



Competition: a benefit for all

Guide for Business Associations



Competition: a
benefit for all

Competition: an
obligation for all

Contents

1. Introduction

.....5

2. Business associations and competition law

.....6

A. Decisions and recommendations on pricing, market sharing and other trading conditions.

.....8

B. Boycotts

.....10

C. Exchange of information with member companies

.....11

D. Advertising

.....13

E. Standardisation

.....14

F. Standard Contract

.....15

3. Consequences of violating the competition act

..... 18

1. INTRODUCTION

Business associations play an important role in Spain given the social and economic functions they perform and the strong tradition of the association model in different economic sectors.

The organisation of different business corporations into associations is a well entrenched tradition in our country. Leading examples are the Chambers of Commerce, Industry and Navigation, the various associations and groups that belong to the Spanish Confederation of Business Organisations (Confederación Española de Organizaciones Empresariales — CEOE), professional associations and colleges, the councils that regulate denominations of origin in the agricultural sector, and even the more recently created self-regulating industry entities to promote codes of good practices.

The continued vigour of business associations is due to the usefulness of the services they provide to their members and to the economy as a whole. They articulate the business community's representation, perform services that can contribute to modernising production and promote socially responsible behaviour.

However, inasmuch as the associations provide a forum for collaboration between companies that compete against each other in the market, their actions must be especially cautious with respect to competition rules. It must not be overlooked that competition law does not just apply to the corporate members of these associations; the organisations themselves, insofar as they carry on activities of an economic nature, are also subject to antitrust obligations.

Both the associations and the executive officers that represent them must be mindful that their actions may run afoul of competition law if they are capable of disturbing the normal functioning of the market, mainly by serving to unify the conduct of members and that of other parties as well.

There are numerous cases in which the National Competition Commission (Comisión Nacional de la Competencia or CNC) and its predecessor, the former Competition Tribunal (TDC), have dealt with the conducts of business associations and imposed sanctions on them where pertinent.

Also, the new Spanish Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia — LDC) has eliminated the system of preliminary authorisations, which means that it is now the associations themselves that

must assess whether their practices and arrangements comply with the requirements of competition law.

The CNC therefore believes it appropriate to publish this Guide for business associations as part of our competition promotion and advocacy efforts.

2. BUSINESS ASSOCIATIONS AND COMPETITION LAW

How can this Guide help business associations? _____

The purpose of this Guide is to offer business associations guidance on the main factors they must take into account in order to avoid engaging in anti-competitive conducts.

How does the Competition Act affect my association?—

As forums that bring together business competitors, these associations have to be aware that certain practices in their routine activities could potentially constitute infringements of antitrust laws.

Where this occurs, a violation of the Competition Act may give rise to the levying of sizeable fines (see chapter 3).

What is the rationale for public defence of competition? _____

The existence of effective competition between enterprises is one of the core elements of a market economy. Competition disciplines the actions of companies and reassigns economic resources to the most efficient operators and techniques. Competition thus comes to the forefront as a key stimulus for innovation, technological progress and the quest for more efficient means of production.

What public institutions are responsible for enforcing competition law? _____

The National Competition Commission (Comisión Nacional de la Competencia — CNC) is the public institution in charge of ensuring the existence of effective

competition in markets at the national level. The CNC has replaced the former Competition Tribunal (TDC) in these functions.

At the European level, it is the European Commission that is responsible for enforcing community competition rules.

Some of Spain's regional governments (Autonomous Communities) also have their own competition authorities responsible for prosecuting conducts prohibited by the Competition Act whose effects do not go beyond the territory of their region.

Does competition law affect business associations or only companies? _____

The associations are subject to the same competition rules as are companies or individual economic operators. Inasmuch as it engages in activities of an economic nature, a business association has the obligation to comply with the laws and regulations on competition.

What are the most egregious conducts that the Competition Act seeks to punish and prevent? _____

In Article 1, the LCD prohibits agreements, decisions or recommendations that have as their aim, consequence or possible consequence a restriction of competition in the market. Conducts of this kind typically take the form of arrangements or agreements to fix prices or other trading conditions, limit output or share the market.

