CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

Resolution
(Case S/0155/09. STANPA)

Council Members:

Mr. Luis Berenguer Fuster, President
Ms. Pilar Sánchez Núñez, Vice President
Mr. Julio Costas Comesaña
Ms. María Jesús González López
Ms. Inmaculada Gutiérrez Carrizo

Madrid, 7 February 2011.

The Council of the National Competition Commission (Comisión Nacional de la Competencia — CNC), composed of the members indicated above and with Councillor Ms. María Jesús González López acting as Rapporteur, has issued this resolution in enforcement proceeding S/0155/09 STANPA, pursued against the Spanish national perfumery and cosmetics association (Asociación Nacional de Perfumería y Cosmética — STANPA) by the CNC's Investigations Division (DI) for having carried out anti-competitive practices prohibited by article 1 of the Spanish Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia — LDC).

BACKGROUND FACTS

1. This case was initiated as a result of the information found in the simultaneous inspections conducted by the DI, under article 40 of the LDC, as part of enforcement proceeding S/0084/08 Gels; S/0085/08 Toothpastes and S/0086 Professional Haircare, on the 17th and 19th of June 2008 at the head offices of COLGATE PALMOLIVE ESPAÑA, S.A. (hereinafter, COLGATE), and in the Madrid and Barcelona offices of the STANPA Association.

2. The inspections carried out at the STANPA offices in Madrid and Barcelona were appealed before the CNC Council, which dismissed the appeal. An appeal for judicial review to protect fundamental rights was brought against that decision before the Spanish National Appellate Court (Audiencia Nacional). In its Judgment of 30 September 2009 the said appellate court upheld the appeal in part because "*the challenged Resolution and administrative act were unlawful insofar as the inspection involved factual elements unrelated to the professional haircare products sector, and, consequently, we must and do annul within that scope, and order that the copies made of the documents by the inspectors unrelated to the professional haircare products sector be returned, with an express order to pay costs*."

3. The Judgment of the National Appellate Court is the object of a cassation appeal before the Spanish Supreme Court both by STANPA and by the Office of the State Attorney General.

Without prejudice to the cassation appeal, STANPA applied to the National Appellate Court for provisional enforcement of the Judgment of 30 September 2009, requesting that the Investigations Division be ordered to return the copies of documents unrelated to the professional haircare sector which are in the S/0155/09 case record. In a Writ dated 29 April 2010 (folio 3922), the National Appellate Court did not uphold provisional execution, basing its denial on the belief that return by the Administration of the requested copies, which are factual elements, could cause potentially irreparable harm to the investigation.

4. In the analysis it conducted as part of those proceedings of the information obtained in the inspections, the DI *detected information that could constitute a violation of LDC, involving the exchange of commercially sensitive information in certain committees of the STANPA Association.*

5. In its Decision of 15 December 2008 the DI separated certain information from cases S/0084/08 and S/0085/08 that had been obtained in the inspection of the COLGATE offices and initiated a confidential inquiry pursuant to article 49.2 of the LDC (DP/0034/08). The said documents were incorporated into that proceeding (folios 1 to 25 of the case file), after giving notice thereof to the interested party, to the company COLGATE and to the Madrid Office of the State Attorney General to be referred to the Court. COLGATE filed an appeal with the Council (R/011/09) which was rejected in the Resolution of 4 May 2009.

6. In a document sent on 21 May 2009 the DI notified STANPA of the decision made that same day to incorporate into DP/0034/08 certain electronic information that had been obtained in the inspections carried out at the STANPA offices on 19 June 2008, as part of case S/0086/08, Professional Haircare, and fixing a time period within which STANPA could submit its pleadings on the matter. After receiving STANPA's submissions requesting suspension until the National Appellate Court pronounced itself on the fundamental rights involved, the DI rejected STANPA's pleadings on 30 June 2009, and the information was incorporated into the DP (preliminary proceeding) and into the case file (folios 484 to 3019).

7. Considering that the DP/0034/08 information contained prima facie evidence of a violation of the LDC, on 2 July 2009 the DI resolved to open this enforcement proceeding and gave STANPA notice to such effect on 3 July 2009 (folios 3062 to 3068).

8. After the proceeding had been initiated, on 9 February 2010 the DI issued a Decision separating from case S/086/08 new information attained in the inspections carried out in STANPA, and incorporated that information into this case file (folios 3160 to 3320).

9. On 9 June 2010 the DI notified STANPA of the Statement of Objections (SO) charging it with *a violation of article 1 of Act 16/1989 and of article 1 of the current LDC due to exchanges of commercially sensitive information in the Mass*

Consumption Products, Selectivity and Aestheticians Committees in the period running from 26 January 2004 to 8 May 2008.

10. STANPA examined the case file on 29 June 2010 and submitted the pleadings it deemed appropriate. After receiving the submissions regarding the SO, the DI on 2 July 2010 closed the investigation phase and on 9 July 2010 notified STANPA of its proposed resolution, giving it a term within which to submit further pleadings under article 50.4 of the LDC.

11. On 21 July 2010 the DI brought before the Council the Report provided for in article 50.5 of the LDC, including a Proposed Resolution seeking a declaration of violation of article 1 of the LDC "*in the STANPA association's recommendation on the exchange of commercially sensitive information, capable of restraining competition in cosmetics products, inside the STANPA Committees on Aestheticians, Mass Consumption Products and Selectivity, from 26 January 2004 to 8 May 2008".* The DI also proposed application of the sanction provided in article 10 of the Competition Act 16/1989 of 17 July 1989 for very serious infringements.

12. Some days later, on 30 July 2010 the Director of Investigations submitted a brief from STANPA dated 27 July 2010, with CNC document entry register date of 29 July, in which the said party submitted the pleadings it deemed fit, proposed that an oral hearing be held and a number of pieces of evidence be obtained, mainly involving the incorporation of certain documents into the case file.

13. In its decision of 19 October 2010, the Council agreed to accept the evidence requested by STANPA, the submission by the DI of the search engines (folio 6927) used in the inspections carried out in the STANPA offices in Madrid and Barcelona and the incorporation into the case file of the following documents in the CNC's possession: a) the Report of the Office of the State Attorney General of 17 October 2008 and the Opinion of the CNC Legal Office of 27 October 2008; b) the Certificates of the inspections conducted in the companies Colomer, Montibello, L´Oréal and Wella in case S/0086/08 Professional Haircare; c) the Writ issued by the Judicial Review Court (Juzgado de lo Contencioso-Administrativo) of Barcelona on 18 June 2008 annulling the court authorisation pursuant to which the inspectors entered the STANPA offices in Barcelona; d) the cover sheet of the fax sent to the DI by the Barcelona Office of the State Attorney General communicating the previous writ (folios 6839 *et seq.*).

The Council likewise resolved to complete the case file with the incorporation of the Order issued by the Director of Investigations to inspect the STANPA Barcelona offices.

Conversely, the Council did not accept STANPA's petition to incorporate into the case file the internal working papers used by the DI prior to conducting inspections, inasmuch as, if they exist, such documents are mere informal working papers that do not form part of the administrative case file, and, moreover, the criteria followed by the Investigations Division when conducting the inspection are manifest in the search engines which the Council did agree to incorporate into the record. Nor did the Council consider it necessary to hold an oral hearing.

14. STANPA submitted its pleadings in relation to the decision on admission of evidence and hearing in a brief dated 2 November 2010. Once the documents had been incorporated into the case file, and after a written warning dated 11 November that a page was missing, which was presented immediately thereafter, STANPA submitted its evaluation of the evidence on 18 November 2010.

15. On detecting that the Barcelona Inspection Order requested by the Council had not been incorporated into the case file, said error was remedied by a resolution issued by the Reporting Councillor on 26 November 2010, giving the interested parties five days within which to submit arguments.

16. On 24 November 2010 the STANPA representative filed a brief with the Council accompanied by a copy of the Judgment of the High Court of Justice of Catalonia (section five of the Judicial Review Chamber), dated 9 July 2010, in which the said Court dismissed the appeal brought by the Office of the State Attorney General against the writ issued on 18 June 2008 by Court (Juzgado de lo Contencioso) no. 13 of Barcelona, setting aside the writ issued by that same Court on 16 June authorising the inspection at the STANPA office in Barcelona. That document, its accompanying brief and the pleadings of the party were incorporated into the case file on that same date.

17. The Council, at its meeting of 24 November 2010, resolved, as a complementary action, to ask the DI to identify the documents seized in the inspection made in the STANPA Barcelona offices on 19 June 2008 and which are on record in this case file. The Resolution of 29 November 2010 suspended the running of the time limit for resolving the case until that action was carried out and the interested party submitted the pleadings to which it was legally entitled.

18. STANPA submitted its pleadings on that incident on 3 January 2011 and, consequently, the Reporting Councillor issued a Resolution on 5 January 2011 to lift the suspension of the resolution limitation period.

19. The Council last deliberated on this case and issued its resolution thereon at its meeting of 26 January 2011.

20. The interested party is the Asociación Nacional de Perfumería y Cosmética (STANPA).

FINDINGS OF FACT

I. The STANPA Association.

In its Report and Proposed Resolution, the Investigations Division describes the accused association, ASOCIACION NACIONAL DE PERFUMERÍA Y COSMÉTICA (STANPA), and how it functions. That description is transcribed below and has not been objected to by the interested party.

1. According to article 1 of its Bylaws (folios 3798 to 3822), STANPA is a non-profit business association, with its own legal personality, capacity to contract and own assets, independent of its members, and governed by the said Bylaws and its internal rules and regulations approved by its General Assembly, by the resolutions

validly adopted by its governing bodies, and by the general provisions of the laws and regulations applicable to professional and business associations.

2. Since 1952 it has acted as the business organisation representing the perfumery and cosmetics sector in Spain and its membership consists of the greater part of the companies operating in that industry. All companies that, whether on an exclusive or non-exclusive basis, manufacture, import, distribute and/or perfumes, cosmetics, hairdressing products, soaps, toothpastes, essences and aromas or similar items in Spain can belong to STANPA. The member companies are small and medium enterprises (SMEs), family businesses, multinationals, etc., with a highly diversified business and organisational profile.

3. According to the statements made by the STANPA General Director and published in issue number 285 of the journal *Técnica Industrial*, February 2010, STANPA had 270 members, representing more than 90% of the perfumery and cosmetics sector in Spain. According to the Association's own figures, that industry had sales of 4,500 million euros in 2009.

4. STANPA is a member of the Statistics Working Group of Colipa (European Cosmetics Association) and provides its members with periodical information on distribution channels, and product families or categories in relation to the main countries in the European Union, and on key market trends from the standpoint of those distribution channels and product families or categories.

5. According to article 22 of its Bylaws, the Association's governing bodies are:

- General Assembly
- Executive Board
- President.

6. The General Assembly (articles 23 to 28 of the Bylaws) is composed of all members or associates in full standing, as well as by the affiliated members, even where the latter do not have the right to vote. It is the highest body in the Association and as such has authority to make sovereign decisions, without prejudice, nonetheless, to the specific powers and authorities attributed to the other bodies within the Association and, most specifically, those of an exclusive nature that are assigned to the Executive Board.

7. The Executive Board (articles 29 to 38 of the Bylaws) is the responsible for body governing, directing, managing and administrating the Association, on a permanent and ordinary basis, and for implementing the resolutions of the General Assembly. It has been given all powers to make decisions and adopt the resolutions it deems fit in the pursuit, development and fulfilment of the Association's purposes. It is composed of the President of the Association and the number of full members, up to a maximum of 25, determined by the General Assembly for a term of office of four years, without prejudice to their possible re-election.

8. The President (articles 39 and 40 of the Bylaws) is elected by the General Assembly for a term of office of four years, and may be re-elected for periods of like duration. The President also chairs and holds the presidency of all of the collegiate

governing bodies (General Assembly and Executive Board) and will also preside over the Association's Working Groups or Committees when present at their meetings.

9. Article 38 of the Bylaws provides that the Executive Board may name a General Director and/or a General Secretary, to be ratified by the General Assembly, and the personnel at the Association's service, by means of the appropriate contract for performance of the technical or administrative functions required by its activity. In pursuing their activity, said staff must comply with the orders received from the Association's General Director and/or General Secretary and with the instructions received from its President and Executive Board.

10. As regards to how the Association functions, article 18 of its Bylaws states that working groups or committee are established within STANPA to carry on deliberative, advising and informational functions for the governing bodies. These committees and groups are set up according to the most significant subsectors within the cosmetics industry in Spain. Typically, a given manufacturer will be present in more than one group. According to article 21 of its Bylaws, each committee is coordinated by a president, named by the Executive Board of STANPA from, inasmuch as possible, amongst the persons on the Committee who also sit on the Executive Board. The working groups appoint a coordinator from amongst their members.

11. The committee and working group meetings are duly called sufficiently in advance, with an agenda setting out the business to be dealt with there, and minutes are drawn up when the meetings conclude to reflect the matters discussed and decisions. Resolutions adopted by working groups or committees within their respective area of action are approved by a simple majority of the votes present or represented at the meetings.

