

SPAIN

(1998)

Executive Summary

1. The Royal Decree 295/1998 on enforcement of EU Competition rules in Spain allocates jurisdictions between Spanish Competition Authorities in a “rational materiae” way.
2. The Spanish Government kept on liberalising strategic sectors, such as telecommunications, transport, energy, post, etc.
3. Regarding anticompetitive practices, there has been a slight decrease in the number of cases opened (191), being the most frequent those cases opened because of a complaint, principally arising from the service sector. But at the same time, there has been an increase in the number of concluded expedients (8,16%).
4. The exemptions granted by the Tribunal for the Defence of Competition (TDC) refer mostly to the establishment of registers of late-paying clients and, in some cases, to vertical restraints such as exclusive and selective distribution agreements (4 cases).
5. The TDC made a total of 110 antitrust decisions. The Tribunal passed 19 condemnatory resolutions, imposing fines for a total of pesetas 449.895.000.
6. During 1998, the number of voluntarily notified merger operations rose from 19 to 31, which reflects a remarkable increase.

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I. Changes to competition laws and policies

Summary of new legal provisions of Competition Law and related legislation

1. The Royal Decree 295/1998 regulates the enforcement in Spain of European rules on competence.
2. It aims at implementing two objectives:
 - a) fill the existing gap in the field of the assignment of tasks.
 - b) depict the procedure for those expedients initiated following the EEC rules by the Spanish authorities.
3. To be more precise, the General Directorate of Economic Policy and Protection of Competition assumes the task of co-operating with the EEC authorities, without prejudice to the functions of other institutions.
4. The Law 11/1998 on Telecommunications, following the pattern designed by the Law 54/1997 on the Electrical Sector, assigns some tasks in the field of Competition to the Telecommunications Market Commission.
 - a) If the Commission detects restrictive practices, it will inform the SDC of it, and it will release a non binding report.
 - b) The Commission will inform about mergers in the Telecommunications sector when they are submitted to the Government approval, according to the Competition Act.
5. The Royal Decree 2486/1998 creates a new framework for the supervision of private insurance. According to it, the General Directorate of Insurance must communicate to the SDC those operations exceeding the threshold of the Competition Act.

II. Enforcement of competition laws and policies

1. Action against anticompetitive practices, including agreements and abuses of dominant positions

a) Summary of activities of Competition Authorities

The Service for the Defence of Competition (SDC)

6. The following tables show the main developments in the activities of the SDC during 1998 and comparisons with previous years.

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OPENED CASES				
YEAR	TOTAL	COMPLAINTS	SDC INITIATIVE	AUTHORIZATIONS
1991	94	74	11	9
1992	119	95	11	13
1993	141	99	9	33
1994	148	94	5	49
1995	158	86	13	59
1996	180	120	15	46
1997	268	214	14	40
1998	191	146	12	33

7. During 1998 there has been a decrease in the number of cases opened due to a complaint (146 cases), mostly arising from the service sector. In 1997 there were 214 cases opened because of a complaint (30% more than in 1998).

8. As for the cases opened by the SDC in 1998, 76 dossiers were related to “prohibited conducts” (article 1), 49 to “abuse of a dominant position” (article 6) and 31 to “distortion of free competition by unfair acts” (article 7).

9. Moreover, the SDC has received 33 applications for single authorisations. Although, as in previous years, most of the authorisations relate to the establishment of registers of information on late-paying clients, there has also been applications for authorisations of vertical restraints, such as exclusive and selective distribution agreements (5 cases). In addition, some exemptions have been applied for production agreements (2 cases) and price or fixing trade conditions (2 cases).

