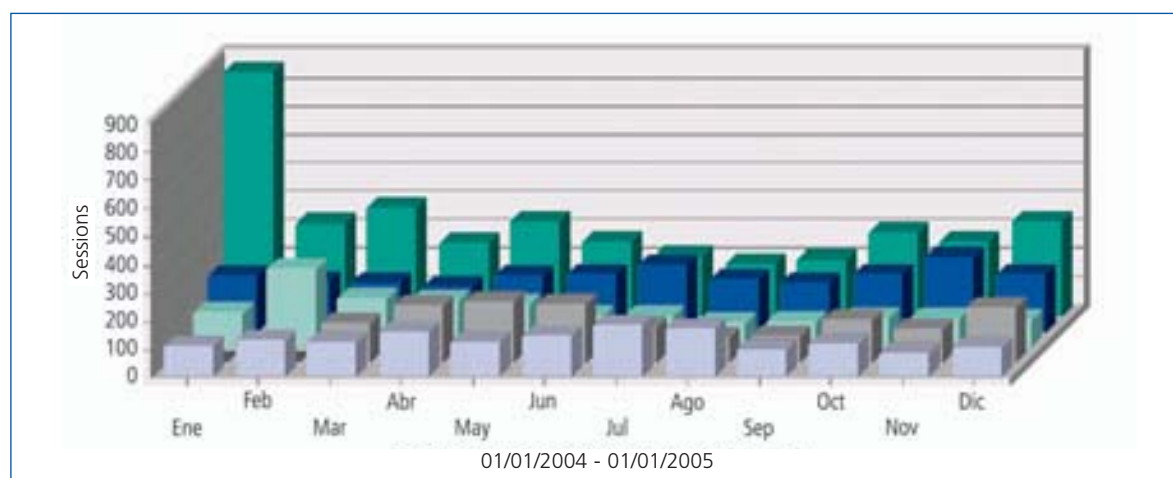
vegetables. The report in question was published on the Competition Service website in January 2004, as indicated in Chart 19.

The following charts show the pages of the website which received most hits, with first place going to the site's

homepage, followed by the page on the merger control.

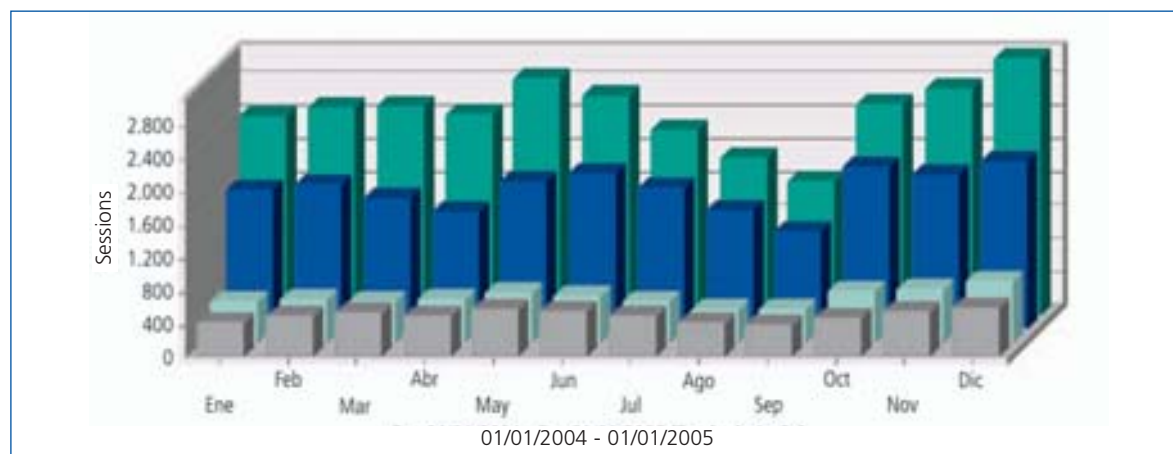
The geographic origins of the users of the site are also shown, classified by countries. The United States are at the top of the list, followed by Spain and Latin American countries.

