

**Template pursuant to Section 3 (a) of the
ICN Framework on Competition Agency Procedures**

COMISIÓN NACIONAL DE LOS MERCADOS Y LA COMPETENCIA (CNMC). SPAIN

The following template is submitted by COMISIÓN NACIONAL DE LOS MERCADOS Y LA COMPETENCIA (CNMC). SPAIN pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

Please add brief presentation/link to agency website.

On October 7th the new Spanish Authority, the National Commission of Markets and Competition (CNMC), became fully operational. The new agency merges the former competition authority, the CNC, with several regulators –Telecom, Energy, Railway, Postal, Audiovisual and Airports. The CNMC has a Board of ten members (President, Vice President and eight members) which acts through two Committees: the Competition Committee, which is devoted solely to antitrust enforcement and the Regulatory Committee devoted to regulatory files (both Committees may issue an opinion on the files decided by the other Committee – cross reports). In order to guarantee due process four Divisions will hold investigations and proceedings: Directorate of Competition (in charge of antitrust enforcement in all sectors), Telecoms and Audiovisuals Directorate (regulation), Energy Directorate (regulation) and Transport and Post Directorate (regulation). CNMC has a Competition Advocacy Department reporting to the CNMC’ President.

Though the institutional representation of the CNMC will be assumed by the President, as the head of the institution, the Directorate of Competition, according to article 19 of Royal Decree 657/2013 (CNMC Regulation), has amongst its competition enforcement competences the cooperation with the European Commission, under EC Regulations 139/2004 and 1/2003, and with National Competition Authorities of members States.

Link to agency website: <https://www.cnmc.es/>

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

Regarding Due Process principles:

In Spain there is a single institution responsible for investigations and decision making on competition issues. The Comisión Nacional de los Mercados y la Competencia (CNMC) presents a pyramidal structure with two separate organs: the Directorate of Competition and the Board (Competition Committee), which independently carry out their respective functions under the supervision and coordination of the institution's President, with the support of a range of common services. Due processes fully respected at the Spanish Competition Authority:

(Investigative phase) The Directorate of Competition carries out investigations, including dawn-raids, decides when formal proceedings should be opened, prepares and addresses Statements of Objections to the parties and finally drafts Decision Proposals to the Board on the substance and on sanctions.

It is also responsible for case allocation between the CNMC and the Regional Competition Authorities, as stated in Act 1/2002, and for securing compliance of the parties with CNMC's decisions. This Directorate represents the CNMC at the ECN.

(Adjudicative phase) In view of the Proposals submitted by the Directorate of Competition, the Board takes the decisions to shelve or dismiss case proceedings, to end a case by way of Commitments, to declare the illegality of a practice and impose the corresponding sanctions, to impose interim measures, etc. The Board may also order that the Directorate of Competition examines new evidence and performs complementary actions, and may decide whether to conduct a hearing.

When the Council estimates that the matter has not been duly qualified in the Decision Proposal, it submits the new assessment to the interested parties and to the Directorate of Competition so that they can present their allegations.

Link to [Spanish Competition Law](#)

Link to [Spanish Regulation for Competition](#)

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

Under Spanish competition law, the nationality, residence, or origin of a Person being investigated is irrelevant to the application of the laws, procedural rules and policies. The laws, procedural rules and policies afford Persons of other jurisdictions treatment no less favorable in like circumstances. All persons and companies concerned are treated in the same way.

Spain is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

In Spain, no law is valid unless it has been published in the Official Bulletin.

The Spanish CNMC makes available on its website a comprehensive collection of guidance documents, guidelines and notices, information leaflets and legislation.

This includes inter alia, [Law 3/2013 for the creation of the CNMC](#), [Spanish Competition Law 15/2007 \(LDC\)](#), [Regulation 261/2008 developing Spanish Competition Law](#), [Guidelines for Commitments decisions.](#), [Fines Guidelines](#), [Guidelines for short form mergers notifications](#), [Guidelines for Leniency applications](#)

[A case database](#) offers the possibility to search for decisions (all CNMC Decision are published in the website) and case summaries. In addition to this, according to the Spanish Law, CNMC must publish the opening of formal investigations, the dawn-raids carried out and the mergers notified.

