CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

SUMMARY OF THE CNC COUNCIL RESOLUTION OF 2 MARCH 2011 (CASE S/0086/08 PROFESSIONAL HAIRCARE)

I. BACKGROUND

Subsequent to the application filed by HENKEL IBÉRICA, S.A. (HENKEL) with the National Competition Commission (Comisión Nacional de la Competencia — CNC) for exemption from payment of the fine for its participation in illicit conduct in the professional haircare sector, on 19 June 2008 inspections were carried out at the head offices of several companies and in the Spanish national perfumery and cosmetics association (Asociación Nacional de Perfumería y Cosmética — STANPA), after formal proceedings had been opened on 16 June 2008.

In July 2008 L'ORÉAL ESPAÑA S.A. (L'ORÉAL) and STANPA filed appeals with the CNC Council against the inspection activities carried on by the CNC Investigations Division; those appeals were not upheld by the CNC Council. Taking into account that STANPA had also filed an appeal for judicial review before the Spanish National Appellate Court (Audiencia Nacional) under the special proceedings for protection of fundamental rights, on 2 September 2008 the Investigations Division resolved to toll the limitation period for handing down a decision on the case until the appeal had been ruled on. After notice was received on 30 November 2009 of the decision handed down by the National Appellate Court on 30 September 2009, on 1 December 2009 the suspension of the limitation period was lifted and it began to run again as from that date.

On 12 December 2008 PRODUCTOS COSMÉTICOS, S.L.U. (WELLA) filed an application with the CNC for reduction of the fine.

On 24 February 2010 the Investigations Division issued its Statement of Objections (SO) charging eight of the companies targeted by the probe —L'ORÉAL, WELLA, THE COLOMER GROUP SPAIN, S.L. (COLOMER), EUGÈNE PERMA ESPAÑA, S.A.U. (EUGÈNE), COSMÉTICA COSBAR, S.L. (MONTIBELLO), COSMÉTICA TÉCNICA, S.A. (LENDAN), HENKEL, DSP HAIRCARE PRODUCTS, S.A. (DSP)— and STANPA with a violation of article 1 of Act 15/2007 of 3 July 2007 (the Competition Act or LDC) on having adopted agreements to exchange sensitive information and a covenant not to recruit each other's employees, thereby constituting a cartel from 8 February 1989 until 28 February 2008.

On 7 July 2010 the accused enterprises were served the Proposed Resolution, including sanctions on the eight accused companies for violation of 1 of Act 11/1963 of 20 July 1963 on the Elimination of Anti-Competitive Practices, of article 1 of the previous Competition Act (Law 16/1989 of 17 July 1989) and of the current LDC, whereby the arrangements for exchange of sensitive trade information carried out from 8 February 1989 to 28 February 2008 were considered a very serious infringement. It was also proposed that HENKEL be exempted from paying the fine under article 65.1.a) of the LDC, and that the fine levied on WELLA be reduced under article 66 of the LDC.

On 9 September 2010 the Investigations Division submitted the case file to the CNC Council, along with the related Report and Proposed resolution.

II. FACTS ON CASE RECORD

A. PARTIES

1. HENKEL IBÉRICA S.A. (HENKEL)

Henkel Nederland B.V. and Henkel Consumer Goods, Inc. are the only shareholders of HENKEL IBÉRICA, S.A., the former with an 80% equity stake and the latter with the remaining 20%. Both companies, in turn, are subsidiaries of Henkel AG Co KgaA.

2. PRODUCTOS COSMÉTICOS S.L.U. (WELLA)

Since 1990 PRODUCTOS COSMÉTICOS S.L.U. has been wholly owned by the company Wella Beteiligungen GmbH, which, in turn, is 100% controlled by Wella AG. On 2 September 2003 The Procter & Gamble Company (P&G) acquired, through Procter & Gamble Germany Management GmbH (P&G GmbH), 50.7% of the capital and 77.6% of the voting rights of Wella AG. However, even though it was the majority shareholder, P&G was not authorised to adopt certain decisions regarding the company's management, such as amending its articles of association, issuing binding instructions to the Board of Directors, requiring Wella AG to adopt possibly harmful decisions and taking measures that could jeopardise its continuity. On 26 April 2004 Procter & Gamble Holding GmbH & Co Operations oHG (P&G oHG) and Wella AG signed an Agreement on Control and Transfer of Profits, due to take effect on 9 June 2004, as from which time it would have authority to give the Wella AG Board of Directors instructions on matters involving the company's management. Subsequent to various share purchases carried out as from 2005, on 12 November 2007 P&G acquired effective control over 100% of Wella AG.

3. THE COLOMER GROUP SPAIN, S.L. (COLOMER)

In 1978 the United States company Revlon Inc. acquired COLOMER, which on 30 March 2000 sold its professional products business to The Colomer Group Participations, S.L. (TCGP), owner of all the equity units representing the capital stock of THE COLOMER GROUP SPAIN, S.L.