The Tribunal for the Defence on of Competition (TDC)

10. The following charts summarise the activities of the TDC in 1998:

VIOLATIONS		
CATEGORY	FOUND	NOT FOUND
VIOLATION CASES	19	67
AGREEMENTS	16	26
ABUSE DOMINANCE	2	25
UNFAIR COMPETITION	1	16

FINES	
TOTAL ANTITRUST DECISIONS	110
VIOLATION FOUND (Number of cases)	19
FINES IMPOSED (Number of cases)	16
AMOUNT FINED (Pesetas)	449.805.000

SINGLE EXEMPTION DECISIONS	
TOTAL	24
EXEMPTION GRANTED	17
EXEMPTION DENIED	1
EXEMPTION REVOKED	1
NO EXEMPTION REQUIRED	3
ACCEPT WITHDRAWAL OF APPLICATION	2

11. The TDC took a total of 110 antitrust decisions (considering that more than a decision, referred to different articles, is included in a resolution) . The TDC passed 19 Commendatory Resolutions, imposing fines amounting to a total of 449.895.000 pesetas.

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12. The exemptions granted by TDC refer mostly to the establishment of registers of late-paying clients and, in some cases, to vertical restraints such as exclusive and selective distribution agreements (4 cases).

b) Description of significant cases

RESOPAL - MACTAC EUROPE

17. In June 5, 1995, RESOPAL filed a complaint before the SDC against MACTAC EUROPE, S.A.

13. RESOPAL is a non - exclusive distributor of the self-adhesive vinyl produced by the Belgian firm MACTAC EUROPE. The latter imports and sells the same products by means of its own subsidiary in Spain, too.

14. The complaint consisted of two points:

- i) A strategy aimed at removing RESOPAL from the retail-market of the product. Though this manoeuvre, MACTAC tried to induce some persons, integrated in the retail network of RESOPAL, to become independent.

As a matter of fact, RESOPAL alleged that some of its former retail agents had set up their own firms Furthermore, MACTAC had changed its financial and supply policy towards RESOPAL.

- ii) The fixing of retail prices and conditions by MACTAC.

According to RESOPAL these facts contravened the articles 1.1 and 7 of the Law for the Protection of Competition (vertical restraints).

In the light of the written pieces of evidence, the Tribunal appreciated the existence of an agreement between MACTAC and its distributors in Spain, in order to fix the retail prices and conditions.

15. The Tribunal dismissed some allegations put forward by MACTAC:

- a) The practices prosecuted by Art. 1.1 are wholly independent of the existence of a dominant position in a market.

Therefore, it is not necessary to prove the latter fact.

- b) The self-adhesive vinyl is not a “quality food”, so that the imposition of a high price cannot be justified on the grounds of an effort not to deteriorate the product image.

16. MACTAC accused RESOPAL of carrying out an unfair competition, by drastically cutting its margins. But the Tribunal deemed this argument unacceptable, since the reaction against a supposedly illicit behaviour cannot be a forbidden agreement.

17. Finally, MACTAC claimed that the agreement was under the “de minimis” rule held by the EEC Communication 86/c231/02 which was in force at the time of the facts. Nonetheless the TDC answered that this Communication only stated that the agreements of a certain size could be prosecuted by both national and EEC Authorities.

18. The TDC imposed a fine for a total amount of 2.5 million ptas.

RED CROSS OF FUENGIROLA

19. In September 9, 1996, a soft drink machine entrepreneur filed a complaint before the SDC against the Townhall of Fuengirola.

20. The fact that gave rise to the complaint was the municipal concession to the Red Cross of thirty licenses for the installation of soft drink machines on the street.

21. Mr. García considered that this behaviour constituted an infringement of Articles 1 and 6 of LDC, which typify restrictive agreements and abuses of a dominant position.

22. 23. The case is specially interesting, since the Article 2 exempts those behaviours adopted by the Administration when acting as a non-economic operator or supported by a law. The Tribunal's decision is thought to have drawn a clear-cut line between the administrative and economic activities of the State. .

