

SPAIN*(1997)***Executive Summary**

1. The Competition Act 16/1989 was modified in 1997 by the Law 66/1997 on Fiscal, Administrative and Social Measures. A new article establishes time limits in the penalisation proceedings.
2. Royal Decree 295/1998 on enforcement of EU Competition rules in Spain allocates jurisdictions between Spanish Competition Authorities in a “*rational materiae*” way.
3. In February 1997 the Spanish Government approved a plan to liberalise the economic activities in sectors such as telecommunications, road and rail transport, books, energy, post, ports, etc. The Spanish Competition Authorities have played a very active advocacy role in the introduction of these measures by carrying out the necessary studies and reports.
4. With regard to competition enforcement 1997 has seen a considerable increase in the number of cases opened (268), being more and more frequent the cases opened because of a complaint (214), mostly arising from the service sector. The enforcement activities of the Service for the Protection of Competition (SDC) had to do with articles 1 (Prohibited conducts), 6 (Abuse of dominant position) and 7 (Distortion of free competition by unfair acts).
5. The exemptions granted by Tribunal for the Protection 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 (3 cases).
6. The TDC took a total of 55 antitrust decisions. The Tribunal passed 11 commdenatory resolutions, imposing fines for a total of pesetas 1.735.297.080.

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I. Changes to Competition Laws and Policies

Summary of new legal provisions of Competition Law and related legislation

7. Law 66/1997 on Fiscal, Administrative and Social measures has modified Competition Act 16/1989. A new article (art. 56) has been added to Competition Act establishing time limits in the penalization proceedings.

8. It aims at implementing two objectives:

- a) make more agile the instruction proceeding (SDC) as well as the final decisions (TDC) relate to files which have been opened by violation of Competition Act;
- b) adapt better to new Act on “Legal Regims of the Public Administrations and Common Administrative Proceeding”.

9. On the other hand, Royal Decree 295/1998 on enforcement of UE Competition rules in Spain allocates jurisdictions between Spanish Competition Authorities in a “*rational materiae*” way.

10. Moreover, it establishes civil servants’ powers when they have to investigate, according to EU rules, firms located in Spain.

II. Enforcement of Competition Laws and Policies

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

a) Summary of activities of Competition Authorities

The Service for the Protection of Competition (SDC)

11. The following tables show the main developments in the activities of the SDC during 1997 and comparisons with previous years.

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OPENED CASES				
YEAR	TOTAL	COMPLAINTS	SDC INITIATIVE	AUTHORISATION S
1990	104	80	4	20
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	

12. During 1997 there has been a considerable increase in the number of cases opened due to a complaint (214 cases), mostly arising from the service sector. In 1996 there were 120 cases opened because of a complaint (50 percent less than in 1997).

13. As for the cases opened by the SDC in 1997, 85 dossiers were related to “prohibited conducts” (article 1), 70 to “abuse of a dominant position” (article 6) and 73 to “distortion of free competition by unfair acts (article 7).

14. Moreover, the SDC has received 40 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 (3 cases). In addition, some exemptions have been applied for production agreements (2 cases) and price or trade conditions fixing (4 cases).

The Tribunal for the Protection of Competition (TDC)

15. The following charts summarise the activities of the TDC in 1997:

VIOLATIONS		
CATEGORY	FOUND	NOT FOUND
VIOLATION CASES	11	5
AGREEMENTS	9	4
ABUSE DOMINANCE	2	1
UNFAIR COMPETITION	-	-

FINES	
TOTAL ANTITRUST DECISIONS	55
VIOLATION FOUND (Number of cases)	11
FINES IMPOSED (Number of cases)	10
AMOUNT FINED (Pesetas)	1.735.297.080
FIRMS FINED	

SINGLE EXEMPTION DECISIONS		
TOTAL		39
EXEMPTION GRANTED		27
EXEMPTION DENIED		5
EXEMPTION REVOKED		2
NO EXEMPTION REQUIRED		4
ACCEPT	WITHDRAWAL	OF 1
APPLICATION		

16. The TDC took a total of 55 antitrust decisions. Most of the violations of the Competition Act deemed in 1997 were horizontal agreements. The TDC passed 11 Commendatory Resolutions, imposing fines amounting to a total of 1.735.297.080 pesetas.

17. The exemptions granted by Tribunal for the Protection 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 (3 cases).

b) Description of significant cases

INDUSTRIAS LACTEAS

18. The Small Farmers Union (UPA) filed a complaint against the Association of Dairy Industry (FENIL) for a recommendation regarding prices paid to farmers according to the quality of milk.