12. According to the Bylaws, as well as to the information posted on its website and in the annual reports of STANPA (folios 3344 to 3548), the Association has had diverse official committees, some of which include different working groups. At present, they are:

a) Of a horizontal nature:

- Technical Committee
- Labour Committee
- Internationalisation Committee
- Legal Committee
- Standards Committee

b) Ad hoc committees:

- Environment Committee
- Mass Consumption Products Committee
- Selective Distribution Committee

- Professional Haircare Committee
- Aestheticians Committee
- Pharmacy Committee

II. The market

With respect to the market where the conduct is carried on, it is defined by the DI as "*cosmetic products sold through three specific distribution channels: mass distribution, aestheticians and selective*". Without prejudice to analysing the arguments made by STANPA in relation to this definition insofar as needed to rule on the case, the Council believes the following has been reliably demonstrated in the case file:

13. The conducts carried on in the cosmetics market taken generally and in the broad sense, which, as the DI states on the basis of the Spanish and European Commission precedents, may be classified into five categories or segments, each of which may in turn be subdivided further:

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

b) Decorative cosmetic products (make-up): face masks (with the exception of peeling products); make-up (liquids, pastes, powders); make-up powders, after-bath powders and hygiene powders; products for nail care and make-up and products for making up and removing make-up from the face and the eyes.

c) Skincare products: this segment includes creams, emulsions, lotions, gels and oils for the skin; treatments; anti-wrinkle products and sunbathing products.

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

e) Toiletries: toilet soaps, deodorant soaps; batch and shower products (salts, foams, oils, gels); depilatories; deodorants and anti-perspirants; shaving products (soaps, foams, lotions); products for the care of the teeth and the mouth and products for external intimate hygiene."

14. This case focused on conducts relating to the sale of cosmetic products through the three channels cited above, *mass distribution*, *aestheticians* and *selective,* and does not analyse STANPA's marketing actions in the direct sale channels, sale in pharmacies or sales made through the professional hairdressing channel. The actions in the latter channel are the object of separate enforcement proceedings.

15. According to the information requested from STANPA (folio 3823), which is included in the DI report (folios 6639 and 6640), in 2009 the cosmetics sector recorded sales of 4,500 million euros at factory outlet prices, some 85% of which was in these three channels. Mass consumption products accounted for 53%, the selectivity channel 30% and aestheticians 1.5%.

16. On the demandside, the perfumery and cosmetics product in Spain sells 7,500 million euros in products and exports some 1,800 million euros of these goods per year.

17. The affected geographical market is national, given that the STANPA Association brings together 90% of companies in the sector and covers all of Spain, even though the companies are concentrated in Catalonia and Madrid.

III. Proven Facts

With respect to the conducts attributed to STANPA, in its Report and Proposed Resolution the DI sets out the facts on which the accusation has been based.

The Council, taking into account the decision of the High Court of Justice of Catalonia regarding the inspection carried out at the STANPA Barcelona office, ordered a complementary action in which it instructed the DI to identify the documents obtained in that inspection. In a document dated 13 December 2010 (folio 7008), the DI specified the documents incorporated into this case file on 21 May 2009, from case S/086/08 Professional Haircare, that were first obtained in that inspection.

Of the facts which the DI regarded in the Statement of Objections as having been established, this Resolution sets out the ones which the Council considers relevant to the resolution of this case and which are duly evidenced and supported by the documents obtained in the inspections carried out at the STANPA offices in Madrid and in COLGATE and the information obtained by the DI in its investigation.

Set out below are the facts stated in the SO in relation to the information exchanges carried out in each of the STANPA Committees, the focus of this enforcement proceeding (specifically, in the Mass Consumption Products, Aestheticians and Selectivity Committees), which the Council deems to have been demonstrated in relation to the actions of the STANPA Association.

Exchange of prices in the Aestheticians Committee.

18. The STANPA Aestheticians Committee was formed on 9 March 2004, at a meeting held at the STANPA Barcelona offices. The call of meeting sent on 1 March already, apart from the committee's creation in point 1 on the agenda, also included, as points 2 and 3, the *Exchange of Prices 2004* and the *Procedure for elaborating the so-called PRODUCTS AND SALES PANEL FOR 2003* (folios 719 and 720). The point dealing with exchange of prices was maintained on the agenda of all of the Committee's meetings held until 23 May 2007.

19. The 2004 Annual Report issued by STANPA (folio 3387) reports the creation of the Aestheticians Committee, which is said to have been created with the companies that previously belonged to association of manufacturers of products for aestheticians, AFESA (Asociación de Fabricantes para la Estética), a majority of which belonged to STANPA. These companies channel the distribution of their products through professional aestheticians who use the products in their treatments and, in turn, sell them to their customers. According to that 2004 Report, the Committee was created with 10 firms that covered around 70% of the sector and had sales of 55 million euros. In 2006 the number was reduced to eight, the same as in 2007. Sales in 2007 reached 80 million euros with the same coverage.

20. On 22 April 2004 an e-mail was sent calling the second meeting of the Aestheticians Committee, to be held on 4 May 2004 at the STANPA Barcelona offices (folios 723 to 725), with point 3 of the agenda dealing with "Exchange of Prices 2004". The meeting minutes sent by the STANPA to the companies on the

Committee on 10 and 11 of May included the resolutions approved on this point (folios 749 to 753):

*"**3.- Exchange of Prices 2004.-** It is resolved that through STANPA, the prices of all members of the group will be exchanged.*

The status of the exchange is as follows:

Price lists delivered to STANPA to be exchanged:

- GERMAINE DE CAPUCCINI

- SKEYNDOR - QUIMIBEL

- CASMARA COSMETICS

- LABo ABAD (Algologie)

-BELNATUR

-LABºATACHE

Pending price lists:

- ALAIN GANANCIA.

- COSBAR (Montibello)

- COSMETICA TÉCNICA (Lendan)

- NATURA BISSE.

- IDESCO - SELVERT.

It is asked that the missing ones be requested from and be definitively submitted by both the persons who attended the meeting and those who notified and justified their absence or were unable to attend.

From now on, the procedure will be that the prices will be requested by STANPA from each company, and then sent out by STANPA as they are received, and, given that not all companies prepare them on the same date, each time prices are sent the companies that have not submitted them yet will be reminded that they must do so as soon as the price lists have been prepared."

21. As can be gathered from the above, the case file shows that the procedure for exchanging price information consisted in having the price lists sent to STANPA prior to the Committee meeting in order for them to be exchanged during the meeting. Nevertheless, given that not all of the participating companies sent them in before the meeting, it was decided at the Committee meeting of 4 May 2004 that they would be requested by STANPA and would be circulated as they were received to all members, whether or not they had attended the Committee meeting, with a reminder to submit the price information for those who had not yet done so.

22. On that same day, 4 May 2004 STANPA, sent an e-mail to the representative of a company on the Aestheticians Committee in relation to the exchange of price information (folios 743 y 744):

"(…) With respect to the tariffs, as soon as we receive them we will proceed to exchange them with all of the participating companies (…)."

The representative of that company replied to that e-mail as follows (folio 743):

"(…) The tariffs will go out tomorrow, without fail, by agency or courier (…)".

23. According to an e-mail dated 18 May 2004 (folio 768), STANPA told the 11 members of the Committee that "*on 14 May 2004 there were sent "by conventional mail the PRICE TARIFFS of the member companies of this group"* and listed the 11 companies to which they had been sent and the period for which each company's prices were valid (dates which ranged from between October 2003 and February 2004). It ends by asking them, if they receive the information in the following days, to forward them in order for a new mailing to be made.

24. Attached to the internal STANPA e-mail of 3 June 2005 were two standard letters for carrying out the exchange of prices: a specific one for a company that sent the tariffs in after the Committee meeting and another one to send the 2005 prices to the following 10 companies and stating the type of information provided (folios 786 to 792) :

- *Alain Ganancia (prices for the public October 2004 and for aestheticians).*
- *Belnatur (recommended prices for the public (Oxygen) March 2005; professionals (Oxygen) March 2005 and recommended Belnatur public price February 2005).*
- *Casmara Cosmetics (prices for the public and for professionals of January 2005).*
- *Cosbar (Montibello) (recommended prices for the public for 2005).*
- *Cosmética Técnica (Lendan) (recommended prices for the public for February 2005 and professionals for 2005).*
- *Germaine de Capuccini (recommended and professional prices for January 2005).*
- *Lab. Abad (prices for licensees and professionals for February 2005).*
- *Lab. Atache (recommended prices for the public and for professionals P.V.E. for 2005).*
- *Natura Bisse (prices for the Diamond product, public and professional, for 2005, rest of products, public and professional prices February 2005).*
- *Sekyndor – Quimibel (public and professional prices for January 2005).*

25. The price lists sent out in June 2005 were accompanied by two documents, both dated 2 June 2005 and signed by the then Director of STANPA, regarding the "EXCHANGE TARIFFS AESTHETICIANS 2005", in which the following was stated in relation to the two documents (787 and 788):

*"(…) Pursuant to the **resolution** approved at the last meeting on 25 May (STANPA-Barcelona) by the members of the Aestheticians Committee, we are sending out the PRICE TARIFFS of the company ALAIN GANACIA, which were not distributed to you at the meeting because they had not yet been received.*

We also ask that if any changes are made over the course of the year to your tariffs, or if they are re-published, you send them to us so we can circulate them to all of you (…)".

"(…) Pursuant to the resolution approved at the last meeting on 25 May (STANPA-Barcelona) by the members of the Aestheticians Committee, we are sending out the PRICE TARIFFS of the member companies of this group

- ALAIN GANANCIA	*October 2004*
- BELNATUR COSMETICS	*February 2005*
- CASMARA COSMETICS	*January 2005*
- COSBAR (Montibello)	*2005*
- COSMETICA TECNICA	*February 2005*
- GERMAINE DE CAPUCCINI	*January 2005*
- LABo ABAD	*February 2004*
- LABo ATACHE	*2005*
- NATURA BISSE	*February 2005*
- SKEYNDOR – QUIMIBEL	*January 2005 (…)".*

26. On 6 June 2006 a meeting of this Committee was held at the STANPA Barcelona office, called by the Director of STANPA on 17 April 2006 (folio 505). The meeting was to have been held on 11 May but had been postponed via an e-mail sent by STANPA to all representatives on the Committee on 5 May 2006. The reasons for moving the meeting back according to that e-mail were the *"failure to send in the data for three of the companies …*" (folios 793 a 795).

27. According to the call of meeting cited above, the agenda was as follows (folio 505):

"(…) 1- Presentation of the result of the sector statistics 2005.

2- Exchange of price tariffs.

3- Questions and other business (…)".

28. In the e-mail sent on 18 June 2006 to the 11 Committee members (both to the six that attended and to the five that excused their absence) on the meeting of 6 June 2006, the following is stated (folios 809 to 816):

"-All of the participants proceeded to exchange prices. In the case of companies whose representatives were unable to attend, they were sent a complete set of tariffs in an email on 12 June (…)".

29. The Annual Report indicates (folio 3473) that in 2007 STANPA, in response to the publication of the new Competition Act (LDC) began to rethink the exchanges of information carried out in the association. It also shows that in the Aestheticians Committee the exchange of tariffs was renamed *exchange of catalogues,* as indicated in the following points.

30. Thus, on 11 April 2007 STANPA sent an e-mail (folio 817) calling the annual meeting of the Aestheticians Committee to be held on 25 April 2007, indicating the following as the points of the agenda:

"- Rules on confidentiality and reiteration of the Guarantees on the Rules of Free Competition.

- Analysis of the statistical results of 2006

- Exchange of Catalogues".

31. In response to that e-mail, the representative of one of the companies on the Aestheticians Committee sent another one to STANPA on 17 April 2007 confirming attendance by two people and adding (folios 817 and 818):

"(…) WE ALSO WANT TO ASK ABOUT THE SECTION ON DELIVERY OF CATALOGUES; WE SUPPOSE YOU ARE TALKING ABOUT THE LIST OF PRICES. IF NOT, COULD YOU SPECIFY WHAT YOU MEAN BY DELIVERY OF CATALOGUES" (…)".

32. Another company on the Aestheticians Committee had raised that same question a few days before. In an e-mail sent on 11 April 2007, we can read the following (folio 820):

"(…) One question about the notice of meeting you sent us:

In point four you refer to catalogues or lists of prices (…)".

33. The answer by the person responsible for statistics in STANPA, sent in an e-mail on 12 April 2007, was as follows, confirming that, indeed, the reference to "catalogue" meant the list of prices (folios 819 and 820) :

"(…), this is not by chance. We have intentionally put "catalogue" and not "list of prices" (even though lists of prices are involved), due precisely to the "antitrust" issue that we discussed there.

It is just a question of form, to avoid the possibility of any future Committee meeting being questioned for activity that may be questionable from the standpoint of competition.

In summary, this is a formal question and what we are really taking about is price lists (…)."

34. The meeting was postponed to 23 May 2007 and in the new notice this point on the agenda is given as, *"- Exchange of Catalogues/Tariffs"* (folio 827). At the meeting, several issues were dealt with and, according to the minutes, on this point of the agenda there is the following (folios 837 to 839):

"(…) Exchange of catalogues:

After the conclusion of the presentation of results, the file for which will be sent to all companies that participated in the statistics, there was an exchange of current product catalogues, between the companies: Belnatur, Cosmética Técnica, Germaine de Capuccini, Montibello, Natura Bisse and Skeyndor. (…)."

35. The case file contains no references to exchange of tariffs or prices after that May 2007 meeting. The next meeting was held in 2008.

