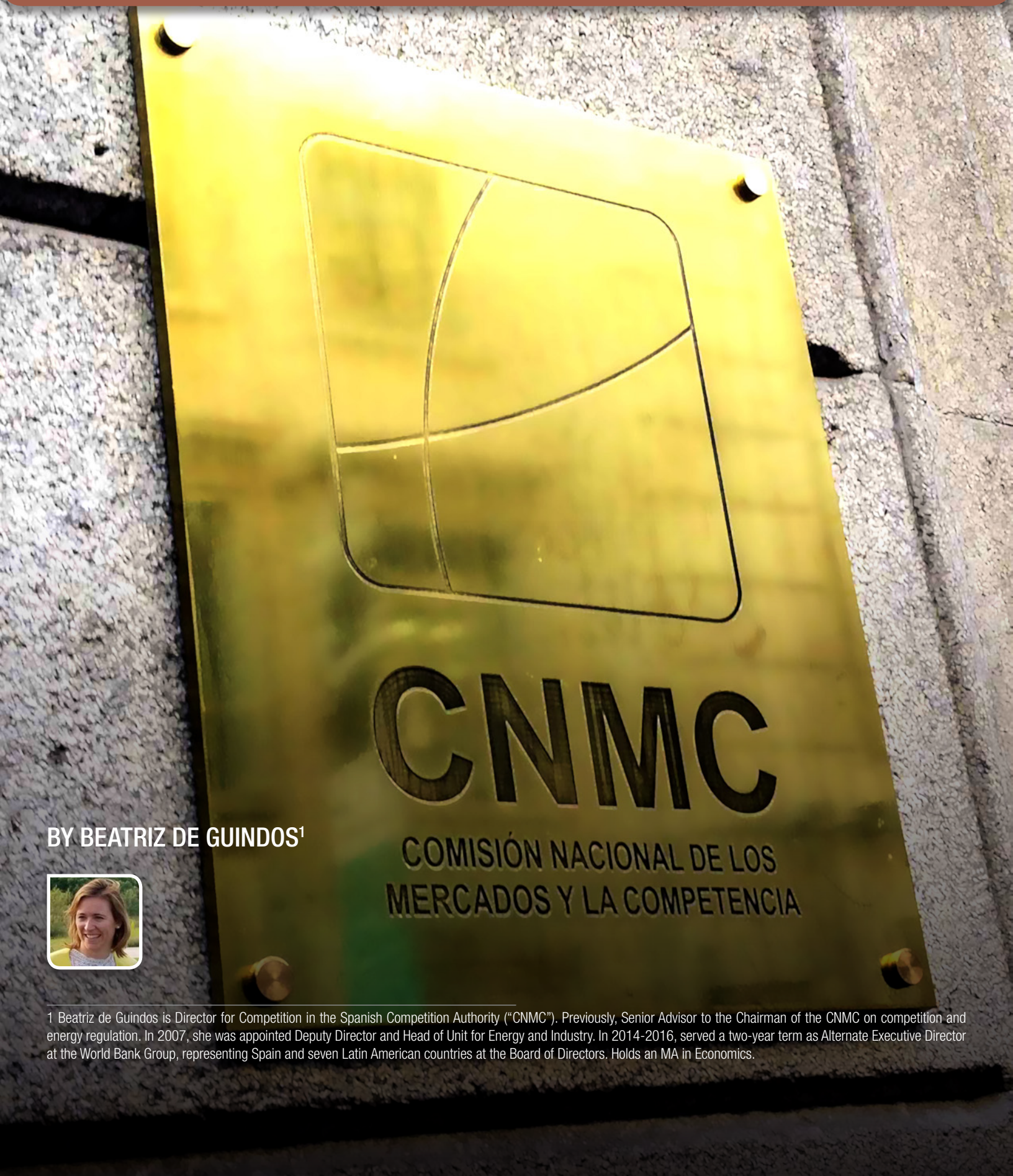
THE SPANISH COMPETITION ACT: AN EVALUATION AND FUTURE PERSPECTIVES



BY BEATRIZ DE GUINDOS[1]

1 Beatriz de Guindos is Director for Competition in the Spanish Competition Authority ("CNMC"). Previously, Senior Advisor to the Chairman of the CNMC on competition and energy regulation. In 2007, she was appointed Deputy Director and Head of Unit for Energy and Industry. In 2014-2016, served a two-year term as Alternate Executive Director at the World Bank Group, representing Spain and seven Latin American countries at the Board of Directors. Holds an MA in Economics.