An example would be the case where certain companies in the same sector agree to raise the prices they charge the public for their products in unison and by a similar amount.

Can an association's decision be subject to legal punishment? _____

A business association's decision may constitute an anti-competitive practice and hence be punishable under the Competition Act.

It bears noting that the way in which the association's decision is adopted is of no relevance on its being considered anti-competitive: if it is capable of restricting competition, it is prohibited under the Competition Act.

How about a mere recommendation? _____

Both the associations and the officers that represent them must be mindful that the messages they issue in the form of recommendations (a declaration of intentions in the press, for example) may be unlawful if they are likely to unify the behaviour of their members and that of other parties in a way that alters the normal operation of the market.

What should an association take into account in order not to engage in anti-competitive practices? _____

There follows a discussion of the main areas in which the actions and recommendations of business associations can raise the most problems for competition in the market. The examples are given to facilitate an understanding of the issues addressed and are not intended to be an exhaustive list of administrative practice and case-law in each case.

A. Decisions and recommendations on pricing, market sharing and other trading conditions.

One of the cases that arouses the most concern from an antitrust standpoint involves decisions and recommendations by business associations that affect key aspects of commercial activity and are addressed to their member companies or to some other operator in the market.

In a competitive market, companies must be able to set their commercial and pricing policies autonomously. Therefore, business associations must refrain from making any decision or recommendation that serves to reduce or eliminate that autonomy of their member companies.

When an association makes announcements that can influence the actions of companies in pricing, sales, contract terms and conditions and, in general, any other commercial variable capable of giving companies a signal as to how they should conduct their businesses, it must be mindful that its actions may be scrutinised by antitrust authorities to evaluate their objectives and possible restrictive effects on competition.

Such recommendations can be made through highly diverse means: circulars, letters, press, websites or statements by executive officers. They can also take very different forms: an explicit announcement of prices; publicity for price hikes

announced by other companies or sectors, such as to give them credibility; the need to pass cost increases on to customers. The reliance on less explicit mechanisms does not necessarily lessen the restrictive nature of the conduct if the message is apt to unify the behaviour of the companies concerned.

Example: In 2009 the CNC levied a fine on the Spanish Federation of Food and Beverage Industries (Federación Española de Industrias de la Alimentación y Bebidas — FIAB) and another eight food sector associations for making a collective pricing recommendation in a series of press releases issued by those associations. The content, wording and dissemination of the press releases contributed to conveying the message that it was inevitable that certain cost increases would be passed through to the end price. This served as a signal for the companies to act in unison and prepare consumers to accept price hikes.

CNC Resolution (Case S/0053/08 FIAB and Members) of 14 October 2009.¹

Example: In a ruling in 2004 the former Competition Tribunal (TDC) held that the National Federation of Wholesale Distributors of Pharmaceutical Specialties (Federación Nacional de Asociaciones de Mayoristas Distribuidores de Especialidades Farmaceuticas — FEDIFAR) had engaged in conduct prohibited by Article 1 of the Competition Act by recommending that its members take a common stand in response to the changes proposed in the commercial policy of a certain drug maker (Pfizer). The Tribunal concluded that the independent response of each wholesaler was replaced by a common position imposed by the association, thereby restricting competition in the market.

TDC Resolution (Case 553/03, FEDIFAR) of 8 January 2004.

Example: In 2000 the TDC fined the Spanish Union of Insurers (Unión Española de Entidades Aseguradoras — UNESPA) for a press strategy in which that association communicated that insurance premiums would have to rise between 7% and 10% as a result of various developments. The Tribunal held that this conduct would foster coordination of the behaviour of sector companies and make public opinion aware of the need for such increases.

TDC Resolution (Case 479/99, UNESPA) of 1 December 2000.

Example: The TDC levied a fine in 2004 on the Madrid Professional College of Dental Prosthetists (Colegio Profesional de Protésicos Dentales) for publishing, in a study of costs in the sector, a table of minimum costs and retail prices proposed for their services. The Tribunal held that the association's conduct

¹ Resolution not final

was a collective recommendation for its members to apply certain minimum prices.