Exchange of prices in the Mass Consumption Products Committee.

36. The Mass Consumption Products Committee started its activity in 1995, although the statistics began to be compiled in 1996. The Committee is composed of companies that sell their products, amongst other channels, through major retail chains (including hypermarkets, as well as centralised sales arrangements, franchises, etc.) and thus target all segments of the public.

37. According to the STANPA annual report for 2003 (folio 3360 *et seq.*), in 2002 the Mass Consumption Products Committee was composed of 19 companies; which rose to 21 in 2003 (folio 3364), and to 22 in 2004 and remained at that number until 2006. In 2007 the Committee was reduced to 20 due to the takeover of two companies by other Committee members, although the number of brands marketed remained the same.

38. The minutes of the Mass Consumption Products Committee meeting held in Madrid on 13 September 2007 (folios 9 to 12) indicate that within the Committee there were two subcommittees: one for Sales Managers and the Logistics Working Group. The first was disbanded in 2005 and the second had a purely technical focus aimed at improving services in the supply chain from the manufacturer to the end consumer.

39. At its meeting of 7 June 2006, the Mass Consumption Products Committee resolved to carry out an exchange of tariffs of the companies that belonged to that Committee similar to those done in other committees and described in the preceding point. The arrangement established for exchanging prices, as can be gathered from the e-mails sent by STANPA to the representatives on the Committee, involved a certified statement by the companies that they wished to participate in the exchange of tariffs by signing a form sent to them by STANPA. In that same form, the signatory companies committed to submit 25 copies of their current tariffs and subsequent updates and named a liaison for the exchange of tariffs.

40. On 8 June 2006 the General Director of STANPA Madrid sent an e-mail to the companies on the Mass Consumption Products Committee (folio 7, found in the inspection carried out in COLGATE), indicating the following:

"STANPA has been carrying on a formal exchange of information between the companies in the Selectivity Committee, Hairdressing Committee and Aestheticians Committee in relation to the price tariffs for their brands. This exchange is being carried out regularly amongst all of the participants to their full satisfaction.

At the meeting of the Mass Consumption Products Committee held yesterday it was decided to carry on a similar exchange between the companies on that Committee. We are implementing the attached survey to ascertain the degree of interest in this initiative.

The arrangement would involve sending 25 copies to the STANPA offices of the tariffs every time they are updated, so that they can be distributed from there ***to all***

companies on the Committee that participate in the exchange *(boldface in the document).*

We ask that you complete and send us the attached survey as soon as possible."

41. Also, the aforesaid e-mail, which was later resent, included a form proposing that the companies participate in the exchange of tariffs in the Mass Consumption Products Committee with the following text and a choice of YES, NO, and, if affirmative, requesting the identity of the person designated as representative for the exchanges (folios 4, 5 and 8):

"Do you wish to participate in the exchange of tariffs amongst companies on the Mass Consumption Products Committee? The arrangement would involve sending 25 copies to the STANPA offices of the tariffs every time they are updated, so that they can be distributed from there to all companies on the Committee that participate in the exchange."

42. The exchange of tariffs was scheduled, according to a written document from the STANPA General Director, for 1 September 2006 (folio 2 *et seq.*), with data, initially, from 10 firms that had stated their wish to participate in the arrangement, with the possibility of bringing more companies in provided they stated their approval in a form that was once again attached to the e-mail sent on 17 July 2006 by STANPA to the representatives on the Mass Consumption Products Committee (folios 2 and 4):

"Pursuant to our e-mails of 8 and 26 June and 5 July regarding the exchange of price tariffs amongst the companies in the Mass Consumption Products Committee, below we indicate the companies that will participate in the exchange as from 1 September:

Antonio Puig S.A.

Myrurgia S.A.

Perfumería Gal S.A.

Icart S.A. Briseis S.A.

Cotyastor S.A.

Eugeneperma S.A.

Glaxosmithkline Consumer Health

Procter & Gamble S.A.

Unilever España S.A.

We ask the participating companies to send us (if they have not already done so) as quickly as possible 25 copies of their updated tariffs, in order to be able to exchange them as from 1 September.

Any other company wishing to join in the exchange should so notify the STANPA offices and send in their tariffs."

Exchange of prices in the Selectivity Committee

43. The Selectivity Committee is composed of STANPA member companies that sell their products, *inter alia*, through the selective channel targeted at distributors of luxury goods. To operate in that channel a merchant must have an outlet that meets certain requisite characteristics and high prices considered adequate by the manufacturer. Inside the Selectivity Committee information has been exchanged on the price tariffs applied to these goods since at least 2006, as can be gathered from the message sent by the STANPA General Director on 8 June 2006 to the members of the Mass Consumption Products Committee, which stated that (folio 7):

"(…) STANPA has been carrying on a formal exchange of information between the companies in the Selectivity Committee, Hairdressing Committee and Aestheticians Committee in relation to the price tariffs for their brands. This exchange is being carried out regularly amongst all of the participants to their full satisfaction (…)".

44. Nevertheless, as already indicated, the case record shows that these exchanges of prices may have been carried out inside that Committee earlier, at least since 1999, as indicated in the message sent on 3 January 2007 by the Director of STANPA to the companies in the Selectivity Committee, which stated that (folio 1701):

"Pursuant to the resolution approved by the members of the Selectivity Committee of this Association, we remind you that, if the price catalogue of your brands for 2007 has been published, send 35 copies to the STANPA offices in Madrid, in order to exchange them amongst the participating companies as has been done since 1999."

45. The case file contains the reply sent by Estée Lauder, S.A. to that e-mail, namely a message sent on 17 January 2007 to STANPA informing the latter that its tariffs would not change until March 2007 and committing to sending them as soon as they were available (folio 1703).

46. There is also an e-mail in the case file sent by STANPA on 18 January 2007 to La Prairie, Louis Vuiton Ibérica, Eugene Perma, Dyal Importaciones, Procter & Gamble, Coty, Shiseido, L'Óréal, Hevige Distribución S.L., IDESA, Jacques Bogart, Cartier, Myrurgia, BPI, The Colomer Group, Estée Lauder, Clarins, Sysley, Perfumes Loewe S.A., Perfumes y Diseño Puig and YSL Beaute, informing the recipients that CHANEL S.A. was no longer participating in the exchange of selectivity channel tariffs due to reasons of company policy (folio 1704).

47. As can be seen from the message dated 18 May 2007, STANPA responded to the firm of Shiseido, which had asked it for the *tariffs* of various cosmetics brands, for the exchange conducted in 2007 under the name *exchange of catalogues*. In that mail, STANPA replied as follows (folio 580):

"(…) We lament to inform you that we do not have the tariffs you requested because those brands are distributed by a company that does not participate in the exchange of catalogues (…)".

48. According to the minutes of the Selectivity Committee meeting held at the STANPA Barcelona offices on 15 October 2007 (folios 523 and 524), the General Director of STANPA had this to say about the exchanges of price tariffs, at that time termed exchange of catalogues:

"(…) Also, the General Director told the Committee members that the actions carried out by the Association, at the request of its members, included being a mere carrier of the product catalogues. It has been decided that this activity does not add any value to the level of services it provides to its members and that, given that sufficient information can be obtained in the market on the products offered in those catalogues, putting an end to the submission by mail would not pose any problem for them. Consequently, it has been considered appropriate to end those mailings, a decision which was thereupon unanimously ratified by the Committee."

OTHER EXCHANGES OF INFORMATION

Aestheticians Committee products and sales panel.

49. The Aestheticians Committee was set up on 9 March 2004 and carried out yearly statistical exchanges. The frequency was increased to half-yearly in 2006. Nevertheless, the STANPA Annual Report for 2004 indicates that STANPA had historical information since 1999 (folio 3387).

"Inside STANPA, this is the first edition of this information, but we have historical information since 1999".

50. From what may be gathered from the discussions carried on in this Committee at its 4 May 2004 meeting at the STANPA Barcelona offices, the statistics were prepared after each company submitted the Individual Sales Panel for the previous year. The meeting also addressed the criteria for constructing the Panel and decided that the companies would receive a consolidated version of the data. In the notice of meeting sent by e-mail on 23 April (folios 723 to 725), point 1 of the agenda was:

"*1.- Submission by each company of the Individual Sales Panel for 2003: This involves each company completing and returning the panel that was sent to them. The procedure to be followed for obtaining the aggregate date for the Group will be decided at the meeting itself."*

51. And the draft minutes of the aforesaid Aestheticians Committee meeting of 4 May 2004, e-mailed on 10 May 2004 to the companies on the Committee, indicated the following (folios 749 to 753):

*"**1.- Statistics.-** At the previous meeting (9 March 20004), it had been decided that each company would submit the 2003 Individual Sales Panel, in electronic format. Those data were also requested in the e-mail of 31 March, either by sending them to STANPA prior to the 4 May meeting or by taking the data directly to the meeting. Lastly, in the 22 April e-mail, all of the participants were sent the call for that meeting, reminding them to send in the statistical data.*

Shown below is the current state of participation in the exchange, including both the data sent prior to the meeting to STANPA and the data provided at the meeting itself:

Companies/Brands that have provided data:

- BELNATUR (data brought to the meeting)

- CÁSMARA	*(e-mail 28 April)*
- COSBAR (Montibello)	*(e-mail 30 April)*
- GERMAINE DE CAPUCCINI	*(data brought to the meeting)*
- Labº ABAD (Algologie)	*(e-mail 14 April)*
- NATURA BISSE	*(e-mail 29 April)*
- SKEYNDOR-QUIMIBEL	*(data brought to the meeting)*
- COSMÉTICA TECNICA (Lendan)	*(at meeting confirmed the data will be sent electronically)*

STANPA was asked to contact the following companies to instruct them to send in the information: ALAIN GANACIA, LURENDOR, IDESCO-SELVERT, LABº ATACHE, RÖS´S, SORISA and ENCO.

The goal for the upcoming meetings is to have the data sent in beforehand so they can be processed and the results prepared for the meeting, in order that a small presentation be prepared, including a brief report with the key results.

2.- Criteria for completing the Panel.- *It is decided that STANPA should obtain the overall result of the survey and provide only the consolidated version to each participant. Along with the group results, each participant will be sent the information that it submitted (in electronic format and by e-mail), to serve as a check and facilitate the detection of any possible errors."*

52. According to the information in the case file regarding the 2003 information submitted by one of the companies, with the content explained in the end notes (folios 737 to 742), the Individual Sales Panel that STANPA requested from the companies on the Aestheticians Committee consisted of a table with data for four product groups: facial care (milks, gels, make-up removers, toning, creams, mascaras, etc.), body care (treatment creams, massage creams, non-creams, etc.), sundry (depilatories, solar and unspecified treatments) and colour line (lipsticks, eye shadows, etc.). For each of these product groups, each company sends in the number of units shipped (containers, without taking into account exports or units sent through central sales organisations —fairs or congresses— or units sold to employees), the kilos or litres represented by the units shipped and the total units shipped at the professional tariff price (i.e., charged to aestheticians) without VAT, not including the recommended retail selling price. The companies also sent their net domestic sales, net export sales and the sum of both.

53. During 2005 the structure of the individual sales panel with the data sent in by the companies for preparing the panel was the same as in 2004 (folios 778 to 785*).* At the Aestheticians Committee meeting of 6 June 2006, according to the e-mail sent by STANPA on 16 June to the Committee member companies (folios 809 to 816), it was resolved to make certain changes, such as shortening the periods covered by the statistical panels to six months (closed half-year) and adding two new product lines:

"(…) – Carry out a half-yearly statistical panel, always at the close of the first quarter, with simplified information referring solely to Net Sales (these data will be requested in July, in order for the results to be returned to the companies in September).

- Two lines of sales, independent from the rest, will be added to the new panels: sales to SPAs and the masculine line. (…)".

54. In an e-mail dated 28 May 2007, STANPA (folio 835) sent the Committee companies the minutes of the meeting held at the Barcelona STANPA offices on 23 May 2007; the PowerPoint presentation of the results given at the meeting, and the statistical results for 2006, which, it says, were sent in on 18 April, that is, before the meeting. The minutes reflect this point in the following terms (folios 837 to 839):

"Principal results of Financial 2006:

The floor was then turned over to Mr. (…) in order for him to present the results of the 2006 Aestheticians Circuit. The presentation was organised as in the previous years with information on: general sector data, information broken down by facial, body and colour product categories, as well as depilatories, sunbathing products and products for the hands. Special emphasis was placed on the comparative information with the results of other circuits".

55. And those same minutes also recorded that during that meeting the new General Director of STANPA gave an assessment, according to the stipulated meeting agenda, the confidentiality rules and competition safeguards prepared by STANPA in relation to what it terms the Association's statistical activity, in accordance with the instructions of the STANPA Executive Board STANPA (folio 838):

"Rules on confidentiality and defence of competition:

After the presentations, the Director discussed the second point of the agenda on the confidentiality rules and competition safeguards. In this connection, she stressed the importance of approaching all objectives and actions from this framework of reference. This is a matter currently being addressed by the STANPA Executive Board, which has requested the association's legal services to pay special attention to these rules.

One example is the statistical activity which the association has been carrying on in recent years, which complies with those rules, although those measures are being expanded with other initiatives, such as a draft model contract between the companies that participate in statistical activities and the association itself in which the methodology and responsibilities of each of the parties involved in those processes are set out explicitly.

