

Unclassified

DAF/COMP/LACF(2011)15

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

30-Aug-2011

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/LACF(2011)15
Unclassified

LATIN AMERICAN COMPETITION FORUM

Session I: Competition Issues in Trade Associations

Contribution from Spain (CNC)

13-14 Septembre 2011, Bogotá (Colombia)

The attached document from Spain (CNC) is circulated FOR DISCUSSION under Session I of the Latin American Competition Forum at its forthcoming meeting to be held on 13-14 September 2011 (Colombia).

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JT03306210

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13-14 September 2011, Bogota (Colombia)

Session I: Competition Issues in Trade Associations

-- CONTRIBUTION FROM SPAIN (CNC) --

1. The application of competition law to trade associations in Spain

1. Competition law in Spain does not admit of any derogations in the activities of business and trade associations. The Competition Act (*Ley de Defensa de la Competencia* or Law), law 15/2007, 3 July, in additional provision 4.1, establishes that “for the purposes of this law, ‘enterprise’ shall mean any natural or legal person exercising an economic activity, regardless of the legal status of the entity and the way in which it is financed.”

2. Business associations are therefore also subject to compliance with competition regulations. Furthermore, as a business association is a separate legal entity from that of its members, it accepts responsibility for any possible non-compliance with competition regulations independent from that of its members, meaning that, in the same case of infringement, both the enterprises and the business association itself can be penalised.

3. The Law only provides for derogation of competition law in the case of conduct that is authorised under law. Any other conduct that restricts competition and that is without such legal status is subject to this law, irrespective of whether the conduct has or has not been propitiated, promoted or even imposed by way of provisions ranking below legislation by the public authorities at any level of government, whether at the central, regional or local level.

2. Cases of competition law infringement

4. The CNC has investigated the possibility of the infringement of competition law in the activities of business associations on numerous occasions and in different sectors. Several cases are given below.

5. In [*case 632/07 Feriantes-The Town of Peralta*](#), proceedings were brought against the municipal authorities in Peralta and the *Asociación Industrial de Feriantes de Navarra* (AIFNA) for having entered

into an agreement to prevent competition between traders and similar enterprises during the annual town celebrations held in 2005, 2006 and 2007, and AIFNA for the abuse of a dominant position through the application of this agreement in the use of arbitrary and discriminatory criteria in the allocation and distribution of stall facilities to traders.

6. With regard to the first accusation, the CNC's Council¹ held that the purpose of various clauses in the agreement was clearly to restrict competition, by preventing any competitive pressure from traders who did not belong to the association, and declared them to be contrary to the prohibition in article 1 of the 1.1 Competition Act 1989² and therefore null and void.

7. With regard to the second accusation (abuse of a dominant position), the Council underlined that the agreement placed AIFNA in a dominant position, whereby it was obliged to establish objective conditions for participation in the allocation of stall facilities in accordance with the principle of "special responsibility", which is required of enterprises with market dominance. In its opinion, AIFNA infringed this principle, in that the conditions for allocating market trading and related facilities permitted both arbitrary and discriminatory practices: for example, for the drawing of stall lots, traders were required to attend a meeting at the Association's headquarters, with AIFNA having the faculty to "not allow entry nor to allow the participation in the draw of such persons that appear to be inappropriate". AIFNA made use of this faculty and prevented natural and legal persons who were not members from entering and participating in the event.

8. In view of this, the Council gave AIFNA a fine of 3,000 EUR for the infringement of article 1.1 of the 1989 Competition Act and a second fine of the same amount for the infringement of article 6 of the 1989 Competition Act. It also fined the Town of Peralta 1,000 EUR for the infringement of article 1.1 of the 1989 Competition Act. It also ordered AIFNA to eliminate all criteria for the allocation of market trading facilities considered to be abusive of a dominant position within sixty days.

9. In [File s/0091/08 Jerez wine \(sherry\)](#), pursuant to the request from a winery in Jerez for application of the leniency programme, the CNC carried out inspections in the main offices of various makers of sherry (Jerez wine) and the winery association, FEDEJEREZ, and collected important material evidence of anti-competitive conduct that was subsequently penalised.

10. Various wineries (*bodegas*), together with the participation of the business association and the *Consejo Regulador de la Denominación de Origen* (the regulatory board for the designation of origin of sherry) established a cartel in 2001 to control the production and price of sherry for export under the trademarks of foreign retailers in the so-called BOB market (Buyer's Own Brand) as private label sherry. Together with restrictions on production, other complementary measures often used in this type of cartel were devised, such as coordinated price increases, agreements to share markets and customers, and the corresponding monitoring of compliance with the agreements by all parties concerned.

11. The eight enterprises that participated in the cartel – all of its members with the exception of the winery that reported the cartel – were given fines ranging from 28,000 EUR to 2,300,000 EUR, according to their size and participation in the cartel, with the total sum of fines coming to 6,123,000 EUR. Having been found guilty of contributory infringement, both the Consejo Regulador (200,000 EUR) and the winery association (400,000 EUR) were fined.

¹ The CNC's decision making body.

² The complaint and handling of the infringement took place prior to the passing of law 15/2007, and the previous anti-trust law (law 16/1989) was applied.

