

Competition Case Questionnaire (‘Legislative Survey Part II’)

General

1. What particular ‘competition problems’¹ were brought to your attention over the last year? Please be as detailed in your answer as possible. If explaining cases, please give a short abstract of the relevant legal issues, the judgement and the reasoning behind it, if possible. (Please note Question 7 below before answering.)
 - Complaint by the Spanish Federation of Food and Drink Industries (FIAB) against the commercial entities Alcampo S.A., Group Carrefour, Group El Corte Inglés and Mercadona S.A.
Agreement between the reported companies to impose their suppliers an uniform safety system by means of originally anti-robbery labels for all those products that justify it due to their size, cost, strategic value and importance in the robbery level.
Collective abuse of power position.
The article 1.1 of the Law for Competition Defence (LDC), which is similar to that corresponding to the norm of article 81 of the Treaty on European Union, contains in the same prohibition field different alternatives as shows the use of expressions that the conducts have as “objective”, or produce or can produce the “effect” of preventing, restricting or falsifying the competition in the whole or part of the national market.
The agreement signed by the four reported distribution companies is prohibited by article 1.1 a) of the LDC, having in mind that the intercompany understanding involves the coordination to fix commercial conditions, that means the imposition of an uniform safety system to the suppliers by means of originally anti-robbery labels for particular products.
Resolution of the Court of Competition Defence: Declare that the commercial entities Alcampo S.A., Group Carrefour, Group el Corte Inglés and Mercadona S.A. are responsible of an infraction penalized by article 1.1 a) of the Law for Competition Defence, give each of the mentioned companies a fine of 75.000 EUR and inform the fined companies that they should abstain from such conducts in the future.
 - Action initiated by trade against Sanofi-Winthrop S.A., Laboratorios Leti S.A., Instituto Berna de España S.A., Evans Medical de España S.A., Rhône Poulenc-Rorer S.A., Laboratorios Nezel S.A. and Instituto Llorente S.A., due to alleged restrictive competition practices against the Law 16/1989, of 17th July, of

¹ **Note: By ‘competition problem’ in this questionnaire we not only mean formal (competition law) cases, but also any other important problems/concerns regarding allegations of anticompetitive business that have come to your attention involving competition law/policy. These concerns could be raised by for example industry newsletters, consumer groups, the media in general etc.

Competition Defence, consisting of the price agreement of the flu vaccines with whom they participated in competitions called for by the Andalusian Health Service. Fines of different amounts have been given, the convicted companies have been invited to stop this type of prohibited conducts and to abstain to carry out them in the future.

- Declared as proven the existence of a restrictive competition practice, prohibited by Article 1 of the Law 16/1989 of 17th July, of Competition Defence, consisting of carrying out an agreed practice or a consciously parallel conduct to fix prices in order to obtain the driving licence B, between the following driving schools operating in the cities of the Province of Badajoz: Ambar, Autopista, Badajoz, Dario, Guadiana, Nasa, Noca and Siglo XXI; and in the Province of Mérida: San José, Emérita, Proserpina, Atenea and Mérida, each of them fined 6.000 EUR and the Provincial Association of Driving Schools of Badajoz fined 60.000 EUR as author of prohibited conducts of price agreements.
- Appeal against the filing of the report against the General Association of Authors and Editors (SGAE) and the Multisectorial Association of Spanish Electronic and Communication Companies (ASIMELEC) due to a supposed infraction of the articles 1.1.a) and 6.2.a) of the Law for Competition Defence.
In the year 2003, the reported associations signed an agreement in which they established an extra fee for sold blank CD-ROMs and DVDs, which the consumer should support as from 1st September 2003, all this on the basis and fundament that these data carriers could be used to record intellectual goods managed by SGAE. Also HISPALINUX, association of Spanish Linux user, and the Association of Internet User, lodged complaints accordingly.
The argument of the Court of Competition Defence was “as it is an Agreement between parties with confronted interests and more than one year has been spent for its negotiation, we can rule out the possibility, without any larger analysis, that the achievement of the Agreement could be declared as an abuse of a dominant position. In November 2005, the appeal against the agreement of filing adopted by the Director of the Competition Defence Department has been admitted and the Director had to reopen the instruction phase in order to complete the investigation in the terms expressed in the basis of the Courts decision.
- Euro 6000, a company with 35 member saving banks, and System 4B, that provides means of payment services to 12 shareholder banks and to 12 other adhered banks, have solicited the extraordinary authorization foreseen in article 4LDC for an agreement between both systems, adopted on 17th May 2001, about exchange fees and “conditions of bilateral services” in the disposal of cash carried out with debit cards in the networks of automatic cash dispensers.
The article 4LDC permits that the Court authorizes agreements restrictive of competition that, on another way, would be pursued as infractions of the LDC when the participants of these agreements ask for and prove that they contribute to improve the production or commercialisation of goods and services or to promote the technical progress whenever they permit the consumers or users to adequately share from their advantages, they do not impose restrictions that are not essential for carrying out the proposed objectives and they do not allow the participating