TDC Resolution (Case 566/03, Dental Prosthetists of Madrid) of 27 May 2004.

Example: In 2009 the CNC fined the Regulatory Board (Consejo Regulador) for the Vinos de Jerez and Manzanilla de Sanlúcar Denomination of Origin for a system of sales quota that had the declared aim of ensuring quality and abundance by traditional wine making methods. The CNC held that this restricted competition in the market and favoured the sales of less efficient winemakers to the detriment of others that were more competitive, and did not qualify for the exemptions from application of competition law available under European rules.

CNC Resolution (Case 2779/07, Regulatory Board for the Vinos de Jerez and Manzanilla de Sanlúcar Denomination of Origin) of 4 June 2009.²

Example: In a 2009 Resolution the CNC ruled that certain price conditions included in collective bargaining agreements or involving other anti-competitive conditions unrelated to labour matters were in violation of competition law.

CNC Resolution (Case S/0077/08, Security Collective Bargaining Agreement) of 17 March 2009.

B. Boycotts

One of the most harmful anti-competitive acts that a business association may commit is to boycott a market operator, whether a supplier, customer or competitor.

A boycott may take diverse forms, although as a general rule it will involve a coordinated response by the member companies intended to directly harm another operator or operators with whom they maintain some type of relation.

This attack on the right to pursue its business of the target of the boycott is contrary to Article 1.1 of the LDC and can bear no justification whatsoever. In particular, it is not acceptable to try to justify a boycott as a response to unlawful actions of the boycotted operator: the defence against illegal competitive conduct involves a complaint and prosecution of the infringement, not the commission of another act contrary to competition law.

² Resolution not final

Example: In 2001 the TDC fined various associations of Fair Organisers, namely, the Coordinadora Provincial de Empresarios Feriantes of Huesca, the Confederación Española de Industriales Feriantes and the Asociación Provincial de Empresarios de Feria of Huesca for recommending that their members boycott the Huesca Fair, and for publishing notices in the press denigrating the company that had won the tender to organise said Fair.

TDC Resolution (Case 503/00, Huesca Fair Merchants) of 24 October 2001.

Example: In 2000 the TDC ruled that the professional association of Pharmacists of Valencia (Colegio de Farmacéuticos de Valencia) violated competition law when it issued a circular urging its members to hinder or discontinue the sale of products by a certain company (Nestle), in response to that company's decision to begin selling its products in commercial centres.

TDC Resolution (Case 472/99, College of Pharmacists of Valencia) of 07 April 2000.

Example: In 1998 the TDC ruled that the Official College of Real Estate Agents of Aragón and Soria had engaged in an anti-competitive practice when it published various advertisements that contained misrepresentations and misleading statements asserting their rights of exclusivity as real estate brokers and denigrating other brokers involved in that activity, with the aim of driving real estate agents who were not members of the Official College out of the market.

TDC Resolution (Case 405/97, Real Estate Experts 2) of 28 July 1998.

C. Exchange of information with member companies

It is quite common for business associations to carry out internal initiatives that involve exchange of information amongst their corporate members. The information obtained through these exchanges on the market and its evolution can be very useful for member enterprises and for other operators as a source of highly relevant data that allows each company to chart its commercial policies autonomously and independently.

However, the compilation of databases, reports, annual statistics, etc. by a business association from the information provided by its members may give rise to or form part of an agreement to fix prices, share markets or set other conditions, in which case it is prohibited by Article 1 of the LDC.

The greater the access by competitors to sensitive and disaggregated commercial information (including sales, prices, capital spending, advertising expenditure, costs, customers), the greater the risk that competition will be distorted in the market, all the more so when the information is updated and exchanged frequently.

There are other factors that competition authorities may take into account when analysing exchanges of information. Such factors include whether access to the information by third parties is restricted and whether member companies are obliged to participate in the information exchange programme.

