CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

REPORT ON THE FIXING OF

MINIMUM TARIFFS FOR THE CARRIAGE OF

GOODS BY ROAD

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1. BACKGROUND

On 12 June 2008, in accordance with the provisions of article 25 of Law 15/2007 of 3 July 2007, the Spanish Competition Law [Ley de Defensa de la Competencia], the Spanish Ministry of Development [Ministerio de Fomento] requested a report from the Spanish National Competition Commission [Comisión Nacional de la Competencia] on the fixing of minimum tariffs for the carriage of goods by road and its impact on competition by reference to the domestic and Community legislation.

In order to prepare the report asked for, account has also been taken of Order PRE/1664/2008 of 13 June 2008 which publishes the Resolution of the Cabinet which takes cognisance of the Agreement between the Central Administration [Administración del Estado] and the Carriage of Goods Department of the National Road Transport Committee [Departamento de Transporte de Mercancías del Comité Nacional del Transporte por Carretera dated 11 June 2008 (Spanish Official State Gazette [BOE] no. 144 of 14/6/2008).

At point 2.12 of the Agreement of 11 June 2008 the following measure is included:

"Preparation of a specific Plan by the National Competition Commission to look at possible practices constituting unfair competition in the context of contracts for carriage by road with particular reference to possible situations of sales at a loss."

2. LEGAL FRAMEWORK OF REFERENCE

2.1. Regulatory framework for the carriage of goods by road

In Spain the carriage of goods by road is fully liberalised, although it is necessary to obtain authorisation to become a carrier. Administrative intervention in the sector is only possible through the establishment of conditions or quantitative restrictions on the grant of such authorisations in certain assessed situations and through the fixing of maximum prices.

The basic legislation of reference for the sector is Law 16/1987 of 30 July 1987, the Land Transport Management Law [Ley de Ordenación del Transporte Terrestre], which regulates not only road transport but also rail transport.

Articles 3 and 4 of the Land Transport Management Law establish the general principles which the management and operation of the transport system must follow, which are coordination and interconnection, **satisfaction of the needs of the community and the maintenance of market unity in Spanish territory**.

Within the context of the provisions that are applicable to all these forms of transport, article 12 of the Land Transport Management Law establishes that "in accordance with article 38 of the Constitution and in accordance with the general principles contained in articles 3 and 4 of this Law, the framework in which transport services and activities have to be carried out is that of a **market economy, with the obligation on the public authorities to promote productivity and the maximum use of resources**".

The Land Transport Management Law specifies a series of instruments that the Administration may use in order to regulate both road and rail transport activity. In particular, article 18 refers to the ability of the transport authorities to establish mandatory or benchmark tariffs in the context of public transport [1], in the following terms:

1. *The transport authorities may establish mandatory or benchmark tariffs for public transport and activities that are ancillary and complementary to the transport regulated in this Law. These tariffs may fix single amounts or maximum or minimum limits or both. If there are no tariffs, contracts must be entered into at the usual or market prices of the place in which the contracting takes place.*

[1] *Public transport* is transport carried out for reward on behalf of someone else.

2. *The fixing of mandatory tariffs provided for in the preceding point must be determined on transport management grounds that are connected to the need for such tariffs in order to protect the position of the users and/or the carriers, in order to ensure the maintenance and continuity of the transport services or activities or in order to carry them out on adequate conditions.*
3. *Where for reasons of economic policy the price of the transport is included in any of the forms of intervention regulated in the general price legislation, the transport authorities must submit the establishment or modification of the corresponding tariffs to the competent price control bodies.*
4. *The fact that no mandatory tariffs have been fixed by the transport authorities for particular transport services or activities because there are no reasons that would justify such tariffs from the perspective of transport management, shall not prevent the application of the interventionist price regimes established in the price control legislation if their repercussion on the general economic system justifies it, in which case the checks provided for in the general prices legislation shall be carried out directly on the prices that the undertakings propose to apply.*

In the specific context of road transport, the legislator reiterates its commitment to the free market in Title II of the Land Transport Management Law, which provides that the transport offer has to be governed by the system of free competition, although access to the transport profession requires a permit or authorisation.

The actions of the Administration in this context are therefore restricted to the grant of these authorisations, based on the objective criteria set out in article 48 (Spanish nationality, professional ability, honourableness, economic ability, compliance with tax, employment and welfare obligations), with the possibility of establishing conditions or quantitative restrictions in certain circumstances pursuant to articles 49 to 51.

Specifically article 49 establishes that the market system may be restricted or have conditions imposed on it by the Administration “where there are imbalances between the offer and demand that result in the market conditions being such as to mean that the correct provision of the activities or services is not guaranteed; where in a balanced market situation the increase in the offer is capable of resulting in such imbalances and malfunctions; where the proper operation of the transport system requires the capacity of the undertakings to be a suitable size; where there are reasons of general economic policy connected with the best use of the available resources; where the operation of the transport system as a whole may be prejudiced”.

Article 50(2) for its part establishes the forms of intervention in such circumstances, which consist basically of measures to control access to the market: the issue of permits imposing particular conditions, modal obligations or restrictions on circulation, the fixing of maximum allowances or quotas for the different types of permits to be issued in the time periods indicated and the temporary suspension of or restriction on the issue of new permits.

Finally article 51 provides that "[w]here the restrictions provided for in the preceding articles are established, the distribution of the allowances or quotas or the fixing of the conditions, obligations or restrictions, according to their various forms, shall be done in accordance with pre-established objective criteria, with the Administration being prohibited in all cases from the discretionary grant or distribution of the corresponding permits".

For their part the enabling Regulations of the Land Transport Management Law, approved by Royal Decree 1211/1990 of 28 September 1990 (the Land Transport Management Regulations), provide in article 2 that one of the fundamental rules that the Administration has to observe in its actions in relation to the management of land transport in general is "the strengthening and liberalisation of the actions of businesses in a market system, taking the necessary steps to remedy market malfunctions as and when they occur".

Later, article 28(5), which refers to the tariff regime for land transport, specifies that "the public carriage of goods shall not be subject to mandatory tariffs, unless they are set by the autonomous regions as maximum tariffs, as provided for in article 5(d) of Organic Law 5/1987 of 30 July 1987[2]".

The current wording of article 28 of the Land Transport Management Regulations comes from Royal Decree 1136/1997, which laid the foundations for the progressive elimination of the existing quantitative restrictions and their replacement with other, qualitative, restrictions, and eliminated the mandatory tariffs. These tariffs would become maximum tariffs, although the Ministry of Development could, and indeed did, publish benchmark tariffs.

[2] "With respect to discretionary public passenger, goods or mixed transport services, provided pursuant to authorisations whose territorial scope extends beyond one autonomous region, the following functions are delegated to the autonomous region that is competent according to the rules laid down in the next article: (…) c. The establishment where appropriate of benchmark tariffs and of mandatory maximum tariffs for short-distance traffic undertaken in its entirety within the territory of the autonomous region, pursuant to the authorisations referred to in this article, provided that the State has not laid down mandatory maximum tariffs generally in relation to them. Likewise, in relation to public passenger transport services in vehicles seating less than ten people, including the driver, the fixing of the corresponding tariffs is delegated, within the limits established by the national transport authorities (…)".

This shows that in its day the aim of article 18 of the Land Transport Management Law was to give legal protection to the possible establishment of tariffs in certain land transport sectors. However, the legal framework by which this provision was implemented demonstrates that its scope has been substantively restricted. Indeed the Regulations under the Act, approved by the aforementioned Royal Decree 1211/1990, already limited the establishment of tariffs to "the public carriage of full loads of goods for more than two hundred kilometres in vehicles over twenty metric tonnes". The current wording of this provision, approved by Royal Decree 1136/1997, establishes that the public carriage of goods shall not be subject to mandatory tariffs unless they are established by the autonomous regions as maximum tariffs, as provided for in article 5(d) of Organic Law 5/1987. Hence minimum tariffs for the public carriage of goods have disappeared since 1997.

2.2. Possible legislative actions of the public authorities in the sector

The legal status of the carriage of goods by road sector as a liberalised market prevents any intervention of the public authorities in the fixing of tariffs, whether by means of a law or a Royal Decree, or makes such intervention inappropriate.

Bearing in mind the evolution of both the Community and national legislation, we can say that the fixing of tariffs by means of a law is only justified in the event of the provision of public services, according to the traditional acceptance of the term. This construction finds its setting in article 38 of the Constitution, in the sense that the principle of free enterprise makes it necessary to limit the intervention of the public authorities in the economy as far as possible. In the same way the construction upheld by the Constitutional Court [Tribunal Constitucional][3], according to which the defence of free competition forms part of the principle of free enterprise found in article 38 of the Constitution, could result in a rule establishing tariffs being considered contrary to constitutional principles. True, free competition is not an absolute principle, but any rule that lays down restrictions on it, and a rule establishing minimum tariffs is an example of a rule laying down restrictions, must respond to various principles in any event, including the principle that the restriction is necessary for the objective being pursued and is proportionate.

Normally the circumstances do not cover a restriction of this nature, which, in principle, represents the replacement of free competition, that is say the fixing of

[3] Constitutional Court Judgment 88/1986 of 1 July 1986.

prices by the free interaction of offer and demand, by public intervention that is neither necessary nor proportionate.

The fact that such a restriction is not necessary is clear inasmuch as we are dealing with a liberalised market, that is to say a market that has been functioning adequately without any government intervention. The fact that this is a disproportionate intervention follows from the factual circumstances that are present in this case. The carriers take the view that in a situation of excess offer those operators most in need of income work at below cost, making the future of the businesses unviable. Regardless of the fact that this is a generic statement that can only be accepted with caution, there are other means of resolving the problem that are less damaging to competition and the operation of the market than the approval of tariffs by the public authorities.

Although this report analyses other possible alternatives, we must now reiterate the fact that the interventionist measure proposed does not have the potential to achieve the aim being pursued. The structure of the sector itself and the way that the market operates means that there are many ways in which to operate at below the tariffs (discounts, additional benefits, the fact that the tariffs cannot be imposed on undertakings from the rest of the European Union countries, etc). Nobody, moreover, can maintain that a rigid tariff framework should be established and that the public authorities should also become responsible for policing its observance. Regardless of the fact that these measures would represent a model for other sectors, which could lead to a situation in which any sector with revenue falling below certain levels of profitability would ask for the derogation of the principle of free competition and its replacement with strict – and moreover impossible – State control. In short we are referring to the derogation of the principle of free enterprise, even at the risk of exaggeration by so doing.

A rule laying down tariffs would also be contrary to articles 3, 10 and 81 of the EC Treaty, albeit that the conclusive nature of this statement is tempered by certain judgments of the Court of Justice which, in deciding preliminary issues, have ruled that certain national rules laying down tariffs are not contrary to article 81, provided that they are tariffs fixed for reasons of public interest and are not the product of a concerted agreement. Bear in mind that in the present situation the initiative does not come from the public authorities but from the business associations themselves. They are the ones who, aware of the fact that an agreement between them would represent the creation of a cartel (and aware too of the impossibility of imposing the observance of their agreements in a coercive way), and based on pressure measures that seriously damage the public interest and the economy, turn to the

State and ask it to protect their decisions as a cartel and, moreover, to act as guardian of the concerted agreements. In such terms, which accord with the reality, the actions of the State would not be a response to a public interest aim and would instead make it an accomplice and facilitator of concerted agreements and, therefore, would represent an infringement of the terms of the Treaty and, without doubt, would mean that the European Commission would take action to set the agreement aside. That would be the case where the agreement is reflected in a rule with the rank of a law.

If on the other hand the measure that approves and provides cover for the concerted agreement is of a lesser rank, there would be even more possibilities for getting it annulled. First of all we must not forget the fact that article 4 of Law 15/2007, the Competition Law, only gives legal protection to conduct established in a rule with the rank of a law. This means that compliance with and monitoring of tariffs established by Royal Decree would not give licence to the undertakings following them to place themselves beyond the reach of the actions of the competition authorities, which could in any event start formal proceedings for a possible breach of article 1 of the Competition Law and article 81 of the Treaty.