4. L´ORÉAL ESPAÑA S.A. (L´ORÉAL)

L´ORÉAL ESPAÑA S.A. was owned from 1990 until 18 December 1994 by Enterprises Maggi, S.A. (30.63%), L'ORÉAL, S.A. (18.37%) and Oomes, BV (51%). Since 19 December 1994 the only two shareholders of the company have been L'ORÉAL, S.A. and Oomes, BV, the latter also being the owner of 100% of the French company L'ORÉAL, S.A.

5. COSMÉTICA COSBAR S.L. (MONTIBELLO)

MONTIBELLO is a Spanish company whose capital is held by diverse family groups.

6. EUGENE PERMA ESPAÑA S.A.U. (EUGENE)

On 12 July 2001 the French multinational Eugene Perma Group SAS acquired all of the capital of EUGENE PERMA ESPAÑA S.A.U., then called COSMÉTICA GENERAL, S.A.

7. COSMÉTICA TÉCNICA S.A. (LENDAN)

LENDAN is a Spanish family company founded in 1961 to create and distribute cosmetics and haircare products.

8. DSP HAIRCARE PRODUCTS S.A. (DSP)

This company was incorporated on 9 December 1980 under the name Distribuidores Peluquerías S.A., and has been called DSP HAIRCARE PRODUCTS S.A. since 21 December 2000.

9. ASOCIACIÓN NACIONAL DE PERFUMERÍA Y COSMÉTICA (STANPA)

Founded in 1952, STANPA is the business association for the perfumery and cosmetics industry in Spain and includes most companies in that sector. Its member base include small and medium enterprises, family companies, multinationals, and other undertakings, giving it an extraordinarily diverse profile in terms of activity and structure. According to the information available on the association's website with data from April 2009, the total number of STANPA member companies is 220, representing 90% of the perfumery and cosmetics sector in Spain.

B. MARKET

The professional haircare sector is part of the overall cosmetics market, which takes in all of the companies involved and, according to national and EU precedents, may be classified into five categories depending on how the products are used:

a) Alcohol based perfumery: perfume, eau de toilette, cologne.

b) Decorative cosmetic products (make-up).

c) Skincare products.

d) Haircare products: hair tints and bleaches; products for waving, straightening and fixing; setting products; cleansing products (lotions, powders, shampoos); conditioners (lotions, lacquers, brillantines) and other hairdressing products.

e) Bath and shower products.

The accused companies operated, amongst others, in the segment of haircare products for professional hairdressers sold to hairdressing salons, with a small proportion of the output also being sold to end consumers by hairdressers.

Grouped into the so-called G8, the companies investigated in the case are the leading operators in the Spanish professional hairdressing products manufacture and distribution market, where they have a combined share of more than 70%.

C. FINDINGS OF FACT

The CNC Council takes the facts set out in the Statement of Objections (SO) to have been proven, without the position stated by the Investigations Division having been contradicted by the accused entities in their pleadings. The CNC Council's Resolution sets out, in chronological order, the 40 meetings evidenced to the Investigations Division from the documents in the case record, beginning with the one held on 8 February 1989 and concluding on 28 February 2008. Those meetings of the so-called G8 —the eight companies participating in the cartel— were held regularly every six months with few exceptions. The meetings involved exchange of sensitive information such as recent price increases and estimated future price hikes, as well as the projected date, discounts, payment calendars and methods and financing, per diems, incentives for sales staff, etc. The data were exchanged by submitting “panels” with different formats, distinguishing between the “Data exchange panel”, the “Summary exchange data by family product panel”, the “Aggregate exchange data by family product panel” (or “Manufacturers panel”) and the “Provincial panel”. The minutes of the cartel meetings also mention an agreement not to recruit each other's sales staff, referred to as “gentlemen's pact”.

STANPA joined the cartel at the meeting of 24 February 2004, replacing a chartered public account engaged prior thereto by the cartel to collect, process and prepare the information received from the cartel companies in order to be exchanged between them.

III. FOUNDATIONS IN LAW

One.- Object.-

In its Proposed Resolution the Investigations Division states that the accused companies should be declared liable for a very serious infringement of article 1 of the LDC, for having engaged during the period from 8 February 1989 to 28 February 2008, in a single continuous anticompetitive conduct consisting in the periodic exchange of sensitive trade information with the object of restricting and distorting competition in the market, and that the sanction envisaged in the LDC for very serious infringements should be levied, with a fine of up to 10% of the aggregate turnover of the infringing entities in the financial year immediately preceding the levying of the fine.

Given that the proceedings originated with an application for exemption under article 65 of the LDC and reduction of fine under article 66 of the LDC, the Investigations Division proposes that HENKEL IBÉRICA, S.A. and its parent company Henkel AG Co KGaA be exempted from paying the fine, in accordance with the conditional exemption granted by the Investigations Division, and that the amount of the fine levied on PRODUCTOS COSMÉTICOS, S.L.U. (WELLA) be reduced, provided that at the end of the disciplinary proceedings each of the said companies has complied with the provisions of articles 65.2 and 66.1 of the LDC, respectively.