Example: In 2004 the TDC declined to authorise the compilation of statistical data on beer brewing and sales requested by the Spanish association of breweries, the Asociación de Cerveceros de España, holding that the high degree of concentration in that market and the nature of the information shared would generate a risk of collusion between the largest players in the market.

TDC Resolution (Case A 329/02, Brewery Statistics) of 30 March 2004.

Example: In 2003, conversely, the TDC did authorise the sharing of information 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), because it involved a voluntary arrangement, maintained the full commercial freedom of the members and established the rights of the non-payers to access and correct the information.

TDC Resolution (Case A 337/03, Payment Delinquency FEDCAM) of 13 November 2003.

Example: In 2006 the TDC fined the motion picture distributors federation, the Federación de Distribuidores Cinematográficos (Fedicine), on finding that the association's compilation of a database that allowed member distributors to share decisive information for setting their commercial strategies (projected film premiere dates, box office revenues, attendance figures by type of motion picture, cinema, city, etc.) was contrary to Article 1 of the LDC. The TDC held that access to information of such key importance for defining commercial strategies represented an important obstacle to competition in the market.

TDC Resolution (Case 588/05, Film Distributors) of 10 May 2006.³

³ Resolution not final

D. Advertising

The bylaws of business associations and other internal rules such as deontological, advertising and self-regulation codes prohibit or place limitations on certain advertising practices (for example, comparative advertising) or on the making of certain claims in advertising messages (for example, references to the price of the service) of the member companies that go beyond what is considered fair or lawful under the Unfair Competition Act and General Advertising Act.

It must be borne in mind that in marketing goods and services, advertising is of vital importance to the competitive activity of businesses. Therefore, an essential condition for such rules or codes of advertising self-regulation to be considered lawful is that they pursue a public interest (protection of health, of children ...) and are indispensable for its attainment.

A business association may consider it good policy to carry on a joint advertising campaign in order for its members to transmit a given message to their customers.

If the advertising campaign contains recommendations on pricing or other trading conditions it will be considered, in general, contrary to the Competition Act, as it would be limiting the autonomous actions of operators vis-à-vis their customers, suppliers or competitors.

When the purpose of the initiative is solely joint advertising, it may be regarded as not adversely impacting competition in the market provided that the association members are not prevented from carrying on their own advertising or made subject to other types of restraints.

Example: In 1997 the TDC analysed an agreement sponsored by the Spanish Videographic Union (Unión Videográfica Española) to conduct an advertising campaign to promote video rentals. Since the arrangement did not imply any restriction of competition or prohibit individual advertising by the association's members, and was even open to other non-member companies, it was not considered as to violate Article of the LDC.

TDC Resolution (Case A 222/97, Video Films) of 16 September 1997.

Example In 2000 the TDC examined a code of self-regulation drawn up by the Spanish Federation of Distilled Spirits (Federación Española de Bebidas Espirituosas) that was intended to be binding for advertising of alcoholic beverages. The TDC concluded that, although the code was contrary to Article 1 of the LDC because it reduced the independent capacity of member

companies to develop their own commercial policies, it could be authorised because the objective was to protect general interests of benefit to consumers and to the rest of the citizenry, the restrictions imposed were indispensable for achieving that aim and the agreement could not be used to eliminate possible competitors.

TDC Resolution (Case A 274/00, Advertising Distilled Spirits) of 10 November 2000.

Example: In 2000 the TDC fined the Córdoba professional association of dental practitioners (Colegio de Odontólogos) for drawing up rules that limited the capacity of its members to advertise in the Yellow Pages.

TDC Resolution (Case 471/99, Córdoba Dental Practitioners) of 5 October 2000.

E. Standardisation

There are certain sectors in which reasons of efficiency would justify establishing certain technical or qualitative requirements for products and services. Associations may promote the adoption of technological, quality or other such standards.

However, standardisation arrangements that introduce unnecessary restrictions of competition would be prohibited, for example: those that impose entry barriers that are not justified by the ends pursued or that make the standard obligatory for the companies.