Secondly, aside from that, we must not forget that Law 15/2007 has given the competition authorities an important instrument to prevent the approval of measures ranking below laws that give protection to unnecessary or disproportionate restrictions on competition. We are referring to the recognition in article 12(3) of the standing to bring proceedings to challenge such rules in the contentious-administrative jurisdiction. Everyone is aware without the need to make an announcement in advance that the approval of a measure fixing minimum tariffs would more than justify the National Competition Commission making use of such standing to bring proceedings, and it would be failing to comply with the functions that the law imposes on it if it did not do so.

In the sections that follow these observations are developed through a deeper legal and economic analysis.

3. LEGAL ANALYSIS OF THE FIXING OF TARIFFS FOR THE CARRIAGE OF GOODS

The fixing of minimum tariffs for the carriage of goods by road can be done through various channels and can adopt various legal forms. From a strictly legal point of

view it is necessary to differentiate between three possible ways of fixing tariffs for the carriage of goods by road:

a) The fixing of the tariffs by a concerted arrangement between the economic operators present on the market (price agreement, collective decision or recommendation, concerted practice and so on).

b) The fixing of the tariffs by a legislative measure that ratifies a prior concerted agreement of the economic operators present on the market.

c) The fixing of the tariffs directly by a legislative measure.

Although from an economic perspective based on the defence of free competition, the evaluation of any fixing of prices and tariffs on the configuration of the market and consumer well-being is substantially the same and its negative evaluation does not change according to the legal form adopted, from a legal perspective it is necessary to analyse each of these different forms that the fixing of tariffs may adopt separately, in order to determine the legal consequences deriving from each of them, in particular, those that concern the actions of the competition authorities.

3.1. Fixing of tariffs by a concerted agreement between the economic operators present on the market

Although the terms of the request from the Ministry of Development to prepare a report are sufficiently broad so as not to rule out such an analysis, we consider it unnecessary to spend too much time examining this possibility, given the fact that it is clearly illegal under both the national and the Community legislation.

According to both sets of legislation, agreements between undertakings, decisions or recommendations of an association of undertakings or concerted practices that directly or indirectly fix purchase or sale prices or other conditions for trading goods or services are considered to be agreements or practices that restrict free enterprise and come within the prohibition contained in both article 1 of the Competition Law and article 81 of the EC Treaty.

Moreover, the fixing of prices by means of horizontal agreements between undertakings or by decisions or recommendations of an association of undertakings are considered to be one of the most serious breaches of competition law, both from a Community perspective[4] and from the point of view of the national legislation. Thus article 62 of the Competition Law treats as a very serious offence “engaging in

[4] Judgment of the CJEC 17 October 1972. Case 8/72 Vereeniging van Cementhandelaren v Comission.

the concerted conduct defined in article 1 of the Law which consists of cartels or other agreements, collective decisions or recommendations, concerted or consciously parallel practices between undertakings that are actual or potential competitors of each other". In accordance with the provisions of article 63 of the Law, a serious breach of this kind can be sanctioned with a fine of up to 10 percent of the total turnover of the offending undertaking in the financial year immediately prior to the one in which the fine is imposed (in the case of associations, groupings or joint ventures this total turnover will be determined by taking into account the turnover of its members).

We do not consider it necessary to examine this possibility in more depth given the fact that it is clearly illegal and is constantly prohibited and sanctioned by both the national and Community competition authorities.

3.2. Fixing of tariffs by a legislative measure that ratifies a prior concerted agreement of the economic operators present on the market

In principle the prohibitions on concerted practices and abuse of a dominant position contained in articles 81 and 82 of the EC Treaty and in articles 1 and 2 of the Competition Law apply to the conduct of undertakings. It is true that they may also be applied to public authorities, administrations and bodies where they intervene on the markets as economic operators and not in the exercise of their legislative and administrative powers.

However, it is easy to understand that there is a channel that enables undertakings to try to get round the clear prohibitions on concerted practices that are contained in article 1 of the Competition Law and article 81 of the EC Treaty: they seek the support of the public authorities so that these anti-competitive practices that constitute a breach of the legislation are required or facilitated by the activity of the said public authorities. This would be the case, for example, where a legislative measure confirms or ratifies a concerted agreement between undertakings for the fixing of prices or the sharing of the market.

The case law of the Community courts addressed this type of situation, which would allow the useful effect of the competition rules in the Treaty to be easily destroyed, years ago. To deal with it the Court of Justice of the European Communities (CJEC) has developed a doctrine regarding the application of the European competition rules to the activities of public authorities that force or encourage economic operators to engage in anti-competitive practices.

The case law is based on the combined application of articles 81 and 82 of the Treaty in conjunction with articles 3 and 10 of it. Article 3(g) of the Treaty establishes as one of its objectives the attainment of "*a system ensuring that competition in the internal market is not distorted*". For its part article 10 of the EC Treaty establishes that "*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks*". It adds in paragraph two that the Member States should "*abstain from any measure which could jeopardise the attainment of the objectives of this Treaty*".

Although there were some earlier precedents, the case law of the CJEC on activities of public authorities that require or encourage economic operators to engage in anti-competitive practices started with the Inno/ATAB judgment of 16 November 1977. In that judgment the Luxembourg court stated[5] that "while it is true that article 82 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness", reaching the conclusion that "Member States may not enact measures enabling private undertakings to escape from the constraints imposed by articles 81 to 90 of the Treaty".

In the years that followed, and in particular between 1985 and 1989, the doctrine expressed in the Inno/ATAB judgment was developed in a series of judgments that went more deeply into the relationship between public action and anti-competitive business practices. The following judgments from this line of authorities are of particular note: Leclerc/Au Blé Vert (1985)[6], Cullet (1985)[7], BNIC/Clair (1985)[8], BNIC/Aubert (1987)[9], Nouvelles Frontières (1986)[10] or Vlaamse Reisberaus (1987)[11].

In the judgment of 10 January 1985 (Case 229/83; Leclerc/Au Blé Vert) the Court expressly emphasised "whether national legislation which renders corporate behaviour of the type prohibited by article 81(1) superfluous (…) detracts from the

[5] To make it easier to read this report and to avoid confusion, the numbering of the articles cited in the judgments referred to has been adapted to the new numbering following the changes made by the Treaty of Amsterdam. Thus for example the old articles 85 and 86 are always cited with their current numbering (articles 81 and 82). The same applies to the rest of the articles of the Treaty.
[6] Judgment of the CJEC of 10 January 1985. Case 229/83.
[7] Judgment of the CJEC of 29 January 1985. Case 231/83.
[8] Judgment of the CJEC of 30 January 1985. Case 123/83.
[9] Judgment of the CJEC of 3 December 1987. Case 136/86.
[10] Judgment of the CJEC of 30 April 1986. Joined cases 209/84 to 213/84.
[11] Judgment of the CJEC of 1 October 1987. Case 311/85.

effectiveness of article 81 and is therefore contrary to the second paragraph of article 10 of the Treaty"[12].

In the judgment of 30 January 1985 (Case 123/83; BNIC/Clair) the Luxembourg Court considered that "by its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all economic operators on the market in question, is intended to distort competition on that market". In this case the CJEC was considering a situation in which the French legislation permitted the possible extension, by a national legislative measure, of agreements entered into within professional organisations which would make them binding on all the economic operators in the sector affected by the agreement. The CJEC took the view that these agreements actually constituted an agreement between undertakings or associations of undertakings and that the existence of an act of the public authority that was intended to make it binding on third parties could not have the effect of removing it from the scope of the prohibition contained in article 81(1).

In the judgment of 3 December 1987 (Case BNIC/Aubert), the CJEC continued along the same line of authority and, after recalling that an agreement between undertakings was subject to the prohibitions contained in article 81(1) of the Treaty, it added an important point: a national legislative measure extending the mandatory effect of the agreement to third parties was incompatible with articles 10 and 81 of the Treaty. The Court of Justice handed down an identical ruling in the Nouvelles Frontières case by its judgment of 30 April 1986. This judgment clarified a situation relating to the approval by the Administration of airline tariffs agreed within a professional association. In the judgment the Court again held that there was a breach of the obligation on the Member States not to adopt or keep in force measures that could deprive the competition rules of their effectiveness if a State were to require or favour the adoption of agreements contrary to article 81 or to reinforce their effects[13]. The judgment concluded by ruling that "to approve air tariffs and thus to reinforce the effects thereof, where (…) it has been found (…) that those tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to article 81" was contrary to the obligations

[12] Judgment of the CJEC of 10 January 1985. (Case 229/83): *whether national legislation which renders corporate behaviour of the type prohibited by article 81(1) superfluous, by making the book Publisher or importer responsible for freely fixing binding retail prices, detracts from the effectiveness of article 81 and is therefore contrary to the second paragraph of article 10 of the Treaty.*

[13] Judgment of the CJEC of 30 April 1986 (Joined cases 209/84 to 213/84; paragraph 72): *Such would be the case, in particular, if a member state were to require or favour the adoption of agreements, decisions or concerted practices contrary to article 85 or to reinforce the effects thereof.*

imposed on the Member States by article 10 of the Treaty in conjunction with articles 3(g) and 81 of it.

Three years later, in its judgment of 11 April 1989 in the Ahmed Saeed case, the Court of Justice repeated these ideas and confirmed that "the approval by the aeronautical authorities of tariff agreements contrary to Article 81(1) is not compatible with Community law and in particular with Article 10 of the Treaty. It also follows that the aeronautical authorities must refrain from taking any measure which might be construed as encouraging airlines to conclude tariff agreements contrary to the Treaty".

This line of authority was completed by the judgment of 21 September 1988 in the Van Eycke case. In it the Luxembourg Court repeated that the competition rules are rendered ineffective if a Member State "were to require or favour the adoption of agreements, decisions or concerted practices contrary to Articles 85 or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private operators responsibility for taking decisions affecting the economic sphere".

In subsequent judgments the Court of Justice has always considered this reasoning to be established precedent, starting each of its subsequent rulings on this issue with the following paragraph, which summaries the line of authority to which we have referred:

"Although it is true that articles 81 and 82 of the Treaty per se are concerned only with the conduct of undertakings and not with national legislation, the fact remains that those articles in conjunction with article 10 of the Treaty require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings".

In particular the Court of Justice has held that articles 10 and 81 of the EC Treaty are breached where a Member State requires or favours concerted practices contrary to article 81 of the EC Treaty or reinforces the effects of such practices, or deprives its own legislation of its official character by delegating the responsibility for taking decisions affecting the economic sphere to private operators.

It is clear from everything that we have said that any national measure, such as the acceptance by the public authorities of an agreement on minimum tariffs emanating from a business association, that requires or favours concerted practices contrary to article 81 of the EC Treaty or reinforces the effects of such practices would constitute a breach of articles 10 and 81 of the Treaty and would be incompatible with it.

3.3. Fixing of tariffs directly by means of a legislative measure

Article 38 of the 1978 Constitution bases the Spanish economic model on the principle of freedom of enterprise within the framework of a market economy. Article 38 also makes the public authorities responsible for guaranteeing and protecting freedom of enterprise, according to the needs of the economy in general. The Constitutional Court[14] has emphasised the direct relationship between the competition legislation and this constitutional provision and the necessary protection that the public authorities must give to freedom of enterprise and the market economy.

However, the Constitution itself provides that the defence and guarantee of freedom of enterprise, and therefore the defence of competition, must be coordinated with other public interests that are also considered worthy of protection. In this respect Law 15/2007 provides that restrictions on competition of this type must be articulated by means of a legislative measure with the rank of a law. According to article 4 of the Competition Law, the legislator is the only person entitled to introduce restrictions on competition. However, the intervention of the legislator must be necessary, appropriate and proportionate to the public interest that it purports to defend. The fact that Spain is a member of the European Union and the primacy and direct effect of Community law, which is also set out in its own competition legislation, adds an even greater requirement to any possible measure from the legislator, if that is possible.