Two.- Applicable laws and regulations.-

Taking into account that the alleged infringing conduct took place while the previous Competition Act (Law 16/1989) was in force and continued under the new LDC (Act 15/2007) until 28 February 2008, and though the conduct regulated by article 1 of both

laws is the same, the disciplinary provisions designed by the current Competition Act (15/2007) are, overall, more favourable to the infringers than those set out in the previous law. One such more beneficial treatment is the establishment of ceilings on the amounts of the minor fines, a shortening of the limitation period for certain conducts and the possibility of cartel participants requesting an exemption from or reduction of the fines.

This assessment is not affected by the different treatment dispensed to associations, unless the amount of the fine to be levied exceeds the limit on the fine established for associations in article 10 of Act 16/1989 (€901,518.16), in which case the fine to be imposed on STANPA would have to be calculated according to the previous law.

Procedural issues

Three.- Lapse.-

STANPA argues that, with a judgment having been entered by the National Appellate Court on 30 September 2009, the running of the limitation period that had been tolled should have resumed on 1 October 2009, and not on 1 December 2009 as understood by the Investigations Division, after having learned of the judgment via an official dispatch sent by the Judicial Review Chamber of the National Appellate Court at the request of the Secretary of the CNC Council, such that the case has lapsed in view that the limitation period of 18 months provided in article 36 of the LDC expired on 14 January 2011.

The CNC Council rejects this argument because, according to 12 de of Act 52/1997 of 27 November 1997 on Legal Assistance to the State and Government Institutions, the date of notification of the CNC must be taken to be the one on which the notice was given by the Office of the State Attorney General before the National Appellate Court, that is, 20 October 2009. Therefore, the resolution of the incident and consequent lifting of the suspension of the toll on the statute should be understood to have occurred on 21 October 2009, with effect on the suspension the following day, so the case cannot be considered time barred.

Four.- Inspections.-

The Judgment entered by the National Appellate Court on 30 September 2009 in relation to the inspections carried out in STANPA provides that "*all data on record the register in relation to the professional hairdressing sector* (that is, the sector targeted by the inspection and probed in the case) *are duly supported by the entry and registration authorisations of the CNC and of the Court, so there were no irregularities regarding their registration"*. This is why the CNC Council, although it recalls that said judgment is the object of a cassation appeal before the Spanish Supreme Court both by STANPA and by the CNC, to the extent that this specific point is not in dispute, does not make any further considerations on this issue because the lawfulness of the evidence obtained in those inspections has been confirmed.

Nevertheless, in relation to the documents obtained in the Barcelona offices of STANPA, for reasons of strict prudence, the CNC Council indicates that it has not taken that documentation into consideration to the extent that it is not necessary to demonstrate the existence of the alleged infringement, given the weight of the documentary evidence

provided by the exemption applicant and obtained in the inspections of the other accused parties and in the investigation.

As regards the allegation put forth by L'ORÉAL adducing nullity of the proceedings due to the copy of a report prepared by outside lawyers on compliance with competition rules of the STANPA statistics, the CNC Council recalls that lawyer-client confidentiality is not an autonomous fundamental right but rather a component element of the right of defence, and that right cannot be considered to have been violated unless the interest party shows some specific use of the information obtained, that is, mere possession or copying of documents of this kind cannot of itself render the accused defenceless unless the documents are used as evidence and, given that the report was not entered into the case file, such violation of the right of defence is not plausible.

Five.- Defencelessness.-

Several of the accused believe the Investigations Division rendered them defenceless by grouping together the pleadings submitted on the SO in a joint response, instead of giving reasons for rejection of the arguments individually. The CNC Council holds that no such defencelessness exists given that the interested parties have been able to submit whatever pleadings they deemed fit over the course of the proceeding. Nor does it accept the objection regarding the assessment of the pleadings, given that there is no right to have pleadings handled in a specific way, but instead to a decision grounded in law. Such decision is not set out in the Proposed Resolution of the Investigations Division, but is given in the Resolution of the CNC Council.

Substantive issues

Six.- The cartel, affected market, organisation and functioning.-

The CNC Council believes that the eight major companies, which as has been shown and is acknowledged by the parties account for 70% of the professional haircare sector, coordinated their actions from February 1989 to February 2008 through regular, stable and systematic meetings of the G8 companies organised on a rotating basis twice a year, generally in the months of February and September. This did not change when STANPA joined the cartel, although as from that time STANPA staff requested information before the meetings and organised its presentation at the meetings and subsequent distribution, something previously done by the company whose turn it was to organise the meetings. Therefore, the facts demonstrate the perfect operation of the agreement between the G8 companies to exchange information and to do so in such way that each and every one of the participants, regardless of size or importance in the market, had the same responsibility in executing the agreement. The detailed information gathered in proven facts in the case record, which provide exhaustive evidence of the activity of the eight companies in coordinating their actions over a period of nearly 20 years, points to a very clear pattern of concerted action.