companies to eliminate the competition with regard to a fundamental part of the considered products or services.

- Reporting by the National Energy Commission with respect to a contract between the companies Enagás, S.A. and Gas Natural Comercializadora, S.A., integrated in the Group Gas Natural, because of conducts supposed to be prohibited by the articles 6 of the Law for Competition Defence and 82 of the Treaty on European Union, consisting of abuse of dominant position.

It has been declared that the Group Gas Natural has committed a practice prohibited by the article 6 of the Law for Competition Defence and by the article 82 of the Treaty on European Union because of having obstructed, by a contractual way, the access of third-party to the capacity of re-gasification, essential access for the gas supply on the Spanish market.

The parent company and head of the Group Gas Natural, Gas Natural SDG, has been fined eight millions Euro.

- Reporting of the ASSOCIATION OF PROFESSIONAL PRESS against the SOCIEDAD ESTATAL DE CORREOS Y TELEGRAFOS, S.A (Post office) because of the infraction of the articles 1, 6 and 7 of the LDC. Based on the fact that the post office carries out an excessive exploitation policy of its power position, executed in the unexpected and excessive increase of its official tariffs for 2002 and in the discriminating sector applied to the editors of periodical publications on the subject of prices and other sales conditions, discrimination that results from the arbitrary policy of discounts that the post office has agreed individually with its clients on the new tariffs. According to the Association of Professional Press, these practices have been carried out by the post office because they hold a share “in the postal distribution market of periodical publications, in no case inferior to the qualifiable 85%, consequently, and without any doubt as power position, especially in face of the non-existence of an equivalent postal operator that could be an authentic alternative”.

The post office is invited to abstain from carrying out this type of practices in the future and is fined NINEHUNDRED THOUSAND EURO due to the committed infraction.

2. Were these particular ‘competition problems’ covered by the media in your jurisdiction? If so, how were they dealt with? (i.e. how comprehensive was the media’s treatment of the competition law issues?) Was the issue considered by the media to be an important element in the public debate on competition policy? If so, why? If not, why not?

Yes. They are usually covered by all media and are largely dealt with. Usually, the reported companies, the reason and the imposed sanctions are exhibited.

3. How would you rate the general level of awareness of the *importance* of competition law issues in your jurisdiction (e.g. very good, good...non-existent)? Please elaborate.

Very good. When the consumers receive information about legal problems on competition, they notice it as more important or with more attention when products and services are concerned that they often use. For example, in the above mentioned cases, the media has better covered the cases of the Spanish Federation of Food and Drink Industries and of the Driving Schools than the case of the Press Association against the Post Office (obviously it is more interesting for the citizens because it affects them more directly).

4. How would you rate the general level of awareness of the *substance* of competition law rules in your jurisdiction (e.g. very good, good...non-existent)? Please elaborate.

The knowledge of the consumers regarding competition subjects does exist but is not very good. In general, they believe that these are problems that only affect the companies and when the news are spread, it is not very common that the broken legal precepts are detailed.

5. Have the authorities in your jurisdiction tried to improve understanding and awareness of competition law issues among the *business community*? If so, how?
6. Have the authorities in your jurisdiction tried to improve understanding and awareness of competition law issues among *consumers in general*? If so, how?

ANSWER for questions 5 and 6:

The only information that exists is when the Court of Competition Defence issues reports and resolutions that are available for all companies and consumers that wish it. In case these reports and resolutions deal with subjects of general interest, they are published in the mass media.

There are no specific campaigns, whereby the website of the Court of Competition Defence is very large with respect to general information, regulations, reports, resolutions, etc. but it is the interested manager or consumer who has to enter it. There are no informative campaigns from the authorities side.