With the adoption of measures restricting competition (such as the fixing of minimum tariffs) being excluded by the national legislation without express legislative provision and with any public intervention being subject to the special requirements of Community law, any legislative measure that purports to fix minimum tariffs must meet special characteristics in terms of its object and content. When rules of this kind have been adopted in the past (in relation to the so-called “crisis cartels”), there was detailed regulation of important elements such as the objectives pursued on the one hand (amongst them a restructuring of the sector which habitually carries with it a reduction in the offer through a specific restructuring plan) and the temporary nature of the measure on the other hand, without opting for price fixing in any of these important cases of industrial restructuring.

The fact that Spain is a member of the European Union carries with it certain additional requirements. As we have already said, the Court of Justice considers the codified case law in the Van Eycke judgment of 21 September 1988 to be

[14] Constitutional Court Judgment 88/1986 of 1 July 1986

established precedent. It has stated as much over the last 20 years, preceding any consideration of the question in subsequent decisions by an express reference to this doctrine.

In subsequent judgments, which have generally dealt with specific preliminary issues, the Court of Justice has examined the application of the doctrine to specific cases. The complexity of the issues debated means that it is necessary to approach each of these precedents with care, because when dealing with preliminary issues the Court of Justice deals *only* with the issues put to it and does not look at the case as a whole, which is the task of the national court raising the issue. Given that only the doctrine to which we have just referred is established precedent, the specific circumstances that are exceptions to the general rule that a Member State cannot require or favour concerted practices contrary to article 81 of the EC Treaty or reinforce the effects of such practices must be construed restrictively.

Having rejected the mere approval or ratification by public authorities of tariffs agreed within professional organisations as incompatible with the Treaty, the CJEC has on occasions examined whether certain national regulations that provide that certain tariffs are approved by the public authorities, taking into account proposals of committees that include representatives of business organisations, are compatible with the provisions of the Treaty.

Cases raising these issues were dealt with by the Court of Justice in the judgments in Reiff[15] (1993), Delta[16] (1994), Spediporto[17] (1995) and Librandi[18] (1998). As they refer to the sector in respect of which the Ministry of Development has requested this report, it is appropriate to look at the analysis of the Court of Justice in the last two of these judgments, Spediporto and Librandi.

In the judgment of 5 October 1995 (case C-96/94, Centro Servizi Spediporto), the Luxembourg Court analyses whether an Italian legislative measure providing for the fixing of tariffs for the carriage of goods by road via an administrative procedure is compatible with the Treaty. In its conclusions the CJEC took the view that the existence of a national measure that provides that the tariffs for the carriage of goods by road are approved and given executive effect by the Administration based on the proposal of a committee is not in principle incompatible with the Treaty. In order for it not to be incompatible, the Court demanded that specific requirements were met, as the Reiff and Delta judgments had already indicated. Amongst these

[15] Judgment of 17 November 1993, Reiff case; C-185/91.
[16] Judgment of 9 June 1994; Delta case; C-153/93.
[17] Judgment of 5 October 1995; Centro Servizi Spediporto case; C-96/94.
[18] Judgment of 1 October 1998; Autotransporti Librandi case; C-38/97.

requirements or conditions the Court highlighted the fact that the committee in question should be made up of a majority of representatives from the public authorities, along with a minority of representatives from the interested operators. In addition the committee must always respect public interest criteria in its proposals. Finally the public authorities concerned must not relinquish their prerogatives and must take into account comments from other public and private bodies before approving any proposal from the committee.

As we can see, this judgment does not contradict the consolidated case law of the Court in relation to the possible breach of articles 10 and 81 of the EC Treaty where a Member State requires or favours concerted practices or reinforces the effects of such practices or delegates the responsibility for taking decisions affecting the economic sphere to private operators. The Tribunal restricts itself to an examination of the specific case before it and takes the view that as certain requirements are satisfied, a specific national measure is not contrary to the provisions of the Treaty. In no case does it consider that the mere ratification by a public authority of a tariff fixed by economic operators is compatible with the Treaty.

The judgment of 1 October 1998 in the Autotransporti Librandi case can be seen as complementing the judgment referred to above and contains some interesting points.

- First of all, the Court highlighted the fact that a change in the composition of the committee proposing the tariffs, where there was a greater representation of the national road carriers' associations, did not mean that it automatically followed that there was a concerted practice, whilst the committee continued to be obliged to respect the public interest criteria defined in Italian law in its proposals.

- Secondly, the Court clarified that the concepts of general interest (mentioned in the Reiff and Delta judgments) and public interest (alluded to in the Spediporto judgment) had an equivalent meaning that should make it possible to determine whether "the interests of the collectivity had to prevail over the private interests of individual operators" (paragraph 40).

- It is up to the national bodies (in the case in point the national courts) that have to apply the measure to check whether there is proper regard for this public interest: "it is for the national court to determine, in the exercise of its jurisdiction, that in practice tariffs are fixed subject to observance of the public-interest criteria defined by the Italian Law and that the public authorities are not handing over their prerogatives to private economic agents" (paragraph 36). The Court considers that "it is therefore for the Member States to determine the criteria

which best allow the Community rules of competition to be observed" (paragraph 46). It is also "for the national courts (…) to determine whether the public-interest criteria defined in the national legislation are observed in practice".

The importance of these judgments has to be evaluated, as we have already said, having regard to the fact that they are a response to specific preliminary issues. In the Spediporto and Librandi cases, which related to the carriage of goods by road sector, it is also necessary to highlight the fact that the judgments were handed down at a time when the process of liberalising the carriage of goods by road was underway. Since January 1993 and in the context of the single market, a carrier has had to be able to operate in the rest of the countries included in the single market. With a view to possible changes in the conditions of competition on the market, the European Union introduced the liberalisation legislation in separate phases, the last of which came into force on 1 July 1998, although action in the sector has continued[19]. For its part, in the case of Spain, Law 29/2003 of 8 October 2003 on the improvement of conditions of competition and safety on the carriage of goods by road market, which partially amended the Land Transport Management Law, declared in its recitals that the Spanish market was at that time "practically liberalised". This all means that there is a significant difference between the regulatory context in which the CJEC handed down the Spediporto and Librandi judgments (a highly regulated market) and the current legislative framework in Spain in relation to the carriage of goods by road, which is practically liberalised.

Another judgment from 1998, Commission/Italy[20], looks more closely at the question of the necessary respect for the general interest that must be shown by the public authorities when using their regulatory powers. It is also a particularly interesting judgment because it does not deal with a preliminary issue raised with the CJEC by a national court, but rather with an action brought by the European Commission again a Member State (Italy) for failure to fulfil obligations. The Commission took the view that Italian law required the Italian National Council of Customs Agents to adopt a decision of an association of undertakings contrary to article 81 of the EC Treaty. This consisted of fixing a mandatory tariff for all customs agents, who could be the subject of disciplinary proceedings if they failed to observe it. The Commission had already issued a decision ruling that the adoption of this mandatory tariff was a breach of article 81(1) of the Treaty.

In its judgment of 18 June 1998 the CJEC makes three important observations:

[19] See Directive 2006/94/EC of the European Parliament and of the Council of 12 December 2006 on the establishment of common rules for certain types of carriage of goods by road.
[20] Judgment of 18 June 1998, Commission/Italy, C-35/96.

- The members of the National Council of Customs Agents [CNSD] cannot be characterised as independent experts as they are not required by law to set the tariffs taking into account the general interest and, specifically, the interests of undertakings in other sectors or users of the services for which they purport to fix the tariffs.

- Therefore the decisions of the National Council of Customs Agents that fixes a uniform and mandatory tariff for all Italian customs agents restrict competition within the meaning of article 81 of the Treaty and may affect intra-Community trade.

- Given that the breach of article 81 consisting of the fixing of tariffs had been favoured or facilitated by the Italian legislation, the judgment also studied the responsibility of the Italian Republic in this context. The Court was very clear in this respect: "by adopting the national legislation in question, the Italian Republic clearly not only required the conclusion of an agreement contrary to Article 81 of the Treaty and declined to influence its terms, but also assists in ensuring compliance with that agreement. (…) First, (…) of Law No 1612/1960 requires the CNSD to compile a compulsory, uniform tariff for the services of customs agents. (…) Secondly, (…), the national legislation in question wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs. (…)Thirdly, the Italian legislation expressly prohibits registered customs agents from derogating from the tariff (…) on pain of exclusion, suspension or removal from the register (…). Fourthly, although no provision laid down by law or regulation confers on the Minister for Finance the power to approve the tariff, it remains the case that the Decree of the Minister for Finance of 6 July 1988 bestowed upon it the appearance of a public regulation. First, publication in the `General Series' of the Gazzetta Ufficiale della Repubblica Italiana gave rise to a presumption of knowledge of the tariff on the part of third parties, to which the CNSD's decision could never have laid claim. Second, the official character thus conferred on the tariff facilitates the application by customs agents of the prices that it sets. Lastly, its nature is such as to deter customers who might wish to contest the prices demanded by customs agents".

This clear stance of the Court of Justice led to a ruling in the judgment that the Italian Republic had failed to comply with its obligations with respect to articles 3 and 81 of the Treaty when it passed and kept in force a law that required the National Council of Customs Agents, by giving it the corresponding decision-making power, to

adopt a decision regarding an association of undertakings that was contrary to article 81 of the Treaty, consisting of fixing a mandatory tariff for all customs agents.

The subsequent case law (Arduino[21] and Wouters[22] judgments of 2002, Consorzio Industrie Fiammiferi (CIF)[23] judgment of 2003, and Cipolla[24] judgment of 2006) follows the same lines and looks more closely at some of these conclusions, adding some important observations. They include the need to consider the possibility of an infringement of the free movement of services in these cases, which is one of the four basic freedoms established by the EC Treaty.

The reasoning in the judgment of 9 September 2003 in the Consorzio Industrie Fiammiferi (CIF) case is particularly noteworthy. The Court held that where conduct of undertakings contrary to article 81(1) of the EC Treaty was required or favoured by a national legislative measure that ratified or reinforced its effects (specifically with regard to the fixing of prices and the sharing of the market), a national competition authority with the task of ensuring respect for article 81 of the EC Treaty is obliged to exclude the application of the national measure in question. Equally it can impose sanctions on the undertakings involved for their conduct after the decision to exclude the application of the national measure (once the decision has become binding) and for their conduct when the national measure simply favoured or facilitated their conduct (provided that due account is taken of the particularities of the legislative framework within which the undertakings acted).

Furthermore, in the judgment of 5 December 2006 (Cipolla case, joined cases C-94/04 and C-202/04) the Court highlighted other possible implications of legislative measures that impose an absolute prohibition on derogating by agreement from minimum fees or tariffs (in that case lawyers' fees) contrary to the Treaty. The Court took the view that "*the prohibition of derogation, by agreement, from the minimum fees set by a scale such as that laid down by the Italian legislation is liable to render access to the Italian legal services market more difficult for lawyers established in a Member State other than the Italian Republic and therefore is likely to restrict the exercise of their activities providing services in that Member State. That prohibition therefore amounts to a restriction within the meaning of Article 49 EC".*

Going more deeply into this point, the Court adds "*that prohibition deprives lawyers established in a Member State other than the Italian Republic of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with*

[21] Judgment of 19 February 2002, Arduino case; C-35/99.
[22] Judgment of 19 February 2002, Wouters case; C-309/99.
[23] Judgment of 9 September 2003, Consorzio Industrie Fiammiferi (CIF) case; C-198/01.
[24] Judgment of 5 December 2006; Cipolla case.

lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad (…). *Likewise, the prohibition thus laid down limits the choice of service recipients in Italy, because they cannot resort to the services of lawyers established in other Member States who would offer their services in Italy at a lower rate than the minimum fees set by the scale"*.

For all these reasons the Court highlights in its decision that legislation of this kind constitutes a restriction on the free provision of services for the purposes of article 49 of the EC Treaty. The Court considers that it is for the national court to decide whether such legislation, in the light of specific rules for its application, actually serves the objectives of protecting consumers and ensuring the proper administration of justice which may justify it, and whether the restrictions it imposes do not appear disproportionate in the light of those objectives.