Beginning in 1989 the G8 functioned in the following manner: representatives of the eight companies met every six months and exchanged information, either directly during the meeting, in view of all of them, or after the meetings through the "manufacturers panel" or "aggregate data exchange by families panel" that was prepared before the meeting with the

data submitted by the companies by a chartered public accountant (or by STANPA as from 2003) and the aggregate information on which was available at the time of the meeting. The information exchanged in the meeting was later distributed so that each company also had the information contributed by the other G8 members in writing. The information was submitted by fax or letter until 2001 and by electronic mail thereafter.

As for the information shared, from the first meeting information was exchanged about recent and planned price increases, with the projected dates for the increases. If a company did not provide the information at the meeting, it was requested by the company assigned to organise that specific meeting in order to be distributed to the rest of the group later on.

During the period of the infringing conduct, the sensitive data exchanged included recent price increases and planned future increases, complete with the projected date, discounts, payment calendars and methods and financing, per diems, incentives for sales staff, etc.

The data was exchanged by submitting (with no company declining to do so) “panels” with different formats, distinguishing between the “data exchange panel”, the “summary exchange data by family product panel”, the “aggregate exchange data by family product panel” (or “manufacturers panel”) and the “provincial panel”.

The minutes of the cartel meetings also mention an agreement not to recruit each other's sales staff, referred to as “gentlemen's pact”.

The professional haircare sector cartel made up of the G8 functioned on a regular and stable basis until its dissolution. In its nearly 20 years of existence it did not vary significantly. After the STANPA association joined, however, it became even more transparent. The previous procedures were maintained but now the individual data of each company were exchanged in writing through the information provided by STANPA to the companies, including tables with the information from each G8 member. STANPA also prepared and distributed presentations with the results of the panels.

Seven.- The concerted practice.-

Except for the leniency applicants and for DSP, which did not submit pleadings, the other G8 participants have argued that the practices evidenced in the case file do not meet the requirements set forth in the fourth additional provision of the LDC to be considered a cartel, although they all admit that information has been exchanged, but differ as to the assessment of that practice and its consequences.

Having analysed the facts in the case record on the information exchanges carried on by the G8, initially with the support of a chartered public accountant and then with the participation of STANPA, the CNC Council agrees with the Investigations Division that the evidence shows this was a single and continuous conduct that, by the nature of the information exchanged and of the pursued objective of coordinating commercial strategies, prices and entry by new operators, thereby distorting competition, for the benefit of the members coordinating the group, constitutes a violation by object of article 1 of the LDC, and qualifies as a cartel within the meaning of the fourth additional provision of the LDC.

The CNC Council finds, because it is thus evidenced in the minutes of each and every one of the G8 meetings in the case file, that every six months the eight competitors exchanged

at least information on the price increases applied since the last meeting and on the planned near-term increases and their timing.

Therefore, this systematic exchange of current and future prices amongst eight companies qualifies on its own as one of the most egregious infringements, as it can have no other purpose than to seriously affect competition by eliminating any strategic uncertainty, independence of commercial policies and the incentive to compete against each other on price, quality or service.

So held the European Commission in its Communication on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation arrangements, indicating that there are certain information exchanges which have a high likelihood of leading to a collusive outcome, because such exchanges constitute a restriction of competition by object and must by their very characteristics be considered cartels.

The companies that have not applied for leniency have repeatedly alleged that the conduct cannot be considered a violation because the information exchanged is not the competitive variable, which would involve the special offers and gifts for hair salons. The CNC Council does not accept that information on prices increases is not a competitive variable when manufacturers based their business strategy on offering professional hairdressers competitive prices that allow the latter to have wide margins, accompanied what is more by exchange of data that have direct bearing on all strategies targeting hairdressers, such as advantages for customers, payment calendars, incentives for sales representatives, etc.

With respect to the gentlemen's pact, all of the accused except the leniency applicants deny there was any arrangement not to recruit staff from the other companies. In this regard, they have requested incorporation into the case file as evidence, and the Council has accepted, the cross-hiring contracts, arguing that if such pact existed it did not work, because such recruitment has been significant in every way.

The case record contains evidence of the existence of the pact, as shown by the displeasure voiced by several members against one member at the meeting of 26 February 2003, in relation to what they regard as a breach of the pact. And the same meeting reaches the conclusion that "*the agreement still stands*", urging the *managements* to maintain that spirit (of not hiring), without the fact of the sporadic hirings done over the course of nearly 20 years questioning the existence or effectiveness of the agreement.

In truth, the parties have not rebutted that such hiring may have been done consensually. In any event, the agreement not to cross-hire is one more fact of the continuous conduct engaged in by the G8 companies.

