



# THE BENEFITS OF COMPETITION FOR CONSUMERS: QUESTIONS AND ANSWERS

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## **PREFACE**

Competition is an essential tool for improving the well-being of society.

Spain's National Authority for Markets and Competition (CNMC) aims to ensure, preserve and promote effective competition and the proper functioning of markets for the benefit of consumers and users.

The benefits of competition are sometimes indirect to consumers and users, and can be difficult to understand.

This Guide aims to be a tool to bring consumers and users closer to issues such as what competition is, how it benefits us all, when competition may be at risk, how competition is related to economic regulation and what regulation should be, what is the role of the CNMC and how to collaborate with CNMC.

The Guide consists of a set of frequently asked questions on competition and good regulation, which it aims to answer in an instructive way, incorporating notes and real cases.

The Guide is part of action 14.3 of the [CNMC Action Plan for 2020](#) (revised in the context of the Covid-19 crisis).

## **1. UNDERSTANDING COMPETITION**

Competition is a form of economic relationship between suppliers and consumers which, where it exists, causes markets to function properly, resources to be allocated optimally and, consequently, consumers benefit from it. In this first section we will see what competition consists of and why it is so important.

### **1.1. What is competition?**

It is a market organisation system in which different companies offer goods or services of similar characteristics, which can be substituted for each other, and in which the price offered is the basic, but not the only, element of competition between suppliers. In a competitive market, where there are no dominant companies, consumers can compare and choose between various options, and companies rival and strive for consumers to choose their products, lowering their prices, improving quality or developing new varieties that are better suited to the needs and tastes of the consumers.

On the contrary, when there is little competition, companies with a dominant position can take advantage of their market power, to the detriment of consumers, who receive products that are more expensive, of poorer quality and less suited to their needs.

### **1.2. How does competition work?**

Competition encourages companies to strive and work for consumers to select their products. A company that wants to attract consumers can do so in different ways:

- Offering its products at lower prices.
- Offering a wider range of products or adjusting their products to the needs and tastes of consumers.
- Offering higher quality or incorporating sustainability strategies into their processes (for example, companies that make their production processes "greener", because they know this matters to consumers who purchase the products).
- Offering greater and better services related to its products (such as delivery, product information, warranty or return options).

If there is competition, when a company is tempted to raise its prices or worsen quality for greater profits, it will find that consumers will switch to another firm.

That is why competition "disciplines" and encourages companies to continually improve. And so we, the consumers, benefit.

### 1.3. Who benefits from competition?

Competition benefits society as a whole. It benefits us all directly as consumers and users of cheaper, better quality products that are more suited to our needs. But it also indirectly benefits businesses and the public sector by promoting economic growth, employment and innovation.

On the contrary, restrictions on competition benefit only a few and harm everyone else. Moreover, it is the most disadvantaged groups who suffer most from the high prices, poorer quality and less variety caused by restrictions on competition.

### 1.4. How does competition benefit consumers?

Consumers are the main beneficiaries of increased competition and well-functioning markets, because they benefit both directly and indirectly:

- Directly: through lower prices, greater variety or higher quality of the goods and services they consume. For example, new technologies (improved telecommunications, smartphones, development of mobile applications...) have made it possible to meet users' previously unsatisfied needs for instant remote communication (see Box 1).
- Indirectly, in at least four ways:
  - o Firstly, competition reduces prices and improves the quality of the products that firms purchase as intermediary products (which they incorporate into their production), allowing them to sell cheaper and higher quality products.
  - o Secondly, competition reduces and improves the quality of products purchased by the public sector, enabling thus the public sector to provide more services or reduce taxes and to improve the quality of public services that citizens receive.
  - o Thirdly, competition has very important global effects on the economy: by boosting efficiency and entrepreneurial innovation, promoting productivity, economic growth and employment.
  - o Fourthly, competition drives businesses to adopt sustainable business strategies.

*Box1*

#### COMPETITION IN TELECOMMUNICATIONS MARKETS

Throughout the 1980s and 1990s, a process of liberalisation of the telecommunications sector took place in the European Union. With it, this sector has opened up to competition (the monopoly of national companies was eliminated, as was the case with Telefónica in Spain).

New companies appeared on the market and began to compete with each other, which added to the great advances in technology (which allowed the development of new services and reduced costs, increasing efficiency). As a result, access to services such as mobile telecommunications and internet became widespread. The options available were expanded and improved (e.g. internet access via mobile phone, progressive increase in internet access speed, offering flat rates...), meeting users' needs much better and reducing the prices of services. Moreover, progress in the telecommunications sector has been crucial for the development of the other economic sectors and now also for digitalisation.

### **1.5. How does competition affect the most vulnerable groups?**

Competition is positive for all consumers, but it has effects that are especially important for the most vulnerable consumers:

- Access to more products: when competition drives prices down, vulnerable consumers have access to a broader portfolio of products. For example, if a family pays less for its electricity bill, they can afford to allocate more resources for other purposes.
- Greater economic inclusion: when products become more affordable, more people can access them, in particular low-income households. For example, in air transport services, competition has led to significant price reductions, so that many users who previously could not afford to travel by air because of high fares are now able to do so.
- Increased productivity and improved operation of the economy: competition stimulates productivity and innovation, which also generates greater opportunities for employment and entrepreneurship.

### **1.6. How does competition benefit companies?**

With greater competition, companies are "disciplined". Competition leads companies to continually try to improve. Some companies that are not efficient enough, or are wrong in their decisions, may have to leave the markets. Therefore, does competition benefit companies?

From a business point of view, competition is a way of promoting equal opportunities and rewarding merit and effort. Where there is competition, ideally, there is no one company that has an unattainable advantage over the others. Competition stimulates and rewards entrepreneurship and innovation, as thriving depends mainly on effort.

Another way to see it is to analyse what happens when there is no competition: in these situations, the successful companies are not the ones that have tried the most or best, but success happens to depend on factors such as luck, opportunity, contacts, historical reasons or even corruption.



In addition, companies also benefit from competition between their suppliers and between their customers. In order to produce goods and services, firms need to purchase other goods and services (inputs), which will be better and cheaper the more competition there is between the suppliers of these inputs. On the other hand, companies that sell their goods and services to other companies will benefit from competition between the latter.

For example, a computer manufacturer needs to purchase microprocessors to incorporate them into their product. If microprocessor manufacturers agree to raise their prices, the costs of manufacturing computers will rise. Even if the computer manufacturer reacts by raising its prices, their situation will have worsened, as it will probably sell fewer computers.

Following the example, computer manufacturers would also be harmed if, on the other hand, it was the commercial establishments that buy computers from manufacturers to sell them to final consumers who agreed to raise computer prices, because it is likely that, in the face of higher prices, computer sales will fall.

### **1.7. Does competition benefit all companies?**

Some companies prefer the "comfortable" life and, instead of offering better products and services, infringe competition rules in order to achieve better results in their business. These companies do not benefit from a higher degree of competition.

But it is also true that sometimes companies make wrong or unfortunate decisions. And competition can lead to less efficient businesses to lose weight on the market or even disappear. While competition may be beneficial on the whole, it can sometimes entail costs for, for example, the employees, suppliers or investors of the worst-performing companies. Even if the balance of profits and costs is overall positive, we must be aware of these effects and try to minimise them. We shall refer to these issues later in section 3.

### **1.8. How does competition benefit the public sector?**

To meet their needs and to provide goods and services to citizens, the public sector has to purchase goods and services from companies. Government procurement represents between 10 and 20 per cent of GDP (gross domestic product) in Spain<sup>1</sup>; that is, it has a great economic relevance. For example, the

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1 [Radiografía de los procedimientos de contratación pública en España \(Overview of public procurement procedures in Spain\) \(CNMC, 2019\).](#)

public sector purchases office supplies, computer equipment or vehicles, or contracts external services, such as security or cleaning, which are necessary to carry out its functions.

The more companies offer a product, the more likely the public sector will be able to acquire it at a lower price and, therefore, savings can be generated for the public budget.

On the contrary, the public sector will be harmed when there is no competition. For example, if companies supplying goods and services agree with each other to raise prices or allocate public contracts among themselves, this will result in a significant cost to the Administration, an increase that taxpayers will pay. This is an unnecessary increased use of public resources that could be used for other public services. This type of agreement between companies is one of the practices that concern the CNMC most. Between 2015 and 2019, around 50% of the penalties imposed by the CNMC relate to the dismantling of cartels in public tenders (see Boxes 2 and 3).

Moreover, the public sector also benefits from competition as a producer of goods and services. When the public sector produces goods and services that are also produced by the private sector, competition encourages the public sector to improve. As a result, we all benefit from better products and greater efficiency.

It is these potential gains that have led, in recent decades, to liberalise some markets in which only the public sector was present. A good example is rail transport, which has been liberalised in Spain in search of cheaper and better quality transport.

Box 2

**GUIDE ON PUBLIC PROCUREMENT AND COMPETITION**

In 2011, the CNC (National Competition Authority, CNMC predecessor) published a [Guide on Public Procurement and Competition](#) to promote competition when administrations procure goods and services.