3.4. Action of the National Competition Commission with regard to the different forms of fixing tariffs

According to the analysis that we have just carried out, the response of the competition authorities to the different methods of fixing tariffs that have been examined would vary.

a) If the fixing of the tariffs for the carriage of goods is done by means of concerted conduct by the operators present on the market (agreement on prices, collective decision or recommendation, concerted practice), the National Competition Commission would be obliged to start formal proceedings against those operators in accordance with the statutory obligations laid down in Law 15/2007, which could lead to the imposition of sanctions of up to 10% of the total turnover of the offending undertaking in the financial year immediately prior to the one in which the fine is imposed (in the case of associations, groupings or joint ventures, this total turnover will be determined by taking into account the turnover of its members).

b) If the fixing of the tariffs is done by means of a legislative measure which restricts itself to approving or transposing a prior concerted agreement of the operators present on the market, the National Competition Commission's actions would require certain additional steps.

   According to the established case law that we have looked at, a measure of this kind by which a Member State requires or favours concerted practices

contrary to article 81 of the EC Treaty or reinforces the effects of such concerted practices constitutes a breach of articles 10 and 81 of the EC Treaty.

The primacy and direct effect of Community law obliges public authorities (including national competition authorities) to apply the Community legislation in preference to national legislation. If a Spanish law includes a rule or disposition that contradicts the provisions of the Community legislation, the national authority is obliged to refuse to apply it, as the Community case law confirms: "the national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, and it is not necessary for that court to request or await the prior setting aside of such provisions"[25]. This obligation not to apply its own law is a direct consequence of the basic principles that underlie Community law.

The Consorzio Industrie Fiammiferi (CIF) judgment of 9 September 2003 reminds us that this general principle applies to national competition authorities. Thus the National Competition Commission, as a national competition authority whose functions include ensuring respect for article 81 of the EC Treaty, would be obliged to exclude the application of a national measure that legitimises or reinforces conduct of undertakings that is contrary to article 81(1) of the EC Treaty. According to the CIF judgment it would also be entitled to impose sanctions on the undertakings involved for their conduct after the decision to exclude the application of the national measure or for conduct when the said national measure simply encouraged or facilitated their conduct.

The current legislation does not give the National Competition Commission the right to exclude the conflicting measure from Spanish law directly. However, article 12(3) of Law 15/2007, the Competition Law, gives the National Competition Commission the standing to apply to the competent courts in order to challenge actions of public authorities subject to administrative law and general provisions ranking below a law that create barriers to the maintenance of effective competition on the markets.

c) If the fixing of the tariffs for the carriage of goods is done by means of a legislative measure that tries to preserve the general interest, the case would be more complicated, but the National Competition Commission would clearly

[25] Judgment of the CJEC of 11 July 1989; Case C-170/88; Ford España S.A.

have the power to examine the repercussions on the market of a measure of this kind and take action as a result.

First, in order not to be incompatible with the Treaty, according to the existing case law a measure of this kind would have to address all of the interests affected by the measure in the economy as a whole, not just the interests of one part of the operators present on it, and would have to be made after the appropriate discussion and debate with all the parties involved on the affected market. The views of independent bodies concerned with defending free competition on the market and defending the interests of consumers and users must also be canvassed.

Equally the measure in question should clearly explain the objectives pursued and the instruments used for that purpose, to enable an evaluation of whether they are suitable for and proportionate to the attainment of those objectives. From a constitutional point of view too, any intervention by the public authorities that may restrict free competition must satisfy the requirements of need, suitability and proportionality. The restrictions on competition must be inspired by the general interest and must pursue a constitutionally legitimate purpose. The restrictions established by the public authorities must be suitable for the attainment of the objective pursued, must be necessary to attain it and must also be proportionate, so that the restriction on competition to which they give rise must be the minimum necessary to achieve the objective defined.

Faced with a measure of this kind, a competition authority such as the National Competition Commission should carry out an evaluation of it that is very similar to the one that it already carries out in order to apply article 1(3) of the Competition Law and article 81(3) of the EC Treaty, when it also evaluates whether certain business practices which in principle are anti-competitive may nonetheless be allowed if they satisfy certain requirements. These requirements include not imposing restrictions on undertakings that are not essential to achieve public interest objectives and not allowing them to eliminate competition with respect to a substantial part of the production. In the competition context the burden of proof when it comes to showing the suitability and proportionality of the restriction on competition rests on the party defending the restriction.

In accordance with this analysis and if the view is that the measure that fixes the tariff gives rises to barriers to the maintenance of effective competition on the markets, unless it is not essential to the attainment of the objectives

pursued by it, the National Competition Commission could use the standing recognised in article 12(3) of Law 15/2003 in order to challenge the measure before the competent courts if it is an administrative decision or a general disposition ranking below a law. Depending on the analysis of the measure, it could consider the possible application of the doctrine set out in the Consorzio Industrie Fiammiferi (CIF) judgment of 9 September 2003 in order to exclude the application of the measure if at the end of the day it considers that it ratifies or reinforces conduct of undertakings that is contrary to article 81 of the EC Treaty.

The need to evaluate the need for and suitability and proportionality of a measure that restricts competition such as the establishment of a minimum tariff for the carriage of goods makes it necessary to evaluate the question from the economic point of view so that, starting from a consideration of the situation within the sector affected, we can discover whether the measure proposed is necessary, that is to say whether it is suitable to achieve the public interest objectives that have been defined, and proportionate, because it does not impose unnecessary restrictions on competition in order to achieve the aforementioned objectives and does not eliminate competition with respect to a substantial part of the market.

4. ECONOMIC ANALYSIS OF THE ESTABLISHMENT OF A MINIMUM TARIFF FOR THE CARRIAGE OF GOODS BY ROAD SERVICE

In order to evaluate the need for and suitability and proportionality of a measure restricting competition such as the establishment of a minimum tariff for the carriage of goods, it is necessary to make a series of observations from a strictly economic point of view in terms of the repercussions which the regulation of prices through the fixing of minimum tariffs may have on the sector.

To do so it is appropriate first of all to make some general observations on the possible forms of public intervention on the markets. Secondly we shall review the structure of the carriage of goods by road market and its evolution over the last few years and then go on to consider the effects of regulation on this sector, which has basically been regulation by controlling access to the activity. This will be followed by an analysis of the measure proposed, the fixing of minimum prices, and of the effects of this type of intervention by the public authorities on the free operation of the market.

4.1. Public intervention in the market economy

As we have already indicated, in order to evaluate any form of intervention by the public authorities in the economy, the starting point must be that the general principle by which the Spanish economy operates is the free market. This is established by article 38 of the Spanish Constitution, which recognises freedom of enterprise in the context of the market economy. The market economy is characterised by the fact that it leaves the fixing of prices and other trading conditions to the free interaction between offer and demand. Typically in a market economy, given the restrictions that they face, consumers and customers take decisions on demand that reflect their preferences and businesses take decisions on the offer of goods or services that maximise their profits, likewise subject to the restrictions that they face. These offers must be attractive to consumers, either due to their prices or due to other differentiating characteristics such as quality or variety.

It therefore follows that competition between operators is an inherent aspect of the market economy system; the most efficient agents, who are capable of offering goods or services demanded by consumers at a lower cost or of interesting them in better or more innovative products will find themselves rewarded with higher market shares and higher profits. In contrast agents who are less efficient or whose offers are less attractive will suffer from the competition and at the end of the day may find themselves forced to leave the market.

Thus the mechanism of competition will lead overall to an efficient allocation of the economy's resources, characterised both by productive efficiency – production at the lowest possible cost – and allocative efficiency – resources are destined for the preferred and most profitable uses – as well as by dynamic efficiency – there are incentives for the reallocation of resources and product and technology innovation. In order for this competitive mechanism to work efficiently, it is essential that the price mechanism functions freely. It is this mechanism that sends out the appropriate signals so that offer and demand can adapt to the market conditions. Faced with excess offer prices tend to go down, the profitability of the activity falls and this serves as an incentive for businesses to reallocate production resources for other purposes. Price intervention leads to a distortion of the signals mechanism, making it hard for offer and demand to adjust, which distorts productive, allocative and dynamic efficiency.

The fact that the market is the basic way in which our economy operates does not however exclude recognition of the active role of the public sector, which intervenes in economic activity in a variety of ways.

The constitutional framework of the market economy means that the public authorities exercise responsibility in two ways. On the one hand the public authorities must promote conditions that allow the market mechanism to be effective and produce benefits for the general well-being, progressively eliminating the barriers which historically may have prevented the exercise of free competition between operators on the markets and articulating an efficient system for defending competition. On the other hand the public authorities must refrain from doing anything to distort or threaten the market mechanism and if they do take action the action must be properly justified and must not unnecessarily threaten the potentiality of this principle.

In relation to the first of these aspects – guaranteeing the market mechanism – we must bear in mind the historical perspective and the evolution of the environment in which the Spanish economy and other nearby mixed economies have developed, which has led to the current situation. Thus, as a consequence of the recognition of the market economy and the fact that it is essential for the free circulation of goods, services, merchandise and capital established by the EC Treaty, the transition from more or less interventionist markets to a scenario of a free market economy has been an objective of Spain's economy policy over the last 20 years. For this purpose various sectors of the economy have seen the implementation of liberalisation, deregulation and, in many cases, privatisation processes. What has happened in the carriage of goods by road sector is a good example of these processes. The sector

has undergone a progressive liberalisation and deregulation to the point where it is now almost completely liberalised.

In terms of the second of the aspects mentioned – the restrictions on the intervention of the public authorities on the markets – it must be admitted that from an economic point of view there may be circumstances that justify the fact that public intervention affects the development of competition on the markets. This would be so with situations in which the markets are not capable of efficiently allocating the resources by themselves. Some form of public intervention would then be justifiable and desirable and could be directed towards minimising the losses of efficiency caused by these market failures. Finding the right balance in the economy between the public sector and the private sector is in fact one of the fundamental questions of the economic analysis.

These market failures may appear in very diverse forms. There may be negative or positive external factors in the consumption of a product that mean that without intervention its production would be excessive or inadequate compared with the value that society places on it. Intervention may also be required in the case of so-called public property which an individual may enjoy free of charge and from whose consumption it is hard to exclude him, giving rise to problems of free riding and a lack of incentives for investment. In either of these cases public intervention is socially acceptable in order to ensure adequate provision of such property.

There may also be flaws in the markets which make it difficult for businesses to enter and leave them freely. There may be information imbalances which make it difficult to establish new businesses that need to have data on the characteristics and consumption patterns of potential customers in order to start trading but find such data very expensive to obtain. There may also be information imbalances on the offer side which prevent consumers from properly selecting the goods or services that they want to consume. Or a situation where significant investments in assets that are very specific to the activity undertaken make it hard to leave the market because it is very expensive to do so. In all these examples public intervention may be justified in order to facilitate the market mechanism.

Intervention is also justified in certain economic sectors where the number of operators is very small, or there is even just a single operator, due to the presence of high fixed costs for the operation of the service that generate economies of scale and make it inefficient for a large number of operators to operate. Typically this is also the case with so-called “network” services. Given that the stable prices that may result from these monopolised markets carry with them inefficiencies that are not socially desirable, the direct intervention of the State is justified, either by providing

the service in question itself, or by regulating the prices of the private monopoly holder.

However, it is not always the correction of market failures that justifies market regulation. On other occasions other socially accepted objectives lead the public authorities to intervene in the economy. For example, there is broad consensus about the fact that the State has an important role to play in improving economic equality, although at the same time there are major disagreements in terms of the interpretation of such equality and the instruments that should be used to achieve it. Taxes that redistribute wealth and social expenditure may produce significant benefits, but also significant costs, not only direct but also indirect in the form of a distortion of the incentives of the economic agents.