In response to the pleadings submitted by some of the accused that given the characteristics of the market and the information exchanged, the conduct was not apt to constrain competition, the CNC Council defers to the answer given by the Investigations Division to similar allegations on the SO. The Investigations Division has argues that these eight companies, with a market share of more than 70%, had the capacity to, and in fact did, organise a cartel and control a market in which they all maintained their positions, without displaying genuine competition between them during those years.

In any event, as the Investigations Division has also stated, the very nature of the information exchanged inside the G8 automatically leads to a distortion of competition that

affects prices, quantities and solely benefits the companies in the group, to the detriment of customers and consumers and other competitors excluded from the arrangement. A cartel, pure and simple.

For as upheld in the case-law of European Community courts, the purpose of setting up a cartel is to maintain the respective positions of its members in the market, and achieve price stability or increases. Cartel members therefore deliberately interfere with free competition and act to protect the prosperity of the members as a group.

In relation to the allegation that the agreement does not meet the first of the criteria for being considered a cartel, namely, secrecy, the CNC Council has determined that the information exchanged was only available to the G8 companies and STANPA itself and that, had it not been for the filing of an exemption application and the inspections carried out, the infringement would have gone undetected, as proven by the fact that the conduct lasted 20 years.

The secrecy of the cartel meetings cannot be made to depend on whether or not a charted public accountant was used or whether the gatherings were held at the headquarters of an association. Quite the contrary, meetings are secret when they are held out of view of the rest of the operators in the market, who have no information on the content or results of those meetings. The CNC Council likewise holds that it cannot be accepted that a certain amount of publicity of the meetings disproves their secrecy, as this would mean that consideration as a cartel could be avoided by giving general publicity to meetings between competitors.

In relation to the second component of the definition of cartel given in the 4th Additional Provision of the LDC, "*the fixing of prices, the limitation of output or sales, the allocation of markets, including bid rigging, or the restriction of imports or exports*", the lawmaker's intent was obviously not to include only the most conspicuous forms of the practices listed there, for the "fixing of prices" may be done in many different ways, and effective competition regulations must be able to take in not just the most blatant forms of price fixing (such as straight and simple fixing of selling prices), but also more or less subtle arrangements and practices aimed at limiting price competition.

In addition, to determine that a practice is intended to fix prices it is not even necessary that the prices have actually been fixed: it is sufficient that the parties to the agreement have been able to rely on the rest of the participants following a common strategy of collaboration to increase or keep prices at a certain level, in an "atmosphere of mutual certainty", (Commission Decision of 14 October 1998, British Sugar, upheld by the Judgment of 12 July 2001, joined cases T-202/98, T-204/98 and T-207/98 Tate & Lyle plc, and Commission Decision of 5 June 1996, case FENEX). According to the community case-law, even the fact of the future prices that are exchanged not being applied in some occasions does not necessarily mean the conduct does not qualify as a cartel.

In this case it has been duly evidenced that the accused parties exchanged their future price increases and the projected date for the increases, which would allow each member of the group to apply them without fear of impact on their market share, and also permit them to fully monitor the behaviour of the cartel members, so that they could adjust their own strategy in response to any deviations observed.

For all of these reasons, the CNC Council holds that the practices of the G8 that have been evidenced can be considered a cartel within the meaning of the Fourth Additional Provision

of LDC, as their object was to restrict competition in prices, quantities and other competitive variables equivalent to price fixing.

Eight.- Effects.-

The CNC Council considers proven that the exchanges of information between competitors analysed here constitute an infringement by object and can in no event be captured by article 1.3 of the LDC (article 3.1 of Act 16/1989).

And it is an infringement by object because the companies, by mere fact of exchanging that strategic information, and all the more over such a lengthy period of time, are knowingly replacing the risks of competition with cooperation, voluntarily relinquishing their independent conduct in the market, thereby reducing the play of competition. And this is anti-competitive because such exchanges, in and of themselves, make it easier for competitors to fix higher prices without the risk of losing market share, with no need to demonstrate that prices have risen.

Nevertheless, and given that all of the companies have argued lack of effects, basing itself on the report commissioned by STANPA to the consultancy Price Waterhouse Coopers, the CNC Council concludes that in this case, in which there has been proven to exist concerted action between companies that account for 70% of the market and who have been engaging in that concerted practice since the 1980s, it is very difficult to determine an undistorted market price for purposes of gauging the price increases produced by the cartel or what the price would be if the cartel did not exist. With respect to the report, it cannot be used as a basis for determining the price impact of the conduct because, though the report suggests the prices applied have risen less than announced, it cannot be concluded that this is the result of competitive behaviour.

In addition, the study draws a comparison between the prices of professional hairdresser products and those consumed by the general public, which is not relevant because the market we are analysing has been subject to a collusive environment for many years now. It also establishes an econometric model to assess whether the exchange of information has had an impact on prices, but compares the prices for 2000, 2003 or 2004 with previous years in which the cartel was also functioning.