This Guide, in addition to providing guidelines for clean procurement procedures and favouring competition, also included some guidance to avoid collusive actions by firms. The document highlighted the importance and benefits of competition for public procurement: competition among firms is the way to ensure that public sector entities and society ultimately benefit from the best offers in terms of price, quality and innovation of the goods or services finally procured. Poor conditions of competition generate greater expenditure for public administrations and therefore damage to citizens.

General principles that should guide public procurement in order to avoid restricting competition include: freedom of access to tenders, publicity and transparency of procedures, non-discrimination and equal treatment among candidates, search for efficient use of public funds, prior definition of the needs to be met, safeguarding free competition and selection of offers economically most advantageous.

Box 3

**PUBLIC PROCUREMENT IN THE EUROPEAN UNION**

Since its inception, the European Union has **attached great importance** to the creation of a single market for public procurement, in order to facilitate the access of all EU companies, regardless of their nationality, to the public procurement processes of all member states. This single market benefits both European companies, which have more business opportunities, and the public sector (and therefore taxpayers) in each country, which have to pay less for the provision of public goods and services.

In 2014, the Parliament and the Council adopted a new public procurement package in order to simplify and make procedures more flexible and, thus, encourage European small and medium-sized enterprises to participate in public tenders, in addition to ensuring that social and environmental criteria were given greater weight. This package was transposed into Spanish legislation with the reform of Law 9/2017, on Public Sector Contracts. The Spanish standard seeks to make the public procurement market more competitive. In short, European procurement legislation aims to reduce costs, but also to improve quality and to promote innovation and environmental friendliness, thus benefiting citizens.

### 1.9. How does competition affect economic growth?

The fact that there is more competition not only benefits individuals who are directly involved in a particular market as consumers or producers, but also contributes to overall economic growth and serves society as a whole<sup>2</sup>.

Economic growth means an increase in GDP, that is, increases the value of goods and services produced in the country. Ultimately, it leads to an increase in the income of the population (GDP *per capita*), which potentially improves the wellbeing of society. More competition favours growth through several ways:

- Firstly, competition creates incentives for the continuous improvement of the internal management of companies. In sectors where competition exists, **productivity grows** because companies become more efficient.
- Secondly, **competition drives innovation**, since the pressure exerted by competitors encourages the company to try to improve, innovate in the product (new goods or services, of higher quality or with different characteristics), in the process (improvement of production technology) or in its organisation. Innovation generated in a given sector can also be useful to other sectors, so that technological advancement spreads and generates chain benefits.

### 1.10. If competition is good for everyone, why are there sometimes companies that don't want it?

For companies already established in a market, the arrival of new entrants may cause discomfort. New ones pose a threat and can reduce sales or profits from already installed ones. Therefore, some operators already installed may be tempted to boycott customers or suppliers who trade with new entrants, or convince the public authorities to protect them through regulation.

Similarly, some companies may find it more convenient to agree to raise prices or share customers with other companies rather than to strive to improve and compete.

All these behaviours have a huge cost to society. For this reason, the CNMC devotes a great deal of effort to preventing, detecting and sanctioning them.

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2 A summary of the evidence about the effects of competition on economic growth is found in OECD (2014). [Factsheet on how competition policy affects macro-economic outcomes](#).

### **1.11. So is competition perfect?**

To the extent that some companies may have incentives to strategically reduce competition, competition cannot develop satisfactorily without clear rules on the market and without the existence of public institutions that ensure market and consumer protection, such as the CNMC.

Competition is not an end in itself, but an instrument for prosperity. Sometimes the circumstances are not right for competition alone to provide the best outcome from a social welfare point of view. These circumstances occur when there is what is known as "market failure" in economic theory, or where there is an overriding reason in the general interest<sup>3</sup>, cases where it is necessary to establish by regulation those measures which can reproduce the optimal results of a competitive market.

Therefore, protection of competition does not imply an absence of regulation. On the contrary, such a protection may require sound regulation: a well-adjusted, good quality regulation. In some sectors of economic activity (notably in network industries), competition may require *ex ante* regulation. We will address these issues in the chapter on Competition and Public Administration (section 3).

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3 An "overriding reason in the general interest" is a goal in the public interest which justifies a public intervention to alter the market outcome, for example, preserving public health, the environment or cultural heritage. We refer to these issues in section 3 of the Guide.

## 2. COMPETITION AND COMPANIES

When there is little competition in a market, firms can take advantage of their position to set prices higher than consumers would pay if there were competition. Thus, they get more benefits at the expense of citizens' welfare. Moreover, without the threat of other companies, they have no incentives to improve product quality, to launch new varieties or invest in research, development and innovation (R&D&I). In the short and the long term, lack of competition is very detrimental to social welfare and economic growth.

### 2.1. What business behaviour is harmful to competition?

There are three categories of conduct that may be carried out by companies that seriously damage competition:

- Anti-competitive agreements between companies.
- Abuses of dominant position by the company with market power.
- Distortion of free competition by unfair acts.

Next, we explain a little more about what these behaviours consist of.

### 2.2. What are anti-competitive agreements?

Collusive behaviour occurs when two or more undertakings coordinate their behaviour, restricting competition to the detriment of the consumer.

These conducts include cartels (the most serious and harmful anti-competitive conduct), which are agreements between competitors to raise prices for their products or services, limit the quantities produced by each firm, geographically divide up customers (so that each company acts as a monopolist in an area), engage in fraudulent bidding in public tenders (see Box 4) or exchange information on future prices, among others.

Box 4

#### CARTEL OF PAPER ENVELOPES

In 2013, the National Competition Authority (CNMC predecessor) sanctioned 15 companies with more than 44 million euros for creating [a cartel that affected the supply of paper envelopes](#) (File S/0316/10 SOBRES DE PAPEL).

For 33 years (between 1977 and 2010), the business plot shared out customers and agreed on prices in the paper envelope market throughout the country. The pacts affected the Public Administration and taxpayers, as they included market sharing in the tendering of electoral envelopes for all electoral processes held between 1977 and 2010. In addition, they shared out the national customers, both public and private, in the pre-printed envelope market and

reached agreements on the pricing and sharing of blank envelope customers. They also agreed to limit technological development in the paper envelope sector, thus limiting innovation in the sector.

Such behaviour is severely restrictive on competition because it artificially raises prices, worsens the quality of services and is very detrimental to consumers (including the Public Administration and taxpayers), raising their costs and worsening the quality of services received.

The decision sanctioning the companies was upheld by the National High Court following appeals lodged by the sanctioned companies and is final as regards the infringement sanctioned and the fine imposed<sup>4</sup>.

From 2014 to February 2021, the CNMC has sanctioned 39 cartels in sectors such as car dealerships, car manufacturers, nappies, railways, concrete or manipulation of public tenders or, more recently, health or energy<sup>5</sup>.

However, on certain occasions, agreements between companies are not prohibited if they contribute to improving the production or the marketing and distribution of goods and services, or to promoting technical or economic progress, provided that they (1) allow consumers to benefit from these advantages, (2) do not impose restrictions on companies which are not essential to achieve these objectives, and (3) do not enable the participating companies to eliminate competition in respect of a substantial part of the products or services in question.

### **2.3. What are abuses of dominant position?**

A company has a dominant position when it has a high market power that allows it to raise prices or worsen the quality of its products or services without its competitors or consumers being able to discipline them (there is not enough competitive pressure).

The fact that a company has a dominant position is not prohibited by competition law, because it may have acquired it on a meritorious basis<sup>6</sup>. But having such a

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4 However, with respect to one of the sanctioned companies (ANDALUZA DE PAPEL S.A.), the final judgment of the National High Court, of 28 March 2017, obliged the CNMC to re-quantify the sanction, which was enforced by means of a new CNMC Resolution of 19 April 2018, which was appealed by means of a contentious-administrative appeal before the High Court and is still pending a ruling.

5 The decisions of the Board of the CNMC are available at <https://www.cnmc.es/acuerdos-y-decisiones>. In particular, the decisions on anti-competitive conduct can be consulted by clicking on the following [link](#).

6 Dominance can be achieved through purely meritorious causes, for example, through a strong investment in innovation that leads to differentiation from the rest and to the consumer valuing your product more highly than others.

dominant position, it must be especially sensitive when undertaking certain commercial policies, because if it relies on this dominant position to implement them successfully, the damage it may cause to competitors, suppliers and consumers may lead to an abuse of its dominant position, and be sanctioned for such conduct.

In particular, competition authorities are concerned about two types of conduct by companies with a dominant position:

- Conducts that aim to **exclude competitors**: for example, when a firm decides to sell its products at a price below what it costs to produce them so that its competitors will be driven out (predatory pricing). The dominant company, having greater economic capacity than the others, can bear to sell at losses for a period of time, while the others, under a worse condition than the dominant company, cannot bear these losses and end up leaving the market.
- Conducts that aim **to exploit consumers**: for example, when a company raises its prices well above its cost (excessive prices) or worsens its terms of sale in order to obtain more profits at the expense of consumers, or when it imposes the obligation to buy products that the customer does not want in order to access the desired product (product linking).

Box 5

#### ABUSE OF DOMINANT POSITION

##### Case SGAE-CONCERTS

In 2014, the CNMC sanctioned the General Society of Authors of Spain (SGAE) with more than 3.1 million euros for abusing its dominant position between 2009 and 2012 by charging abusive royalty fees to promoters of concerts and other live music events ([File S/0460/13, SGAE-CONCIERTOS](#)).