CPI ANTITRUST CHRONICLE
OCTOBER 2019

I. INTRODUCTION

The Spanish Competition Authority is celebrating its 30th birthday with a very positive balance sheet. A long way travelled and many challenges ahead. The integration of the previous independent regulatory bodies in a single agency has brought about a number of useful synergies in the present context. But the development of the digital markets and how to face the challenges they pose to competition authorities is still a hot topic worldwide. In parallel, the CNMC is dealing with the amendment of the Competition Act – looking for global consensus – and making efforts to preserve the effectiveness of our successful leniency program.

II. THE SPANISH COMPETITION AUTHORITY: 30 YEARS FOSTERING COMPETITION

Spain already has a long history of antitrust enforcement. The application of antitrust law is constantly evolving, and, in parallel, the agency tasked with preserving, guaranteeing, and promoting competition has evolved over time, as it strives for the optimal institutional structure.

In 1989, a nationwide enforcement system was implemented, based on the existence of two specialized administrative bodies, to fight against practices that stifled competition and to review mergers: The Service for the Defence of Competition, as an examining body, and the Court for the Defence of Competition, as a decision-making body.

In 2007, a new antitrust law was enacted to reinforce existing mechanisms and endow the Spanish competition system with additional instruments, such as the implementation of the leniency program. The result was the creation of the National Competition Commission ("CNC"), a unique and independent agency that combined the Service and the Court for the Defence of Competition, keeping the functional independence between assessment of cases (via Investigation Directorate) and final decisions (adopted by the "Council").

Further, in 2013, the Parliament decided to unify the independent sectoral regulators with the competition authority, in order to provide legal certainty and institutional confidence, taking advantage of the economies of scale derived from the existence of similar supervisory functions and procedures. Thus, the National Commission on Markets and Competition (the "CNMC") was created, combining the National Competition Commission with myriad agencies, namely the Telecommunications Market Commission, the Railway Regulation Committee, the National Postal Sector Commission, the Airport Economic Regulation Commission, and the State Council on Audiovisual Media.

In short, the Spanish antitrust authority has had 30 years of experience during which, under different structures and empowered by successive regulatory frameworks, it has sought to foster effective competition.

The creation of the present institution, the CNMC, faced some resistance and criticism from law firms and consultancy boutiques that dealt with competition and specific regulatory issues separately, as they-had to adapt to the new model. However, in our view, it is fair to recognize that the integrated model, if existing synergies are successfully achieved, can be more effective than simple coordination between previously independent regulators. The experience of these six last years has shown that such synergies are indeed possible (as evidenced by the joint work of the different Directorates in merger control in the fuel sector, or in the process of the liberalization of passenger rail transport are some clear examples).

This does not imply that any such change is easy, or that the institution's potential is always fully exploited, especially considering that the integrated model has been very challenging, for instance, when combining labor and civil servants that came from very different working cultures and that had very different job promotion perspectives. Nevertheless, having overcome the initial hurdles inherent to such an institutional integration, our assessment is positive and we are confident that we can continue to benefit from the advantages of a single agency in the future if we pursue the aforementioned synergies.

As regards the application of antitrust law, the CNMC carries out its activities from a dual perspective: (i) enforcement (by the Competition Directorate); and (ii) advocacy (by the Advocacy Department). Under this structure, competition policy is enforced both ex post (by opening disciplinary proceedings against anticompetitive behavior, or challenging administrative decisions that restrict competition), and ex ante, (by preparing reports and recommendations, or enforcing merger control). We believe that the key to successful public antitrust enforcement lies in a balanced approach between both strategies.