In any event, the anti-competitive object having been demonstrated, it is not necessary to determine whether the practice did or did not have effects, as this would only be significant for purposes of deciding the size of the fine to be levied in each case, but not for the legal assessment of the conduct; furthermore, the long life of the G8 arrangement, and hence its effect on competition in the market, hinders calculation of the possible effects which may nonetheless be presumed.

Nine.- Timing of the infringement.-

The CNC Council believes that the cartel is one and the same as it was and has been since it was first established, having regard to the evidence of the meeting held on 8 February 1989, with the same participants and identical object, even though one member (STANPA) joined later one.

The changes in way the cartel work were not substantive, although after STANPA joined there was an increase in the information exchanged, the frequency and disaggregation of data, facilitated by STANPA's organisational resources, thereby heightening the capacity to distort the market. Nevertheless, the conduct was the same over the entire period and pursued the same object, and so qualifies as a single continuous violation of antitrust law.

The CNC Council therefore does not accept any of the arguments submitted by the parties as regards STANPA's entry marking a break in the cartel's development and, most especially, that the acts prior to 2004 are statute barred.

The Investigations Division takes 28 February 2008 as the end date of the cartel, the date of the meeting where the participant decided to put an end to the infringement, according to the information provided by WELLA. Nevertheless, several of the companies place the end of the cartel in February 2007 or May 2007, time at which it has been shown that an exchange of information was carried out between the G8 companies through STANPA.

The CNC Council's dismissal of these arguments is based on the existence of the call for a meeting on 5 November 2007, attendance at which was confirmed by several companies, and to the aforesaid meeting of 28 February 2008, with the reminder that the doctrine on cartels establishes the presumption that such arrangements persist until there is explicit evidence that it has been stopped. It can therefore be interpreted, and there is no evidence to the contrary, that the cartel went on until the probe was initiated (in June 2008), which happened before the next G8 meeting, scheduled for September 2008 was held. Nevertheless, in the Resolution the CNC Council accepts the time frame established by the Investigations Division for the infringement, with end date 28 February 2008.

Ten.- Liability of the accused.-

The CNC Council Resolution holds that the G8 companies engaged in conducts with full awareness by their senior managers of what they were doing, and concludes that the accused deliberately violated competition rules, pointing out that the evidence shows the representatives who participated in the meetings were individuals with a high level of responsibility. Even though the accused reject classifying the conducts as very serious violations, it is surprising, to say that the least, that companies of the importance of the accused, including major multinationals, can allege that they did not know it was contrary to competition law to hold regular meetings of eight companies to exchange information and agree on strategies. Though ignorance of the law would not exempt a party from compliance, the CNC Council furthermore believes that such ignorance enjoys little credibility in this case.

With respect to the STANPA association, in the CNC Council's view, the facts investigated and demonstrated in the case support the conclusion that STANPA is a co-perpetrator, together with the rest of the accused, for a violation of article 1 of the LDC. This conclusion is grounded in the association's demonstrated pursuit of an active role in organising and monitoring the proper implementation of the cartel arrangements, making a considerable contribution to keeping it in effect and covert and hence, to a serious and prolonged restriction of competition in the relevant market.

In addition, as rightly noted by the Investigations Division, this case involves the action of a professional association that represents the economic and industrial interests of all

member companies and, as such, it should not have been unaware of the anti-competitive nature of the practices it learned of when it was invited to participate in this cartel, which clearly harmed not just the sector but also other member companies directly. Instead, the association contributed actively and deliberately to the prolonged maintenance of this cartel of certain companies in the sector, namely the market leader and the main operators, and served as platform for the cartel's implementation.

STANPA alleges that the Investigations Division has infringed the principle of lawful sanctioning by *in mala partem* application, ex article 25 of the Spanish Constitution, as it seeks to sanction for a type of perpetrator status that is not envisaged in competition law.

In relation to this argument, the CNC Council clarifies that in administrative law, imposing sanctions does not require a formal assessment of the participation of each of the sanctioned parties in the wrongdoing, it being sufficient that they commit, whether knowingly or negligently, an act of those defined as violations of administrative law by the relevant legislation. Both the Investigations Division and the CNC Council believe that STANPA has engaged in material commission of the infringement, that is, it is co-perpetrator of the offence, as corroborated by the references made over the course of the proceedings to the "role played by STANPA as facilitator of the infringement, of decisive importance for the success of the exchange of information amongst the G8 companies", and the connection made, for purposes of justifying the accusation of the association, with the Judgment handed down by the European Court of First Instance (now, the General Court) on 8 July 2008, in AC-Treuhand AG/Commission, T-99/04, which in fact sanctions as perpetrator a party that knowingly participated in a cartel as facilitator.