**Chart 19**  
**MOST FREQUENTLY DOWNLOADED FILES (1 YEAR PERIOD)**



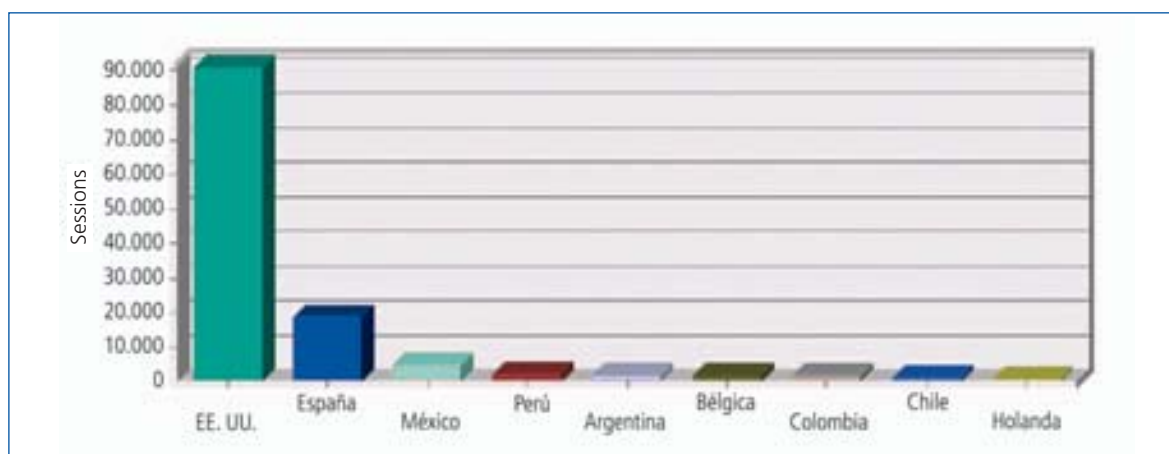
	File	N° of downloads	% of total	Sessions
■ 1	<a href="http://www.mineco.es/dgdc/sdc/Informe.pdf">http://www.mineco.es/dgdc/sdc/ Informe.pdf</a>	54.791	11,51%	4.129
■ 2	<a href="http://www.mineco.es/dgdc/sdc/Informes+SGC/n306infweb.PDF">http://www.mineco.es/dgdc/sdc/ Informes+SGC/n306infweb.PDF</a>	6.275	1,31%	2.603
■ 3	<a href="http://www.mineco.es/dgdc/sdc/97/documem97.pdf">http://www.mineco.es/dgdc/sdc/ 97/documem97.pdf</a>	4.042	0,84%	1.664
■ 4	<a href="http://www.mineco.es/dgdc/sdc/Informes+SGC/N04005INFWEB.pdf">http://www.mineco.es/dgdc/sdc/ Informes+SGC/N04005INFWEB.pdf</a>	4.781	1,00%	1.654
■ 5	<a href="http://www.mineco.es/dgdc/sdc/Informes+SGC/N03056INFWEB.pdf">http://www.mineco.es/dgdc/sdc/ Informes+SGC/N03056INFWEB.pdf</a>	5.180	1,08%	1.598

**Chart 20**  
**PAGES WITH MOST HITS (1 YEAR PERIOD)**



	File	Hits	% of total n° of hits
■ 1	Servicio de Defensa de la Competencia - España <a href="http://www.mineco.es/dgdc/sdc/">http://www.mineco.es/dgdc/sdc/</a>	43.233	24,86%
■ 2	Servicio de Defensa de la Competencia - Spain - Control Concentraciones <a href="http://www.mineco.es/dgdc/sdc/control_concentra.html">http://www.mineco.es/dgdc/sdc/control_concentra.html</a>	26.719	15,36%
■ 3	Servicio de Defensa de la Competencia - Spain - Decisiones y Resoluciones <a href="http://www.mineco.es/dgdc/sdc/decisiones.htm">http://www.mineco.es/dgdc/sdc/decisiones.htm</a>	8.337	4,79%
■ 4	Servicio de Defensa de la Competencia - Spain - Legislación <a href="http://www.mineco.es/dgdc/sdc/legislacion.htm">http://www.mineco.es/dgdc/sdc/legislacion.htm</a>	7.183	4,13%

**Chart 21**  
**MOST ACTIVE COUNTRIES**



Countries	Sessions
United States	90.491
España	18.529
México	5.004
Peru	2.348
Argentina	1.945
Belgium	1.620
Colombia	1.536
Chile	1.080
Netherlands	690



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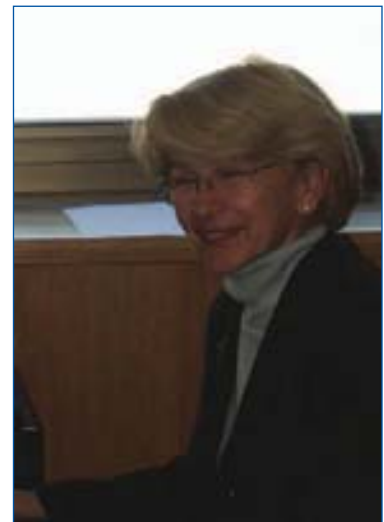
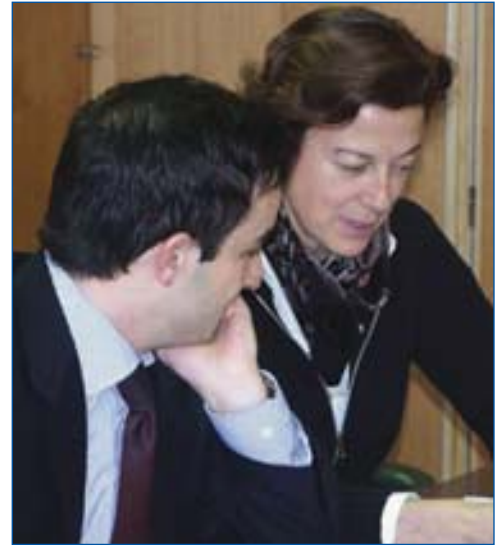
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