However, once the necessity or expediency of the public authorities intervening in economic activity has been established, whether because market failures have been detected that justify intervention or in order to serve other objectives of general interest, we have to reflect on the different ways in which this can be done. One of the most important ways is the proposal for laws and regulations of different kinds and the necessary measures to implement them. We then have to ask whether, in pursuit of the legitimate objectives that have been defined, the regulation imposed is a quality regulation, that is to say it is a response to criteria or principles of efficiency. Or in other words, whether the regulation in question achieves the proposed aims at the lowest possible cost, bearing in mind that part of this cost manifests itself through the distortion of the incentives and the market mechanism and competitive interaction.

Precisely because of the second-generation reforms that have followed the extensive processes of liberalisation and deregulation of the markets in many western economies in the 1980s and 1990s, there has been extensive debate on the principles that have to be satisfied by a regulation that is efficient and favours competition.

Amongst these principles, those that stand out are ***need and proportionality, which require the restriction on competition imposed by the regulatory measure in question to be fully justified in order to achieve the objective pursued with the regulation and require that it is not excessive***. To put it another way, it is necessary to ensure that the benefits deriving for society as a whole from the attainment of that objective are greater than the prejudice caused to it by the distortion of competition that is introduced as a result of the regulation. Of course a prerequisite for being able to carry out this benefits and costs analysis is that the objective being pursued is explicit and clearly defined.

In tandem with the principle of proportionality we also have to analyse whether the instrument chosen for the intervention is the most suitable one because it is the least restrictive of competition; it has to be the case, therefore, that there is no alternative intervention mechanism that enables the same goal to be achieved but causes less distortion to the free operation of the market.

In its report on the legal restrictions on competition in the carriage of goods by road published in 2005, the now defunct Competition Court [Tribunal de Defensa de la Competencia] expressed the same concerns when it said that "[i]nterventions on the market must be weighed with extreme care, evaluating the costs of the regulation against the intended benefits and always against the objective of ensuring that overall social well-being is greater than in a situation where there is no intervention"[26]. The National Competition Commission also considers it crucially important to consider all these principles of effective regulation, from the point of view of competition, when it comes to evaluating legislative processes and other public activity, and in this context it is preparing a series of recommendations that will see the light of day shortly.

It is precisely these principles that must be taken as the point of reference for evaluating the regulation of minimum prices that is under consideration.

4.2. Description of the sector

In Spain carriage by road continues to be far and away the most-used method for carrying goods: in Spain 95.4% of goods are carried by road (the same reference for the European Union average at 25 is 77%).

We set out below the most representative data for the sector – which are taken in the main from the various carriage of goods reports.

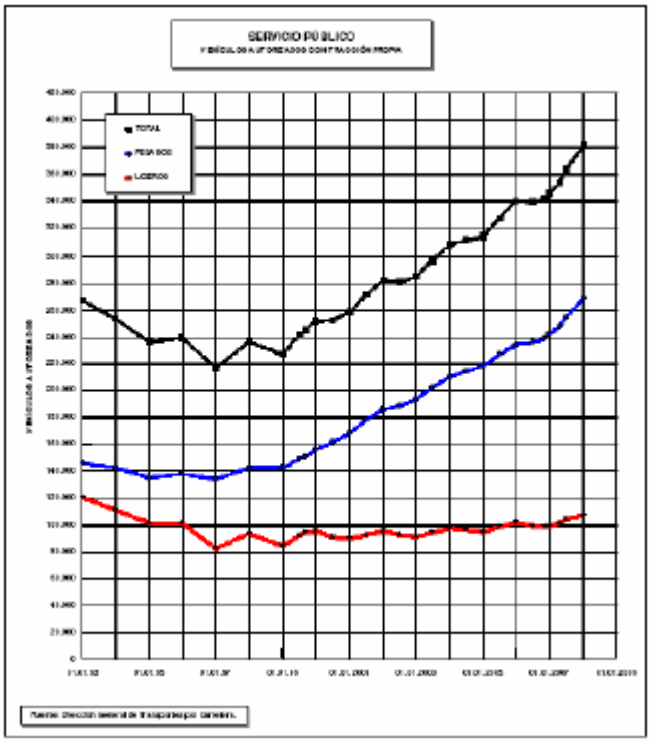
Authorisations

There are 381,327 authorised vehicles in the public carriage of goods by road[27] sector (data from January 2008).

[26] Report I/99/02, *Legal restrictions on competition in the carriage of goods by road*, published in June 2005.

[27] Public carriage is transport carried out for reward on behalf of someone else, compared with private carriage, which is transport carried out on one's own account, either for one's own needs or by way of complement to other main activities.

Its evolution over time can be seen in the graph below, which shows significant growth from 1999 onwards. This is due to the fact that the legislation on accessing the market was changed that year. In particular the "quota system" was removed in the case of authorisations for heavy goods vehicles within national territory. Up until that time they could only be acquired by purchasing existing authorisations. This meant that from then on the highest rate of growth was in the sphere of public service authorisations for heavy goods vehicles (almost 90% since 1999).

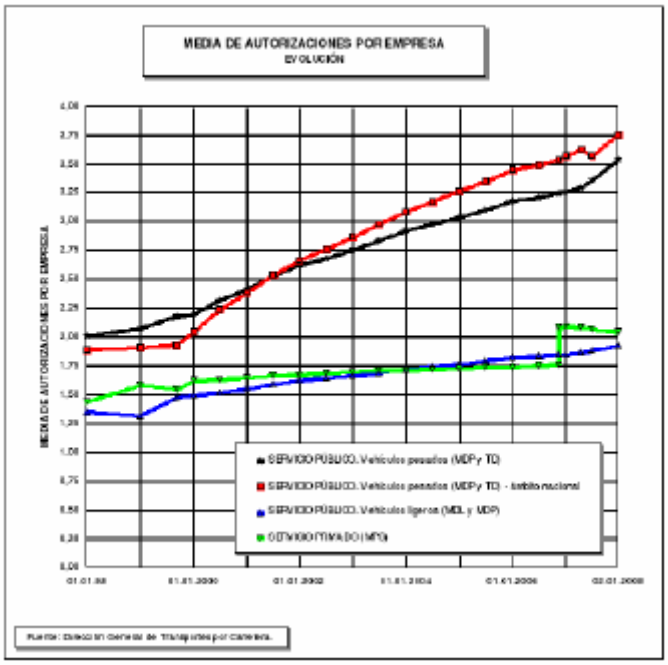


Source: Carriage of Goods by Road Report

However, in terms of authorised businesses, growth since 1999 has not been as great. The number of businesses currently authorised for public service is 136,024, with almost 76,000 being businesses with heavy goods vehicles.

Business structure

As a result of this trend, the average size of businesses has gone up since 1999 from 2.08 to 3.54 vehicles per business in the case of heavy goods vehicles and from 1.31 to 1.92 vehicles per business in the case of light goods vehicles.



Source: Carriage of Goods by Road Report

Similarly the number of businesses with a single authorisation has gone down, going from 73.7% of the total in 1999 to 54.6% at the present time. At the same time, the number of large businesses, meaning ones with more than 20 vehicles, has gone up by 185%.

However, when analysing this trend we must remember that the legislative change in 1999 to which we have already referred made it mandatory in the case of carriage in heavy goods vehicles to have three vehicles available, which has without doubt affected the trend in the average number of vehicles.

In any event, despite this growth, we can say that the carriage of goods by road sector continues to be a sector with a high level of fragmentation, with small heavy goods vehicle businesses (with between 1 and 5 vehicles) representing almost 90% of the total. This fragmentation is more pronounced in the case of light goods vehicles, where the current legislation does not require a minimum fleet.

However, as the Competition Court said in its 2005 report *Legal restrictions on competition in the carriage of goods by road*, this fractured structure can be misleading if it is not compared with data on the organisation of the sector, in particular the fact that the market is organised through intermediaries who are either agencies or large businesses that subcontract the carriage through a stable relationship.

This subcontracting allows the fixed costs of businesses to be reduced, at the same time as enabling fluctuations in demand to be addressed flexibly. This results in an improvement in the competitiveness of businesses. For their part intermediary agencies mean that the problem for the sector of "empty" return trips can be overcome, allowing businesses to obtain return loads, thus making trips profitable.

Evolution of the activity

In the carriage of goods by road sector, domestic carriage (as against international carriage) is the most important activity, representing 97.5% of tonnes carried and 72.2% of tonnes-km produced in 2006.

In terms of heavy goods vehicles, tonnes carried by public service in 2006 represented 75.85% of the total, compared with 24.2% tonnes carried by private service. Measured in terms of tonnes-km, the greater weight of the public service increases to 91.9% of the total.

Vehicles with a load capacity of over 20 tonnes are the ones that carry most goods, representing 60.1% of the tonnes carried by Spanish vehicles in 2006 and 87.3% of the tonnes-km produced.

The trend in the public carriage of goods by road using heavy goods vehicles has increased between 1999 and 2007 by 124.6% in terms of tonnes carried and by 96.3% in terms of tonnes-km produced. The fact that the increase in tonnes-km produced is less than the increase in tonnes is indicative of the fact that the average carriage distance has gone down.

In the past year (first quarter of 2008 compared with first quarter of 2007) there has been a reduction of 3.4% in tonnes carried by public service and heavy goods vehicles, whereas tonnes-km produced has gone up by 3.4%. This trend shows a reduction in tonnes carried and an increase in the average carriage distance, which may be due to the decrease in carriage of certain products, particularly construction materials, which in the main are carried for short distances.

TREND OF THE ACTIVITY ACCORDING TO TYPE OF SERVICE AND MOVEMENT

HEAVY GOODS VEHICLES and inter-city journeys

Tonnes carried

Base index 1999 = 100

			PUBLIC SERVICE							
	TOTAL		TOTAL		Interregional		Interregional		Interregio	
Year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	Var com w pre y
1999	100,0		100,0		100,0		100,0		100,0	
2000	114,3	14,3%	114,0	14,0%	115,2	15,2%	111,1	11,1%	113,3	13,3%	115,1	15,1%
2001	128,7	12,6%	128,0	12,2%	130,5	13,3%	122,3	10,1%	126,1	11,3%	123,2	7,0%
2002	142,8	11,0%	145,7	13,9%	149,6	14,8%	134,3	9,8%	153,8	21,9%	133,3	8,2%
2003	149,8	4,9%	154,3	5,9%	158,5	5,9%	144,2	7,3%	151,2	-1,6%	135,8	1,9%
2004	169,2	13,1%	176,2	14,2%	181,1	14,3%	162,0	12,3%	184,5	21,9%	148,6	9,4%
2005	188,5	11,4%	195,8	11,2%	204,6	13,0%	174,8	7,9%	189,5	2,7%	166,7	12,2%
2006	198,2	5,2%	207,9	6,2%	217,0	6,0%	189,3	8,3%	185,3	-2,2%	169,4	1,6%
2007	210,1	6,0%	224,6	8,0%	233,2	7,5%	208,3	10,0%	195,8	5,7%	167,3	-1,3%
2008		-6,7%		-3,4%		-4,8%		0,6%		7,4%		-10,1%

HEAVY GOODS VEHICLES and inter-city journeys

Tonnes carried

Base index 1999 = 100

			PUBLIC SERVICE							
	TOTAL		TOTAL		Interregional		Interregional		Interregi	
Year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	Variation compared with previous year	Activity for the year (Index)	V co p

Source: Carriage of Goods by Road in Heavy Goods Vehicles Report according to data from the Permanent Survey of the Carriage of Goods by Road. (*) In 2008 three is a variation in the aggregate data for the first quarter compared with the same data for the previous year.

Finally if we look at the “take-up of the offer” indicator in the Carriage of Goods by Road in Heavy Goods Vehicles Report as an indicator of production per tonne offered, this has gone up by 27.2% between 1999 and 2007 measured in tonnes carried per tonne offered and by 11.2% measured in tonnes-km produced per tonne offered. However, in the past year this ratio has gone down by 13.2% in the case of tonnes carried per tonne offered and by 7.0% in the case of tonnes-km produced per tonne offered.

4.3. Regulation in the carriage of goods by road market

Unlike other forms of transport such as air and train, in which there has been a strong public presence for years, not only in terms of regulation but also in terms of the provision of such services, the level of intervention in the different activities listed has been much less in the case of carriage of goods by road.