19. After dismissing one of the written pieces of evidence as either false or illegally obtained, the Tribunal for the Protection of Competition stated in its Resolution of June 3, 1998 (E.352/94) that, in any case, there was evidence enough to prove that the distribution by FENIL of a document with criteria (bonus or discount) to pay for milk according its quality (fat content, protein content, number of germs) was a recommendation of prices forbidden by article 1 of the Protection of Competition Act.

20. The Tribunal stated also that the application by forty nine dairy firms of the same prices recommended by FENIL, given that the market conditions (demand and supply) could not result in such

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uniformity of prices, had to be considered the result of an agreement forbidden by the same article of the Competition Act.

21. The Tribunal did not accept the allegation that the uniformity of prices was a consequence of the Common Market Organisation and the European Regulation for milk.

22. Therefore, the Tribunal imposed a 15.000.000 pesetas fine on FENIL and fines for a total amount of 1.177.150.000 pesetas on the forty nine firms that applied the recommended prices.

DESMOTADORAS DE ALGODON (RAW COTTON PROCESSING INDUSTRY)

23. A complaint was filed against a professional agreement subscribed by cotton processing firms to allocate quotas of raw cotton and to fix prices and other conditions in the raw cotton market.

24. The Tribunal for the Protection of Competition stated that the object of the agreement was that the raw cotton market to be shared by twenty one cotton firms representing 80 percent of the total market. This agreement to fix quota and prices provided also a system whereby those that exceeded their quota had to make compensating payments to those who didn't completely dispose of theirs.

25. The Tribunal, considering that market sharing and price fixing are serious violations of article 1 of the Competition Act, in its resolution of June 10,1997 (E:370/96) imposed fines for a total amount of 177.153.080 pesetas to be distributed according to their allocated quota among the twenty firms proved to be involved in the agreement .

FUNERARIAS DE MADRID

26. In 1991 UNESPA (an association of insurance companies) filed a complaint against Empresa Mixta de Servicios Funerarios de Madrid (EMSFM) according to which this company had breached Competition Law by increasing the price of different services, by eliminating the less expensive services, by imposing a 300 percent surtax on the burial in Madrid of non residents and by extending its monopoly in the transport of corpses from Madrid, where EMSFM had legal monopoly granted by the Municipal Government, to other cities.

27. In 1995 the SDC, decided not to report the case to the TDC considering that since EMSFM was in fact a legally established monopoly it was protected by article 2 of the Competition Act.

28. UNESPA appealed to the TDC which revoked the SDC decision and continued the procedure, stating that there was evidence concerning the following facts:

- in 1991 EMSFM was a company funded both by private and public capital;
- EMSFM had a dominant position in the Madrid funeral services market;
- EMSFM increased the price of its services by an average of 15.92 percent. In the case of services rendered to non residents the increase reached 300 percent;
- this increase in prices was in no way related to the cost of services provided;

- the new prices were approved by the *Ayuntamiento* of Madrid (Municipal Government);
- the prices applied in Madrid by EMSFM were substantially higher than the prices for the same services in towns around Madrid.

29. Since all these facts were accepted by EMSFM, the Tribunal reasoned that the core question was to come to a decision regarding the allegation according to which EMSFM, partially owned by the Madrid Municipal Authority, was obliged to accept the “public prices” fixed by this authority.

30. After an ample reference to former cases in TDC and the EU Court of Justice, the TDC stated that the companies partially or totally owned by public institutions, State or local authorities, are subject to the Competition Law in the same way as the private firms are.

31. At the same time, the TDC reminded that article 6.3 of the Law states that the prohibition of abusive exploitation of dominant position is also applicable when the dominant position has been established by legal provisions.

32. After stating the existence of abusive behaviour, the Tribunal, in order to evaluate the amount of the fine to be imposed on EMSFM, in accordance with article 10.2 of Competition Law, considered the seriousness of the violation, its effect on consumers, its duration and the size of the affected market,

33. In December 30, 1997 (E. 361/95) the TDC imposed a fine on EMSFM of pesetas 137.710.000 pesetas (1, 5 percent of the 1996 EMSFM turnover).

Interim measures

34. In 11 cases the SDC, applying article 45 of the Competition Act, proposed to the TDC interim measures that were considered necessary to ensure the effectiveness of the decision to be eventually taken.