III. DIGITAL MARKETS: A GLOBAL CHALLENGE FOR COMPETITION AUTHORITIES

In a constantly changing economy, with increasingly globalized markets and breakneck technological advances, the CNMC faces constant challenges to adapt to these developing markets and render its actions as effective as possible. Many of these issues are currently being debated in international forums, where there is broad agreement as to the main concerns of all competition authorities worldwide.

At a global level, our main challenge is clearly dealing with digital markets in a coherent and consistent way worldwide. Our challenge is not only to address the dynamism of these markets with the appropriate instruments, but also to do it jointly and coherently with all competition enforcers. Digital players operate in a world without borders.

There is currently an intense international debate on whether the current competition policy instruments to deal with new markets are fit for purpose. While some experts defend the effectiveness and sufficiency of traditional tools – tailored as needed depending on the markets in question – others call for significant modifications to adapt to the new environment.

This debate is especially controversial in terms of merger control, given the surge of business structures and models that have a great bearing on the markets, and yet are beyond the scrutiny of antitrust authorities in most jurisdictions.

In this regard, in Spain we have always defended our market share threshold in merger control. So far, this has been shown to be a very valuable tool for digital merger operations. Mergers such as *Facebook/WhatsApp* or *Apple/Shazam* met the Spanish merger notification threshold based on market shares. The CNMC was therefore able to refer them to the European Commission for an EU wide assessment and not only in the Spanish market. At a national level, the market share threshold has allowed for the review of six platform mergers in the last years, which did not fulfil the turnover notification threshold.

The debate, however, not only focuses on how to prevent certain transactions from evading antitrust authorities' oversight, but also on how to adequately and effectively analyze their market effects, and to implement any requisite remedies. Thus, the question often arises as to the appropriate role of merger control and to what extent antitrust authorities should intervene in the markets. Present circumstances render it particularly complex to strike the right balance between the public and economic interest. As a result, prudence is seen as the best alternative.

In the framework of this discussion, the debate surrounding so-called "national champions" has emerged strongly. It is probably due to the geopolitical context we are living in right now, but experience has taught us that we should keep industrial policy apart from antitrust rules, which are based on a rigorous and objective assessment. Other instruments (industrial policy, commercial policy, etc.) must play their role to achieve a level playing field. However, competition policy tools, namely antitrust and merger rules, by their nature, must be insulated from any influences that could put at risk the impartiality of the assessment.

The decision of the European Commission in the *Siemens/Alstom* case has been discussed at length internationally, and also criticized in some forums. Obviously, everyone is mindful of the need to defend European industries, but we have to be sure of which instruments and agencies are best suited for this. Spain defended the stance of the European Commission, not only because we firmly believe that competition policy must be separate from industrial policy, but also because, in this particular case, the main "victims" were Spanish markets and companies that are also part of Europe's industry and, therefore, also warrant protection.

In conclusion, at present, international cooperation among competition authorities is more relevant than ever, to share experiences regarding our future endeavors, and work together on the best solutions to understand economic structural changes and how best to address together the new challenges in an effective way.

IV. TEN YEARS OF THE COMPETITION ACT IN SPAIN AND THE NEED FOR AMENDMENT

Focusing on Spain, one of our immediate challenges in competition policy is the amendment of the Competition Act to transpose the recently approved ECN+ Directive. The Ministry of Economy and Business, responsible for this transposition, opened a public consultation on this subject in July. Spanish legislation already includes most of the legal provisions required by the Directive, although Spain would still need to apply some legal changes to comply with ECN+. Among these would be the possibility for the CNMC to choose not to pursue complaints on the basis of the agency's priorities, taking into account the public interest, and to increase the maximum level of the fines for abuse and vertical restraints cases.

At present, Spanish competition law requires a detailed assessment of each and every complaint received by the Competition Directorate. Taking into account the limited resources, the short procedural deadlines, and the increasing complexity of the cases, the CNMC has welcomed the new legal provision allowing for the prioritization of cases, as it will allow for a more efficient use of public resources. However, the establishment of priorities and the internal procedures for their approval are still under discussion.