Even though it was first validated by the Executive Board, this reference document is now in the process of being evaluated by the Legal Committee.

Notwithstanding this example, STANPA informs the group that in all actions to be undertaken, though special attention was already being placed on this aspect, from now there will be even greater attention on ensuring compliance with those rules on confidentiality and free competition".

56. The documents on record in this enforcement proceeding show that the statistical information prepared inside the Aestheticians Committee was distributed by STANPA solely to the members of that Committee who participated in the statistics by providing data, and that a PowerPoint presentation of panel with aggregate figures was normally distributed (folios 840 to 939).

57. Starting in 2008 the documents on record in the case file begin to show changes in how the statistic were prepared, following the period of reflexion carried out inside the Aestheticians Committee after the approval of the new Competition Act, as mentioned above.

58. At the Aestheticians Committee meeting of 12 March 2008, there continued to be distributed a PowerPoint presentation with the 2007 sales figures aggregated by companies and disaggregated by product category (folios 960 to 1057). At that meeting, the STANPA officers explained the conclusions regarding how the Committee functioned with respect to the statistical models and compliance with competition rules. According to the minutes of that meeting (folios 1060 y 1061):

"2.- SELF-ASSESSMENT OF THE STATISTICAL MODELS.-

The information shared in this Committee poses no antitrust problems. There are, however, improvements that can be made to increase the current degree of security of this work:

1.- Increase the number of companies that participate in the statistics. To do this, STANPA will once again offer the market information services to all member companies that operate in this circuit. In addition, efforts will be made to identify non-member companies that may be significant players in the professional aesthetician's world, inviting them to join this association. The members of the Committee are requested to give us the support you consider most appropriate for this purpose.

2.- Revision of the current product classification, to see and analyse it and consider the possibility of simplifying the panel, without this resulting in the loss of significant information (…)".

Selectivity Committee panels

59. From the information contained in the STANPA annual reports in the case record (folios 3342 *et seq.*), the statistics for the selective channel exchanged between the competitor companies that participated in the STANPA Selectivity Committee are as follow (folios 3351, 3367, 3368):

- *Panel on monthly exchange of data by brands for the main markets (domestic, tourist and departments stores), which is investigated in this enforcement proceeding.*
- *Panel on quarterly analysis of products, which is investigated in this enforcement proceeding.*
- *Panel on main provinces, which is investigated in this enforcement proceeding.*

- *Panel on customers, which began functioning in 2000, and which analyses the evolution of customers organised as chains (Juteco, Bodybell, etc.), and which is not investigated in this enforcement proceeding.*
- *Panel on the selective market in, begun in 2003, and which is not investigated in this enforcement proceeding.*
- *Benchmarking study: Operating expenses, started in 1998 and carried out every two or three years, and which is not investigated in this enforcement proceeding.*
- *Study of Sale Force Salaries and Compensation, started in 2003, and which is not investigated in this enforcement proceeding.*

60. According to those Reports, the Selectivity Committee's statistical activity goes back to 1989 (2003 Report, folio 3367), although the 2002 Report indicates that the statistics, as compiled that year, began to be obtained in 1996 (folio 3351) and were maintained until 2007, with a change in the information exchange methodology as from 2005.

61. According to the STANPA annual report for 2002, 29 companies in the Selectivity Committee participated in the selective channel statistics, representing approximately 170 brands, which rose to 190 in 2003, with a market share of more than 95%, rising to 97% in 2003 (folio 3367) and turnover of over 1,000 million euros per year. The number of companies remained stable until at least February 2007, according to the year-end closing reports since 2003 which the STANPA officer sent to a company that requested this report on 20 February 2007 (folios 2595 and 2600).

62. In addition to the above, inside the Selectivity Committee other more disaggregated statistics were compiled amongst a group of companies that belonged to that Committee, with market and product data. Those statistics were called the "brand exchange panel".

Selectivity Committee statistics apart from the brands panel

63. This section analyses the information exchanges carried on in the Selectivity Committee by STANPA through the so-called general selectivity statistics which covered the first three panels identified above:

- Panel on monthly exchange of data by brands for the main markets (domestic Baleares, Canarias, tourist and departments stores).
- Panel on quarterly analysis of products.
- Panel on main provinces.

64. According to the minutes of the Selectivity Committee meeting of 13 February 2003 (folios 514 to 516) and to the STANPA 2003 annual report (folio 3367), the methodology followed to prepare the statistics was the same one as had been used since 1996, and consisted in a monthly exchange of market data; the quarterly exchange included product data, and the year-end information reported on the main customers:

"(…) monthly exchange of market data; product data were included on a quarterly basis and the year-end information reports on the main customers; the information on sales by provinces was left out due to its difficulties. The market share has reached 95%, represented by 28 companies and 170 brands (…)".

65. In 2003 the list of customers organised in chains that were analysed in the statistics was updated and the domestic market was divided into traditional and chains, with a breakdown of the information for the Balearic Isles and Canary Islands into fragrances and cosmetics. As can be gathered from the e-mails sent by STANPA on 17 July 2004 (folios 1113 to 1116), each month the monthly and cumulative data were sent. These statistics were aggregated and a comparison made with the previous year, both of the sales volume of all companies, and of the market and product data.

"…We are sending you the statistics for the month of June and the first half of 2004".

66. Until 2004 the general selectivity statistics, as they were called by STANPA, were divided into:

- Statistics by markets:
    - Domestic market (traditional and chains).
    - Tourist market (Balearic Isles and Canary Islands, subdivided into fragrances and cosmetics).
    - Department stores (fragrances and cosmetics).
- Statistics by products:
    - Treatments (facial, hygiene, body/hands).
    - Solar.
    - Colouring (facial make-up, lipsticks, eyes and nails).
    - Fragrances (women's and men's).

67. The statistics produced by STANPA with the sales data of the 28 companies are distributed in aggregate form to all of the companies, accompanied by a list of participating companies, order alphabetically, not by revenue (folios 1113 and 1116).

68. Nevertheless, as from the end of 2004 the statistics methodology changed (folios 1474 to 1477, 1484 to 1489 and 2595 to 2599) to include the month-on-month variation, compared with the previous quarterly measure, in the cumulative data of all companies, but with a higher degree of disaggregation by markets and products. Thus, MARKETS included the traditional domestic market and the chain domestic market, the tourist market (Balearic Isles and Canary Islands) and department stores, and PRODUCTS includes facial treatment, hygiene treatment, body/hands treatment, men's cosmetics, solar creams, facial colouring make-up, lip colouring, eye colouring, nail colouring, women's fragrances and men's fragrances. The decision to change the methodology was made at the Selectivity Committee

meeting of 2 November 2004, at which STANPA informed the companies participating in that Committee on the evolution and state of the selective market, and deal with questions regarding the procedure for sending and receiving files (folios 1141 to 1146):

"Also, at the request of some companies, various proposals were discussed to modify the current level of information. On the one hand, it was requested that the traditional market be broken down into fragrances and cosmetics to be segmented as follows:

- *Domestic fragrances market*
- *Domestic cosmetics market*
- *Chains fragrances*
- *Chains cosmetics*

Secondly, a request was also received to have the product data that are received quarterly solicited and processed on a monthly basis instead.

Both proposals were accepted by the Committee members and, therefore, the appropriate modifications will be made in the statistical information as soon as possible."

69. In 2006, in order that the companies that participated in the Selectivity Committee (26 at that time) could submit homogeneous data, a specific model was used, which was maintained until 2008, as can be seen by the form e-mailed on 16 June 2006 by the STANPA statistics officer to the sector's association in Portugal (folios 1478 to 1489):

"the first two columns refer to 2006 (D and E) and the last two to 2005 (F and G). The last two columns are simple percentage calculations to see the evolution of each indicator (H and I). As you will see, there is always a column for the sales information for fragrances or perfumes (D, F and H) and another column for everything under cosmetics (E, G and I). In addition, there are several rows that describe the sales per circuit (from 6 to 10-Domestic Traditional, Domestic Chains, Tourist Balearic Isles, Tourist Canary Islands, and Department Stores) (…)

The bottom part of the folder is used to summarise the data sent to us each month by the company.

When the companies complete these data, the data matrix d6 to e10 must have exactly the same sum as the e11 to d12 data matrix. That is, the sales by markets or circuits will be the same as the sales by product category. (…)

(…) actually, we always provide the figure for the previous year to the company in order to make things easier for them and because we have a historical series of data for all companies in all of the circuits in which they participate (be it mass consumption products, selectivity, pharmacy or any other circuit).

We are also attaching the REAL Report Model "Selectivity Report 2005". This is the standard report we issue every month, the result of consolidating all of the data received with the previous model file. In that report each company receives the

sums for the entire group and the evolution of each circuit and product category, both for each month and cumulatively. And at the end you have a list of Companies and Brands that participate in our Selectivity Statistics and whose data are included in that report. As you will see, it is the year-end 2005 report, just as it was in Spain (these are real data) (…)".

70. Subsequent to the approval of the new Competition Act (LDC), at the Selectivity Committee meeting of 5 July 2007 (folios 517 to 521) participants were informed of the entry into force of the new law, and the companies on the Committee were told that the STANPA Legal Service, in coordination with the STANPA Legal Committee, was in the process of approving a reference document for all companies that participated in the market studies that would regulate the methodology and procedures for conducting those studies. In relation to the Selectivity Committee statistics, the persons in attendance at the 5 July 2007 meeting were given a comparative analysis between the selectivity circuit and the general performance of the sector and other circuits, with detailed analysis of the main products.

71. The Selectivity Committee meeting of 15 October 2007, cited above in relation to the exchange of prices, adapting to the new LDC and the consequences for the functioning of the STANPA Committees were discussed by the General Director of STANPA, as set out in the minutes (folios 523 and 524), which say that one of the actions carried on by STANPA is that of being a mere carrier of product catalogues (in reference to the exchange of catalogues between the companies).

72. The minutes of the STANPA Legal Committee held at the Barcelona offices on 4 March 2008 (attended by representatives of Antonio Puig, S.A., The Colomer Group, Henkel Ibérica, S.A., Procter & Gamble España, S.A., Unilever España S.A. and the legal advisor for STANPA, with Johnson & Johnson, S.A. and L'Oréal España S.A. having notified and justified their absence) were obtained during the STANPA inspection (folios 3173 to 3175). Those minutes indicate that the meeting took up the issue of self-assessment of the statistical models of the different STANPA Committees, including the Selectivity Committee, with advice being given on the various modifications that were needed in each of those Committees. The STANPA e-mail sent 30 April 2008 to the companies on the Selectivity Committee with the minutes of the meeting of that Committee held on 30 April 2008 (folios 3193 to 3198), indicated the procedure that was to be followed from then on:

"(…) In accordance with the resolutions approved at the said Committee meeting, we confirm that STANPA is in a position to execute the panels and studies that the group wishes to put in motion. In this regard, the panel on General Statistics for the National Selective Market is fully operational and its participating companies are receiving the related report each month. The same holds for the Andorra panel, and the results of the first quarter of 2008 of that panel will be published in the coming days.

As for the Divisions panel, in line with the recommendations of the audit report aimed at simplifying the panel and giving it an annual frequency, we are attaching the model to be completed by the companies, knowing you should first send us written confirmation (…) that you wish to participate in the panel (…)".

Brand exchange panel

73. The Selectivity Committee, in addition to exchanging tariffs and monthly aggregate statistics by markets and products, also produced disaggregated statistics called the "brand exchange panel", which includes data on a smaller group of companies that belonged to that Committee, in which each company provide the data to STANPA completely disaggregated data in full view of the rest of the companies.

74. The STANPA annual report for 2003 (folio 3367) indicates that in October 2001 STANPA began implementing the brand data exchange panel, initially prepared with data from 14 companies on the Selectivity Committee that distributed products under 55 brands and represented 70% of the market. The number of companies participating in the panel rose to 18 in January 2006, as can be seen in the e-mails sent by the STANPA statistics officer to the companies taking part in the brand exchange panel, with the statistics attached (folios 1073 to 1112 and 1113 to 1120). Those companies accounted for more than 90% of the market and represented 75 brands (folios 1313 to 1326bis 11). As for the procedure followed, STANPA requested data and supplied tables that were completed by the companies participating in these exchanges of disaggregated information. The companies would also submit their comments and suggestions for improving the statistics. After completing the data, the companies sent them to the STANPA statistics department, which was also responsible for requesting the data not sent in by the participants. The department prepared fully disaggregated charts and sent them to the participating companies.

75. The charts sent by the participating companies to STANPA, as indicated by the e-mail sent by a Procter & Gamble representative to STANPA, attaching all of the completed month to month and cumulative charts for 2006, included the data for each of the brands sold by the company in the traditional market, chains, Balearic Isles and Canary Islands, broken down into fragrances and cosmetics (folio 1525).

76. Also included were data of each of the brands marketed by the company, disaggregated into facial treatment, hygiene, body/hands treatment, men's cosmetics, solar, facial make-up, lips and eyes (folios 1525 to 1551). Each month the charts were sent with the data to all of the companies participating in these information exchanges, broken down as already indicated, and at the end of the year STANPA also sent each participating company the information that had been input into its systems in previous years, as a means of indirectly auditing the system and in order that the said companies could have a historical log of their data (folios 1876 to 2594). The statistics were always accompanied by a list of the companies that participated in this brand exchange panel, and the brands distributed by each of them.