According to the CNMC, fees applied by the SGAE to concert promoters were unfair and abusive as excessive, as it charged 10% of the box office proceeds (after deduction of VAT) as the general rate applied to remunerate royalties and 9% in the case of seats of less than 1,000 spectators, while fourteen Member States of the European Union applied lower rates than the SGAE, in particular the United Kingdom with tariffs of 3 per cent of gross box office revenue.

This anti-competitive conduct, moreover, may have been detrimental to the consumer because the higher costs of concert promoters may have led to higher concert ticket prices.

This decision is final as it was confirmed by the Supreme Court of Spain in 2019.

##### Cases CENTRICA

Another prominent case of abuse of dominance is the total sanction of 35.8 million euros through five parallel proceedings that the National Competition Authority (CNMC predecessor) imposed in 2009 on the five main electricity distributors. The sanctioned conduct consisted in



denying a competitor, Centrica Energía, access to the supply information held by the distributors under the conditions provided for by the regulations. In addition, in the case of three distributors, they gave privileged access to that data to the companies in their own group, to the detriment of the other companies that had to compete with a disadvantage because they had worse market information (Files [641/08 Centrica/Endesa](#), [642/08 Centrica/Unión Fenosa](#), [643/08 Centrica/Electra de Viesgo](#), [644/08 Centrica/Iberdrola](#), [645/08 Centrica/Hidrocantábrico](#)).

This conduct was particularly damaging because it took place at a very relevant moment, in the middle of the process of liberalisation of the electricity markets in Spain. At that time, the electricity companies already installed had all the information on electricity demand and, moreover, when managing the electricity distribution networks, they could know how that demand evolved. With this information, they were able to make offers tailored to customers' needs. On the contrary, new entrants had worse information, which made it much more difficult for them to adjust their offerings to attract customers. The legislation provided that the information should be the same for all electricity retailers, so that they could compete on an equal footing. Refusing to give such information or giving better information to companies within the group than to others amounted to abusive conduct, which prevented other retailers from entering the market and offering better prices to consumers. Sanctions for abuse of a position of dominance were ratified by the Supreme Court in subsequent years.

#### **2.4. What is the distortion of free competition by unfair acts?**

Unfair competition practices are forms of competing contrary to professional diligence, such as, for example, deceiving about competitors' products. These practices are prohibited by the Law on Unfair Competition and are prosecuted, and the consequences of these practices are dealt with by the Commercial Courts. Nonetheless, when they seriously disrupt the competitive structure or functioning of the market, affecting the public interest protected by the LDC, affecting the public interest protected in the Unfair Competition Act (LCD), these practices may also be sanctioned by the CNMC. An example of distortion of free competition by unfair acts can be seen in Box 6.

##### *Box 6*

#### **DISTORTION OF COMPETITION BY UNFAIR ACTS**

In 2011, the National Competition Authority (CNMC predecessor) sanctioned Gas Natural for carrying out unfair competition acts that distorted competition and affected the public interest.

Between May and September 2009, in the midst of the process of liberalisation of natural gas marketing, the company Gas Natural Comercial (the former monopolist, which at the time had a market share of over 70%) carried out a massive letter-writing campaign to more than 5 million consumers with misleading and denigrating claims about competing companies (warning them about the alleged dangers of switching companies). Consequently, given the impact on the public interest and the detrimental effects on competition in the market, the CNC (CNMC predecessor) sanctioned it for an unfair act of denigration with a fine of 2,650,000 euros.

The National High Court and the Supreme Court confirmed this sanctioning decision and is therefore final.

## 2.5. Should business associations take special care?

Business associations are the common forum for competing companies in the same sector, and therefore special care must be taken to avoid collusive behaviour within them. For example, within a business association, which seeks to protect the legitimate interests of its members, it may, however, be easier to engage in anti-competitive conduct, such as exchanges of commercially sensitive information between companies (such as future pricing intentions) or price recommendations that constitute anti-competitive infringements.

Box 7

### PARTICIPATION OF BUSINESS ASSOCIATIONS IN CARTELS

In 2010, the National Competition Authority (CNMC predecessor) sanctioned nine companies in the sherry wine sector for forming a cartel, together with the association FEDEJEREZ (FEDERATION OF BODEGAS DEL MARCO DE JEREZ) and the Regulatory Council for Designations of Origin ([File S/0091/08 VINOS FINOS DE JEREZ](#)). Between 2001 and 2008, the cartel carried out a series of restrictive competition agreements, such as limiting supply, market sharing, fixing minimum prices and exchanging sensitive commercial information, with the aim of raising market prices for sherry wine bottled under private labels to levels that would allow them to achieve their expected profitability.

FEDEJEREZ, a sectorial association that brought together most of the companies participating in the cartel, was punished with €400,000 as co-author of the infringement for having participated in prohibited anti-competitive practices and contributing with its behaviour to the creation of the cartel. The sanction against this association is final, as it was confirmed by the National High Court.

Among the cartels dismantled since 2014, seven of them involved business associations, in the sectors of car dealerships (Files [S/0489/13](#) and [S/0471/13](#)), travel agencies ([S/0455/12](#)), nappies ([S/DC/0504/14](#)), school transport ([S/DC/0512/14](#)) or cables ([S/DC/0562/15](#)).

Concerns about the possible occurrence of collusive practices, even unintentional, within business associations are not new, and that is what led the CNC (CNMC predecessor) to publish in 2009 the Guide for Business Associations, which can be consulted on our website (<https://www.cnmc.es/expedientes/g-2009-01>).

## 2.6. How are companies that damage competition prosecuted?

Competition authorities (including the CNMC, see section 4) have the power to prosecute and sanction companies that engage in anti-competitive behaviour.

In the case of Spain, the main tools we have are: Law 15/2007 of 3 July on the Protection of Competition and, like the other Member States of the European Union, the Treaty on the Functioning of the European Union.

Collusive conduct is prohibited by Article 1 of the Spanish Competition Law and Article 101 of the Treaty on the Functioning of the European Union.

Abuses of a dominant position are prohibited in Article 2 of the Spanish Competition Law and Article 102 of the Treaty on the Functioning of the EU.

For its part, Article 3 of the Spanish Competition Law prohibits the distortion of free competition by unfair acts.

In addition, European and Spanish courts also apply competition rules and review the decisions of administrative bodies when they are appealed. An appeal against the sanctioning resolutions of the CNMC Board may be lodged before the National High Court (Audiencia Nacional). Once the National High Court has handed down its judgment, an appeal in cassation can be lodged with the Supreme Court (Tribunal Supremo).

## **2.7. What are the consequences of breaching competition rules?**

Companies that infringe the competition rules may be sanctioned. These penalties can be up to 10% of the previous year's turnover of the offending company.

Individuals who commit competition breaches (e.g. company managers) may also be punished. In this case, the current limit provided for by legislation in Spain is 60,000 euros.

In addition, the CNMC may impose certain obligations on companies to prevent the repetition of infringements or to publicise penalties.

In addition, the Law on Public Sector Contracts establishes the prohibition of contracting with public administrations for a period of up to 3 years for companies which have been firmly sanctioned for serious infringement of distortion of competition.

Finally, firms that commit competition infringements may be obliged to make good the damage they have caused (see section 2.8.).

## **2.8. Do I have the right to be compensated for the damage caused by companies that commit breaches of competition law?**

Any person or entity, including consumers and the Public Administration, who has suffered damages for breaches of competition law may demand compensation

for the damage suffered and file claims in court against the companies that committed the infringement.

Box 8

**PRIVATE ENFORCEMENT OF COMPETITION LAW:  
COMPENSATION FOR DAMAGES IN THE SUGAR CARTEL**

In the mid-1990s, the associations of manufacturers of biscuits, sweets and chewing gum, chocolate and cocoa derivatives, nougat and marzipan, and branded bakery and pastry products denounced Ebro Agrícolas, Azucarera, ACOR and Azucareras Reunidas de Jaén for having formed a cartel in the wholesale sugar market. After confirming the existence of such conduct, the competition authority imposed penalties on these sugar factories in 1999 totalling almost PTA 1.5 billion, or EUR 9 million (File [426/98, Azúcar](#)).

Following the sanction, those affected by the cartel initiated legal proceedings to seek compensation for the damages caused by the cartel. These proceedings ended with two judgments of the Supreme Court in 2012 (STS, 8 June 2012, 2012, Rec. 2163/12, RJ 5462/2012) and 2013 (STS, 7 November 2013, Rec. 5819/13, RJ 5819/2013) which obliged the cartel companies to compensate the complainants for damages. The Supreme Court found that the cartel caused extremely serious damage to the wholesale sugar market, resulting in price increases that harmed the complainants. These rulings were pioneering in that they established for the first time in Spain compensation from cartelists to those harmed by their conduct, initiating thus the private application of competition law in Spain.

Recently, thanks to the legal framework established by transposition of EU regulations ([Directive 2014/104/EU](#), transposed by [Royal Decree-Law 9/2017 of 26 May](#)), private enforcement of competition law has been promoted.