23. 24. In its analysis of the operation the Tribunal distinguished two sides: the subscription of the contract by the Red Cross reflected an economic behaviour, for this organisation acquired some favourable conditions to supply goods at the market of soft drinks. Meanwhile, the Townhall did not assume any obligation which made him act as an economic agent. Its behaviour boiled down to grant some licences, which can be qualified as an administrative decision.

24. Consequently, although the operation in itself could have economic repercussions(over Red Crosse's rivals in the market of soft drink trade), the article 2 was applicable.

CEPSA ESTACIONES DE SERVICIO

25. In November 26, 1997, the owner of an oil station (henceforth Montequinto) filed a complaint before the SDC against CEPSA, an oil wholesale distributor.

26. The complainer claimed that some points in his commission contract were against the CEE Rule 1984/83 about exclusive purchases. In particular, he denounced the imposition of abusive conditions; the price and trade conditions fixing; the establishment of unequal conditions for equivalent transactions and the infringement of the Article 2.1 of the mentioned Rule.

27. But before beginning to clarify those issues, the Tribunal had to classify the contract as one of "commission" or, by the contrary, as "resale". The reason underlying this fact was that, should it be a commission one, it could not properly reflect the relationship between two economically independent parties. As a result, it could not be subject to the Competition Act.

28. The Tribunal admits that in the bills of the oil station, the concept "commission" was mentioned. But at the same time, it is said that "the supplies will become property of the owner of the oil station since he receives them". Thereby, the TDC couldn't assess the relationship as one of commission, but of resale. Moreover, departing from this conclusion, it sent back the case to the SDC in order to check whether it complied with EEC 1984/83 Rule.

29. Though small in size, the case is very important and has to be put in connection with the 12-2-97 TDC's decision about a new type-contract which REPSOL, the biggest oil wholesale trader in Spain, planned to introduce in the market. Just like here, the Tribunal decided to examine the nature of the relations created by the contract and the implicit risks assumed by the supposed agent, concluding that his performance was that of a reseller.

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30. The transcend of this could be enormous, if the SDC applies the same doctrine to the amount of dubious contracts that are being assessed this year . For instance, many of their conditions could be renegotiated in a more pro-competitive way, according to the New Vertical Restraints Code, including a wider ability of retailers to fix prices under those suggested by the wholesalers.

ANTENA3, TELECINCO/TELEVISIONES AUTONOMICAS

31. In February 13, 1992, Antena3 and Telecinco, two private Spanish TV channels, filed a complaint before the SDC against the Regional Public Channels of Madrid, Cataluña, Galicia, Valencia and Andalucía.

32. Those channels argued that the denounced party abused of the dominant position they enjoyed thanks to the subsidies they receive . There were two ways in which they exerted their abuse: by paying non competitive prices for the programmes they buy, and by selling at non competitive prices their time for commercials.

33. First of all, the SDC inferred the absence of a dominant position. Its method was to compare their audience quotes with their commercial quotes: should the latter be disproportionately bigger, this would mean that their extra financial resources would have made possible the abuse.

34. Antena3 and Telecinco replied that the market definition was wrong, as the concept “audience” didn’t constitute a separate market, where to measure the quotes.

35. The Tribunal, even agreeing with the claimants, retorted that they drastically supposed that the receipt of subsidies generate a dominant position, which had not been proved by them. In sum, albeit the audience wasn’t a proper market, it works as a proxy to determine the success of a TV channel when it comes to publicity.

36. The claim was finally dismissed by the Tribunal.

37. Apart from the social weight of the parties, the case is particularly relevant because:

- i) it exemplifies the difficulties in defining certain markets and verifying a dominant position.
- ii) it states that the mere concession of huge subsidies does not imply the existence of a dominant position. Moreover, further investigation is needed to demonstrate the real strategic independence of the firm in its market.