The [Annual Report](#) provides a concise overview of facts and figures as well as the most important cases of the year.

d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide*

reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.

CNMC' informs any Person that is the subject of an Investigation as soon as practically and legally permissible of that Investigation, according to the status and specific needs of the investigation.

The opening of a formal investigation is notified to all the Parties, so that they can access to the case file and make allegations in any moment. During the preliminary investigation, there is no possibility of accessing to the file, but the Parties must be informed about the object of the investigation when are required for information.

In merger control proceedings the parties are in contact with the competent case handler from the beginning (even before the notification). Not every company transaction is subject to merger control by the CNMC. An obligation to notify only exists where a transaction is considered a concentration within the meaning of the Spanish Competition Law and where certain thresholds are met.

Requests for information must usually be answered in a ten working days period, with the possibility of extending it for 5 additional working days.

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

Regarding the Antitrust enforcement, Article 36.1 of the Spanish Competition Law 15/2007 (LDC) deals with timing of antitrust procedure. The maximum period for issuing and notifying the CNMC' resolution (final decision) shall be **18 months** and its distribution between the phases of investigation and decision is set at the Spanish Regulation of the Competition Law (**12 month** for investigative phase –by the CNMC Directorate of Competition– and **6 months** for adjudicative phase –by the CNMC Council).

The LDC includes the possibility to extend the antitrust procedure time limit **when special circumstances, settled at the LDC, happen and it is regulated** by Law LDC: Article 37: Cases of extension of periods (deadlines) and suspension of their computation. This provision has not been hardly used.

As for merger control procedures, the following is worth highlighting:

Mergers that are not subject to mandatory filing pursuant to the EC Merger Control Regulation (ECMCR) have to be notified to the CNMC if the thresholds (double threshold: aggregate market share or aggregate turnover) specified in the LCD are met.

Merger control proceedings are divided into first-phase (**one month**) and second-phase (**two additional months**) proceedings. Second-phase proceedings are undergone only when necessary, i.e., when at the end of first-phase proceedings competition concerns remain that need to be assessed.

The Council of the CNMC is to make the decisions at the end of both first- and second-phase proceedings. The Council may clear, prohibit or condition the operation.

Where the Council of the CNMC prohibits the merger or imposes conditions or commitments, the Government may, within 15 days, intervene based on an open set of public-interest criteria (different from competition-related criteria), including defence and national security, protection of public health or security, free movement of goods and services within the national territory, environmental protection, and promotion of research and technological development.

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

Regarding the officials duty of secrecy, Article 43 of the Spanish Competition Law deals with CNMC' Officials Duty of secrecy as follows:

1. Anyone who takes part in the handling or resolution of proceedings laid down in this Act or becomes aware of the referred proceedings by reason of its profession, post or participation as a party, must keep secret the facts that they have learnt through them and the confidential information that they have learnt during the course of their employment, even after ceasing their functions.

2. Without prejudice to the criminal and civil liabilities that may apply, the infringement of the duty of secrecy is always considered a very serious disciplinary offence."

For the treatment of confidential information: "Article 42. Deals with the Treatment of confidential information. At any time during the procedure, it may be ordered, ex officio or at the request of the parties, that the data or documents considered confidential are kept secret, using them to create a separate part of the file.

Moreover, Regulation 261/08, which develops some aspects of the Spanish Competition Law, has also an article for confidentiality:

"Article 20. Treatment of confidential information

Any person who when submitting documents to the National Competition Commission requests confidential treatment of the data or information, must do so on a reasoned basis before the competent body within the framework of the proceeding in question, and must also submit a non-confidential version of those documents."

Additionally and related with the leniency program, the mentioned Regulation on its article 51 says:

Article 51. Processing of applications for exemption from or reduction of fines

“1. The National Competition Commission will treat as confidential the fact of the filing of a fine exemption or reduction application, and will organise a special separate record with all application data and documents deemed to be confidential, including, in all events, the applicant's identity.