In any event, this point leads us to a second issue which, though distinct, is directly tied to the previous one and is likewise relied on by STANPA, namely, whether an economic operator that is not considered a competitor company can be charged and sanctioned as perpetrator of the conduct. Now then, it is not just the General Court, but also the CNC Council that, when analysing the application of the aforesaid Treuhand judgment (in its Resolution of 28 July 2010 in case S/0091/08, Sherry Wines of Jerez), has ruled with the utmost clarity that, "*the fact that an undertaking does not operate in the market where the sanctioned conduct is implemented does not exempt it from liability for contributing to that implementation*". *Secondly, it points out that even where an undertaking is not an operator in the market where the conduct is carried on, it can perfectly well anticipate that the prohibition of article 81.1 applies to it. It is not because it is an operator in that market that it can believe it may participate in collusive arrangements. Lastly, that judgment establishes that the necessary conditions for being able to hold an undertaking liable for a cartel "apply mutatis mutandis to the participation of an undertaking whose economic activity and professional expertise mean that it cannot but be aware of the anti-competitive nature of the conduct at issue and enable it to make a significant contribution to the committing of the infringement". The requirements referred to by the GC for a company to be considered responsible as co-perpetrator of the infringement are that it has participated in meetings of the cartel at which tacit or explicit agreements have been reached that are prohibited by competition law, without publicly distancing itself from that conduct. In the case of a single agreement, composed of a set of unlawful conducts, a company that through its own conduct contributes to the achievement of the common objectives pursued by the participants as a whole and was aware of the conduct of the rest of the companies to achieve those same objectives will be a co-perpetrator*".

It is beyond question that STANPA did not just perform administrative tasks for the cartel of a merely accessory nature, as WELLA and STANPA allege, but that it has played an active role in the cartel and shown, through its acts, its clear intention to collaborate in carrying out the prohibited practice. These, in short, are the conditions that the CNC Council has required exist in previous cases in order to sanction under community case-law an association for participating in a cartel as a facilitator. The association's argument that STANPA has not obtained any enrichment from committing the offence is not considered of relevance by the CNC Council, given that the definition of the offence is not based on the criterion of enrichment but on that of jeopardising competition, irrespective of whether the participant benefits from those actions or not.

Eleven.- Liability of the parent company with respect to its subsidiary.-

The CNC Council agrees with the Investigations Division in considering the parent companies of L'ORÉAL, WELLA and EUGENE as jointly liable for the conduct, as from the moment those parent companies take control of their subsidiaries, based on the "juris tantum" presumption of exercise of decisive influence of those parent companies over the subsidiaries given that they own all or nearly all of the capital of the latter. These companies have not submitted sufficient evidence to rebut that presumption and demonstrate that the subsidiaries decided their markets conduct independently.

Therefore, the infringement is attributable solely to L´ORÉAL ESPAÑA S.A. for the period from 8 February 1989 to 18 December 1994 and, jointly to L´ORÉAL ESPAÑA S.A. and its parent L'ORÉAL, S.A. for the period from 18 December 1994 to 28 February 2008. As for WELLA, the infringement is attributable solely to WELLA for the period from 8 February 1989 to 9 June 2004, but with joint liability for PRODUCTOS COSMÉTICOS, S.L.U. and its parent The Procter & Gamble Company for the time between 9 June 2004 and 28 February 2008. EUGENE is solely liable for the time from 8 February 1989 to 12 July 2001, but jointly liable with its parent EUGENE PERMA GROUP, SAS for the period running from 12 July 2001 to 28 February 2008.

Twelve.- Financial situation and fixing of the fine.-

Some of the accused argue in their pleadings that their current economic situation is a factor that should be taken into account when determining and reducing the fine to be levied on them. The CNC Council points out, however, that article 1 of the LDC makes no reference to the financial situation, good or bad, of companies party to prohibited agreements; nor do the criteria set out in article 64.1 of the LDC for determining the amount of sanctions mention the economic situation of the accused. And that situation is likewise not included amongst the mitigating factors to be considered when fixing the amount of a fine.

Similarly, analysis of community case-law shows there is no requirement to consider the economic situation of the accused companies when imposing sanctions.

In addition, the objective of applying fines, apart from punishing companies directly involved in the wrongdoing, is to serve as a deterrent. CNC Council therefore concludes that the specific situation of the companies involved cannot condition the decision as to the scale of the fine. This does not mean that that situation will not be taken into account but

that, in any event, it would be considered in the context of all of the circumstances surrounding the case.

Thirteen.- Calculating the fine.-

The CNC Council finds there is reliable proof that the accused enterprises violated article 1 of the LDC by forming a cartel based on a stable system for exchange of sensitive information.

According to article 62.4 of the LDC, this conduct qualifies as a very serious infringement and can be fined by up to 10% of the total turnover recorded by the liable company in the year before the year in which the fine is levied. The CNC Council has taken into account that this is one of the most egregious violations of competition law and that the conduct has a direct impact on the Spanish market for professional hairdressing products, in which the infringing companies account for 70% of that market's turnover. What is more, the conduct was maintained on an uninterrupted basis during nearly 20 years.