Without doubt this is due to the fact that we are not dealing with a sector with significant market failures, unlike the position in other cases. We are not dealing with services subject to strong external factors, there are no strong imbalances in terms of information and the production of the service does not require fixed and irrecoverable investments that lead to a monopolistic or oligopolistic offer.

In fact this is far from the case; the sector has been characterised by the ease with which new operators can gain access. Indeed the risk of what has been referred to as *destructive competition* has often been alluded to. Destructive competition is the situation that characterises certain sectors in which there is a very high number of businesses, giving rise to excess capacity, which in turn forces prices down. This may result in a situation in which many businesses do not make an adequate rate of return to enable them to recoup their investments, but at the same time they do not opt to leave the market because the owners of the businesses, most of them independent in this case, cannot easily recoup their investments.

As the Competition Court indicated in its 2005 report, “in the early 1970s growth (in the carriage of goods sector in Spain) collapsed due to the increase in petrol prices. Against a background of what was referred to as “excessive competition”, the sector itself demanded measures to restrict the offer, which materialised in entry restrictions through a quota policy. Access was therefore only possible by acquiring an existing business. This only gave greater flexibility to private carriage or carriage on one’s own account, which in turn encouraged greater development of this form of carriage compared with public carriage. Although the quotas were initially very generous, they gradually reduced over time to the point where in the mid-1980s the

quota for heavy vehicles was zero. The offer was therefore strained and it had to increase the average capacity of the vehicles in order to be able to meet a higher volume of carriage."

Quantitative restrictions on access to the activity of carriage of goods by road ceased many years ago. At this stage in the process of liberalising the sector, and in line with the Community legislation, we have seen that the application of qualitative requirements is sufficient. Since the Land Transport Management Law was enacted, administrative action in the carriage of goods by road sector has basically focused on the management of the entry conditions in the different forms that the law establishes.

At the present time regulation in the carriage of goods by road sector is aimed principally at protecting certain objectives regarding safety in the operation of the service, road safety and environmental protection – which without a more in-depth analysis could be considered justified. But also, as the Competition Court indicated in its 2005 report, it is aimed at promoting business concentration in a sector in which the offer is relatively fragmented, using instruments that enable the rationalisation of the entry of new players to the market for carriage of goods by road using heavy goods vehicles.

Specifically entry to the market is regulated by means of administrative authorisation, which lays down requirements of professional capability in order to carry out the activity, honourableness and economic capacity, to which other more demanding requirements are added for new operators wishing to obtain a public carriage authorisation. These requirements refer to the minimum number of vehicles needed in order to start trading. The vehicles must also satisfy certain characteristics.

In this respect it is necessary to repeat that in the specific pursuit of the aforementioned objectives the regulation imposed has to accord with the principles of efficient regulation and, in particular, conditions must not be imposed on operators if they could be disproportionate and represent discriminatory treatment between them. However, we are not concerned here with an evaluation of the regulation of access to this market, but rather with an evaluation of intervention on the market by means of price control.

4.4. The regulation of a minimum tariff for the carriage of goods by road

As can be seen from the situation described in section 4.2., the current economic circumstances, coupled with the structural characteristics of this market, have placed the sector in a difficult position. The sector is open to competition, with a large number of businesses, most of them very small, and in structural terms it seems to be experiencing a certain amount of excess offer. This situation has found itself particularly aggravated at a time like the present where there is slower economic growth, which may favour a contraction of demand as a result of adjustments in the final market for goods in which carriage is a production input and, in turn, a phenomenon of new operators entering the market, possibly having moved from other sectors, and, therefore, a greater expansion of the offer, which leads to a reduction in prices. In such conditions operators offering carriage services may find themselves in a position of some weakness vis-à-vis their customers when it comes to negotiating prices. Added to that is the fact that the sector – like the rest of the sectors in the economy moreover – is facing a scenario of significant rises in fuel costs, one of the most important production factors. Without doubt the excess demand and the increase in costs in a context of limited bargaining power drives margins down.

In this context there is increased demand for the imposition of minimum prices for the offer of services for the carriage of goods by road. Bearing this context in mind, it is appropriate to make the following observations on the regulatory measure proposed.

A) <u>The fixing of a minimum tariff distorts the free operation of the market</u>

Where the forces of offer and demand are allowed to act freely, prices serve to measure the relative shortage or abundance of goods and services. This is fundamental economic information. If the price at which the carriage service is exchanged on the market goes down, the business supplying it will have incentives to reduce its activity, and its customers, who use it as a necessary resource for their business, will have incentives to increase the demand for it. Prices therefore constitute a very powerful mechanism for communication between the various economic agents that interact on the market. This mechanism should not be interfered with through the action of the public authorities, as such interference could make it more difficult for the economic agents to make decisions and could even lead them to make the wrong decisions.

As the Competition Court has indicated in earlier reports in relation to this same sector, “the free price is a basic institution of the market economy. It has to be the parties – customer and supplier – who decide on the price. Society must be left to sort this out and the State must remain on the sidelines and not force the wishes of either party, save with very good reason. Freedom in terms of prices, provided that adequate conditions are present, that is to say a sufficient number of suppliers and a sufficient knowledge of the alternatives on the part of the consumers, is essential in order to obtain the benefits of competition between the different producers of goods or providers of services”.

In the case with which we are concerned, the proposed price intervention results in a particularly damaging distortion of the market due to the fact that it involves fixing minimum prices. Price regulation normally refers to the imposition of maximum prices. This intervention may be justified where its aim is to protect consumers from situations of market power, generally derived from the monopoly position of certain operators. However, in terms of general interest, the regulation of prices through the fixing of a minimum tariff is much more questionable in that it does not purport to discourage the exercise of excessive market power in absolute terms and involves imposing a higher cost on the people demanding the product. This distorts the signals mechanism, so that the real market situation is not translated to either the offer or the demand on the market, preventing its adjustment.

B) <u>The fixing of a minimum tariff generates losses of efficiency in the economy</u>

In a liberalised environment such as that of the carriage of goods by road, the imposition of a minimum tariff via legislation generates losses of economic efficiency compared with a free market scenario, in that it prevents competition between operators in terms of the main competitive variable of the service: price.

By preventing the price from falling below a certain threshold – which in order to be effective will obviously have to be fixed at above the price that would result from the free interaction of offer and demand – in principle the quantity of the carriage service supplied will also be reduced. In this situation there could be carriers interested in providing the service at a lower price than the one fixed and at the same time shippers or other people requiring the service who are interested in contracting it on these economic conditions. This difference between the willingness of some people to pay and the minimum price that others are prepared to accept in order to secure the contract is what justifies the interest of free exchange on the market and what is

lost where such free exchange is prevented. This gives rise to losses of efficiency that are directly associated with the measure being proposed.

The fixing of prices that are higher than would be the case where there is a balance not only generates losses of efficiency in this sector but also leads to other inefficiencies in many other sectors which depend on carriage in their business. Having seen their production costs artificially increased, they are forced to adjust their offer and with the consequent increase in prices the well-being of the economy as a whole is damaged.

The fixing of minimum prices therefore has a negative effect on productive efficiency. In addition, by providing inadequate signals in the context of offer and demand, it may also distort the investment strategies of the businesses and give wrong signals that affect decisions on entry to and exit from the market, which also has a negative repercussion on allocative efficiency. From the dynamic or long-term point of view, it distorts the incentives for the introduction of more efficient production processes or improvements in the quality of the goods and services, as a guaranteed economic return through these minimum prices may mean that the operators do not consider investment in these aspects to be justified. In short, the measure proposed is inadvisable from the point of view of its impact on the efficiency of the economy.

C) The fixing of a minimum tariff is unfair

Based on what we have said above, this is not a sector that is seriously affected by market failures. The carriage of goods is not an economic activity that requires large initial investments, nor are we dealing with public property or a service that the public sector has to disincentivise or encourage due to the external factors that it produces. In contrast it is a liberalised sector that operates with an acceptable level of competition and with transparent information for the agents operating on it.

The absence of these characteristics therefore leads to the search for some justification other than that of mitigating certain market failures, in order to support the proposed intervention. It seems that in this case the aim of price control would be to protect a certain sector of the offer that is part of a weaker situation, made worse as a result of the rise in petrol costs.

However, if the protection of the interests of this group is one of the objectives of the measure proposed, we must bear in mind that the pursuit of this objective could be openly threatening the interests of other participants on the market.

On the one hand, as a consequence of the price control there would be a direct transfer of income from the people demanding these carriage services, who find themselves obliged to pay a higher price than if there were no intervention, to the people offering them, who can close transactions at those prices, with the corresponding prejudice for the first group. Those producers who are excluded from the market in the event that the minimum price control is actually effective would also be prejudiced. In addition, given the fact that the carriage of goods is just one integrated link in a logistical chain that meets ever greater and more diversified demand needs, the fixing of minimum prices would have a repercussion on the prices of other markets, affecting other consumers and producers.

Moreover, there is no evidence of circumstances in which normal price competition could prejudice consumers (the reason put forward in the Cipolla judgment), inasmuch as it could result in an undesirable loss of quality. The management of the entry conditions mentioned above is precisely the way in which these service quality standards are guaranteed.

Finally, given that many other sectors of the economy are also bearing the cost of the increase in fuel prices, it would be unfair to intervene in this sector and specifically favour certain groups of producers but not others who are equally affected.

To summarise, in these circumstances it is hard to justify the fact that the imposition of minimum prices is for the benefit of the general interest or for the benefit of the economy and, specifically, in the interests of businesses in other sectors or of users of the services for which it is sought to fix tariffs.

D) <u>The fixing of a minimum tariff is not an effective way of achieving the objective pursued</u>

In the preceding criticisms of the regulation of minimum prices it is taken as read that this instrument is going to be effective when it comes to achieving the proposed objective. However, various factors may mean that the measure is not even effective when it comes to achieving the intended objective: protecting the interests of a sector of the offer of carriage services. This is due to a variety of reasons. First, as we have said, maintaining artificially high prices and protecting profitability compared with a situation of free prices means that there is a lack of incentive for market adjustments. In a sector that does not suffer from excess offer, preventing prices from being reduced only succeeds in delaying the reduction of this excess. Furthermore, this artificial price maintenance may have a negative effect on the

demand for carriage services, which is already weakened by the economic situation. In such conditions the fixing of prices is particularly counter-productive.

Secondly, to the extent that many carriers have little bargaining power vis-à-vis their customers, the measure may become ineffective, because they will find other ways of passing on their costs to them or of achieving actual price reductions (deferred payments to name but one). This kind of situation is not infrequent. We have the example of commercial distribution where the measures to protect suppliers with less market power have turned out to be unworkable. The experience shows us that it is not usually possible – or advisable – to provide for and fetter all aspects of the commercial relationship between agents.

Thirdly, the very fact that there is excess demand and the fragmentation of it may favour the ineffectiveness of the measure. Given that exiting the market seems to present certain relative barriers due to the indebtedness of the economic agents and the difficulties they have in realising their assets, there may be agents who are prepared to provide the services at prices below the regulated prices. In addition the fragmentation of the offer market may make it difficult to check that the measure is being implemented properly. Given these conditions it is possible that there may be a whole range of transactions on the black market that fix prices at below the prices determined by law, without such practices being easy to detect.

E) <u>The fixing of a minimum tariff may have widespread social repercussions</u>

Finally, in the current context of the carriage of goods by road sector, it is hard to justify price intervention, which would clearly be a retrograde step in the efforts to liberalise the sector that have been taking place since the enactment of the Land Transport Management Law.

From the point of view of the economy as a whole this kind of intervention would contribute to reducing the credibility of the government's policy, both internally and externally, due to the clear negative effect that it would carry with it. This minimum tariff could give other sectors grounds for making similar demands, thereby multiplying the cost and the distortion to the operation of the economy that the measure proposed represents. Furthermore, the choice of inadequate regulatory instruments introduces uncertainty on the markets which may have very harmful effects on investment at a delicate time for the Spanish economy, an uncertainty that may be increased if the instruments in question do not turn out to be effective, that is to say if at the end of the day the proposed aim is not even achieved.