2. According to what is provided in article 50.3 of Act 15/2007 of 3 July 2007, the interested parties will have access to the data and documents which, though forming part of a special confidential record, are necessary to responding to the statement of objections.

3. Without prejudice to what is provided in the preceding paragraph, no copies can be obtained of any statement by the fine exemption or reduction applicant that has been specifically made by the applicant for submission with the related application.”

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

The Law 3/2013 of the CNMC creation contains rules on conflicts of interest and incompatibilities for the members of the CNMC' Board in article 22 in the following terms:

“Article 22. Functions and incompatibilities of Council members.

1. Members of the Council of the National Markets and Competition Commission shall exercise their functions on an exclusive basis and shall be regarded as senior officials of Central Government.

2. Council members may not individually assume executive or management functions in respect of specific areas of the National Markets and Competition Commission, responsibility for which lies with the management staff of the Commission.

3. Council members shall be subject to the rules on the incompatibility of activities established for senior officials of Central Government in Act 5/2006 of 10 April 2006 regulating Conflicts of Interest of Members of the Government and Senior Officials of Central Government, and in its implementing provisions.

4. For a period of two years following their vacation of office, the President, the Vice-President and Council members may not engage in any private professional activities whatsoever related to regulated sectors and the activities of the National Markets and Competition Commission.

Pursuant to that restriction, the President, the Vice-President and the members of the Commission, upon vacating office due to resignation, expiry of their term of office or permanent incapacity for the exercise of their functions, shall be entitled to receive, as from the month after their vacation of office and for a term equal to that during which they held office, subject to a maximum limit of two years, monthly economic compensation equal to a twelfth of eighty percent of the total remuneration allocated to the office in question in the budget in force during the indicated term.

No entitlement to receive that compensation shall arise in the event of the remunerated performance of any job position, office or activity in the public or private sector on the terms provided for in Article 1 of Royal Decree 20/2012 of 13 July 2012 on Measures to Safeguard Budget Stability and Boost Competitiveness.”

Other top members of the Staff, (i.e. Directors) are subject to the rules on the incompatibility of activities established for senior officials of Central Government in Act 5/2006 of 10 April 2006 regulating Conflicts of Interest of Members of the Government and Senior Officials of Central Government (public administration), and in its implementing provisions.

Act 5/2006 of 10 April 2006 regulating Conflicts of Interest of Members of the Government and Senior Officials of Central Government (public administration), and in its implementing provisions.

Particularly article 8 refers to work in private sector after leaving public sector as follows (informal translation):

Article 8. Limitations on the exercise of private activities after termination.

1. During the two years following the date of its cessation senior officials, which Article 3 refers, not may perform services in companies or private companies directly related des competences the position held. For this purpose it is considered direct relationship exists when any are given of the following factual circumstances:

a) That the senior, his superiors proposal them or their dependents holders organs, delegation or substitution, they have issued resolutions in relation to such companies or firms.

b) they have participated in sessions of bodies colleges in which an agreement had been adopted or resolution concerning such entities.

2. The officials, regulated by this Act, which Prior to taking such public office would practiced his profession in private companies, which would reincorporate not incur the incompatibility referred to in the preceding paragraph when activity that are to play in them are done in jobs that are not directly related with the powers of public office or busy they can make decisions affecting it.

3. During the period of two years referred to in first paragraph of this article may not hold itself themselves or through companies or enterprises by them directly or indirectly more than 10 percent technical assistance contracts, service or similar with public authorities, directly or by contractors or subcontractors.

4. People who had played any of senior officials covered by Article 3 shall perform during the two-year period referred to The first section of this article, to the Office of Conflict Interest provided for in Article 15 declaration on activities to be undertaken, with character prior to its inception. Within a month the Office of Conflict Interest shall decide on the compatibility of the activity to be performed and shall notify the applicant and the company or society in which it was to provide its services.

5. Where the Office of Conflict of Interest considers that private activity you want to play

a person who had served as a senior violates as provided in paragraph 1, it shall notify the applicant and the company or society to which it was to provide its services, which will provide the allegations that have by convenient. Analyzed the allegations, the Office propose the appropriate decision.