12. Lastly, [File s/0053/08 FIAB-CEOPAN](#) concerns several press releases published in July, August and September 2007 by various associations in the foodstuffs sector allegedly to alert public opinion to the increase in the cost of certain raw materials. These increases were quantified in all of the press releases, the structural nature of the price increases was stressed and the idea that this was going to have an impact on the end price of foodstuffs was expressed in more or less explicit terms.

13. In its ruling, the Council held that this action by the associations constituted a wrongful collective recommendation under the Law, given that the content, wording and dissemination of the press releases conveyed the message that the increase in costs would inevitably lead to higher end prices. The press releases therefore constituted a sign for companies to act in the same way and to predispose consumers to accept future price increases. Communication between the associations concerned contributed to their taking into account each others press releases, their coordination of the message that they wanted to put across and the publicising of the same, thereby enhancing the capability of their conduct to distort competition.

14. The Council noted in its Resolution that both associations and the persons who discharge managerial responsibilities and represent them must be aware that, as regards public communication, their messages may transgress the scope of what is lawful if they unify the behaviour of their associates and that of other third parties and thereby alter normal market behaviour.

15. The Council decided to fine the nine associations responsible for the conduct a total of 1,309,000 EUR, broken down into individual fines that ranged from between 500,000 EUR and 15,000 EUR, according to the importance of each sector and the role played in the infringement of the Competition Act by each association.

3. The Guide for Business Associations

16. Following various legal proceedings against professional associations, and especially after the aforementioned Resolution on collective recommendation, associations in various sectors expressed interest in obtaining more precise guidelines on the evaluation of their activities from the perspective of competition advocacy. In response to this interest, at the end of 2009 the CNC published its *Guide for Business Associations* (in [Spanish](#) and [English](#)) within the framework of its activities to promote competition.

17. The purpose of this short (23 pages long), easy-to-use document is to offer business associations a series of guidelines on the main factors to be taken into account so as to avoid anti-competitive conducts.

18. The Guide deals first with competition law enforcement and business associations, which is followed by a series of chapters with the main types of competition infringement committed by business associations. Details are given of what each infringement consists of, including a series of practical examples based on cases dealt with by the CNC. Mention is made of the fact that the main infringements are those relating to decisions and recommendations on pricing, market sharing and other trading conditions; boycotts; the exchange of information with member companies; sectoral rules on advertising; standardisation rules; and standard contracts.

19. The Guide pays special attention to the risk that competition will be distorted due to the exchange of information between competitors in business associations and points to it as being one of the main potential problems in the activity of these associations.

20. The frequent exchange of information between members of an association enables all market operators to regularly obtain and share an understanding of the market and market trends that has an influence on their respective individual marketing policies, while also allowing for possible price fixing

and market sharing agreements. An association can encourage this exchange of information through the compilation of databases, reports, annual statistics, etc.

21. The greater the access by competitors to sensitive and disaggregated marketing information (including turnover, prices, costs, customers, investment, etc.), the greater the risk that competition in the market will be distorted, all the more so when the information is frequently updated and exchanged. Other factors of concern for the CNC are the limitation of access to information for association members, the restriction of access to information to third parties, and whether member companies are obliged to participate in information exchange programmes.

22. The Guide refers to the three following practical examples on how the CNC analyses the exchange of information. In [File A 329/02 Statistical data on the Brewing Industry](#), in a ruling by the TDC (*Tribunal de Defensa de la Competencia*, the then Competition Tribunal and predecessor of the CNC), authorisation to compile statistical data on the brewing and marketing of beer as requested by the *Asociación de Cerveceros de España*, the Spanish association of breweries, was declined on the grounds that the high degree of concentration in the market and the sensitive nature of the information being shared would increase the risk of collusion. Conversely, in [File A 337/03, Morosos FEDECAM](#), authorisation was given for information to be shared on delinquent payments amongst the members of the Spanish federation of cement derivatives, traders and warehousemen (*Federación Empresarial de Derivados del Cemento y Comercio-Almacenistas, FEDCAM*), given that it involved a voluntary arrangement that, for competitive reasons, allowed the members to freely establish their policy with regard to bad debtors.

23. Lastly, in [File 588/05, Film Distributors](#), the TDC ruled that FEDICINE (*the Federación de Distribuidores Cinematográficos*), the Spanish federation of film distributors, was liable for an infringement of the Law for compiling and maintaining a database that allowed member distributors to exchange sensitive and strategic information in order to circumvent free competition, which included projected film premiere dates up to one year in advance and disaggregated figures for box office revenues according to type of film, week and cinema, for which it was fined 900,000 EUR. This fine was separate from the fines of 2,400,000 EUR given to each of the five companies that had entered into agreement over their commercial policies.

24. In addition to the description of the different possible infringements, the Guide explains that the consequences of committing any infringement could, amongst other things, lead to any decisions by the association being considered null and void, in addition to fines being imposed on the association, its members and the directors of both. Furthermore, the association could also be sued under commercial law in the private enforcement of competition law and forced to compensate any injured parties for its actions.

25. Following publication of the Guide, which was well-received by the business associations, the CNC is considering the possibility of these associations cooperating in work to promote competition in their respective spheres of activity.