77. Although the brand exchange statistics began to be compiled in October 2001, the first statistics on record in the case file are from 26 January 2004, the date on which the STANPA statistics officer sent a message to the companies participating in this exchange of disaggregated information, accompanied by the final report for 2003 compared with the 2002 data, and the sales figures for the brands of the 14

corporate participants in this exchange of disaggregated information, ordered by sales volume, from largest to smallest, thereby establishing a ranking of the brands of A. Puig, BPI, Calvin Klein, Chanel, Clarins, E. Arden, Lancaster, Loewe, L'Oréal, LVMH, P&G, Perfumes Y Diseño, Shiseido and YSL Beaute (folio 1073).

78. The results obtained from the data of all of the companies were arranged into differentiated panels structured by markets and products, with the information and brands ordered according to the sales volume of each of them (folios 1073 to 1080).

79. Specifically, in 2004 the data were structured as described below:

a) The first block differentiated the following markets:

- Domestic market, divided into traditional and chains.
- Tourist market, divided into Balearic Isles and Canary Islands and, within each of these divisions, into fragrances and cosmetics.
- Department stores, divided into fragrances and cosmetics.

b) The second block offered data by product categories:

- Treatments: divided into facial treatment, hygiene and body/hand treatment, solar.
- Colouring: divided into facial make-up, lips, eyes and nails.
- Fragrances: divided into women's and men's.

80. The first statistics on record that were sent by STANPA in January 2004 (folios 1073 to 1080), with sales figures for 2002 and 2003, show the percentage year-on-year variation for each category, and the figures of the 14 companies participating in these exchanges of disaggregated information are accompanied by the data from the "Total STANPA sampling" of the 28 companies on the Selectivity Committee.

81. The case file contains the panels sent by STANPA to the companies participating in this panel since 2004, (folios 1525 to 1551, 1641 to 1700, 1749 to 1875, 2601 to 2641 and 2736 to 2832), such as, for example, the following information e-mailed by STANPA on 29 January 2007 to the companies participating in this panel:

- AC Cosmetics, to which the STANPA statistics officer sent the information submitted with the data for 2006 (folios 1876 to 1905).
- Puig, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 1906 to 2022).
- Yves Saint Laurent Beauté, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2023 to 2066).
- Perfumes y Diseño, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2067 to 2110).
- P&G, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2111 to 2154).
- *L'Oréal, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2155 to 2198).*

- *IDESA, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2199 to 2242).*
- Clarins, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2287 to 2330).
- Chanel, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2331 to 2374).
- Productos Beauté Juvena, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2375 to 2420).
- LVMH, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2421 to 2464).
- Shiseido, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2465 to 2507).
- Loewe, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2508 to 2551).
- Elizabeth Arden, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2552 to 2594).
- Estée Lauder, to which the STANPA statistics officer sent the data on markets and on products for 2006 (folios 2243 to 2286).

82. The companies on the STANPA Selectivity Committee that did not provide information for these statistics did not receive the brand exchange panel. This can be seen in an e-mail of 31 March 2006 sent by STANPA to all participants in those statistics, which states as follows (folios 1318 and 1319):

"(…) The company (…) adducing computer problems, has not provided its information on brands, so its data do not appear in the Panel. We trust this situation will be corrected next month (March), at which time we will resume including its data as from the month of January. On this occasion, since it did not sent the information, it will not receive the panel (…)".

83. Nevertheless, the decisions on brand exchanges were made inside the Selectivity Committee with the knowledge of all companies that participated in that Committee. One example would be the resolutions adopted at the Committee meeting of 9 February 2006, changing the brand exchange methodology to break the information down more by markets (folios 1292 and 1293):

"At the last meeting of the Selectivity Committee on Thursday, 9 February 2006, the following decisions were adopted concerning the Brand Exchange Selectivity Statistics: (…)".

84. These exchanges of information, according to the information on record in the case file in the e-mails sent from 24 February 2004 to 23 September 2007 by the STANPA statistics officer to the companies participating in the brand exchange, were maintained until 28 September 2007 (folios 1081 to 1108, 117 to 1131, 1136 to 1140, 1147 to 1160, 1165 to 1168, 1176 to 1221, 1327 to 1342, 1352 to 1428,

1440 to 1469, 1471 to 1474, 140 to 1524, 1552, to 1634, 1705 to 1748, 2542 to 2661, 2683 to 2813, 2881 to 2891 and 2892 to 2981).

85. There follows a chronological account of how those exchanges of disaggregated information were carried out in practice by STANPA. Thus, in an e-mail dated 24 November 2004 STANPA told the following to the companies participating in those exchanges of disaggregated information (folios 1163 and 1164):

"- (…) The procedure is the same as the one followed in previous years:

- The responses are received (…)

- A list is compiled with the changes requested by a majority of the companies.

- That list is presented to the Selectivity Committee members for their approval.

- The definitive list is sent out (…)".

86. On 19 January 2005 L'ORÉAL sent an e-mail to STANPA proposing the creation of a single heading "Men's Cosmetics" in the products panel (folios 1161 to 1164). It also had this to say:

"Also, you told me that STANPA wants to ask for breakdowns of sales by product category every month.

As we already said during the meeting which was attended by (…) and myself, L'Oréal would agree to share more information provided all the players in the selective committee share their data. Unfortunately, we still do not have any data in the direct reading of several brands, some of which carry a lot of weight in this business.

Thus, for now and until this matter is resolved, L'Oréal Lujo, though it will not stop sending monthly data by distribution channels and quarterly information by product category, does not wish to submit more data.

I am at your disposal for any doubt you may have and I hope that we will be able to move forward on both the first and the second points".

87. On 27 January 2005 the STANPA statistics officer announced a change in the markets report, indicating that (folio 1169):

"*It is not possible to make this update in the Products environment because STANPA does not have an alternative monthly information source for 2004".*

88. In an e-mail of 26 October 2005, the STANPA statistics officer instructed the company The COLOMER Group SPAIN (COLOMER) as follows in relation to the exchange of brands (folios 1229 and 1230):

"(…) Pursuant to our telephone conversation, find attached a "model file" for the data exchange panel, (…) The fact is that this panel now has coverage of 70%. But we expect it to keep increasing, because we are in talks with E. Lauder to include them in these statistics as well. In fact, we expect that they will be included in full in the October panel, given that we have received a commitment from them to do so.

This being the situation, only three companies would be missing: (…) and yourselves, the panel's coverage would go from the current 70% to 91%. And in

*view of the trend seen in these statistics, everything indicates that in a few months, all of the companies not participating in the Selectivity Statistics, say the "traditional" one (and I mean the statistics), will end up participating in this "**data in view**" system, which is nothing other than a type of European Forecast, but for the domestic market, monthly and free.*

I believe this is an issue you should evaluate internally and with some speed, so the situation does not run ahead of us (…)".

89. In February 2006 the methodology was changes subsequent to a meeting held on 9 February 2006. This was indicated in the e-mail sent on 14 February 2006 by the STANPA statistics officer to the participating companies (folios 1292 and 1293):

"During the latest meeting of the Selectivity Committee on Thursday, 9 February 2006, the following decisions were approved concerning the Selectivity Brand Exchange Statistics:

1) The Traditional and Chains Domestic Markets will be broken down into Fragrances and Cosmetics, as is the case with the other markets (Tourist and Department Stores).

2) The monthly and quarterly reports will be identical, so the product information will be sent in every month (as is the case in the General Statistics).

3) It is resolved to add a column to the reports specifying the weighting per company in relation to the market as a whole.

4) Lastly, it is resolved to add to the report a ranking of companies, independently of the ranking by brands.

For this reason, in the coming days we will update the data transmission files in accordance with the decisions adopted by the Committee (…)".

90. Thus, the information continues to be disaggregated, contrary to the general statistics prepared within the scope of this Committee, as is confirmed in the e-mail sent by STANPA on 22 March 2006 to a company that did not participate in those exchanges of disaggregated data (folios 1314 to 1318):

"(…) Find attached a model form for the Selectivity Statistics report that I mentioned to you this morning. Due to the requisite confidentiality of the data, I am sending you a report from June of last year.

*As you will see, it is a panel in which **the participating companies exchange the data in full view and they do so regardless of their participation in the general statistics which you already know well and in which you have been participating for many years.***

(…) yours is the only significant company that does not yet participate in this exchange. (…)"

91. The modifications agreed at the Selectivity Committee meeting of 9 February 2006 began to be implemented with the submission of the January data. Thus, on 31 March 2006 the STANPA statistics officer sent the companies participating in the

exchange of disaggregated information an e-mail with the data for January (folios 1318 to 1326).

92. With regard to the data exchanged, the following novelties were introduced:

a) Markets panel:

- The data on the domestic market, both traditional and chains, is broken down into fragrances and cosmetics.
- Also, in addition to the ranking of brands by sales that was being compiled, a ranking was added of the 18 companies participating in this exchange of disaggregated information, breaking down each of their sales volumes according to the market division used for the brands: domestic market (fragrances and cosmetics), tourist market (Balearic Isles and Canary Islands, fragrances and cosmetics) and department stores (fragrances and cosmetics). The sales figures allow a calculation of the weighting of each company in the total of the 18 analysed (the total sampling for the exchange of disaggregated information), as well as the weighting in the total STANPA market sampling covering 25 participating companies (total of the selective market, composed of the STANPA statistics for the Selectivity Committee, which included the same sales data disaggregated by markets but aggregated by companies). There was a ranking for each market and an overall ranking. In relation to the latter, the 18 companies participating in this markets panel accounted for 92% of the total sales volume of the 25 companies whose data were comprised by the STANPA sampling.

b) Products panel:

- The disaggregated data began to be exchanged on a monthly basis.
- A differentiation is made, in the treatments category, between women's and men's products, breaking the sales data down into women's facial treatment and men's cosmetics.
- Similarly to the market panel, the products panel contained a ranking of participating companies by product category (not all of the companies are present in all of the product categories) and an overall ranking, with an analysis of weighting in relation to the companies participating in this exchange of disaggregated information and to the 25 companies in the total STANPA sampling.

93. On 28 April 2006 the STANPA statistics officer sent a message to the Selectivity Committee companies that participated in these exchanges of information, informing them, amongst other matters, that the company AC Cosmetics has joined the information exchange and that (folios 1352 to 1418):

"the reports will hereafter present markets and products separately (…)".

94. Nevertheless, the most characteristic feature of these exchanges of information "by brand" is that they are disaggregated, as is confirmed by the e-mail of 16 June 2006, which the STANPA statistics officer sent to the Portuguese association for the

sector. In that message, the STANPA statistics officer explained the statistics methodology and sent the said association the general statistical models for selectivity and, moreover, told it (folios 1478 to 1489):

"In addition, of these selectivity model reports we have what we call the "Exchange by Brands", which is another environment in which the companies provide their data in full view. This is another question to take up, one that I believe is of great interest and which merits separate discussion (…)".

95. Other examples include the e-mails sent by various companies participating in this exchange of disaggregated information to the STANPA statistics officer in December 2006 and January 2007, with their statistical data attached (folios 1705 to 1748, folios 1749 to 1788, folios 1789 to 1875).

96. Another e-mail that is illustrative for understanding the difference between the General Statistics of the Selectivity Committee and the markets and products panels compiled with disaggregated data is the one sent by the STANPA statistics officer to the company LVHM on 20 February 2007. That message reads as follows (folio 2595):

"(…) Pursuant to your request, I am sending you the closing reports for 2003 and 2004, in accordance with the Selectivity General Statistics as it was configured at that time (as per the relevant lists of companies and brands at that time, the chains then involved, etc., etc.).

I make separate mention of the case of 2005, the time at which the Selectivity Statistics were thoroughly revised and whereupon the report was given its current structure.

In another e-mail I will now send, you will receive the reports for the Exchanges of Brands, likewise for the Selective Market."

97. The e-mail was accompanied by three tables containing the data on markets and products, along with the companies participating in each of them, in the years 2003, 2004 and 2005. All of the tables include, under the same headings as the markets and products panels, the aggregate sales data of 28 companies in 2003 and 2004 and 26 companies in 2005.

98. There are e-mails subsequent to 3 July 2007 confirming the existence of these exchanges of disaggregated information in which the participating companies would send STANPA the data for the month in question and corrected the data from previous months (folios 2736 to 2832).

99. The companies participating in these information exchanges continued sending STANPA disaggregated data for June 2007, as can be seen from the e-mails of 19 July 2007 (folios 2816 to 2846) and 23 July 2007 (folios 2847 to 2880).

100. On 25 July 2007 the STANPA statistics officer sent the 18 companies participating in the exchanges of disaggregated information the information for the exchange of brands (markets and products) for the month of June and the cumulative for 2007. He also told them that during the month of August 2007 the reports would be

suspended until September 2007, at which time the data for July and August 2007 would be released (folios 2881 to 2891).

101. The companies sent their data for July and August and certain data were requested by STANPA, after setting a deadline for submission of the information at 18 September 2007; with the data eventually being sent in during the month of September, on 20 September (folios 2892 to 2923), 21 September (folios 2924 to 2954) and 28 September 2007 (folios 2955 to 2981).