35. TDC granted the interim measures in seven of these cases.

SERVICOM-TELEFONICA

36. In August 7, 1996, Servicios de Informacion Interactivos(SERVICOM) filed a complaint before the SDC against Telefónica de España S.A., Telefónica Transmisión de Datos S.A.(TTD, Unisource), Telefónica Servicios Avanzados de Información S.A. (TSAI) and Servicios y Contenidos por la Red S.A. (SYCPR), for collusive agreements and abuse of dominant position in services related with access to INTERNET.

37. Two months later, the SDC accepted Servicom request, asking the TDC for the adoption of interim measures to prevent the competitors of Telefónica de Espana and its group of companies from being excluded from the market during the time needed by the TDC to reach the final decision.

38. In its resolution of 4 February 4, 1997 (E.MC 18/96) the TDC explains that to decide on the application of interim measures the *fumus bonni iuris* and *periculum in mora* principles have to be evaluated.

39. The TDC defines the market affected as the market of information services through telecommunications.

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40. Telefonica de Espana and its group of subsidiaries are present in the three sub-markets that can be identified in the so defined market:

1. the carrier, that is to say, the basic telephone net where Telefónica de España, through Infovía, provides the Internet service to users all over Spain;
2. switching. Unisource makes possible the switching to the Internet service providers;
3. TSAI and SYCPR are active in the sub-market of content providers where they compete with more than other 500 firms (Servicom is included in this group)

41. All the companies concerned in the complaint use the Telefonica logo in advertising and commercial mail. Telefonica has implemented a single telephone number (022) to inform the public about all these services that it or its group of companies provide.

42. For more than 70 years, Telefonica has had the monopoly of telephone services in Spain. Recently new operators are competing with Telefonica in the basic telephone market.

43. The TDC considers that in the new markets opened to competition Telefónica must not use the former's monopoly instruments. Otherwise it would be impossible to achieve really effective competition.

44. If, for instance, Telefónica uses its commercial offices to distribute the services rendered in these new markets by its subsidiary companies, competitors like Servicom could be placed in a disadvantaged position.

45. As a matter of fact, in the last few months Servicom has lost market share and, if this loss is due to an abuse of dominant position, it could eventually be left out of the market and it would be impossible or very difficult to repair the damage. In that case, the final decision of the TDC would be meaningless.

46. In its resolution of February 4, 1997 (E.MC 18/96) the TDC decided to apply the following interim measures:

1. Telefónica and its subsidiary group of companies must discontinue the joint advertising of their Internet related services in order to allow the consumers of these services to be able to know which ones are provided by each company;
2. Telefónica and its subsidiary group of companies must cease using Telefónica's number 022 to distribute the switching, connecting and information services of Telefónica's new companies.

47. To ensure the effectiveness of these measures the TDC established a fine of 100.000 pesetas for each day of infringement.

48. When two months later the SDC, who had the responsibility of enforcing these measures, reported that the number 022 was still active and that joint advertising continued as before, the TDC imposed a fine of 14.800.000 pesetas on Telefonica.

2. *Merger and acquisitions*

a) *Statistics*

49. During 1997, 19 operations have been voluntarily notified to the Service for the Protection of Competition (SDC) according to art. 15 of the Competition Act, which means a slight reduction in the number of voluntary notifications with respect to 1996 (23). At the same time, the SDC started inquiries regarding 28 merger operations. In three cases, as a result of these inquiries, the companies involved 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 proceedings.

50. Seven operations were sent to TDC. Three of them were approved by the Government in 1997, subordinating its approval to the observance of conditions in two cases.

MERGER CASES	
NOTIFICATIONS	19
SENT TO TDC	7
TDC REPORTS PRODUCED	3

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

b) *Significant cases*

52. In 1997, three mergers, voluntarily notified to the SDC and sent to the TDC, were referred to the Government for decision.

53. All of them obtained the authorisation of the Government, although in two cases the authorisation was submitted to certain conditions to offset the damage to effective competition that the merger could inflict.

54. In the case Johnson/Schmalbach, the firm-Lubeca A.G. acquired 100 percent of the shares of Johnson Controls España S.A.

55. Continental PET España S.A. (a subsidiary of Schmalbach), was the leading producer in Spain of PET (polyethylene terephthalate) containers for fluid human food.

56. Consequently, the acquisition of Johnson Controls was a reinforcement of the leadership of Continental (market share exceeding 70 percent in some products) but it was established that the market of these products had a high degree of contestability, with no entry barriers and considerable idle capacity.