Sector Specific

7. What particular 'competition problems' were brought to your attention over the last year (or more) concerning the particular *product markets chosen by the partners*, i.e. petrol, printer-ink, paracetamol, downloadable music...etc.? Please be as detailed in your answer as possible. If explaining cases, please give a short abstract (no longer than one paragraph) of the relevant legal issues, the judgment and the reasoning behind it, if possible.

April 2006:

Report presented by the Association of Service Station Owners and Supply Units of Andalusia against REPSOL S.A. and REPSOL COMERCIAL DE PRODUCTOS PETROLÍFEROS S.A., because of supposed conducts prohibited by the Law 16/1989, of 17th July, of Competition Defence (LDC), consisting of violation of the national and community competition regulation by non-compliance of the regulation that prohibits to fix prices and limits the maximum duration of the supply contracts.

REPSOL S.A. has committed a practice prohibited by art. 1.1 of the Law for Competition Defence when fixing the customer sales prices of fuel to the suppliers which act under a supposed system of commission or agency.

In the year 2001, the Court of Competition Defence pronounced a resolution in which it was agreed: to declare that REPSOL S.A. had committed a practice prohibited by art. 1.1 of the Law for Competition Defence when fixing the customer sales prices of fuel to the suppliers which act under a supposed system of commission or agency, to invite REPSOL S.A. to stop fixing prices with service stations to which they are linked due to a contract with similar characteristics and to fine REPSOL S.A. 500 millions Pesetas (3.005.060,52 Euro) because of practices contrary to art. 1 LDC.

Against this resolution, Repsol S.A. lodged a judicial-administrative complaint.

In April 2006, the Court of Competition Defence has decided to execute the decision of the resolution of 2001 and fine Repsol S.A. 3.000 EUR per each day of delay.

November 2004:

Rejection of the appeal lodged by Disared de Servicios Petrolíferos, S.A. (oil-bearing services) against the resolution of the Court of Competition Defence of 31st May 2002 (legal proceedings no. 520/01, Disared). The conduct declared contrary to art. 1.1.a) LDC and to art. 81.1.b) Treaty on European Union and penalized (300.000 EUR) consists in including the following clauses not allowed by the Regulation 1984/83 nor by the Real Decree 157/92 of exemption by categories: excessive duration of the contracts, exclusivity of lubricant sales, fixing of resale prices, capacity of Disa to inspect service stations and prohibition of industrial activities not allowed by Disa.

8. Were the 'competition problems' mentioned in Question 7 above covered by the media in your jurisdiction? If so, how were they dealt with? (I.e. how comprehensive was the media's treatment of the competition law issues?) Was the issue considered by the media to be an important element in the public debate on competition policy? If so, why? If not, why not?

Yes. The petrol subject has been largely treated and spread by all type of media.

Legal Procedures and Substance

9. Do you or any other consumer organisation bring (competition) complaints before a court or a competition authority on behalf of consumers?

Our organization not, but other consumer organizations yes.

10. If so, what were the most important cases that you brought in the last 1-2 years?

Union of Spanish Consumers (Unión de Consumidores de España - UCE) and the Association of Users of Banks, Saving Banks and Insurance (Adicae):

Demand to the Court of Competition Defence to not allow the agreement subscribed in December 2005 between the banks and the business-minded in order to reduce the commissions of the card payments until they do not explain in what extent this decrease will affect the final customer and until there are not guaranteed mechanisms from which the consumers could benefit.

Organization of Consumers and Users (OCU):

This organization contacts the Court of Competition Defence as they think that the success of Gas Natural's offer to purchase Endesa could provoke a serious risk in the increase of gas and electricity tariffs and would be a transaction that would cause irreversible damages in the free function of the market and informed the Court about a possible non-supplying.

Organization of Consumers and Users (OCU):

Against KOIPE, S.A. (KOIPE), because of presumed infractions of the Law for Competition Defence consisting of carrying out practices of vertical price fixing.

UCE Consumer Union of Extremadura:

Due to the existence of a practice prohibited by the Law for Competition Defence consisting of the recommendation of prices by the Provincial Association of Driving Schools of Badajoz.

11. If not, why not? Please be as detailed as possible. (Possible reasons include: no legal recourse, scarce resources, lack of information on anticompetitive practices...)
Because we are an organization dedicated to education, documentation and consultation and we do not take legal action.