Where damages suffered by anti-competitive conduct are claimed in a civil court, if the CNMC, the regional competition authorities or a Spanish court have declared such conduct unlawful, and such declaration is final, the infringement is deemed to have been proved and therefore the judge only has to determine whether the complainant has suffered damages and the amount of those damages. This facilitates the filing of such claims, although the victim of an anti-competitive practice need not wait for the CNMC or another competition authority to declare an infringement, and can go directly to the civil courts if he proves that the infringement has been committed. However, if the sanctioning decision is from authorities of other EU Member States, evidence before the judge is admissible to show that there was no infringement. In any event, the complainant must prove to the judge the damage he has suffered as a result of the infringement, except in cartel cases where the damage is presumed.

If the amount of damage is not so great that the consumer believes it is worthwhile to bring an individual claim, he can also join with others affected and file a class

action or turn to legally constituted consumer associations, which can file the claim on their behalf.

The affected party can also try to reach an agreement with the wrongdoer in order to avoid the costs of legal proceedings (uncertainty, legal fees, etc.).

### 3. COMPETITION AND PUBLIC ADMINISTRATIONS

Public authorities have a special role in the protection and promotion of competition. With their actions, they influence competition in the markets. In this section, we will look at what relationship exists between competition, regulation and other forms of public intervention<sup>7</sup>.

#### 3.1. Does defending competition mean defending no regulation in the markets?

No, nothing could be further from the truth. The defence of competition needs good regulation.

First, in order for competition to be beneficial to consumers, basic rules on the interaction between consumers and businesses are necessary: from matters of principle, such as property rights or freedom of enterprise, to more detailed issues such as the rights of consumers to return spoiled goods. Competition rules are also part of that set of basic rules.

Secondly, public authorities intervene to correct market failures, such as natural monopolies or externalities (see section 3.2.). For example, they regulate to prevent pollution or set taxes on polluting activities. Another example is the liberalisation processes in markets that have previously been reserved for the public sector (e.g. telecommunications or in the airline industry), where liberalisation is usually accompanied by increased regulation and supervision of business practices to ensure safety and consumer protection.

Thirdly, in addition to market failures, public authorities intervene to ensure other public interests, such as equity among citizens and access to health or education. For example, the [social bonus](#) (*bono social*) is a discount on electricity bills that aims to enable the most vulnerable consumers and families to have access to an essential commodity such as electricity.

In short, competition and regulation are instruments for the same purpose: that society reaches the highest possible levels of prosperity . But sometimes these

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7 When we speak of "regulation" in this section, we refer, in line with the provisions of the Market Unity Law (LGUM), to interventions by the public powers as an "authority" that affect the free organisation of markets. It is a broad concept, ranging from basic regulation of commercial transactions to obligations on individual operators, such as prices or supply obligations, to other forms of intervention such as licensing requirements or subsidies.

Apart from these, there are other forms of intervention, for example, through the direct performance of economic activities by the public authorities, as recognised in Article 128.2 of the Spanish Constitution. As with regulation, such intervention is not unlimited and is subject, inter alia, to the provisions of Article 103 of the Spanish Constitution and Article 106 of the Treaty on the Functioning of the European Union.

instruments are alternative: it is therefore important to know when to use one or the other.

### 3.2. What are market failures?

Market failures refer to situations in which markets, due to various circumstances, not behavioural but rather structural, are unable to function properly, and therefore the optimal outcomes of a competitive market are not achieved. They can be of several types:

- **Market power:** a company has market power if it is able to raise prices or worsen the quality of its product without risking losing customers. This is because there is not enough competitive pressure from other companies to improve the offer (prices, quality...). In this case, the role of the Administration will be to design a regulatory framework that allows effective competition between companies and punish those that do not comply with competition rules.
- **Asymmetric information:** broadly speaking, in markets there is private information (known only to certain operators) and public information (known to all). Among companies, some degree of private information is positive because it stimulates "competitive uncertainty": that is, the fact that each company does not know exactly the situation and expected strategies of its rivals is an incentive to "not relax" and makes collusive situations difficult. However, in some cases, a lack of public information (on prices, available products, product qualities, etc.) can lead consumers or companies to make bad business or consumption decisions, and can reinforce the market power of some companies. In these cases, the role of the Administration will be to promote transparency and the availability of information (although without fostering an excess of transparency that facilitates collusive practices!).

#### Box 9

#### THE ROLE OF INFORMATION AND THE CASE OF THE CNMC'S ELECTRICITY AND GAS OFFERS COMPARATOR

Information in the market helps to level the knowledge of all actors about market conditions, e.g. about the price or quality of the products offered by different companies, which can help the consumer choose the option that suits him best, reducing the costs associated with searching and comparing the products of different companies, and limiting the privileged position that the best known or longest established brand may have in the market.

In the gas and electricity market, the technical and complex nature of information on energy offers makes consumer decisions difficult. With the aim of improving transparency in the market and thus reducing the information asymmetry suffered by energy consumers, the CNMC



provides them with an [Energy Offers Comparator](#), which helps them to choose their electricity and gas contracts with the option that best suits their consumer profile. The application includes about 800 offers from more than 80 retailers, including offers that have a regulated price (PVPC on electricity and TUR in gas) and free-price offers, and the user can easily check the conditions of permanence and the penalties for termination of the contract. The veracity of the offers has been checked by CNMC technicians before including them and all offer data is checked monthly to ensure that the information is truthful, transparent, homogeneous and up to date.

It is also part of the commitment to digitalisation and simplification of processes undertaken by the CNMC. The Comparator was launched in 2011 and has recently been adapted and refined to pick up the different options that have been appearing on the market.

- **Externalities:** they occur when the activity of a business or a consumer has a collateral effect on third parties that the business or consumer does not take into account. In this case, the prices of the goods or services exchanged do not reflect that side effect. An externality can be negative or positive:
  - o An example of negative externality: when a factory emits polluting gases and impairs citizens' health. As a consequence, the company will produce more than is socially desirable because it will not take into account the social cost of its activity: the cost is paid by citizens in the form of worse health. In this case, the Administration may intervene, for example, by taxing pollutant emissions or by setting emission ceilings.
  - o An example of positive externality occurs with education: ensuring a minimum education for citizens allows greater decision-making capacity, improves democratic quality and allows for the development of a country, benefits that arguably outweigh the individual benefit that each citizen derives from being educated. Consequently, public authorities can subsidise or guarantee universal access to education in order to increase the number of citizens who have access to education.
- **Public goods:** a good is public when a person cannot be prevented from consuming it, even if he/she does not pay for it (the good is non-excludable), and its consumption by one person does not diminish the quantity available to others (the good is non-rivalrous). A striking example of public good is innovative ideas: one company can copy from another a new, more efficient production method, without preventing the innovative company from continuing to apply innovation to its products. Although the spread of good ideas is positive for society, it can also reduce the incentive to invest in good ideas, which is ultimately negative for society. Therefore, in some cases there is some kind of public intervention, such as patents.



### 3.3. What are the "overriding reasons in the general interest"?

When markets are functioning properly and in competition, they can ensure that there is an "efficient" allocation. "Efficient" means that companies serve as many products as possible, and at the lowest price, taking into account consumer tastes and needs and production costs. But efficient solutions are not always the most socially desirable ones. There are other public interest objectives that justify public intervention in order to correct market performance.

In the jargon of good regulation, we call "overriding reasons in the general interest" those public interests that justify intervening in the markets, either because of market failures or because the market solution is not the best social solution.

Among these overriding reasons of general interest, we have such important issues as the protection of health and safety, the environment, public order, consumer and workers' rights or the protection of national historical and artistic heritage. Where the market does not adequately satisfy these general interests, public intervention is justified, even if it restricts competition, as long as it respects the principles of efficient economic regulation.

Box 10

#### UNIVERSAL SERVICE OBLIGATIONS

There are sectors where the free market is not able to guarantee the provision of some services that are considered to be of general interest or does not provide them under sufficient conditions. In such cases, public authorities may intervene to ensure access to all users, irrespective of their economic, social or geographical situation: they may establish the obligation on one or more companies to provide such services, under specific conditions of quality and price, through so-called universal service obligations, which constitute a type of public service obligations.

In the case of telecommunications services, there is currently an obligation for Telefónica de España, S.A.U. to ensure that all users who so request under reasonable conditions, irrespective of their geographical location, are guaranteed connection to the communications network at a fixed location, allowing telephone calls, fax and broadband internet connection (at a downward speed of 1 Mb/s and subject to certain price and quality conditions). This allows people in areas where it would not be profitable to deploy the telecommunications network to have access to these services.

In the case of the postal sector, Sociedad Estatal Correos y Telégrafos S.A. is obliged to provide the universal postal service throughout the national territory. Among these services is the delivery of letters (up to 2 kg weight) and packages (up to 20 kg) meeting quality standards, delivery times and affordable prices.

The CNMC has competences related to the existing universal service obligations and their financing in the telecommunications and postal sectors. For example, among other functions,

in the case of postal service, the CNMC controls and measures the conditions for the provision of the universal postal service and verifies the cost incurred by Sociedad Estatal Correos y Telégrafos S.A. to fulfil those obligations. In the case of telecommunications, the CNMC calculates the cost of universal service and establishes the operators obliged to contribute to financing it through the National Universal Service Fund.