102. As from that date STANPA stopped issuing the disaggregated statistics that it had been sending out until then. Quoted below is the e-mail of 2 October 2007 which an officer from one of the companies participating in this exchange of disaggregated information sent to the STANPA statistics officer (folio 2982):

"(…) one little question: I received the market data for July and August, but not the brand exchange data, and this surprised me because they normally arrive together.

Is it just that I have not received them or that they are not yet ready?".

103. The representative of another company participating in the exchange of disaggregated information expressed himself in similar terms on 2 October 2007 in an e-mail sent to the STANPA statistics officer, as quoted below (folio 2984):

"(...) persons from different brands are saying that certain reports are missing which STANPA was sending out until this summer.

You can see an example in the accompanying e-mail.

We are waiting to receive them, as it is very important for them in order to prepare the report on results by brand (...)".

104. As indicated in the e-mail, it was accompanied by an example of the data exchanged by STANPA with the companies participating in that panel, with the company sending in four tables with markets and products data, broken down by brands, for the months of July and August 2006, with their respective cumulative figures, previously sent out by STANPA (folios 2987 to 2998).

105. An officer from another company participating in these exchanges of disaggregate information sent an e-mail to STANPA on 8 October 2007 likewise requesting the brand exchange data for July and August (folios 3017 and 3018).

106. In relation to these exchanges of the panel called the Selectivity/Divisions Study, the STANPA Legal Committee on 4 March 2008 had this to say (folio 3173): "*Selectivity/Divisions Statistics.- Adapt both the periodicity and the breakdown of the information.*

IV. The STANPA self-assessment process

According to the case file and to STANPA (folio 6825), in February of 2007 it was decided to undertake a self-assessment, followed by a request for an external audit, of the systems used by the association to prepare the statistical panels.

It is also on the record that the STANPA Legal Committee met on 4 March 2008 at its Barcelona offices (folios 3173 to 3175) and decided to analyse the report issued by the

external consultancy on the statistical models used by the different STANPA Committees. In view of the report, the Committee submitted certain recommendations to STANPA regarding the various exchanges of information, and in specific relation to the brands exchange indicated what was quoted in the preceding point:

- *Selectivity/Divisions Study.- Adapt both the periodicity and the breakdown of the information.*

Lastly, the General Assembly held on 8 May 2008 ratified the resolutions adopted by the Executive Board on 21 February (folio 3178) in relation to confidentiality and disclosure to the members of the confidential information.

> *"In view of what was stated, the General Assembly unanimously approved the resolution to ratify the content of the aforesaid resolutions adopted by the Executive Board on 21 February 2008, and, in this respect, provides that no member of the Executive Board, not even the President of the Association, may have access to the information submitted to the Association by the companies that participate in the different statistical studies for the purpose of preparing consolidated studies of the different markets".*

FOUNDATIONS IN LAW

First.- In this case the Council must decide whether, as charged by the Investigations Division (DI), STANPA violated article 1 of the LDC by establishing and managing, in several sector committees of the association that group together competitors, arrangements for exchanging information with the aim of constraining or distorting competition between those competitors.

Specifically, the DI, on 27 July 2010 brought the following proposed resolution before the Council:

- ***One**. That collusive conduct be declared to exist under article 1 of the Competition Act 16/1989 of 17 July 1989 (and article 1 of the currently prevailing Competition Act 15/2007 of 3 July 2007), in the STANPA association's recommendation on the exchange of commercially sensitive information, capable of restraining competition in cosmetics products, inside the STANPA Committees on Aestheticians, Mass Consumption Products and Selectivity, from 26 January 2004 to 8 May 2008.*
- ***Two**. That the association STANPA be declared liable for that violation.*
- ***Three**. That said collusive conduct be classified, for purposes of determining the applicable sanction, as a very serious infringement.*
- ***Four**. That there be levied the sanction provided in article 10 Competition Act 16/1989 of 17 July 1989, for very serious infringements, with a fine of up to 901,518.16 euros.*

Before undertaking a substantive analysis of the conduct which the DI charges is contrary to the LDC, the Council proposes to first analyse the applicable laws and regulations, followed by the procedural questions which the accused has repeatedly claimed over the course of the proceedings are grounds for nullity.

Second.- Applicable laws and regulations. The DI charges that the infringement began in 2004, when Competition Act 16/1989 of 17 July 1989 was in force, and ended in 2008, under the current LDC approved by Act 15/2007 and in effect since 1 September 2007. The DI, following the pronouncements of this Council, regards Act 16/1989 as more favourable for STANPA and therefore proposes that the conducts it is accused of having carried on be assessed and sanctioned under that law.

The Council agrees with the Investigations Division's assessment. Indeed, even though the proceeding, opened in July 2009, has been pursued under the procedural rules provided in Act 15/2007 that was in effect at that time, the Council has repeatedly ruled that in a case-by-case analysis, when assessing and sanctioning "*a continuous illegal conduct that goes on under two laws, there must be applied, having regard to what is provided in article 128.2 of Act 30/1992 of 26 November 1992 on the Legal Regime of Public Administrations and Common Administrative Procedure, the one which on the whole is more favourable to the party engaged in the unlawful conduct".*

Taking into account that article 1 of both laws, Act 16/1989 and Act 15/2007, prohibit the same type of conducts, for purpose of the legal assessment of the facts that are considered to have been proven, the question of which of the two laws is applied is of no significance. Conversely, taking into account the sanctions provided by the two laws when the accused is an association of companies, the legal consequences may be different.

Indeed, whereas Act 16/1989 in article 10 stipulates that violations of article 1 of the LDC may be sanctioned by the competition authority with fines of up to 901,518.16 euros, and that limit cannot be exceeded when the offender, as is the case here, is an association, article 63 of Act 15/2007 provides that the limit will be a percentage (higher or lower depending on the gravity of the sanction) of the infringing party's turnover in the preceding year. And it expressly stipulates: *"The total turnover of associations or unions or groupings of undertakings will be determined taking into consideration the turnover of its members".* Therefore, without having to conduct a more in-depth analysis, Act 16/1989 is more favourable for STANPA and hence the one to be applied by this Council.

Third.- Procedural questions.- With respect to STANPA's arguments regarding possible irregularities committed in the office inspections, which it claims render the DI's investigation null and void, we must begin by noting, before examining the issue, that this Council is fully aware of the judgment entered by the National Review Chamber of the National Appellate Court on 30 September 2009 partly nullifying one of the inspections carried out in proceeding S/0086/08, Professional Haircare. Nevertheless, and though the relation between the inspection adjudged there and this proceeding is evident, the impact that said ruling may have on this case at the present time is much smaller than what is invoked by STANPA, as we will now explain.

First of all, and independently of another series of considerations we will make later on, it bears emphasis that the judgment in question is not final, and has been challenged in an appeal brought before the Spanish Supreme Court both by STANPA and by the CNC, and its provisional enforcement was sought but denied in the Writ of 29 April 2010. In other words, although it is beyond discussion that if the National Appellate Court's ruling is upheld, it would have a direct impact on this case, because as the said Writ rightly points out *"a decision by the Supreme Court against the appeal would render null such sanction as might be levied on the basis of the documents obtained unlawfully"*, the truth is that, for the time being, its enforceability is pending the ruling of the High Court. Consequently, the Council will not take it into consideration, neither insofar as it may harm, nor to the extent that it may benefit, STANPA's position in this proceeding.

Pursuant to this line of argument, and for reasons of strict prudence, this Council will not take up an analysis of the documents obtained in the inspection carried out on 19 June 2008 in the STANPA Barcelona offices, as part of proceeding S/0086/08 Professional Haircare, when, moreover, they are not needed to demonstrate the existence of the infringement. On the contrary, assessment of the existence of the infringement will solely and exclusively take into consideration the abundant evidence obtained during the inspection conducted in the Madrid STANPA office; the inspection carried out on 17 June 2008 at the COLGATE offices, in cases S/0084/08 Gels and S/0085/08 Toothpastes, and the information subsequently requested of STANPA over the course of this investigation, as set out in the Findings of Fact.

We must add to what has already been set out here that STANPA proposes to argue in this proceeding questions which, as occurs with the inspection's breach of limits, cannot be the object of debate insofar as they affect a different administrative proceeding from this one, the aforecited S/0086/08, which is pending resolution and in which there may no doubt be raised the objections of unlawfulness that it has made with respect to the CNC's actions.

Conversely, what can be debated in this proceeding are the issues on which the National Appellate Court does not pronounce itself, and it expressly declares as much in the Third Foundation of its judgment, precisely because they go beyond its powers of judicial review, that is, with respect to the incorporation into the case record of certain factual evidence that happened to be found in an inspection.

The European Court of Justice (ECJ), in its judgment on Case 85/87, Dow Benelux NV, had the following to say in this respect:

> *19.- On the other hand, it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is necessary to protect professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the performance by the Commission of its task of ensuring compliance with the competition rules in the common market and to bring to light infringements of Articles 85 and 86 of the Treaty (LCEur 1986, 8).*

> *20.- In this case, the applicant' s complaint is directed precisely against the fact that the Commission relied on information obtained during earlier investigations having a **different subject-matter** in order to open a new inquiry concerning infringements of the competition rules in the Treaty. It follows from the foregoing that the complaint must be rejected.*

Similarly, the report of the Office of the State Attorney General of 16 October 2008 on the scope of the inspection function, which was sought by STANPA and the Council agreed to incorporate into the case file (folio 6840), concludes, on the basis of the broad national and European case-law and on the national antitrust laws, that the use of information obtained by chance and without premeditation can be used in other competition proceedings, though subject to certain conditions, namely:

> *"In these cases, the use of information obtained by chance in an inquiry appears to be legitimate. Now then, such use, on the terms that will be discussed, is conditional on the Director of Investigations issuing a reasoned resolution, and communicating that decision to the interested company, approving the opening of a new investigation in order for the company to submit the arguments it deems fit. The reasoned decision of the Director of Investigations, the hearing of the interested company and the consequent opening of a new proceeding are, moreover, necessary in order for the Administration to be able not just to use but to also seek (recall the nuance expressed earlier in relation to the formulation of the question) new documents relating to the information obtained by chance.*
>
> *…*
>
> *The information obtained is thus capable of giving rise to the opening of either a confidential proceeding under article 49.2 LDC, or to the direct initiation of an enforcement proceeding"*.

Nor is it otiose to recall that consistent criminal case-law precedents (all of which can be represented by the Supreme Court judgments 5/2009 of 8 January 2009 and 2228/2001 of 22 November 2001, and the Constitutional Court judgments 41/1998 of 24 February 1998 and 50/1995 of 23 February 1995), in proceedings which have infinitely more guarantees and safeguards than administrative disciplinary proceedings, have recognised without any doubt that entry in a domicile with court authorisation for a specific purpose does not mean that, if another offence is discovered, said other infringement cannot be investigated by the competent authority or public official. Thus, for example, the Supreme Court judgment of 30 March 1998 declares with the utmost clarity that "*the doctrine of this Chamber has adopted a position in favour of the lawfulness of investigating other criminal conducts that originate with evidence found in court authorised searches*".

In view of the above, and of many other pronouncements on the issue, this Council believes that, striving for the compatibility of juridical rigour and full respect for fundamental rights with the legally imposed obligation it has to serve the specific public interest it is charged with protecting, it is lawful to use documents found during an inspection that are unrelated to the object of the inspection and incorporate them into another distinct enforcement proceeding, provided the finding was incidental and that certain other safeguards are respected.

STANPA argues, in this respect, that the information and documents used as evidence against it in this case was not discovered *accidentally,* but as the result of a deliberate and premeditated process designed before the inspection was conducted. To support this assertion, it requested as evidence and in a hearing "*all internal documents used to prepare the inspections that took place at the STANPA offices on 19 June 2008, including the search engines used by the inspectors during the visit and, if applicable, the list of questions the inspectors were instructed to put to the officers and employees of the inspected entity".* It likewise sought the official certificates of all inspections carried out in case S/0086/08 Professional Haircare.

The Council accepted the inclusion in the case file of most of the evidence proposed by STANPA, such as the report of the Office of the State Attorney General, the official inspection certificates and the search engines used by the DI in its inspections, which were incorporated into the case file on 26 October 2010.

The Council did not accept inclusion of the possible *internal preparatory working papers produced by the DI before the inspections are carried out*, because, if those papers did exist in the DI archives, they would constitute informal preparatory documentation, which can in no event form part of an administrative case record.

The words used as search engines (folio 6927), as the DI rightly stated in its submission of evidence, are a complementary support used when conducting the search and selecting the information in a digital medium, but is and remains nothing but an instrument used for delimiting and facilitating the search for evidence.

And the Council sees that the search engines used correspond to words relating to hairdressing (permanents, shampoos) or to the association's bodies in which there were or could be dealt with matters relating to the so-called G8 group in relation to professional haircare (e.g. Group of Sales Directors).

STANPA argues that the inclusion of the GROUP OF SALES MANAGERS (GSM) and the questions asked by the inspectors in the interviews in respect of those groups indicate that the DI was looking to investigate the Mass Consumption Products Committee, the subject of this proceeding, to which those groups belong. And that said search, irrespective of the hairdressing segment, was done intentionally.