In the light of these considerations we must look again at the matters raised in the legal analysis in the preceding section in terms of whether this measure, in accordance with existing case law and in order not to be incompatible with the Treaty, preserves the general interests affected by the measure and whether the restriction on free competition meets the requirements of need, adequacy and proportionality, that is to say whether the social benefits which it purports to achieve sufficiently compensate for the costs that it imposes in terms of the operation of the market.

In this sense we can categorically state that the measure does not satisfy the proposed test. The prejudice that it would cause to consumers and other producers apart from the carriers has been clearly shown, which means that the measure would not take account of all of the interests affected in the economy as a whole. Not only that, the regulation of minimum prices would also impose disproportionate costs. The distortions that it causes on the market, making it impossible for the prices to indicate the relative abundance or shortage in the provision of the service, and the inefficiencies caused to both the carriage market and other related markets are not offset by the potential benefits to the carriers. These benefits would also be dubious because there is a certain risk that the measure will not be effective to achieve the objectives pursued.

Finally, if the intention is to help with the take-up of the excess offer, it is clear that any intervention via quantities is preferable to price intervention. Therefore the regulatory instrument proposed does not comply with the principle of minimum restriction. Indeed, as we have already said in section 3.3, not even in the crisis cartels have price control measures been accepted in situations of excess capacity.

In short, we must conclude that from the point of view of the economic analysis and the maintenance of effective competition on the markets, a regulation that fixes a minimum tariff for the carriage of goods service is neither justified by virtue of the objective that it purports to achieve nor would it be proportionate if it were, given that there may be other less expensive mechanisms for achieving that objective.

5. ANALYSIS OF POSSIBLE ALTERNATIVE MEASURES TO DEAL WITH THE PROBLEMS OF THE SECTOR

Having shown that a system of minimum tariffs is incompatible with the national and Community legislation, and having also proved that it is ineffective when it comes to resolving the problem of the sector in a stable way, we need to reflect on different alternatives to that measure in general and on the scope for action by the competition authorities in particular.

As we have repeatedly said in the course of the report, the sector is basically facing: 1) a contraction of the demand, which by definition necessitates a reduction in prices or offer in order for the balance of the market to be restored, and 2) this adjustment has come up against a rise in costs and an increase in the offer, which has come from other carriage subsectors such as construction. Clearly all that the second of these problems does is make the adjustment dynamic that the first problem requires much more difficult, making it harder for operators with less bargaining power, which in general means the small operators. This is particularly significant in a relatively fragmented sector, where a multitude of small operators, most of them independent, exist alongside larger and more professional operators with greater flexibility to adapt to the changing situation on the market. In this context the small and medium-sized carriers have been complaining of the existence of unfair practices by other carriers who would be selling at below cost or at a loss. They have also complained of a refusal on the part of shippers to accept price changes as a result of the rise in fuel prices. Indeed one of the measures recently agreed between the Ministry of Development and the majority representation of the sector is to propose the *"preparation of a specific Plan by the National Competition Commission to look at possible practices constituting unfair competition in the context of contracting road carriage with particular reference to possible situations of sales at a loss."*

So, in the light of that proposal it is appropriate to make a series of observations that enable us to focus properly on its limits and possibilities.

Sales at a loss

Traditionally the doctrine and decisions of the competition authorities have treated sales at a loss as an example of conduct constituting abuse of a dominant position. Someone in that position, in order to consolidate his position and prevent new operators from entering the market or to prevent his weakest competitors from increasing their market share at the expense of the dominant operator's share, may

engage in an aggressive price policy, selling his products at a price that may be less than his costs. When this happens the dominant operator may accumulate losses, but his greater financial muscle allows him to do so, whereas his weaker competitors end up being driven out of the market. Alternatively possible entrants lack incentives to operate on a market on which they would be forced to accumulate losses. As a result of such manoeuvres, the dominant operator consolidates his position and once his competitors have been eliminated or weakened he recovers his ability to act autonomously and finds himself in a situation in which he can increase his prices again to levels that are much higher than if he were in a competitive situation (a situation known as predation). At that point in time there is a **prejudice to consumers, justifying action by the competition authorities, given that the authorities do not defend competitors but rather preserve consumer well-being.**

However, in order for a dominant operator's strategy of selling at a loss to be capable of being prosecuted under the competition legislation, various requirements have to be satisfied. First the market must not be capable of being captured by storm. To a large extent a market capable of being captured by storm would be readily accessible to new operators as soon as the price increase that follows the expulsion of the original competitiors of the dominant operator occurs, making the practice of sales at a loss unviable or irrelevant to consumers. Secondly it is necessary to be able to show clearly that there have been sales at below an adequate costs measure. The authorities are not unanimous in terms of what the said measure should be, given that it is not always easy to determine the price level at which there are sales at a loss[28].

In Spain such difficulties are evidenced by the fact that the now defunct Competition Court has only penalised a situation of predation on one occaion. Specifically it imposed sanctions on Tabacalera[29] for the sale of a particular brand of cigarette at below cost in order to make it more difficult for the competition, but the Supreme Court [Tribunal Supremo] set aside the decision because it took the view that the existence of such sales at a loss had not been adequately proved. If such difficulties exist in the case of product sales, it is clear that the difficulties must be considerably greater in the case of the services market.

[28] Traditionally it has been held that predation exists where sales are at less than mean variable costs (judgments of the CJEC in the AKZO and Wanadoo Interactive cases), whereas a price that is higher than the mean variable cost but less than total mean costs does not automatically mean that predation exists.
[29] Decision 375/96, Tabacos de Canarias, of 16 February 1999.

There have been repeated accusations of sales at a loss in certain markets, particularly from smaller operators against larger ones. The case of retail distribution is particularly significant, with the representatives of small traders repeatedly accusing superstores of selling at a loss in order to drive out the small trader, but such practices have not always been easy to prove. However, the insistence on the effects of such a strategy has given rise to the existence of two different regulations in respect of sales at a loss, the first in the unfair competition legislation and the second in the Retail Trade Management Law [Ley de Ordenación del Comercio Minorista] of 1996. By way of passing comment only on this last piece of legislation, it considers that a sale by a retailer at below the price at which he bought the products constitutes an offence under administrative law which is sanctionable by the authorities with responsibility for domestic trade.

Before this regulation, Law 3/1991, the Unfair Competition Law [Ley de Competencia Desleal] had already been entrusted with considering whether sales at below cost constitute unfair competition in certain circumstances. However, this legislation considerably restricted the concept of sales at a loss, construing it very narrowly, as set out in the recitals, because it was seeking to liberalise a particular practice rather than to incriminate it. In that sense, in article 17 under the heading "sales at a loss", the first subsection contains a general statement: "save as provided otherwise by statute or regulation, the fixing of prices is free", whilst subsection 2 provides that a sale at a loss or at less than the acquisition price [is considered unfair] in three situations: where it is capable of misrepresenting the position with regard to the level of prices of other products or services of the same establishment; where its effect is to discredit the image of a product or an establishment of a third party, or "(w)here it forms part of a strategy aimed at eliminating a competitor or group of competitors from the market".

Certain conclusions can be drawn from this unfair competition regulation. First of all that the legislator took the view that selling at a loss was contrary to the loyalty required from traders, and considered such conduct to be unfair not just when perpetrated by a dominant operator, but when perpetrated by any operator, whether or not he is in a dominant position. However, this statement cannot allow us to forget that such conduct, to the extent that in order for it to perpetrated it requires the perpetrator to have much greater financial muscle than his competitors, can only be perpetrated by someone with considerable market power. This can be seen in particular from the third of the situations in article 17(2) of the Unfair Competition Law.

Secondly, treating the conduct as unfair, and not as an illegal anti-trust, appears to place its prosecution in the sphere of private actions, to the extent that actions for unfair competition have to be brought before the commercial courts [Juzgados de lo Mercantil], even though it should not be forgotten that article 3 of the Competition Law of 2007 (like its predessor, article 7 of Law 16/1989) allows the National Competition Commission to hear as illegal anti-trust actions those cases of unfair competition that affects the public interest due to their impact on the market.

Bearing in mind these restrictions, we must now determine whether a hypothetical practice of **selling at a loss in the carriage of goods by road sector** may be the subject of prosecution by the authorities, particularly by the competition authorities.

As a preliminary matter, we have to say that the regulation of sales at a loss contained in the Retail Trade Management Law is not applicable to the carriage of goods sector, as this is outside the sector that it regulates, that is to say retail trade. As a result, the only point that we have to consider must start from the possible application of article 17 of the Unfair Competition Law, particularly by the National Competition Commission. It goes without saying that certain actions in relation to unfair competition may be brought by people who consider themselves to have been prejudiced by such conduct and by both business and consumer associations. This means that possible competitors affected by possible unfair conduct involving sales at a loss or their associations may apply to the commercial courts if they consider that such conduct exists. Hence our comments here only take account of a possible action by the competition authorities. From that perspective it is clear, *prima facie*, that the first two situations regulated in article 17(2) of the Unfair Competition Law do not apply, as we are dealing neither with attempts to mislead the consumer about the level of prices nor with conduct whose effect is to discredit a third party. The only situation that can be analysed is the content of article 17(2)(c) of the Unfair Competition Law, that is to say whether the particular sale at a loss forms part of a strategy aimed at eliminating competitors from the market.

In order for this situation to apply, we must again remember that under the Spanish regulation sales at a loss do not only constitute an illegal situation where they are made by a dominant operator. Whilst that may be true, the fact remains that strategies aimed at eliminating competitors by building up losses can only be implemented where there is a considerable imbalance between some operators and others. Between operators trying to monopolise the market and operators who are candidates for expulsion from the market due to their lesser economic power. Therefore, if the possibility of an action by the National Competition Commission or the regional competition authorities is to exist, it is necessary to consider two

preliminary matters: the characteristics of the market and possible distortions in the operation of the market that could affect the public interest.

From the characteristics of the market that have been described above, it does not appear easy to say that they are possible practices aimed at excluding competitors by means of a strategy of selling at below cost undertaken by the most powerful operators. The fragmentation of the market, the fact that the market cannot be taken by storm or the fact that it appears clear that situations may exist where services are provided at below cost (even with the difficulties inherent in determining what that cost is) or, at least, the difficulties of passing on the increase in fuel prices to the prices for the services, is not the product of a strategy to expel competitors but rather the consequences of the greater market power of the shippers over part of a very fragmented sector at a very particular point in time, with excess offer and rising costs. This is regardless of the fact that, if the information conveyed in the course of the dispute is true, the possible sales at a loss represent conduct which, it seems, has not actually been perpetrated by the carriers with the greatest market power but in fact by much smaller carriers, who are the ones who, being particularly affected by the crisis, find themselves forced to provide their services at any price, even if it means that they will be driven from the market in the medium term.

The second consideration is to a large extent connected with this circumstance. It could make sense to consider an action by the competition authorities in this sector if the strategy of selling at a loss were pursued by the carriers with the greatest market power. In such a situation there would then have to be consideration of whether that conduct forms part of a strategy aimed at driving competitors from the market, and finally whether the public interest is affected so as to justify the application of article 3 of the Competition Law. If on the other hand the indications are that such conduct appears to have been pursued by the carriers with less bargaining power, any action by the competition authorities to prosecute such conduct would only help to accelerate their expulsion from the market. In other words the opposite of what is intended.

We cannot threefore say from the available information that the necessary prerequisites for action by the competition authorities to prosecute possible practices of selling at a loss in the carriage of goods by road sector, in particular actions by the National Competition Commission, are present.

The difficulty of passing on the increase in costs

The second thing that we need to consider is why the carriers have not been able to pass on the increase in fuel prices in their prices.

On this point we could consider the existence of possible abusive behaviour by the shippers, who seem to acquire greater market power than the carriers, at least in the case of the independent carriers,. This supposed abusive conduct cannot be analysed in accordance with the provisions of article 2 of the Competition Law, given that the absence of dominant operators on this market makes it impossible to apply that article.