### 3.4. What should market regulation be like?

Economic regulation of markets aims to achieve market outcomes that maximise social welfare and must therefore be well designed. Sometimes, very well-intentioned public interventions are ineffective or even counterproductive because they fail in their design. From an economic point of view, a proper regulatory design must, at least, comply with the principles of necessity, proportionality and non-discrimination, which we explain in detail below.

The CNMC, within the framework of its functions to promote competition, makes recommendations to public administrations in the search for an efficient design of economic regulation.

### 3.5. When is economic regulation well designed?

Regulation, given its nature as public intervention in markets, affects competition and, therefore, its appropriateness is conditional on compliance with the **principles of efficient economic regulation**<sup>8</sup>:

- **Necessity:** public intervention must be justified by an overriding reason in the general interest which would not be achieved autonomously by the market. For example, requiring all surgeons training in medicine serves to ensure adequate levels of public health protection, which would not be respected in the absence of this requirement. This may restrict potential competition, but it is necessary to ensure the protection of patients' health (overriding reason in the general interest).
- **Proportionality:** if there are several alternative ways to solve a problem, the least restrictive for competition should be chosen. For example, to ensure the quality of a product, it is less burdensome to establish ex post quality control than to require a licence (e.g. in the specific case of sunscreens, the EU does not require a licence to market sunscreens, but it does require that all sunscreens on the market protect against all

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<sup>8</sup> These are principles recognized by both European and Spanish regulations. In the case of Spain, they are included in Article 5 of Law 20/2013, of 9 December, on Market Unit Guarantee, and Article 129 of Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations.

dangerous UV radiation<sup>9</sup>). Obviously, this depends on each circumstance, and in some cases, it will be necessary to opt for stricter control measures.

- **Non-discrimination:** the same treatment should be given to companies in equivalent situations. For example, regulation should not give an advantage to companies established in a given territory or to those which have been operating for a longer time or those that adopt certain structures or legal forms.

In addition, the Public Administration has to follow a process of constant review of the regulation, so that it is consistent with the reality of the moment.

If the regulation is properly designed and complies with the principles of efficient economic regulation, it will benefit society: it will protect the general interest without imposing unjustified restrictions on competition and without causing serious distortions of the markets. On the contrary, if the regulation is poorly designed, the functioning of the market will be poor and will harm citizens, creating unnecessary or non-proportional restrictions, such as barriers to entry to new enterprises, creating advantageous situations for certain undertakings or groups, or discouraging innovation and development of a sector.

The CNMC advises public administrations and intervenes, by means of report, in the process of drafting standards that affect markets in order to promote a design of the regulation that is more respectful of competition and the principles of good economic regulation. You can consult our advisory activity and participation in the drafting of the [regulation](#) on our website<sup>10</sup>.

Box 11

#### PHARMACY PLANNING

In Spain, planning for the establishment of pharmacies is a competence of each Autonomous Community. In general, Autonomous Communities have set strict geographical limits, including the obligation to maintain a minimum distance between pharmacies.

In theory, the planning criteria aim to ensure the accessibility and quality of pharmacy service and the adequacy of the supply of medicines. However, in practice this reduces competition between pharmacies, prevents new entrants from exerting competitive pressure on already installed pharmacies, increased profitability for existing establishments, and harms patients, who could travel less distance to buy their medicines, get more service quality or pay cheaper prices on certain products.

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9 [Regulation \(EC\) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products.](#)

10 <https://www.cnmcc.es/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria>.

In the case of Navarre, the minimum distance between pharmacies was at least 250 metres until 2000, when a reform was carried out which, among other measures, reduced the distance to 150 metres. This easing of regulation led to such an increase in the number of new pharmacies that the total number of pharmacies open to the public doubled in just two years. This improved the welfare of consumers by being able to choose between more establishments, reducing distances travelled, and being able to take advantage of lower prices on certain products.

Box 12

#### AUTOMATIC FILLING STATIONS

Automatic filling stations are those that do not have staff in their facilities and therefore the fuel supply is done directly by the user. As they do not have staff to refuel and pay, they bear lower costs and, moreover, require less physical space than traditional gas stations, which helps to make them cheaper and allow them to be installed in less attractive areas for traditional stations. Therefore, they introduce more competition in the retail fuel market, help contain prices and allow a wider variety of formats to choose from by consumers. The CNMC estimated that, between 2012 and 2016, the savings generated for consumers in the autonomous region of Madrid from the entry of automatic filling stations was between 15 and 24 million euros<sup>11</sup>.

Despite this, in recent years, the CNMC has identified numerous regulatory restrictions on the opening and development of automatic filling stations and has made recommendations to limit such restrictions, some of which have been adapted in the amendments to the regulations (such as not imposing physical presence of an operator, but alternatives such as an emergency stop switch allowing power outage or monitoring with security cameras), but others still exist and some new ones have been introduced (such as limits on refuelling of trucks, vans and other large passenger cars) which the CNMC has proposed to review. With these actions, we have tried to improve the regulation of the sector and competition in the market, to the benefit of consumers.

### 3.6. How can the design of public procurement be improved?

The public sector acts as a consumer when it purchases goods and services necessary to carry out its activities.

Well-designed public procurement has a positive impact on general welfare. Moreover, if it is well designed, the risk of collusive behaviour can be reduced and, over and above, competition between companies can be stimulated so that

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11 [PRO/CNMC/002/16 PROPUESTA REFERENTE A LA REGULACIÓN DEL MERCADO DE DISTRIBUCIÓN DE CARBURANTES DE AUTOMOCIÓN A TRAVÉS DE ESTACIONES DE SERVICIO DESATENDIDAS \(PROPOSAL CONCERNING THE REGULATION OF THE MARKET FOR THE DISTRIBUTION OF MOTOR FUELS THROUGH UNATTENDED FILLING STATIONS\).](#)

[E/CNMC/005/19 ANÁLISIS DEL EFECTO COMPETITIVO DE LA ENTRADA DE GASOLINERAS AUTOMÁTICAS EN EL MERCADO DE DISTRIBUCIÓN MINORISTA DE CARBURANTES \(ANALYSIS OF THE COMPETITIVE EFFECT OF THE ENTRY OF AUTOMATIC FILLING STATIONS IN THE FUEL RETAILING MARKET\).](#)

the Administration will obtain lower prices and higher quality in the goods and services it purchases. Here are a few examples:

- Where the Administration needs to purchase a good or contract a service, if it organizes a public tender so that the different companies that are willing to provide it compete with each other rather than directly entrust it to a particular company, it will benefit from competition. In a [study](#) we developed in 2019<sup>12</sup>, we estimated that opting for open forms of procurement could lead to savings of [around 10% of the final price](#) of public contracts.
- When the Administration organises a tender, if it makes a good design, it is easier for it to get the maximum benefits from the tender. For example, in 2020 we have analysed<sup>13</sup> some passenger transport [tenders which place restrictions on the participation of some companies, which limits the number of companies participating and makes the service more expensive](#), without leading to a better quality of service.
- The Administration also benefits from competition when it gives maximum publicity to tenders, in order to maximise the number of companies bidding and competing.

For the CNMC, public procurement is a priority sector in the defence and promotion of competition. We make recommendations to public administrations to achieve a more competition-friendly procurement design, which benefits us all. On our website you can consult our recommendations<sup>14</sup>.

The Guide to Public Procurement and Competition (see Box 2) develops the principles and practices that should guide public procurement to maximise competition.

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<sup>12</sup> [E/CNMC/004/18: RADIOGRAFÍA DE LOS PROCEDIMIENTOS DE CONTRATACIÓN PÚBLICA EN ESPAÑA \(OVERVIEW OF PUBLIC PROCUREMENT PROCEDURES IN SPAIN\)](#)

<sup>13</sup> [PRO/CNMC/002/19: INFORME RELATIVO A LAS LICITACIONES PÚBLICAS DE LOS SERVICIOS DE TRANSPORTE DE PASAJEROS POR CARRETERA EN VEHÍCULOS DE TURISMO -ESCOLAR LABORAL Y SANITARIO \(REPORT ON PUBLIC TENDERS FOR PASSENGER TRANSPORT SERVICES BY ROAD IN TOURIST VEHICLES: SCHOOL, WORK AND HEALTH\)](#).

<sup>14</sup> <https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/contratacion-publica>.

Box 13

#### OVERVIEW OF PUBLIC PROCUREMENT PROCEDURES IN SPAIN

The CNMC conducted a study<sup>15</sup> in 2019 in which it assessed the impact of efficient public procurement in Spain. It concluded that Public Administrations would have saved at least EUR 1.7 billion between 2012-2016, if they had used competitive procedures, as open and transparent procedures lead to savings of almost 10% on average in procurement amounts. It also noted that the Public Administration generally uses uncompetitive procedures for low value contracts and, in addition, in many cases there is little intensity of competition, with one third of the contracts analysed involving only one participating company and 65% of the contracts involving 3 or fewer participants. It therefore recommended that Public Administrations maximise the use of open, transparent and competitive procedures for the procurement of goods and services.

### 3.7. How can the design of public aid be improved?

Public aid is a form of intervention in the economy whereby the Public Administration facilitates the financing of an economic activity through, for example, subsidies to certain companies or sectors.