The Council, on the other hand, believes that the description given by STANPA in its pleadings of 18 November 2010 (folio 6951) lead to the opposite conclusion. Indeed, had the DI known that those Groups were involved in other Committees, it would not have had any restriction on expanding the inspection order or even on issuing different inspection orders, as it did in other cases, as it has no limitation in this respect. If it did not do so, the only logical reason is that the DI was looking for evidence for the professional haircare case, and in its search, it unintentionally happened upon evidence of other actions carried out by STANPA in areas outside the hairdressing segment.

And it is irrelevant whether the DI knew, for example, that the GSM belonged to the Mass Consumption Products Committee and not to the Hairdressing Committee.

The inclusion of those search words and the questions regarding the groups clearly show that, as is only to be expected in the every earliest stages of an inquiry, that the DI had not delimited the scope within which the professional haircare issues it was

investigated were dealt with, and for that reason it attempted to obtain information on those groups and requested information in the interviews on their composition and how they functioned. As reflected in the pleadings, one of the questions regarding the GSM was precisely: "What issues did they deal with?". It is therefore not otiose to once again recall what has been said by the ECJ, that an inspection is shorn of utility if the DI can only request documents which it has fully identified.

Based on the foregoing, this Council finds that in its investigation of this case the DI has shown scrupulous respect for the requirements cited above for the incorporation into the record of this proceeding of documents obtained in the inspection carried out as part of case S/0086/08. With the information that the DI happened upon in the professional haircare inspections in the STANPA and COLGATE officers, preliminary proceedings were opened (DP/0034/08) and, later on, a new enforcement proceeding was opened, during the course of which information was sought from STANPA, which provided additional evidence of the investigated infringement and in which STANPA as accused has been fully able to make ample use of all of the rights of defence to which it is legally intended.

Fourth.- Doctrine and precedents regarding exchange of information between competitors.- Exchanges of information between competitors may be carried on in many forms; one of them, and not the least common, is through an organisation in which the companies in a sector participate, that is, an association.

STANPA does not deny the information exchanges it is charged with conducting, but denies that those interchanges can be considered an infringement of the LDC. Therefore, what is needed here is a preliminary view of what, for these purposes, is considered an infringement by the relevant laws, regulations, authoritative legal practitioners and commentators and by the practice of this Council and of its predecessor, the TDC, and which STANPA should have known.

Act 16/1989, which applies to these proceeding for substantive purposes for the reasons set out in the Second Foundation in Law above, just like the Act 15/2007 now in force, prohibits the following conducts as anti-competitive:

> *"All collective agreements, decisions or recommendations, or concerted or consciously parallel practices, which have as their object, produce or may produce the effect of impeding, restricting or distorting competition in all or part of the national market are prohibited (…)".*

The actions carried on by the STANPA association are set out in the findings of fact; the DI holds that part of those actions constitute a violation of article 1.1 of the LDC and requests of the Council:

> *"That collusive conduct be declared to exist under article 1 of the Competition Act 16/1989 of 17 July 1989 (and article 1 of the currently prevailing Competition Act 15/2007 of 3 July 2007), in the STANPA association's recommendation on the exchange of commercially sensitive information, capable of restraining competition in cosmetics products, inside the STANPA Committees on Aestheticians, Mass Consumption Products and Selectivity, from 26 January 2004 to 8 May 2008".*

The accusation made by the DI and which this Council must analyse in the light of the applicable laws and regulations and the Spanish and European precedents therefore refers to STANPA's actions as instigator, propitiator and vehicle of the exchange of information between competitors inside the Association, confined to its three component Committees, namely, the Aestheticians Committee, the Mass Consumption Products Committee and the Selectivity Committee.

With respect to the doctrine and practice seen in the EU, as set out, *inter alia*, in *Judgment C-7/95 P of 20 May 1998, John Deere Ltd versus the Commission of the European Communities,* cited above, it is reflected in a recent Communication from the European Commission (*2011/ C 11/01), Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, published on 14 January 2011 in the Official Journal of the EU (hereinafter, the Communication Guidelines)*.

The Guidelines, after defining the possible means of exchanging information, including sharing data indirectly through business associations, states in point 59:

> *"Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel".*

And it adds that certain specific information exchanges are highly likely to lead to a collusive outcome, wherefore those exchanges constitute a restriction of competition by object, as defined in points 72 and 74:

> *72. Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place. To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition.*
>
> *74. Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfil the conditions of Article 101(3).*

The Communication also discusses at some length circumstances in which the likelihood of a collusive outcome is not as high, in which case they should be analysed

under article 101.3, weighing the possible advantages of efficiency gains that benefit the undertakings and consumers against the drawbacks of impact on competition. In other words, the analysis of those conducts will take into account the effects of the exchanges and, toward that end, they must be analysed according to characteristics of the market in which they take place (concentration, transparency, symmetries) and the characteristics of the information exchanged (type of information, aggregation, age, frequency, publicity etc.).

In addition, this Council and its predecessor TDC has pronounced itself on infringements involving information exchanges carried on through data collection or shared databases (TDC Resolution of 10 May 2006 in case 588/05, Film Distributors). In that case, the Spanish federation of motion picture distributors, Fedicine, was fined for setting up and maintaining a database used by film distributors to exchange competitively sensitive strategic data.

There have also been pronouncements on the conditions that must be fulfilled by information exchanges in order to consider that their positive effects outweigh the negative ones and, therefore, that they meet the requirements set out in the current article 1.3 of the LDC or article 3.1 of Act 16/1989. Amongst other decisions, in its Resolution of 11 July 2007, involving a singular authorisation in case *A-360/06 BREWER STATISTICS 2,* the then TDC held:

> *"It is the consistent case-law (wholly represented by Judgment C-7/95 P of 20 May 1998, John Deere Ltd versus the Commission of the European Communities, which refers to the Judgment entered by the Court of First Instance (CFI) on 27 October 1994) that an agreement to exchange information between competitors that weakens or removes uncertainty as to the operation of the market is prohibited by article 1 of the LDC*".

And consequently, pursuant to that doctrine, the TDC established the requirements set forth below for authorising the exchange of statistical data, where said data refer solely to production and sale, between Association members:

> *"The system will be organised through a notary, to whom the companies will submit the data at the stipulated periodic intervals. After aggregating the information, and destroying the individualised data of the companies, the notary will send the information to the Association, which will be responsible for establishing the mechanisms required so that the information is accessible to all interested parties and to the public in general at the same time as it is made available to the Association members.*
>
> *The information to be exchanged will solely and exclusively consist of the information for the six categories set out below, and no combinations between the categories will be permitted:*
>
> *……*
>
> *The information will be annual for all categories except for category 1 "Hectolitres billed or placed in the Spanish market including the imported beer, without any breakdown into subtypes or subcategories of any kind", always on a quarterly basis. This means that the data will be gathered annually and refer to hectolitres*

billed or placed in the market in the last 12 months, except for category 1, which will be compiled quarterly and refer to hectolitres billed or placed in the Spanish market in the last three months".

Fifth.- Infringement by object of the STANPA conducts.- Having analysed the facts in the case record on the information exchanges carried on inside STANPA by the light of the guidelines and precedents cited in the preceding Foundation in Law, the Council agrees with the DI that the conducts attributed to the Association have been sufficiently demonstrated, namely, the exchange of prices in the Aestheticians, Mass Consumption Products and Selective Committees and the brand exchange panel in the Selectivity Committee (points 242, 264 and 267/268 of the SO), and that due to the very nature of the information the exchanges constitute a restriction of competition by object contrary to article 1 of the LDC.

> In fact, the exchanges of pricing information in the three Committees described above and demonstrated in the findings of fact share a number of common characteristics that make them, in and of themselves, anti-competitive.

These involve information exchange between competitors, which is more harmful given that what is exchanged are the present and future prices of a highly disaggregated series of the related products. The information is distributed in full view of the companies participating in the exchange so that all of them know the current and future price tariffs of the rest. The statements in the Committee meeting minutes show how the price exchanges were organised, with STANPA receiving that information and then distributing it to the Committee members, who received the information prior to the meetings and discuss them there.

Aestheticians Committee:

> *"3.- Exchange of Prices 2004.- It is resolved that the prices of all members of the group will be exchanged through STANPA.*
>
> *"-All of the participants proceeded to exchange prices. In the case of companies whose representatives were unable to attend, they were sent a complete set of tariffs in an email on 12 June (…)".*

Mass Consumption Products Committee:

> *"STANPA has been carrying on a formal exchange of information between the companies in the Selectivity Committee, Hairdressing Committee and Aestheticians Committee in relation to the price tariffs for their brands. This exchange is being carried out regularly amongst all of the participants to their full satisfaction.*
>
> *At the meeting of the Mass Consumption Products Committee held yesterday it was decided to carry on a similar exchange between the companies on that Committee. We are implementing the attached survey to ascertain the degree of interest in this initiative.*
>
> *The arrangement would involve sending 25 copies to the STANPA offices of the tariffs every time they are updated, so that they can be distributed from there to all*

companies on the Committee that participate in the exchange (boldface in the document)".

Selective Committee:

"*Pursuant to the resolution approved by the members of the Selectivity Committee of this Association, we remind you that, if the price catalogue of your brands for 2007 has been published, send 35 copies to the STANPA offices in Madrid, in order to exchange them amongst the participating companies as has been done since 1999."*

STANPA argues (folio 6798) that the name *Exchange of prices* ("Intercambio de Tarifas") was perhaps not the most appropriate, but that the prices exchanged were the ones that each company had published and communicated to its customers, that is, price tariffs that *were already in force and could not be modified*.

This Council does not deny that the tariffs exchanged were prices fixed by each company, but what it does not accept is that they were past prices. On the contrary, what we have here is an exchange between competitors of present and planned future prices. The claim that "*they could not be modified*" cannot be accepted, because as has been shown in HA 25, projected changes were envisaged and had to be notified in advance, which, to use the terminology of the aforementioned Communication from the Commission (paragraph 74) constitutes a restriction of competition by object.

But, what is more, the exchange of prices or tariffs (also referred to euphemistically as *delivery of catalogues*), not only affects the future prices in effect at the time of the exchange, but, as we have just pointed out, it includes prior notification of any change or modification of the prices, as indicated in HP 25: "*We also ask that if any changes are made over the course of the year to your tariffs, or if they are re-published, you send them to us so we can circulate them to all of you (…)".* This allows the companies to co-ordinate and adapt prices and strategies. And it is not significant, as STANPA tries to argue in its submissions, that there is no evidence of notices of modifications because there existed, in any event, the possibility of making those modifications, and this shows that what we have here are projected future prices, not closed prices.

The exchange carried on by STANPA, which brings together 90% of the companies in the sector, of information as sensitive as the present prices and the current projections of near-term future prices, is on its own fully capable of restricting competition in the national cosmetics market, reducing the independence of the companies that operate there and facilitating price alignment and hindering continuation or entry by companies that did not participate in the exchange.

In the case of the ***Brand exchange panel*** in the Selectivity Committee, as set out in HPs 73 *et seq.*, between 14 and 18 companies that distribute 55 brands and represent more than 70% of the market exchanged exhaustive information on the sales figures of each brand by type of product (facial treatment, solar, etc.), by market channel (traditional, chains etc.) and by geographical market (Balearic Isles, Canary Islands).

STANPA received from and sent to the participating companies monthly and historical information on each of them with the disaggregation described above. And it sent out this information immediately, monthly in arrears, as shown in the meeting minutes and

emails sent by STANPA. In addition, STANPA maintained the historical data so that, with each receipt of the information for the immediately preceding month, each company received the data for the same month of the previous year and a calculation of the variations and deviations (HP 79).

This panel increased the data exchanged and the frequency of the exchanges over the course of the period during which the infringement continued, making it even more anti-competitive. (See folios 2685 *et seq.*, with the statistics exchanged in the year 2007).

In 2006 STANPA sent its members an e-mail telling them (HP 89):

> *"During the latest meeting of the Selectivity Committee on Thursday, 9 February 2006, the following decisions were approved concerning the Selectivity Brand Exchange Statistics:*
>
> *1) The Traditional and Chains Domestic Markets will be broken down into Fragrances and Cosmetics, as is the case with the other markets (Tourist and Department Stores).*
>
> *2) The monthly and quarterly reports will be identical, so the product information will be sent in every month (as is the case in the General Statistics).*
>
> *3) It is resolved to add a column to the reports specifying the weighting per company in relation to the market as a whole.*
>
> *4) Lastly, it is resolved to add to the report a ranking of companies, independently of the ranking by brands.*
>
> *For this reason, in the coming days we will update the data transmission files in accordance with the decisions adopted by the Committee (…)".*

And on 28 April 2006 it gave notice that:

> *"the reports will hereafter present markets and products separately (…)".*

The information is not distributed to the Selectivity Committee companies, but only to the companies that participate in the system, and each of them knows the individual information submitted by its competitors, as follows from the e-mails exchanged with the Portuguese sister association (HP 94) and the e-mail sent by STANPA that is transcribed in HP 90:

> *"(…) Find attached a model form for the Selectivity Statistics report that I mentioned to you this morning. Due to the requisite confidentiality of the data, I am sending you a report from June of last year.*
>
> *As you will see, it is a panel in which the* ***participating companies exchange the data in full view and they do so regardless of their participation in the general statistics which you already know well and in which you have been participating for many years".***

STANPA (folio 6800) argues that the ***brands panel*** is aggregated and that no type of information is given on prices or market strategies. The Council cannot accept this allegation, because even though prices are not exchanged, the information exchanged

on sales figures for the brands, in conjunction with the rest of the information on quantities and formats that circulates in the Selectivity Committee and the immediacy of the information, allows each company to know the actions being taken at all times by their competitors in very specific and controllable markets. And any deviations can be easily detected, because as indicated in the preceding paragraph in STANPA's own words, the data are exchanged in full view.