Regarding the independence of the CNMC in relation to the Government, although all CNMC workers are subject to the internal code of conduct, and other legislation governing civil servants, some minor amendments must be made in our Law to fully comply with the Directive. Nevertheless, the main relevant amendment required in relation to the independence of the Authority is the economic independence. Though the CNMC already has its own budget, the human resources policy is dependent on the Ministry of Finance. For instance, the CNMC is not allowed to create or modify its own job posts, which hampers the adjustment of the current structure in light of its real needs.

Finally, another provision required by the ECN+ Directive that must be transposed to the Spanish Act, and that has been very welcome by the Authority, concerns the limitation of periods for the imposition of fines. According to this article, the period for the imposition of fines shall be frozen for as long as another competition authority is investigating the same conducts or there are proceedings pending before a review court. Regretfully, the CNMC has in the past been unable to impose sanctions for certain conducts because the Spanish deadline had been reached while the European Commission was deciding the referral of a case. In the same way, we have lost the possibility of reopening a case that has been dismissed by the courts for a formal defect, due to the limitation period.

In parallel with the ECN+ Directive, in 2017 we launched a broad consultation with stakeholders (including competition lawyers, academics, and regional competition authorities) to evaluate the effectiveness of the Spanish legislation, 10 years after its entry into force. The Competition Act has been a huge success for detecting, sanctioning, and restraining anticompetitive conducts, and also for preventing mergers affecting competition in the markets. Part of the success of this Law lies at least in its drafting process, since the preliminary approval of a White Paper submitted to public consultation, and the majority support of every political group, ensured its high technical quality, and its favorable reception by experts. However, in these ten years, markets have changed and experience has revealed some shortcomings that should be amended in our Competition Act.

During this consultation, there has been agreement at every meeting and seminar as to the need to initiate an amendment process, taking advantage of the requirement to transpose the ECN+ Directive into national law.

Two of the issues on which there is unanimous support are: (i) the opportunity to incorporate the settlement procedure into our system, given that such procedures have proven to be highly effective in neighboring jurisdictions; and (ii) the possible extension of deadlines in especially complex cases.

The settlement procedure allows for the closing of a case, with companies recognizing their responsibility for an infringement in exchange for a reduced fine. This can be of significant help in expediting our cases and, above all, in reducing the amount of litigation against CNMC decisions. In the Spanish jurisdiction, since we already have a very short fixed deadline (18 months), the settlement procedure would not have a great impact on the duration of the proceedings – as may occur in other jurisdictions – but rather in the reduction of the complexity of the assessment and of the handling of procedures.

All stakeholders agree about the convenience of including the settlement procedure in the Spanish Act, but there are still ongoing debates on the technical details. For instance, the scope of the procedure: if only cartels or other infringements, such as vertical restraints or abuses of dominant position, should be open to settlements. The deadline to ask for a settlement within the procedure (i.e. whether it could occur before or after the statement of objections) or the possibility of having hybrid cases, combining both the settlement procedure and the ordinary procedure, are also under discussion.

With regard to extensions, the time periods involved in Spain are considerably shorter than those applied in other jurisdictions, especially as regards merger control. We are proud of our unique 18-month statutory deadline for antitrust investigations and of our one-month deadline for merger assessments, which enhance effectiveness and legal certainty.

However, it is true that it would be desirable to agree to extend this deadline in particularly complicated cases so as to ensure that companies are able to fully defend their interests within a reasonable time period. Having a maximum deadline that is known to the parties, although unusual in neighboring countries, is something that companies and the community of antitrust lawyers have always viewed very positively in terms of legal security and certainty, so the idea is not at all to remove such deadline but to make it more reasonable for all.

In addition to this, the CNMC is also considering other additional amendments to the Competition Act regarding inspections and the sanctions for individuals.