2. *Merger and acquisitions*

a) *Statistics*

38. During 1998, 31 operations have been voluntary notified to the Service for the Protection of Competition (SDC) according to art. 15 of the Competition Act, which means a considerable increase with respect to 1997 (19) . At the same time, the SDC started inquiries regarding 24 merger operations. In six cases, as a result of these inquiries, the involved companies decided to present voluntary notifications. In the rest of the cases, after having collected the necessary information, it was established that none of the operations were contrary to the maintenance of an effective competition in the market, and, therefore, the SDC did not start any proceeding.

39. Five operations were sent to TDC. The TDC issued reports on three of them, and the reports on the other two were sent to the Government in 1999.

MERGER CASES	
NOTIFICATIONS	31
SENT TO TDC	5
TDC REPORTS PRODUCED	3

40. There were five Government's decisions, and they concerned the following cases:

- Luzenac Set/Ibetasa: authorised.
- Unilever/Ingranasa: authorised, with conditions.
- Procter & Gamble/Tambrands: authorised, with conditions.
- Sara Lee/Nugget, Kanfort: authorised, with conditions.
- Azucarera/Ebro: authorised, with conditions.

41. The notified operations analysed by the SDC concerned different economic sectors, having special incidence in food, retailing, chemistry, telecommunications, electronics and construction. Most of them were acquisitions.

b) Significant cases

b.1) Procter&Gamble/Tambrands.

42. By virtue of this agreement, the firm P&G, a multinational firm specialised in consumer goods, acquired the whole capital of Tambrands, a company which operates in the sector of cosmetics and personal hygiene products (being the most famous of them all the tampons Tampax).

43. Departing from a national definition of the relevant market, the SDC considered that the described operation strengthened the dominant position of P&G in the Spanish market of sanitary towels and tampons.

44. Finally, the authorisation of the merger was submitted to some conditions.

b.2) Azucarera/Ebro.

45. In the above mentioned case, the firms SOCIEDAD AZUCARERA DE ESPAÑA, S.A. and EBRO AGRICULAS COMPAÑIA DE ALIMENTACION, S.A. decided to merger and create a new society, AZUCARERA EBRO AGRICOLA, S.A.

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46. The expedient was sent to the TDC, since it entailed the union of the two main operators in the market of production and trading of refined sugar in Spain.

47. This problem is aggravated by the fact that, due to the EEC regulation on the sugar market, no firm could enter the national market for lacking the legal production share. Moreover, the merger might result anticompetitive in the market of sugar beet, since the emerging firm could be the only alternative for the farmers in some zones.

48. The Tribunal, once studied the case, subordinated the approval to the fulfilment of some conditions which tend to counterbalance the dominant position of the new operator and to foster efficiency.

iii. The role of competition authorities in the formulation and implementation of other policies.

Telecommunications

49. The new Telecommunication law, passed in April 1998, has enhanced the liberalisation of fixed and mobile services, has made possible for international operators with advanced technology to enter the Spanish market, and has made possible alternative networks with the use of cable networks. The law established an independent regulator, the Telecommunication Market Commission. Telefonica total privatisation finalised during 1998, the government keeping *a golden share*. During the first months of 1998 Retevisión became the second operator in basic telephone services. By the end of 1998 a new operator was allowed to enter the market of basic telephone services, this new operator is UNI2.

50. Concerning GSM mobile telephone services, during 1998 two companies were in the market, Telefonica and Airtel. By the end of 1998 the basis were established to have a new operator in 1999.

51. During 1998, eight geographical zones had been established in the cable market. The cable law was passed in 1995. Two operators can operate in each of these zones, one of them in each zone is Telefonica. During 1998, all eight non-Telefonica operators came into the market, they can provide all kind of signals, internet, television services, interactive services and telephone.

52. 1998 has been the last year for which the Government has fixed the interconnection prices, and has fixed them at a competitive level. In the future, the Telecommunication Market Commission will carry out this task. As for the final prices, the Government brought the prices of Telefonica into balance, by scrapping the cross subsidies between the long distance calls and the local ones. The Government intends that the prices of the dominant operator keep pace with its costs.