Example: In 2005 the TDC levied a fine on the Spanish association of makers of corrugated paperboard (Asociación Española de Fabricantes de Cartón Ondulado — AFECO) for an arrangement to set standards for fruit and vegetable packing material that constituted a quality seal (Platform) and which included a prohibition on manufacturing and marketing products not subject to their quality standards. The TDC held that the standardisation arrangement was contrary to Article 1 of the LDC because it restricted the freedom of the companies involved to manufacture products that did not meet the agreed standard and denied the quality seal to other manufacturers and other alternative trademarks.

TDC Resolution (Case 575/04, Paperboard Manufacturers) of 6 March 2005.

F. Standard Contract

A market economy is built on the dual principle of free enterprise and freedom to contract. The use of a standard contract, insofar as it standardises the contract terms eventually signed by different operators who compete in the same market, is, in essence, contrary to those principles.

The application of standard contracts can affect free competition by curbing the independence of economic operators and unifying their behaviour. By aligning commercial strategies, standard contracts limit the capacity of customers to choose amongst diverse offerings, not just as regards price and function, but also in relation to other commercial terms. Furthermore, such alignment of business conducts may foster collusion.

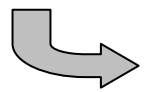
Competition authorities thus tend to be very strict when analysing standard contracts. They are generally considered unlawful, unless their benefits can be demonstrated and clearly offset the risks they entail.

Example: In 2007 the TDC examined a request submitted by the Spanish association of manufacturers of ready-mix concrete, the Asociación Nacional Española de Fabricantes de Hormigón Preparado, for authorisation of a standard supply contract for ready-mix concrete. Although the initiative was judged to constitute a collective recommendation contrary to Article 1 of the LDC, the TDC authorised it on an exceptional basis, because adherence was voluntary, it was not likely to eliminate competition and consumers could stand to benefit from the efficiency gains it would generate.

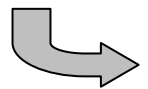
TDC Resolution (Case A 362/07, ANEFHOP Standard Contract) of 6 June 2007.

BUSINESS ASSOCIATIONS AND COMPETITION LAW

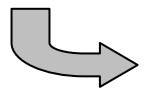
A. Decisions and recommendations on pricing, market sharing and other trading conditions



B. Boycotts



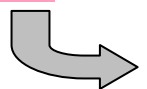
C. Exchange of information with member companies



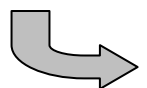
D. Advertising



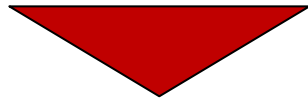
E. Standardisation



F. Standard Contract



CONSEQUENCES OF VIOLATING THE COMPETITION ACT



Can the CNC repeal the decisions of associations?

What fines are provided for in the event of infringements of the Competition Act?

Can penalties be levied on association officers?

What other consequences may arise from violations of the Competition Act?

3. CONSEQUENCES OF VIOLATING THE COMPETITION ACT

Can the CNC repeal the decisions of associations? _____

The law provides that association agreements, decisions and recommendations that are considered anti-competitive will be absolutely null and void.

Faced with a collective decision or recommendation, association members should abstain from endorsing it or from following the association's conduct in order to avoid engaging in a prohibited conduct.

What fines are provided for in the event of infringements of the Competition Act? _____

According to Article 63 of the Competition Act, fines may be levied on business associations of as much as 10% of the turnover of their members.

If the turnover cannot be calculated, the Act provides that fines of more than 10 million euros can be imposed for very serious infringements.

If the association does not have the funds to pay the fine, it would be obliged to collect contributions from its members to cover the amount of the fine.

Can penalties be levied on association officers? _____

The members of the executive bodies of associations who take part in the sanctioned conducts are subject to a fine of up to 60,000 euros.

What other consequences may arise from violations of the Competition Act? _____

The association may be sued before a Commercial Court by any injured party and be ordered to pay compensation for the damages caused by the unlawful conduct.

Competition: an obligation for all

Guide for Business Associations