The way in which this state aid is designed and granted influences competition in the market, since it may favour certain companies over others. Where this is the case, aid can be detrimental to competitive play and, instead of favouring the public interest, it may go against it. For example, if a country grants aid to its companies, it will favour them vis-à-vis foreign companies, so that the market will be distorted. In addition to competitive distortion, other countries are likely to do the same so the end result is that we will all lose.

That is why the European Union has established a regulatory framework on state aid which aims to avoid such undesirable negative effects. In general, aid that is not targeted at individual companies but pursues horizontal public interest objectives is preferable. For example, aid aimed at promoting investment in R&D&i, promoting the development of disadvantaged regions or the financing of SMEs.

The CNMC advises Public Administrations to improve the design of public aid and subsidies so that they are more respectful of competition, which benefits us all. You can check our opinions about it on our website<sup>16</sup>.

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15 [E/CNMC/004/18: RADIOGRAFÍA DE LOS PROCEDIMIENTOS DE CONTRATACIÓN PÚBLICA EN ESPAÑA \(OVERVIEW OF PUBLIC PROCUREMENT PROCEDURES IN SPAIN\)](#).

16 <https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/ayudas-publicas> .

Box 14

#### ANTI-COMPETITIVE PUBLIC AID

Under European legislation, Member States may provide public aid to undertakings providing a public service as compensation for losses incurred by providing it under the conditions required. However, they cannot offer overcompensation.

In 2018, the European Commission concluded, after conducting an investigation into this regard, that Correos (the Spanish national postal service provider) had received an overcompensation for the provision of the universal postal service between 2004 and 2010, and had benefited from tax exemptions incompatible with European Union law. As a result, Correos [was forced to pay back approximately 167 million euros to the State](#). This decision is firm and is being executed.

### 3.8. What is the principle of market unity?

Market unity is a basic principle for any economy to function properly. It aims to ensure that all companies can establish themselves and freely offer their products throughout the Spanish territory, without any competitive advantage due to the regulations where they are established, nor do they have to face unjustified requirements.

At the CNMC we work to ensure free access, exercise and expansion of economic activities throughout the national territory and to ensure their proper supervision. If you want to [know more](#) about it, you can check our website<sup>17</sup>.

Box 15

#### MARKET UNITY LAW

In 2013, Law 20/2013 of 9 December on the Guarantee of Market Unity (LGUM) was adopted, which develops a series of general principles to ensure market unity, such as the principles of necessity and proportionality of the authorities' actions (see section 3.5.), non-discrimination, cooperation and mutual trust, simplification of burdens and transparency<sup>18</sup>.

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17 <https://www.cnm.es/ambitos-de-actuacion/unidad-de-mercado>.

18 It also included the principle of national effectiveness of the actions of the competent authorities, whereby any operator who had complied with the procedures necessary to enter an activity in one part of the territory could carry it throughout the national territory without the need to obtain new authorizations or additional formalities from other different competent authorities. However, [in 2017, the Constitutional Court annulled this principle](#) (Judgment 79/2017, of 22 June 2017 of the Constitutional Court).

According to the 12th legal basis of this judgment, *"to the extent that there is harmonised European Union legislation or common State legislation, or there is a plurality of autonomous community legislations which, notwithstanding their possible technical or methodological differences, set a standard that may be considered equivalent, the State may recognise the extraterritorial effects of autonomous community decisions by imposing the recognition of the*



On the other hand, the LGUM creates the Council for Market Unity as a body for cooperation between governments (state, regional and local) to monitor and promote the implementation of this law. The Council has a technical Secretariat under the Secretary of State for Economy and Enterprise Support.

In addition, it establishes communication channels between the Administration and the private sector to allow economic agents and companies to transmit specific situations and obstacles that fragment the national market to the Public Administrations so that they can be resolved in an agile manner. Thus, an economic operator who believes that its rights or legitimate interests have been infringed by preventing freedom of establishment or movement may lodge a complaint with the Secretariat of the Council for Market Unity.

The European Commission considers market unity to be of vital importance and, in the recommendations for improvement it regularly proposes, stresses the need for Spain to achieve greater market unity making full use of the LGUM, since restrictive and fragmented regulation prevents companies from taking advantage of economies of scale, limits their growth and reduces productivity<sup>19</sup>.

### **3.9. Why is it important to ensure market unity?**

Although regulation must be adapted to the reality and needs of each territory, in some cases, poorly designed regulations establish unnecessary or disproportionate requirements and formalities for businesses, which artificially segment markets, making it difficult for consumers to access goods and services offered in other areas and for businesses to operate in several territories. This increases their costs (because companies have to adapt to multiple different standards designed for the same activity) and hinders their growth.

For example, forcing graphic design companies to establish a physical office in each of the territories in which they want to operate would be contrary to market unity and the principles of efficient economic regulation, because it would be really expensive to set up an office in each Autonomous Community, and it would limit the number of companies offering their services beyond their own region.

Such situations, in turn, reduce competition in the market, prevent consumers from having access to an offer of products and services in good price, quality and/or variety conditions, and harms society as a whole because both consumers

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*decision adopted in a given autonomous community on the rest. The principle of mutual recognition allows for the recognition of the extraterritorial effectiveness of the acts and provisions of a given territorial authority; but leaves in place the ability of territorial authorities to establish, in the absence of centralised harmonisation, their own distinct level of protection".*

<sup>19</sup> For example, in the latest report on Council Recommendations on Spain's National Reform Programme 2020, where a Council opinion on Spain's Stability Programme 2020 is issued:

<https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52020DC0509&from=EN>.



and businesses are affected: efficiency, productivity, competitiveness, investment and economic growth are reduced.

*Box 16*

**APPEAL AGAINST INFRINGEMENT OF THE PRINCIPLE OF MARKET UNITY**

In 2016, the CNMC filed a contentious-administrative appeal against an Order of the Chamber of Economy, Business and Employment of the Regional Government of Castile-La Mancha (JCCM) regulating the granting of public subsidies to professional training programmes.

In this Order, the JCCM included the quality level of the applicant organisation among the criteria for assessing grant applications. To assess quality, higher score (up to a maximum of 14 points) was given to entities that had a quality system specific to Castile-La Mancha, compared to other quality systems, even if they were equivalent (only 1 point could be obtained in this latter case).

The CNMC decided to challenge this provision for violating the LGUM principle of non-discrimination, arguing that it is not justified for JCCM to give higher value to its own quality system over equivalent ones when sectorial regulations do not require a specific certification and allow equivalence between quality certifications. Furthermore, there could also be discrimination on the grounds of the operator's place of residence or establishment, since it was easier for operators established in Castile-La Mancha to join the quality system of that community, so that the others suffered a comparative disadvantage.

The National High Court partially considered the CNMC's appeal and annulled the section relating to the certification system assessment on the grounds of discrimination against entities with a quality system different from that of Castile-La Mancha, which were harmed by that provision, jeopardizing free establishment and circulation protected by Article 18 of the LGUM.

## **4. COMPETITION AND REGULATORY AUTHORITIES**

Competition and regulatory authorities are essential institutions to ensure the proper and efficient functioning of markets and to protect effective competition. Hereafter, we will learn more about the competition and regulatory authorities and their relevance.

### **4.1. Why do public bodies need to be responsible for the defence and promotion of competition?**

Competition agencies are necessary to ensure that there is effective competition in the markets and productive sectors. In this way, consumer welfare is increased. Competition authorities act in three ways:

- On the one hand, by monitoring markets for anti-competitive practices, such as price-fixing agreements between companies, and if detected, by sanctioning the offending companies.
- On the other hand, by controlling that concentrations between companies do not significantly affect the maintenance of effective competition in the markets (merger control).
- Competition advocacy actions are also carried out, which are not part of the sanctioning powers, but are very useful to disseminate the benefits of competition and issue recommendations to the public, administrations and companies on how to act and how to regulate to improve competition.

### **4.2. What are the competition authorities operating in Spain?**

In Spain, competition authorities operate at various levels (European, national and regional). The respective authorities collaborate and work towards the common objective of achieving greater competition in the markets:

- At European level, the competition authority is the European Commission's Directorate-General for Competition ([DG COMP](#)).
- At the national level, the competition authority is the National Authority for Markets and Competition (CNMC).
- Some Spanish Autonomous Communities have agencies dedicated to ensuring effective competition in their territory, although not all of them have the same institutional organisation (some of them have investigation and resolution agencies, others only have an investigation agency and

there are 8 communities with no competition agency at all)<sup>20</sup>. Unlike the CNMC, they intervene in cases where the restrictive effects on competition only affect its Autonomous Community, but do not intervene in cases of concentrations or public aid.

#### **4.3. Why do public bodies need to be in charge of market regulation?**

From the 1980s, a process of liberalisation was launched in the Spanish economy that affected all sectors of the economy, and especially those where the provision of goods and services was carried out under strong regulation due to the oligopoly or monopoly regime in which they operated. In addition, many of them were managed, at least somewhere, by public operators. These sectors, known as "network industries" included the electricity, fossil fuels, telecommunications, postal or railway sectors. The liberalisation process led to a transition (in some cases still in progress) from monopolised (oligopolised) markets to markets where the introduction of competition has allowed new competing companies to enter.