6. During the two years following the date of cessation, those who re-enter the civil service and pay services remunerated by fees, fee or any other form of economic consideration natural or legal persons of a private nature will be inhibited in all those private actions that keep relation to the powers exercised high office.

CNMC has an Ethics Code, published in the Spanish Official Journal, for the CNMC (Competition + regulation competences) [and in the transparency CNMC web site](#)

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

Persons subject to a CNMC' Enforcement Proceeding timely are notice of the alleged violations or claims against them, just at the very beginning of sanctioning procedures.

To allow for the preparation of an adequate defense, parties are informed of facts and relevant information to support their allegations or claims.

Regarding the Spanish administrative jurisdiction we consider relevant to clarify the concept of "interested party" which comes from our common administrative Procedure Law in order to keep in mind that all stakeholders qualified as interested parties in an specific case are involved in all steps of the competition case procedure.

Interested parties have the opportunity to show their opinion in many occasions during procedure, not only before Directorate of Competition –usually by writing-, but also before the Board –by writing too but they have also the possibility to ask the Council for a hearing-. And they have the right to have access to all file documents (with the exception of documents formally classified as confidential documents).

The statement of objections is notified to all parties qualified as “interested parties” on the case by the CNMC Directorate of Competition.

Regarding allegations to the Statement of Objections (SO), all interested parties in a case have the right to be heard at any time during the procedure, and for that they have the right to access to the file.

Alleged infringers are legally entitled to respond to the statement of objections in writing in a 15 “working” days deadline (LDC article 50.3) after the notification and reception. Prior asking for that, parties can get a deadline extension but no longer that the half of the previous deadline given.

After receiving parties’ allegations to the SO, the CNMC’ Directorate of Competition drafts a report (which contents are settled in Regulation 261/08 article 34 : “Article 34. Proposed resolution and report”) which is addressed to the interested parties giving 15 days for allegations.

The proposal decision and parties’ allegations are sent by the CNMC’ Directorate of Competition to the CNMC’ Board.

Under the Spanish competition law proposal decision (final investigation report) is not the same as a draft decision because those two documents are prepared in an independent way from separately bodies from the same Competition Authority.

(At the decision/adjudicative phase) Hearings are organized before the CNMC’ Council (regulated in LDC article 51.3) and developed in Regulation 261/08 articles 37.2 and 37.3.

The role of the CNMC’ Directorate of Competition on these hearing is to present it proposal decision, and parties present their objections to the mentioned proposal. The CNMC’ Council hears (CNMC’ Directorate of Competition and parties), and makes questions if it considers necessary clarifying any aspect.

In Regulation 261/08 article 19 deals with a detailed description of how hearings are held.

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or*

rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.

The Person has as a Constitutional right to legal representation throughout the entire proceedings. However, when conducting dawn raids according to a court-ordered search warrant, the investigators do not have to await the arrival of the defense counsel.

According to the Spanish Case Law, the privilege is limited to communications with independent/external legal counsel, and therefore communications with in-house counsel are not protected.

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.

Decisions of the CNMC are in writing and contain a statement of reasons and the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions.

All CNMC resolutions (final decisions) are publicly available, subject to confidentiality rules.

Regarding mergers, when the second phase is initiated because CNMC considers that the concentration may hinder the maintenance of effective competition, a note including the main concerns detected is published and notified to the persons that may be affected and to the Consumer Council. The commitments proposed by the notifying parties may be communicated to the interested parties or to third parties with the aim of assessing their suitability for resolving the competition problems resulting from the concentration and its effects on the markets.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

CNMC' Board decisions can be appealed before the Spanish Courts (the National Court in first instance and the Supreme Court in second instance).

Appeals before the National Court will be addressed based on law and on facts. Those judgments may be subject to review by the Supreme Court. This second appeal is not destined for reviewing the assessment of the material facts in First Instance, although in

specific cases it can quash the challenged Decision in facts. And they may either confirm, turn down, or partially turn down (it may confirm the CNMC's decision on the substance of the case but cut down the fine, for instance) the challenged decision. There is no difference between judicial review of decisions on substance and judicial review of decisions imposing sanctions.