Currently in Spain, in case there is a risk of an objection to a dawn raid, the CNMC can ask for a search warrant from the court in the area in which the raided company is located. Dawn raids are usually carried out simultaneously in different premises, which usually involve different provinces and, consequently, different courts. Since the scope of action of the CNMC is national, it would be desirable and more efficient to centralize such requests in a single national court.

Finally, although the Competition Act has, since 2007, a legal provision allowing the Spanish Competition Authority to impose sanctions on individuals, this provision has not been applied until recently. The Spanish Supreme Court has upheld only a few months ago the first decisions imposing sanctions against individuals in cartel infringements, so we believe that we should make full use of this tool and reinforce its effectiveness. From our experience, we firmly believe in the deterrent effect of these individual fines, but the maximum amount set in the 2007 Act (EUR 60,000) has clearly become insufficient, and needs to be updated accordingly.

V. PRESERVING THE EFFECTIVENESS OF OUR LENIENCY PROGRAM

Another challenge facing the Spanish antitrust authority at present is that of preserving and enhancing its leniency program. This program was launched in Spain in 2008, and it has worked extraordinarily well. Proof of this is the number of leniency applications presented (more than 100), and consequently, the increase in the number of cartels identified and sanctioned since then. In fact, the Spanish leniency program has been used as a benchmark by the European Commission in its report on the impact of the ECN+ Directive as an example of an effective instrument that, when adopted in Spain, led to a substantial change in the performance of our antitrust authority.

We must preserve the advantages of this program, especially with the expected increase in claims for private damages. As a result, we are working to enhance incentives for leniency applicants. In this regard, European legislation has already established that leniency applicants are not jointly and severally liable for the damages that are recoverable in damage compensation procedures, and that they are also exempt from debarment from public procurement. These provisions have been successfully transposed into our national legislation. The exclusion from public procurement was included this year for the first time in a CNMC decision, specifically in the case of Railway electrification with fines totaling EUR 118 million imposed on 15 companies and 14 executives. This practice will surely be applicable to companies which are being investigated in our ongoing cases involving bid rigging in public tenders.

We are also firmly convinced that stepping up our *ex officio* detection efforts feeds back into the leniency program. This is one of the areas in which the Competition Directorate is working hard. The increased risk of detection stemming from the enhanced *ex officio* investigations is a clear incentive for companies and managers to resort to the leniency program, as evidenced by the events of recent months. Our whistle-blower mailbox is also proving very useful in triggering some investigations that have resulted in the initiation of formal proceedings, without harming the informants who wish to remain anonymous.

To this end, in 2018, we created the Economic Intelligence Unit, which is part of the Competition Directorate, but with its own technical and human resources, devoted exclusively to *ex officio* detection and to enforcing the whistle-blower program.

Finally, the Competition Directorate is going to great lengths to identify and fight antitrust practices in tenders (bid rigging), especially in public procurement, due to the direct impact this has on the economy and on taxpayers. It is unacceptable for public budgets to bear cost overruns in contracts at the expense of illicit gains by certain companies engaging in bid rigging.

We are also working on *ex post* analysis to prove the benefits for markets and consumers of dismantling cartel activity related to public procurement. For instance, in 2011, 15 envelope manufacturing companies that had been allocating public tenders since 1977 were sanctioned. As a result, in the first tender that was offered after that decision, manufacturers submitted bids that were up to 30 percent lower, which shows the enormous cost overruns that are associated with manipulating public contract bids.

In this sense, we are enhancing our coordination with national, regional, and local governments by, on the one hand, offering the training they need to help them identify signs of collusive behavior and, on the other hand, setting up coordination mechanisms with contracting committees and awarding authorities, so as to identify in a timely manner any awarding process that may be manipulated. The Competition Directorate is also working to improve access to information on tenders in order to optimize the monitoring of every sector.

We hope that the efforts to amend and update our Competition Act, to preserve our effective leniency program and to get the new Economic Intelligence Unit up to speed in its *ex officio* detection work, will bear its fruits and allow us to continue fostering competition in Spanish markets for at least another 30 years.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.