The structural characteristics of many of these sectors, or parts of them, mean that the application of pro-competition law alone is not sufficient to ensure effective competition. In these cases, it is necessary not only to design regulations that seek to achieve the optimal outcomes of a competitive market, but also to have authorities to oversee and regulate them. Thus, between 1995 and 2011, several regulatory bodies were created in Spain for the energy, telecommunications, railway, audio-visual, postal and airport regulation sectors (which became part of the CNMC in 2013).

##### *Box 17*

#### **LIBERALISATION OF PASSENGER RAIL TRANSPORT**

Passenger transport by rail has been open to competition from December 2020, allowing the entry of new operators who will compete with RENFE (which, until then, had been the only passenger rail transport company in Spain). This opening is the result of a gradual process of liberalisation of rail services promoted by the European Union.

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<sup>20</sup> We can classify the Autonomous Communities into three groups according to the characteristics of their bodies dedicated to ensuring effective competition in their territory:

- Autonomous Communities that have both investigation (examination) and resolution agencies: Catalonia, Galicia, Valencian Community, Aragon, Castile and Leon, Basque Country, Extremadura and Andalusia.
- Autonomous Communities that have investigation, but not resolution agencies (in these cases, the CNMC resolves the files): Murcia, Canary Islands, Madrid and Navarre.
- Autonomous Communities that do not have competition agencies in their territory: Asturias, Castile-La Mancha, Balearic Islands, La Rioja and Cantabria. The CNMC is responsible for ensuring competition in these territories.

The CNMC has carried out numerous actions in preparation for the liberalisation of rail services, with the aim of addressing the necessary reforms to prepare the market for competition and ensure its optimal functioning. In its role as regulator of the railway sector, it has resolved consultations and issued reports, for example, the [report on the modification of the 2019 Network Statement of ADIF and ADIF Alta Velocidad](#), which includes the characteristics of the railway network and the relevant procedures for accessing it. In addition, within the framework of the initiatives aimed at ensuring the success of opening up to competition and as part of its activities to promote competition, the CNMC published in 2019 a Study<sup>21</sup> where it analysed the market for passenger rail transport, assessed the main challenges and obstacles to its effective liberalisation and made recommendations to the competent authorities on how to deal with liberalisation successfully.

All of this, with the aim of ensuring that liberalisation is carried out effectively, maximising its positive effects and reducing the identified restrictions on competition.

#### **4.4. What is the CNMC and what is its goal?**

The CNMC is the public body that promotes and defends the smooth functioning of all markets in the interests of consumers and businesses in Spain. It has its own legal personality and is independent of the government. It is subject to parliamentary control.

It became operational on 7 October 2013. The CNMC was created by integrating the former authority for the defence and promotion of competition (the National Competition Authority) and the six sectorial regulatory bodies: National Energy Commission, Telecommunications Market Commission, National Postal Sector Commission, State Audio-visual Council and Railway and Airport Regulation Committees (Comisión Nacional de Energía, Comisión del Mercado de las Telecomunicaciones, Comisión Nacional del Sector Postal, Consejo Estatal de Medios Audiovisuales, Comités de Regulación Ferroviaria y Aeroportuaria).

#### **4.5. What does the CNMC do?**

The functions of the CNMC can be classified into two large blocks: (a) those of a general nature aimed at preserving and promoting effective competition in all markets and productive sectors; and (b) those for the supervision and control of certain sectors. Each of these is explained in more detail below.

##### **a) General functions:**

The CNMC carries out two types of competition-related activities:

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<sup>21</sup> [E/CNMC/004/19 ESTUDIO SOBRE LA LIBERALIZACIÓN DEL TRANSPORTE DE VIAJEROS POR FERROCARRIL \(STUDY ON THE LIBERALISATION OF PASSENGER TRANSPORT BY RAIL\)](#)

- **Defence of competition:** its aim is to ensure that competition rules are respected in all markets, and it does so in several ways:
  - o **Suppressing anti-competitive behaviour** (such as collusive or abuses of dominant position) that seriously harm consumers (see sections 2.2. and 2.3). The CNMC investigates and sanctions anti-competitive practices on the basis of complaints or on its own initiative. This control is *ex post*, since the action takes place once the anti-competitive conduct has taken place.
  - o **Controlling corporate concentrations** to prevent corporate mergers or acquisitions from damaging effective competition in markets: the CNMC can authorise, authorise with commitments or conditions, or prohibit mergers of companies to prevent, for example, a merger from giving a dominant position to a company that gives it incentives and the ability to abuse it in the future, to the detriment of consumers. This control is *ex ante*, as action takes place to prevent anti-competitive effects.

Box 18

**SAVINGS FOR CONSUMERS THROUGH COMPETITION ADVOCACY**

The CNMC has estimated the savings generated to consumers as a result of its competition intervention (both restrictive behaviour and merger control) since 2011<sup>22</sup>. These savings stem, among other things, from the lower market prices that consumers have enjoyed compared to what would have been achieved in the absence of the intervention of this institution.

The estimate results in savings for consumers for the cases resolved between 2011 and 2019 of almost 9.2 billion euros, with an average annual saving of 1.149 billion euros. It should be noted that these calculations have been estimated with conservative assumptions and considering only the direct effects of CNMC interventions, but do not take into account indirect positive effects, such as deterrent effects on anti-competitive behaviour or the positive impact on innovation (therefore this estimate represents a minimum, but probably the actual savings have been higher).

The CNMC's share of the budget dedicated to the defence and promotion of competition is between 11 and 15 million euros per year. Therefore, for every million euros of budget devoted to competition, savings to consumers are generated of at least 76.6 to 104.5 million euros (also a conservative estimate and a minimum, since the budget considered is devoted to more actions in addition to anti-trust, such as promotion of competition).

- **Promotion of competition:** promotion efforts seek to foster a more competitive environment in the economy, but without imposing obligations

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<sup>22</sup> [CNMC \(2020\). \*Estimating the impact of competition enforcement by the Spanish Competition Authority \(Revised methodology\)\*.](#)

or sanctions. The aim is to raise public awareness of the benefits of competition and efficient regulation, through interaction with public administrations, citizens or companies in the market. For example, this Consumer Guide is part of competition promotion activities.

Promotion actions include, among others, reports on draft regulations and sectorial studies aimed at ensuring that public administrations apply the principles of efficient economic regulation in their work.

In addition to using its advisory functions to promote competition, the CNMC has legal standing to challenge before the courts administrative acts or regulations of lower rank than law that hinder competition (active standing) and can challenge any administrative act or provision that is contrary to market unity. The CNMC's challenge of rules is based on the principles of necessity and proportionality and is the last resort in the event of particularly serious restrictions on competition introduced by the regulation.

Finally, the CNMC contributes to market transparency and competition by publishing **statistics and reports** on the sectors it monitors. For example, it publishes the Household Panel: a consumer survey that gathers consumer habits and customer satisfaction in sectors such as electricity, telecommunications, collaborative economy or e-commerce.

*Box 19*

**TRAINING FOR PUBLIC ADMINISTRATIONS ON PUBLIC PROCUREMENT AND COMPETITION**

The CNMC began years ago a strategy of training public employees in the promotion and defence of competition in the field of public procurement. This strategy aimed at improving the training of those responsible for public procurement has two objectives: on the one hand, to encourage contracting authorities to ensure that the design of award procedures favours competition and maximises effective competition between tenderers to ensure the efficient use of public funds; and, on the other hand, to train public employees who participate in contracting boards and bodies in the prevention and detection of anti-competitive behaviour (collusion or *bid rigging*) by companies in the framework of tendering processes, as these are very harmful to the consumer and unjustifiably increase the cost of providing public goods and services. The training programme provided by CNMC staff also serves to strengthen collaboration between public employees responsible for competitive examinations and the competition authority in order to improve competition conditions in public tenders. In 2019, the CNMC organized 11 training activities of this nature, involving about 450 public employees of the State, regional and local administrations.

## b) Supervision and control of certain sectors

Together with the functions of defence and promotion of competition, the CNMC exercises supervisory and control functions in certain regulated sectors and markets, where due to its structural characteristics the application of competition rules is not sufficient to ensure effective competition.

These sectors or areas are as follows: electronic telecommunications and audio-visual communication, electricity and natural gas markets, the postal sector, airport fees and the railway sector. The functions of the CNMC in these sectors have traditionally been performed by the sectorial regulatory bodies (which were integrated into the CNMC in 2013, see section 4.3).

In particular, the CNMC has **regulatory functions, in the form of circular letters**, to develop and implement those regulations with the status of law in relation to the sectors subject to its supervision and which have been so expressed<sup>23</sup>.

It also has **supervisory and control functions**, so that it can sanction companies for practices that are contrary to the regulation of these economic sectors.

### Box 20

#### REGULATORY SANCTIONS

In 2015, the CNMC imposed a penalty of 5 million euros on Telefónica for non-compliance with the resolutions of the Telecommunications Market Commission (predecessor institution of the CNMC) concerning wholesale offers of leased lines ([SCN/D TSA/1821/14 TELEFÓNICA INCUMPLIMIENTO ORLA](#)).