In calculating the fines, the CNC Council has taken into account the pre-tax revenues reported by the companies in the professional haircare products market during the twenty years in which the cartel has been in operation, and has applied the CNC Communication on the quantification of sanctions, and the maximum amount provided for associations in Act 16/1989.

Fourteen.- Application of the Leniency programme. Aggravating and Mitigating Factors.-

The Investigations Division proposes an exemption from the fine for HENKEL and a reduction of the fine to be levied on WELLA if at the end of the sanctioning proceeding the companies HENKEL and WELLA meet the requirements established in articles 65.2 and 66.1 of the LDC, respectively.

The CNC Council agrees with the Investigations Division in confirming the conditional exemption granted by the Investigations Division to HENKEL, as it was the first to submit evidence of the infringement. The CNC did not have other means of demonstrating those facts and the Council therefore believes HENKEL should be exempted from paying the fine.

On the other hand, on analysing the contribution made by WELLA, the CNC Council does not believe it fulfils the requirements of article 66.1 of the LDC to entitle it to a reduction in the amount of the sanction. The CNC Council does not share the importance ascribed by the Investigations Division to the information submitted by WELLA in relation to the meeting of 28 February 2008 and, in addition, were it not for WELLA's statement on the 28 February 2008 meeting, the cartel would be presumed to remain in effect as there is no other evidence of its termination. The CNC Council therefore does not believe that WELLA's request for leniency has provided significant value to earn the reduction provided for in article 66 and even less that it has allowed the duration of the cartel to be lengthened, and therefore does not consider that it is entitled to a reduction in the size of the fine.

With respect to the mitigating circumstances, the CNC Council does not accept any of the arguments put forth by the parties in this regard, including those that allege they have not

disputed the facts. It would in fact be very difficult to dispute the repeated evidence of the holding of the G8 meetings, so this cannot be considered active collaboration and recognised as a mitigating factor. Nevertheless, the CNC Council has taken into account WELLA's willingness to provide active collaboration in demonstrating the existence of the cartel and has considered this a mitigating factor to reduce the amount of the fine by 5%.

IV. BE IT RESOLVED

ONE.- To declare L'ORÉAL ESPAÑA S.A. and its parent company L'ORÉAL, S.A.; PRODUCTOS COSMÉTICOS, S.L.U. (WELLA) and its parent company The Procter & Gamble Company; THE COLOMER GROUP SPAIN, S.L. and its parent company TCGP; EUGÈNE PERMA ESPAÑA, S.A.U. and its parent company EUGENE PERMA GROUP SAS; COSMÉTICA COSBAR, S.L. (MONTIBELLO), COSMÉTICA TÉCNICA, S.A. (LENDAN), HENKEL IBÉRICA, S.A. and its parent company Henkel AG Co KGaA; DSP HAIRCARE PRODUCTS, S.A. and Asociación Nacional de Perfumería y Cosmética (STANPA) responsible for an infringement of article 1 of the LDC for having engaged in a concerted practice during the time period from 8 February 1989 to 28 February 2008.

TWO.- To impose the following sanctions on the perpetrators of the wrongful conduct:

- L'ORÉAL ESPAÑA S.A. a fine of €23,201,000. Of this amount, its parent company L'ORÉAL, S.A. is jointly liable for a total of up to €21,854,000.

- PRODUCTOS COSMÉTICOS, S.L.U. (WELLA) a fine of €12,032,000. Of this amount, its parent company The Procter & Gamble Company is jointly liable for a total of up to €6,196,981.[1]

- THE COLOMER GROUP SPAIN, S.L. a fine of €8,739,000. Of this amount, its parent company TCGP is jointly liable for a total of up to €7,770,000.

- EUGÈNE PERMA ESPAÑA, S.A.U. a fine of €2,288,000. Of this amount, its parent company EUGENE PERMA GROUP, SAS is jointly liable for a total of up to €1,523,000.

- COSMÉTICA COSBAR, S.L. (MONTIBELLO) a fine of €2,555,000.

- COSMÉTICA TÉCNICA, S.A. (LENDAN) a fine of €1,003,000.

- HENKEL IBÉRICA, S.A. a fine of €9,890,000, with joint solidarity borne by its parent company HENKEL AG Co KgaA.

- DSP HAIRCARE PRODUCTS, S.A. a fine of €299,000.

- And Asociación Nacional de Perfumería y Cosmética (STANPA) a fine of €900,000.

THREE.- To exempt HENKEL IBÉRICA, S.A. and its parent company Henkel AG Co KGaA from paying the fine levied thereupon on meeting the requirements of article 65 of the LDC.

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[1] These figures have been revised after detecting a mathematical error under the CNC Council Decision of 17 March 2011.

FOUR.- The above companies and the Association must provide evidence to the Investigations Division of the CNC of fulfilment of the obligation set out in TWO above.

FIVE.- The Investigations Division is instructed to monitor and enforce the complete execution of this Resolution.