It is true that in the course of the dispute frequent mention has been made of the possible existence of other unfair practices. For the sake of argument we should consider the possibility of **conduct amounting to an abuse of the situation of economic dependence**. Law 52/1999, of 28 December 1999, the Unfair Competition Law Amendment Law [Ley de Reforma de la Ley de Defensa de la Competencia] introduced the figure of abuse of economic dependence as illegal anti-trust, without repealing its previous incarnation in the Unfair Competition Law. It is true that Law 15/2007 repeals this figure, but it is equally true that this does not prevent the competition authorities from continuing to prosecute such conduct via article 3 of the Competition Law, to the extent that the Unfair Competition Law considered that the exploitation by an undertaking of the situation of economic dependence in which its customers or suppliers found themselves without an equivalent alternative for the exercise of their activity (article 16(2) of the the Unfair Competition Law) would amount to unfair competition, and also treated as unfair “the obtaining, under threat of breaking off commercial relations, of prices, payment conditions, methods of sale, payment of additional charges and other conditions of commercial cooperation not contained in the supply contract that has been agreed” (article 16(3)9b) of the Unfair Competition Law).

Hypothetically therefore, it would be possible for the competition authorities to analyse whether such unfair conduct could exist, but the analysis of the possible existence of such unfair conduct would require the analysis of the specific circumstances in which it has occurred, for which it would be necessary for those affected to provide information that could indicate the existence of *prima facie* evidence of such unfair practices. After analysing such *prima facie* evidence, it would then be necessary to go on to analyse whether the effect on the public interest that is necessary to activate the application of article 3 of the Competition Law is present. It is on this last point that this alternative would probably fail, given

that the public interest being protected is that of competition as a guarantee of lower prices for consumers, not the particular interest of the carriers. This is regardless of the fact that the existence of a significant number of shippers would make it physically impossible to show that the requirement of the absence of an equivalent alternative is met.

The last of the possibilities is that the difficulty that we have mentioned of passing on the increase in costs comes from concerted practices between the people requiring the carriage services in order, for example, to establish maximum purchase prices or share customers. However, on this point we must point out that in view of the excess offer that exists, it does not make much sense to engage in practices to establish maximum purchase prices, as the sector itself probably provides advantageous prices and conditions as a result of the competition.

Bearing in mind the matters that we have set out above, the National Competition Commission takes the view that the problems of the sector do not come from the fact that the competing carriers are themselves engaging in unfair practices, but rather, as the case may be, from the manifestation of the unequal market power of the demand, which in a context such as the present one is amplified. That is to say, where small lorry owners "sell at a loss" it is not in order to drive out their competitors but more likely in order to survive and as a consequence of the difficulty in passing on the increase in their costs in their prices. Moreover, the existence and even the exercise of market power, in this case by the shippers, against another operator, the small carriers, as a consequence of their relatively larger size, is equally not a sufficient condition for a restrictive practice to exist. The National Competition Commission can only act in this context if there are restrictive practices between operators demanding carriage services that make it difficult, for example, to pass on costs or to establish agreements regarding maximum purchase prices.

Thus in view of the imbalances produced, it could be appropriate to develop a line of action based on the preparation of a specific plan to look into possible restrictive practices in the context of contracting carriage by road, with particular attention to possible situations of agreements that make it difficult to pass on changes in costs to prices as would normally be the case. This would all require the collaboration of the carriers' associations so that the evidence that is essential in order to prove such anti-competitive practices is produced.

Another group of alternatives

Although the request for a report from the Ministry of Development focuses on the fixing of minimum tariffs, given that there are other types of actions contemplated by the regulatory authority for the sector, and even at the risk that the matters set out below may go beyond the scope of the report requested, the National Competition Commission considers that there may be a certain margin for action by the public authorities in order to assist in the difficult process of adjustment of the sector, without this failing to respect the conditions of competition on it. Indeed, many of the measures that have been put on the table and that form part of the agreement reached, such as the reductions in offer or compensating for the power of the demand, would not necessarily represent a change to the conditions of competition on the market. Thus the first group of measures intended to **facilitate the reduction and adjustment of the offer** is as follows:

– Plans and allowances to facilitate retirement and/or business closure, including changes to the system for access to authorisations in order to facilitate consolidation or closure.

– Financial measures to encourage the replacement of older assets with others with lower consumption, introducing the obligation to reduce overall capacity within the business.

– Measures that involve direct grants for the activity and that have been provided for, such as social security rebates and tax reductions.

– This group would also include measures intended to increase vehicle inspection to ensure that the vehciles meet the corresponding quality and safety requirements; to improve restrictions on traffic; in terms of requirements for access to the market, to standardise the conditions for provision of the services in the different Member States.

The other group of measures aimed at **increasing the negotiating power of the smallest carriers** is as follows:

– Introduction by statute of a model carriage agreement that contemplates a price review clause as a standard clause to be included in the agreements, save where otherwise agreed.

– To promote the creation of **sales centres by means of associations** of small carriers, provided that they do not exceed certain limits. For these purposes the limits fixed by competition law for de minimis agreements

(10% for agreements between competitors) may be a suitable point of reference. Such associations may also help to improve access to certain imputs and, even, to facilitate hedging of possible fluctuations in their prices.

6. CONCLUSIONS

This report analyses the fixing of minimum tariffs for the carriage of goods by road and its implications in terms of competition by reference to national and Community law.

This analysis requires us to take into account the background against which this sector is currently operating. We are dealing with a liberalised market, with no relevant legal and economic entry barriers, with a fragmented offer, composed of a high percentage of independent operators, which is currently suffering the consequences of the considerable rise in fuel prices and the weakening of demand, causing a tendency towards excess offer and lower prices.

It is precisely these smaller operators, the ones most affected by the situation, who are asking the competent administration (Ministry of Development) to establish measures to mitigate their losses. These measures include the establishment of a system of minimum tariffs.

The National Competition Commission, after carrying out a legal and economic analysis of this measure and studying the possible consequences of its implementation for free competition, conclusively states that the measure is neither legally possible nor economically appropriate. Indeed, in the current situation it would be counter-productive for the sector and for the economy as a whole. The reasons for this are set out below:

ONE: LEGAL ANALYSIS OF THE MEASURE

Both from the perspective of the national legislation (article 38 of the Spanish Constitution and Law 15/2007) and from the point of view of Community law (basically articles 3, 10 and 81 of the Treaty), the National Competition Commission considers that the fixing of tariffs for the carriage of goods by road is not legally possible, because it either constitutes a direct offence which is sanctionable by the

competition authorities, or, in the event that it is adopted by means of a legislative provision, it is a legal measure that is capable of being set aside or not applied.

If the fixing of the tariffs for the transport of goods by road is done by means of concerted conduct on the part of the economic operators present on the market, the National Competition Commission would react by prosecuting the concerted conduct as a very serious offence, so that proper sanctions are imposed. This would also happen in a case where the agreement between undertakings was merely ratified subsequently by a public authority.

In the case where the tariffs are fixed by means of a legislative provision to that effect, the way that it is dealt with will depend on the rank of that provision within the legal structure.

If the tariffs are fixed by means of a regulation, articles 4(2) of Law15/2007, the Competition Law, imposes an obligation on the National Competition Commission to apply the prohibition provided for in article 1 of the same Law, with the right to sanction undertakings adopting it where appropriate. In accordance with article 12(3) of Law 15/2007, the National Competition Commission would also be entitled to challenge the regulation by which the fixing of tariffs is adopted before the contentious-administrative courts, in order to remove it from the body of legislation. This action would be based on the important consequences of the measure, as set out in this document.

Where the fixing of tariffs is adopted by means of a law, this could be considered contrary to the provisions of article 38 of the Constitution, which establishes the principle of freedom of enterprise within the context of a market economy. According to article 4 of the Competition Law, the legislator is the only person entitled to introduce restrictions on competition. However, the intervention of the legislator must be a necessary and suitable intervention and must be proportionate to the public interest that it seeks to defend. The National Competition Commission takes the view that in this case the characteristics of necessity, suitability and proportionality which are needed for a public intervention to restrict price competition on this market are not met.

In the same way, a law that fixes tariffs for road carriage, to the extent that it is limited to protecting concerted agreements, could also be considered contrary to the Community competition legislation, and contrary to the free provision of services, which could lead to the start of the corresponding proceedings by the Community courts to set it aside, along with proceedings to challenge it before the ordinary courts by persons directly affected by it. The Community case law has frequently

dealt with this type of situation, which would enable the effectiveness of the competition rules in the Treaty to be easily destroyed.

TWO: ECONOMIC ANALYSIS OF THE MEASURE

The analysis of the proposed measure from an economic point of view confirms that it does not satisfy the criteria of necessity, proportionality and efficiency that would be essential in order to infringe the constitutional principle of freedom of enterprise and restrict the operation of competition on the markets:

- The National Competition Commission considers that in a liberalised environment such as that of the carriage of goods by road market, the establishment of a minimum tariff by a legislative measure will **cause losses of productive and dynamic efficiency** in relation to a free market scenario, in that it prevents competition between operators in respect of the main competitive variable of the service: the price.

- Not only does this distortion of competition have a **serious impact**, it is also generalised, given that the carriage of goods by road constitutes a necessary input for most sectors of the economy.

- This measure **also prejudices allocative efficiency**, to the extent that it protects this sector compared with others that have also been affected by the rise in fuel prices.

- The measure would also be **ineffective** for various reasons. First because the main reason why the carriers cannot pass on the increase in their costs in their prices is that they have less bargaining power, which would not change with the imposition of a minimum price. The experience of other sectors tells us that if customers - in this case the businesses demanding carriage services –have bargaining power vis-a-vis their suppliers - the carriers – they are able to pass on the increase in costs which the introduction of the minimum tariff represents for them in other ways. Secondly, because the fixing of tariffs that are higher than the tariffs that would result from free interaction on the market, far from favouring the adjustment of the offer within the sector, would remove incentives from it. Thirdly because experience shows us that in a context where there is excess offer, fixing minimum prices may encourage the hidden economy.

- The measure **is not proportionate**. There are other less restrictive alternatives that may help to adjust the offer in a more efficient way and a way that is less damaging for competition and freedom of enterprise than minimum prices. In the event that it is decided to intervene, it would be advisable to exploit such alternatives.

- In the current context of the carriage of goods by road sector, it is hard to justify price intervention, as this would clearly represent **a retrograde step in the efforts to liberalise** the sector that have been taking place since the enactment of the Land Transport Management Law. From the point of view of the economy as a whole and in a global context of economic deceleration, this type of intervention would contribute to a loss of credibility for the government's policy, both internally and externally.

In short, we can conclude that from the point of view of the economic analysis and of the maintenance of effective competition on the market, the establishment by the public authorities of a minimum tariff system for the carriage of goods service is not justified by reason of the objective that it seeks to achieve, nor, even if it were, would it be proportionate, given that there are alternative mechanisms to achieve that objective that are less expensive.

THREE. SALES AT A LOSS

Finally, in the current unfavourable economic environment, small and medium-sized carriers are complaining about the existence of unfair practices by other carriers who would be selling at below cost or at a loss. However, the National Competition Commission takes the view that the information made public in the course of the dispute indicates that such practices, if they exist, have not actually been perpetrated by carriers with the greatest market power; on the contrary, they have been perpetrated by carriers with the least market power. These carriers are trying to subsist and are faced with the impossibility of passing on the increase in their costs due to the rise in fuel prices in their own prices.

We can therefore say that from **the information that exists we cannot state that the necessary prerequisites for action by the National Competition Commission in order to prosecute possible sales at a loss in the carriage of goods by road sector are present.**

However, the apparent absence of evidence that would allow us to assume that sales at a loss and other unfair practices that may be the subject of actions by the competition authorities actually exist, does not prevent the preparation of a specific Plan by the National Competition Commission to look at possible practices constituting unfair competition in the context of contracting road carriage, with particular reference to possible situations of sales at a loss that make it difficult to pass on changes in costs to prices as one would normally do, in the event that information and prima facie evidence of the existence of anti-competitive practices being provided, whether by the administrative authorities for the sector or by the carriers' associations themselves.

Madrid, 17 June 2008