This sanction was established because Telefónica repeatedly failed to comply with the resolutions regulating the conditions under which this company had to rent its large-capacity telecommunications networks to other competitors, which connect to the final address of the customers. These networks are an essential infrastructure for operators other than Telefónica to offer large capacity broadband services to companies or self-employed individuals. Telefónica's conduct led to other operators, such as BT, Vodafone or Jazztel, having to cancel a significant percentage of customer requests for the provision of this service, or to endure conditions other than those established by regulation, all of which resulted in harm to Telefónica's competitors and to consumers. This sanction is final following its confirmation by

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<sup>23</sup> For example, among other regulatory functions in the field of telecommunications, the CNMC can set the characteristics and conditions governing fixed and mobile portability (whereby telephone service subscribers can keep their telephone numbering independently of the operator providing the service). In addition, the CNMC also has important powers in energy matters, including the establishment of the methodology for the remuneration of electricity and gas transmission and distribution, as well as the competencies for the calculation of fees and tolls for access to networks and regulated activities, as set out in Royal Decree-Law 1/2019, of 11 January.



the National High Court in 2018 and the inadmissibility of an appeal in cassation before the Supreme Court in 2019.

In addition, the CNMC carries out other **advisory functions** on regulated sectors in order to benefit citizens. For instance, in the field of energy, it has conducted several consumer information campaigns: among others, an information guide for switching supplier<sup>24</sup> or a comparator of electricity and gas offers<sup>25</sup> (explained in Box 9).

Box 21

#### THE CNMC'S INFORMATIVE GUIDE FOR SWITCHING ELECTRICITY OR GAS SUPPLIER

In 2019, the CNMC published an [Informative Guide for Switching Electricity or Gas Supplier](#), which contains a series of recommendations for electricity and gas consumers (domestic or SMEs) to contract an offer. Among other things, consumers are recommended to compare the prices and services offered by different companies, find out if they are entitled to the electricity "social bonus", read the conditions of the contract carefully and check whether or not it includes the contracting and charging of additional services or permanence commitments and remember that, since October 2018, it is prohibited to sell gas and electricity supply at home if the visit has not been previously arranged by the consumer. In addition, the guide also includes recommendations to be followed by suppliers, such as providing consumers with all the information on their offers in a truthful, transparent, complete and simple manner, so that consumers can evaluate and compare these offers with those of other competitors, or informing consumers of the conditions and deadlines for revising prices, the cost of additional services or the existence of permanence clauses.

Finally, the CNMC has jurisdiction to **resolve disputes** between companies involved in regulated markets: energy, telecommunications companies, rail transport, postal, television networks, etc.

#### 4.6. Who do the decisions of the CNMC depend on?

The Board of the CNMC is the decision-making body. It is a collegiate body, i.e. it is made up of ten members of recognised prestige and professional competence in the CNMC's field of action. These councillors are subject to parliamentary control. Prior to their appointment, at the proposal of the Minister of Economic Affairs and Digital Transformation, they are brought before the corresponding Commission of the Congress of Deputies and, only after the

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24 <https://www.cnmc.es/ambitos-de-actuacion/energia/guia-informativa-para-el-cambio-de-comercializador-de-electricidad-o-gas>.

25 <https://comparadorofertasenergia.cnmc.es/comparador/index.cfm?js=1&e=N>.



candidate proves his/her suitability for the post, are they formally appointed by the Government.

The Board may act in plenary or in chambers. There is one chamber dedicated to competition issues and another to the supervision of regulated sectors.

The proceedings are conducted by the technical staff of the investigation departments (Competition, Energy, Telecommunications and Audio-visual Sector, Transport and Postal Sector) independently of the Board, but their resolution is the Board's responsibility.

The reports and studies related to the promotion of competition are drafted by the technicians of the Promotion Department, reviewed by the other departments to ensure internal consistency, and finally approved by the Board.

The CNMC has organic and functional autonomy and full independence from the Government, the Public Administrations and the market agents. In addition to parliamentary control, it is subject to judicial control. It is governed by technical criteria of action and beyond any other motivation, and acts independently of any business or commercial interest, and cannot request or accept instructions from any public or private entity.

#### **4.7. What other institutions influence competition and good regulation in Spain?**

In Spain, there are multiple institutions that work to guarantee and foster competition in the markets and to promote their proper functioning through efficient regulation.

As mentioned in section 4.2 above, in addition to the European Commission and the CNMC, some Autonomous Communities have their own competition authorities.

Likewise, all public administrations have to comply with the criteria of efficient economic regulation (section 3.5), thus fulfilling the principles of necessity, proportionality and non-discrimination, and protecting the general interest without causing serious distortions in the markets. Through the Market Unity Law (section 3.8), the different State, autonomous and local administrations cooperate and collaborate in the Board for Market Unity to promote the application of the law and these principles.

The Sub-directorate General for Better Regulation, Support for Business and Competition of the Ministry of Economic Affairs and Digital Transformation has also functions related to the defence of competition and efficient regulation and exercises, among others, the functions of the Secretariat of the Board for Market Unity.

Finally, the European and Spanish Courts of Justice also apply anti-trust and market regulation rules and review the decisions of administrative bodies when they are appealed.

#### **4.8. What can you do to promote competition?**

Achieving a high level of competition and efficiency in our markets is a task that requires a commitment from society as a whole, including all institutions and also consumers. As a consumer, you will help businesses thrive if you maintain a demanding attitude, making informed decisions and regularly looking for offers that best suit your needs. For example, you can use tools such as [the energy offers comparator offered by the CNMC](#) to choose which gas and electricity offers best suit your needs, and periodically review existing offers to see if there are any new offers that interest you more.

Likewise, if you have relevant information on practices contrary to the Law on the Defence of Competition (collusive conduct such as cartels or fraud in public tenders, abuse of a dominant position or distortion of free competition by unfair acts), you can collaborate with us by providing this information through three different collaboration channels: a telephone number (0034 671483741), an e-mail box ([buzoncolaboracion@cnmc.es](mailto:buzoncolaboracion@cnmc.es)) and a completely anonymous channel, the anonymous informant channel (<https://edi.cnmc.es/buzones-anonimos/SICA>). The submission of this information does not in any way constitute a formal complaint. For this type of collaboration, you can request the confidentiality of the identity and contact details you provide.

If you prefer to file a formal complaint, you can do so through our electronic office (<https://sede.cnmc.gob.es/tramites/competencia/denuncia-de-conducta-prohibida>) or in our physical register, describing the allegedly anti-competitive behaviour you have knowledge about, identifying those responsible and contributing the evidence that you have.

In addition, since 2008, a leniency program has been under way in Spain, a powerful tool for cartel detection. Companies and managers involved in a cartel may benefit from exemption (if it is the first leniency applicant) or reduction of the fine (if it is the second or successive applicant) by bringing the existence of the cartel to the attention of the Competition Authority, providing sufficient evidence and cooperating with the Authority in the investigation. You can apply for leniency to the CNMC in writing and also through the CNMC's Electronic Registry (<https://sede.cnmc.gob.es/tramites/competencia/solicitud-de-clemencia>) or with an oral declaration at the CNMC's headquarters. The confidentiality of the leniency applicant and the fact of the application itself are guaranteed until the

notification of the Statement of Facts. Since 2010, applications for leniency have resulted in the dismantling of a total of 31 cartels<sup>26</sup>.

On the other hand, contracting authorities can make use of articles 69, 132 and 150 of the Public Sector Contracts Law (Law 9/2017) to bring to our attention indications of collusion in public tenders.

If you have any idea to contribute to improve competition in any market, you can collaborate with us by participating in the public consultations that the CNMC launches in the field of regulated sectors or in the framework of studies to promote competition. You can also suggest topics or areas you would like us to work on in this [suggestions section to the Promotion Department](#).

If you want to keep up to date, you can follow us on our website ([www.cnmc.es](http://www.cnmc.es)), on our blog ([blog.cnmc.es](http://blog.cnmc.es)), on social networks (on Twitter, [@CNMC ES](#), [LinkedIn](#)), or on our [YouTube channel](#).

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## IN SUMMARY...

- ❖ Competition means that companies offering similar products rival each other to attract customers by lowering their price, innovating or improving their quality and/or variety.
- ❖ Competition increases consumer welfare, benefits the public sector, creates a fairer and more efficient framework for businesses and improves competitiveness, innovation and economic growth.
- ❖ There are conducts by companies that restrict competition and harm consumers and are infringements of the Law on the Defence of Competition, such as price agreements between competitors, market sharing, fraud in public tenders, abuse of dominant position or acts of unfair competition that seriously distort competition.
- ❖ Regulation is applied to correct problems in markets that are not functioning properly or when there are overriding reasons in the general interest that need to be protected. It should be regulated to the extent necessary to solve a problem and in a proportionate manner, introducing the least possible distortions in the market.
- ❖ The CNMC, as an independent competition and market regulation authority, ensures effective competition and efficient regulation to benefit the consumer, through the defence of competition (repressing practices and controlling mergers) and its promotion and regulatory supervision of the electricity, natural gas, telecommunications, audio-visual, airport fees, railway sector and postal market sectors.
- ❖ In conclusion, competition and efficient regulation are essential to strengthen a country's economy and benefit us all. Therefore, it is important that we know them and understand how they affect us.
- ❖ The CNMC and the other competition and regulatory authorities are working to help citizens and businesses and are at their disposal.