Energy

Electricity

53. In 1998 the Law 54/97 came into force. Enterprises consuming more than 15 GW/h were considered big consumers and given the possibility of choosing their supplier. This threshold will diminish year by year and as of 2007 all consumers will be able to choose their supplier (in 1999 this date has been advanced to 2002).

54. As a consequence of the 1997 Law, in 1998 the electricity prices fixed by the government lowered 3,63% (and accumulatively, 10,83% in real terms between 1997 and 1998).

Gas.

55. The new Hydrocarbon Law, passed in the Parliament in October 1998, establishes a progressive price liberalisation (beginning with the big consumers), during a period of fifteen years, as well as the accounting separation of activities (transportation, storage, distribution and marketing). Furthermore, the Act contemplates that the Government will fix an only tariff for the third parties access to the network, under some conditions.

Oil products retail.

56. The new framework provided by the Hydrocarbon Act deepens into the liberalisation of this sector. Some measures must be highlighted:

57. An access system is introduced to transportation and storage activities subject to regulated authorisations; the necessary conditions to obtain administrative authorisations for some activities are reviewed; the retail sales are liberalised, and the differentiation between the concepts of supplies to installations and retail stations is removed, in the sense that both are liberalised.

58. Besides, the Act enable third parties to accede to transportation and storage facilities, through a negotiated procedure. Along the same line, it enacts the Government to fix the access tolls. The oil stations are allowed to renegotiate their supply contracts in order to control the retail price.

59. The oil price liberalisation has been completed in October 1998, and its decrease has been remarkable.

Post

60. The new Postal Service Act, passed in July 1998, has liberalised the Postal Service to a great extent, and has granted basic services at accessible prices across the whole country. On the other hand, the new Statute of “Correos y Telégrafos” turns this institution into a public business entity. The goal of the reform is to make it more flexible and efficient and incentive it to adapt to its new liberalised environment.

Land

61. The new Regime on the Land and Valuation was passed in April 1998. One of its objectives was to cut the land price thanks to some measures that would increase its supply, foster the competition between owners, speed up the urbanisation processes and reduce the burdens on the land .

62. For instance, the land for the municipal patrimonies is reduced to a maximum of 10% (before it reached 15%). The increase in the land supply is made possible by reversing its definition, so that every piece of land is potentially subject to urbanisation unless the contrary holds (due to some specific protection or the inadequacy of the ground).

IV. Reports and studies on competition policy issues

The SDC

63. The SDC is entrusted by the Competition Act with the issuing of reports and studies on the economic sectors in order to determine the degree of competition in the different product markets.

64. During 1998 the SDC has carried out 53 studies and reports. These specially refer to sectors which have just been liberalised: press distribution, public subsidies and EEC regulation.

The TDC

65. The Law 7/1996 on The Regulation of Retail Trade establishes that the TDC has to evaluate the impact of a new hypermarket department store before the licence can be granted.

66. According to this, the TDC has issued 29 report and has studied 10 more cases, where reports were not deemed necessary.

67. The TDC has also issued reports on the following subjects:

A) Twelve reports complying Law 16/1989 arts. 2 and 26

Agreed competition among travel agencies

Chemical fertilisers

Tariffs established by Sociedad General de Autores

Commercial conditions imposed by Iberia on travel agencies

Regulations on fire protection equipments

Law 8/1997 on shopping opening hours passed in Valencia Comunidad Autonoma.

Mercamadrid opening hours and distribution

Ministry of Defence tenders

Services and activities carried out by Urban Property Boards in Cataluña

Licence to produce grapes *Superior Seedless*

Intellectual Property Law, art.25.

B) Four reports to be deliver to the Under-secretaries Commission. This Commission meets every week and analyses subjects prior to their approval by the Council of Ministers

Co-operative Societies Law draft

Public Administration Procurement Law draft

Highways users discounts

Commercial codes of conduct