12. Are 'class actions' possible in your jurisdiction?²

Yes

13. If so, is the class action procedure an 'opting in' or an 'opting out' procedure?³

The regulation of the collective actions of the Law of Civil Lawsuit does not foresee opt-out mechanisms, that means, a procedure through which the individual

² A class action lawsuit is a lawsuit in which a person or business acting as the plaintiff in a lawsuit represents a larger group of people that have similar legal claims against a particular defendant or group of defendants.

³ Essentially an 'opt in' class action is one where the potential claimants must expressly elect to be a member of the class. If they do not they will not be able to recover any of the damages awarded to the class. They may however bring their own claim. An 'opt out' class action by contrast is one where all potential members of the class (i.e. those that meet the definition of a class member under the relevant law) are considered members unless they expressly opt out of the class. With an 'opt out' procedure potential members must be given an opportunity to opt out. The award to that class is binding on all potential members except those who have expressly opted out. Only those who have opted out of the class can bring their own claim against the defendant(s).

consumers represented by the Association appear in person in the actions in order to state that they renounce to be a represented part in the initial action, avoiding that the pronounced sentence has affect as judgement. The autoexclusion of the affected persons from the process is not allowed. On the other hand, opt-in mechanisms are foreseen.

14. If so, what conditions need to be fulfilled in order to bring a class action?

When the persons affected by a harmful fact is a group of consumers or users whose components are perfectly determined or can be determined easily, the legitimization for the tutelage of these collective interests corresponds to the associations of consumers and users, to the legally constituted entities that have as objective the defence or protection of consumers and users as well as to the own groups of affected persons.

When the persons affected by a harmful fact are an indefinite multiplicity of consumers or users or difficult to be determined, the legitimization to sue the defence of these diffuse interests corresponds exclusively to the associations of consumers and users that are representative.

15. Is it possible for consumer organisations to be involved in cases that have come before the courts, for example through the use of *amicus curiae*⁴ briefs? If so, what particular mechanisms are available to the consumer organisation? Please be as detailed as possible.

The figure of *amicus curiae* does not appear explicitly in the Law of Competition Defence, however, it can be understood that this figure exists in the article 36.5 because in the procedure of prohibited and allowed agreements and practices it is

⁴ Page: 8

[0]*Amicus curiae* is a legal Latin phrase, literally translated as "friend of the court," that refers to a person or entity that is not a party to a case that volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it". The information may be a legal opinion in the form of a brief, testimony that has not been solicited by any of the parties, or a learned treatise on a matter that bears on the case. The decision whether to admit the information lies with the discretion of the court.

stipulated that, after the legal proceedings have been initiated, it is possible to publish a brief note about the fundamental extremes of them, with the objective that everybody can provide information within 15 days.

16. What substantive provisions of your competition law do you think are particularly useful in bringing complaints on behalf of consumers? Please elaborate.

- That the complaint of the conducts prohibited in the Law is public, that means everybody, interested or not, can lodge it at the Department of Competition Defence which initiates the legal proceedings when they observe rational signs that it exists.
- That one of the functions of the Department of Competition Defence is to address reports and recommendations about competition defence subjects to the organizations of consumers and users.
- The consultative function of the Court of Competition Defence as the organizations can realize consultations with respect to competition subjects.
- The usefulness of the Competition Defence Register which is public and where the agreements, decisions, recommendations and practices authorized by the Court are registered.
- That for the authorization of certain agreements it is an obligation to ask for information to the Council of Consumers and Users.

17. What substantive provisions of your competition law do you think are *not* particularly useful in bringing complaints on behalf of consumers? Please elaborate.

We have not find anything that is not particularly useful.

18. What particular standard of harm is pursued by the competition authorities in your jurisdiction? For example: harm to the competitive process; a consumer harm standard; substantial lessening of competition; significant impediment to effective competition...etc.

Competition Law Questionnaire ('Legislative Survey Part II')

- The agreements or practices prohibited (fixing prices or other commercial or service conditions, the limitation or control of production, the distribution, the technical development or the investments, the division of the market or of the supply sources, the application -in commercial or service relations- of different conditions for equivalent services that place some competitors in a disadvantageous situation against others, the subordination of the fulfilment of contracts when accepting supplementary services that are not in relation with the contract)

- The abuse of a dominant position

- The disloyal competition that hardly distorts the competition conditions in the market or that affects the public interest.