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57. Therefore, the Government decided not to oppose the merger and to approve it with the condition of reducing the validity of the seller's non-competition clause from five to two years and the obligation to report prices and trading conditions of the PET containers to the SDC.

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

58. In February 1997 the Government approved a liberalisation plan to foster economic activity. The aim was to design structural reforms to promote competition as well as to improve the quality of the regulation.

59. The General Directorate for Economic Policy and Protection of Competition has played a very important role in promoting competition in plenty of sectors of the Economy. These effects have resulted, as mentioned below, in important structural reforms and deregulatory measures in a wide range of economic sectors.

Books

60. Law 66/1997 of 30 December on Fiscal, Administrative and Social Measures has modified the price system. From now on, it will be possible to offer higher sales discount (12 percent). Until now the limit was 5 percent.

Tobacco

61. A bill on tobacco market liberalise manufacturing, import and wholesale for tobacco products coming from Non-EU countries. Besides, a new regulatory agency will be created.

Telecommunications

62. In March 1997, a governmental ruling establishes the interconnection charges and conditions for the access to the structure incumbent's network.

63. A new Spanish numbering plan have been designed by the government to allow the telecommunications infrastructure to develop in the most effective what possible.

64. Some measures have been taken regarding the dominant operator's prices for the provision of leased lines and international circuits.

65. A Royal Decree has liberalised pay-phones other than those set up in streets and squares and furthermore new licences for cable operators have been granted in different territorial areas. Another Royal Decree has liberalised satellite communications.

66. Regarding digital networks, a new governmental ruling has been approved. It establishes conditions for an effective competition through either integrated services digital network or public telecommunications network's.

67. The government described the powers and competence of the Regulatory Authority (*Comisión del Mercado de las Telecomunicaciones*) in order to supervise the market efficiently.

68. A Royal Decree establishes a general regime to provide personal communications services (DCS-1800).

69. Finally, a new general telecommunications Act has been approved by the Parliament. It described the basic principles of the future regulatory framework governing the telecommunications sector. This Act takes in account EU rules.

Road and Rail transport

70. GIF's Statute has been approved this year. As we pointed out in our last Annual Report, GIF -Gestor de Infraestructuras Ferroviarias- is a public body which has been created for the construction and administration of rail infrastructures.

71. Furthermore, Law 66/1997 of 30 December on Fiscal, Administrative and Social Measures develops a number of measures in order to open the rail market to new operators.

72. With respect to **road transport**, a Royal Decree of July 1997 has eliminated plenty of regulations which limited, in a quantitative way, the offer. Now, the controls will be more qualitative.

Ports

73. Law 62/1997 reinforces the ports autonomy, mainly to fix their prices.

Land and Housing

74. A land law has been approved, aimed at reducing land prices. To do so, it includes some measures to increase land offer and to promote competition among land owners.

75. With respect to **housing** an Agreement on financing of Officially Sponsored Houses -*Viviendas de Protección Oficial (VPO)*- will allow a greatest competition among financial entities.

Post

76. A bill on liberalisation of Postal Services promotes free competition in the sector. At the same time, it fixes limits for the public post operator's activities (Public Post System).

Energy

77. Law 54/1997, of 27th November, has been a very important step to liberalise the sector. It takes into account UE rules on the electricity single market and lays the foundations for a free market for the electric power generation.

78. As for **gas**, Law 66/1997 has eliminated some regulations concerning distribution at retail level.

79. In addition to this, a Royal Decree which was approved in December 1997 reduces thresholds to be considered as a "qualified" client.

IV. Reports and Studies on Competition Policy Issues

1. The Service for the Protection of Competition

80. 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.

81. During 1997 the SDC has carried out 69 studies and reports. These specially refer to sectors which have just liberalised.

2. The Tribunal for the Protection of Competition

82. 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 a licence can be granted.

83. According to this, the TDC has issued 48 reports and has studied 15 more cases, where reports were not deemed necessary.

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

- Draft Regulation on Tobacco Market;
- double financing of Public Televisions;
- Draft Royal Decree on TV satellite services.
- Draft Royal Decree on distribution of pharmaceuticals;
- bill on sport broadcasting rights;
- bill on electric power supply liberalisation;
- bill on Telecommunications;
- Draft Royal Decree on aid to cinematography;
- Draft Royal Decree on access conditions to gas facilities;
- bill on Fiscal, Administrative and Social Measures;
- bill on Postal Services liberalisation and Universal Postal Service;
- royal Decree 295/1998 on Enforcement of UE rules in Spain;
- bill of the Navarra Government on Phamarceuthical Attention.