Lastly, STANPA asserts that the information exchanges it is accused of carrying on are not agreements that can weaken or remove uncertainty in the market because the current or historical information available was not sufficiently disaggregated, and this is a market with little concentration. And it concludes that the exchanges have not been shown to have collusive effects.

Contrary to what STANPA alleges, the foregoing paragraphs have established that the exchanges involved current and future prices and that the information, in all cases, had a disaggregation and immediacy that can by no means be considered historical information, but rather information with direct impact on the design of the companies' present and future strategies.

Indeed, the exchanges of information, both on prices and the brands panel, was of an exhaustive nature that allows the companies to keep abreast of the actions and trends of the rest of the companies, revealing the conduct to be pursued to the rest of the competitors, and therefore remove or sharply reduce strategic uncertainty, the independence of commercial policies and the incentive to compete against each other on price, quality and service.

Because these information exchanges produce what the ECJ defines as a concerted practice (Reference for a preliminary ruling. Judgment of 4 June 2009, C8/08 T-Mobile Netherlands BV), that is, *a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.*

In summary the exchanges of information between competitors described above as carried out by STANPA, by their nature, have a serious effect on competition and thus constitute an infringement by object of article 1.3 of the LDC (3.1 of Act 16/1989). In any event, STANPA has neither argued nor demonstrated that this exchange was indispensable, nor that it produces efficiencies that allow consumers to partake in a more equitable manner in the advantages, nor that it is necessary for achieving any such efficiencies. On the contrary, it makes it easier for the participating companies to eliminate competition with respect to a substantial part of the products or services involved.

Because as the Commission says in the Guidelines of reference, the exchange of strategically useful, commercially sensitive information can constitute a concerted practice if it reduces strategic uncertainty in the market, thereby facilitating collusion, for example, if the exchanges involve strategic data. And the mere exchange of such strategic information, without the need for pricing or market-sharing agreements is on its own an infringement of article 1, because it knowingly substitutes cooperation for the risks of competition, with a voluntary abandonment of the independence of the

competitors' conduct on the market, thereby diminishing the play of competition. And because such exchange in itself, by allowing competitors to fix higher prices without the risk of losing market share, is anti-competitive without the need for any further demonstration. As held by the ECJ in its above-cited Judgment C8/08 T-Mobile Netherlands BV,

> *"(39). Therefore, contrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices".*

And this Council has repeatedly pronounced itself along the same lines. Representative of all such decisions is the Resolution of 21 January 2010 in case S/0084/08 Gel Makers, which ruled that:

> *"If the analysis of that aptness leads to an affirmative conclusion, there would be no need to look for the real effect or for any measure thereof as that would only be useful for calculating the fine to be levied for conduct that violated competition rules. This is, in the Council's opinion, the proper analysis having regard to the relevant Community case-law".*

The Council therefore agrees with the DI's view that STANPA's actions, according to the doctrine and precedents of the preceding Foundation in Law and as argued in this Foundation, constitute a restriction of competition by object contrary to article 1 of the LDC, because they are apt to restrict and distort competition.

Sixth.- Other Exchanges.- In the Statement of Objections, the Investigations Division does not believe sufficient evidence has been obtained that other information exchanges carried on inside the Aestheticians and Selectivity Committees and that were analysed in the case (see HP 49 to 72) can restrict competition. The DI therefore charges STANPA with only one continued infringement consisting of the exchanges of information on price lists through the Aestheticians, Mass Consumption Products and Selectivity Committees and of the brand exchange panel on the Selectivity Committee, but none of the other exchanges analysed in the inquiry.

Consequently, and given that STANPA has not been charged in respect of those actions, the Council will not take into account any of their effects; in particular, it will not take them into account when determining the sanction.

The DI has based its assessment of those exchanges on the aggregate nature of the information circulated amongst the Association companies (and not with third parties).

Even where an information exchange is not considered a restriction by object, it may nonetheless have restrictive effects on competition and violate article 1. According to the Communication from the Commission:

> "(75*) The likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. (…) For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or*

innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged".

Keeping the above in mind, the Council cannot fail to make a reflexion on this issue. First of all, the information exchanged in the Aestheticians and Selectivity Committees other than the list of prices or exhaustive panels on brands, the so-called General Statistics, consisted of significant information on sales in the national market or in regional markets in very recent data on quantities and value, such as the preceding month or quarter. For example, in the Aestheticians Committee there were half-yearly and quarterly exchanges of information on number of units sold, quantities (by weight or volume) and revenues of four product groups (HP 52); and the Selectivity Committee exchanged highly disaggregated information on a monthly basis (HP 66 *et seq.*). It is true that, as the DI says in its report, it has not been evidenced that the exchange of information for the general statistics was done in full view, as was the case in the investigated exchanges in which each participant knew the individual data of the rest, and that it may have only involved aggregate information. But it is also true that said aggregation was not done by a third party — it was done inside the Association. Furthermore, the type of information that STANPA obtains and provides to the competitors in the market (quantities, volumes, sales revenue), the high frequency (monthly) of the exchanges and the recent nature of the data (monthly or quarterly in arrears), allow companies to make highly reliable estimates and extrapolations; for example, calculating the average prices for a given product category, which could have effects on competition on the market.

And all the more if we take into account the context in which this information is obtained and the structure and actual conditions of the market's operation, which does not seem to be too complex, highlighted by a relatively stable demand, homogenous companies that remain in the market (at least the most important ones, which are the ones that participate most stably in all of the exchanges), with small and frequent orders, and, moreover, with competition weakened by the more or less disaggregated information that STANPA obtained from and disseminated to the competitors. In such conditions, although the exchange involves aggregate information, the likelihood of the information exchange having restrictive effects on competition rises.

Secondly, an anti-competitive strategy may consist of different actions that make up an *overall plan*, and it is possible that not each and every one of those actions carried on separately would constitute an infringement on its own, but when combined they give rise to an anti-competitive framework. The information exchanges in the Aestheticians and Selective Committees mentioned above, also referred to as general statistics, in certain conditions such as the ones described above can on their own affect competition, and at the very least amplify the anti-competitive effects of the rest of the exchanges sanctioned here.

The foregoing leads to the conclusion that it would be advisable to address some of the factors that heighten the risk that this kind of exchange of aggregated information will distort competition: frequency, age, overall set of data exchanges, the exchange mechanism and the degree to which the information is available to other parties. In short, factors which have already been taken into account and included in the

assessment of the precedents on exchange of aggregate information (CASE A-360/06 BREWER STATISTICS 2). Unless this set of factors is properly modulated, the likelihood of the information exchange having effects on competition, and even of constituting an unlawful practice, will increase.

Seventh.- Period of the infringement.- The anti-competitive strategy pursued by STANPA and established in the foregoing Foundations in Law regarding information exchanges, which are anti-competitive by object, in the Aestheticians, Mass Consumption Products and Selective Committees, went on continuously for several years, as can be seen in the STANPA 2003 Annual Report, which refers to exchanges of prices in 1999 (folio 1701). The DI nevertheless dated the start of the infraction at 26 January 2004, the day on which the STANPA statistics officer sent to all participants the final report on the brands panel for 2003 and its comparison with 2002, and which is in the case file (HP 77). The Council agrees with the DI on setting that date as the start of the infringement for purposes of the sanction.

The end of the infringement is dated by the DI on the day of the meeting of the STANPA Ordinary General Assembly held on 8 May 2008, which ratified the Executive Board resolutions aimed at making the necessary changes to bring STANPA's activity in line with the LDC.

Indeed, the case record contains evidence of exchanges of prices for every year as from January 2004 (except for 2008, when the General Assembly met), as well as of the submission of the monthly brand panel data until September 2007, and there is no evidence that the exchanges were ended prior to that General Assembly meeting, which ratified the resolutions of the previous meetings of executive bodies like the General Meeting (HP IV

STANPA pleads that as from May 2007 and with the publication of the new LDC, the Executive Board, with new directors, begins an internal evaluation and ends up requesting an external audit at the end of the year, which leads to the changes resolved by the Executive Board in February 2008 and backed by the General Assembly in May 2008.

But STANPA does not claim, and no evidence has been provided, that those actions suspended the exchanges, albeit only provisionally. And much less that they were ended, for, as evidenced in HP 30 *et seq.*, prices continued to be exchanged in the Aestheticians Committee of May, although under the name "delivery of catalogues". With respect to the brands panel, there is record of exchanges until the month of September (see HP 100 *et seq.*). And until the meetings of the different sector Committees, of the Legal Committee, of the Executive Board and of the General Assembly that were held in 2008 there is no evidence of any attempt to eliminate or modify the exchanges that were being carried on. Because the confidentiality commitments of the Executive Board referred to by STANPA were mere formal declarations and there is no record, nor does STANPA claim, that modifications were introduced that could change the potentially restrictive effect of the exchanges that were in progress.

Eighth.- Liability of STANPA.- Article 10 of Act 16/1989 provides that conducts which *deliberately or by negligence* violate the LDC are subject to sanction.

The deliberate action of STANPA in this case is beyond all doubt, as there exist abundant references in the findings of fact that STANPA as Association, and its various bodies, were aware that the information exchanges were contrary to competition rules.

For example, they changed the name of the exchange of "lists of prices" to exchange of "catalogues" to try to mask the content of what was in fact and exchange of prices. (HP 31, 32 and 33).

> *"(…), this is not by chance. We have intentionally put "catalogue" and not "list of prices" (even though lists of prices are involved), due precisely to the "antitrust" issue that we discussed there.*
>
> *It is just a question of form, to avoid the possibility of any future Committee meeting being questioned for activity that may be questionable from the standpoint of competition.*
>
> *In summary, this is a formal question and what we are really taking about is price lists (…)."*

But, what is more, the STANPA Association was very active in expanding the statistics between the different Committees, as seen in the e-mail sent by the STANPA General Director in 2006 to the members of the Mass Consumption Products Committee, in order for them to exchange prices the same as was being done on the Aestheticians and Selectivity Committees (HP43).

And STANPA tries to extend its anti-competitive strategy to its sister association in Portugal, as seen in the e-mail sent on 16 June 2006 by the person responsible for its statistics (HP 94).

STANPA argues that its formal decision making bodies, the Executive Board or General Assembly of STANPA, adopted no decisions to influence the behaviour of its members, so that the alleged information exchanges could be treated as a collective recommendation or, in short, so that they could be considered an anti-competitive act by STANPA.

It is completely impossible for the statistics compiled by STANPA and set out in the findings of fact not to have been approved and endorsed by the Association's decision-making bodies. All of these actions were dealt with at the Committee meetings, but what is undeniable is that they were known by all STANPA bodies, for the preparation of these statistics was reported in all of the Association's Annual Reports.

In any event, the Council agrees with the DI that the question of which body made the decisions is irrelevant because *"what is relevant for determining the prohibition, apart from this collective origin, is the aptness for harmonising or homogenizing the competitive behaviour of the members. Consequently, the acts of the General Director of STANPA, and those derived from the resolutions adopted on the STANPA Committees investigated in this case, and those carried out by the Association's staff are all an expression of the collective will represented by".*

And as this Council has repeated in numerous recent Resolutions, represented by the CNC Resolution of 17 May 2010, Case S/0106/08 Iron Warehouses: "*The fact that the resolutions or actions of some of these bodies no not have binding force on the members, does not prevent them from being considered actions attributable, imputable, to the associative entity, because what is important for competition law, once it has been shown that the conduct has been carried out by a member or body of that collective group, is that the conduct by its content, by the person who pursues it and by its dissemination, objectively has as its object a common pattern of behaviour by the members".*

Ninth.- Calculation of the fine.- As has been reliably evidenced, the STANPA Association committed an infringement of article 1 of the LDC when it decided to carry on inside the organisation an exchange of information on prices and quantities amongst competitor companies in the cosmetics sector. Those information exchanges between competitors that were carried on through STANPA had as their goal the mutual recognition of the strategies of the competitors in order to reduce uncertainty in the market and thus restrict competition.

The Investigations Division, in its proposal, which is backed and accepted by the Council, based the accusation brought against STANPA on Act 16/1989, as this was the more favourable one for the accused for purposes of fixing the fine, given that this was an association of companies that does not have any turnover. Indeed, whereas the Act 15 /2007 currently in force provides that fines be determined, including in the case of associations, in proportion to turnover and stipulates, in the case of associations, that the fine "*be determined taking into consideration the turnover of its members*", its predecessor Act 16/1989 provides in article 10.1, when the accused are legal persons or operators with no turnover, that the maximum amount of the fine would be €901,518.16. Therefore, in calculating the fine the Council will heed this limit.

The doctrine of the Spanish Supreme Court is that when fixing the amount of the fine, the Council must take into account the criteria for graduating the penalty that are set out in article 10.2 of the said Act, as well as the principles of congruency and proportionality between the infringement and the penalty (the various relevant decisions are wholly represented by the Supreme Court judgment of 1 December 2010, Baker's and Pastry-maker's Federation of the Province of Valencia), in which the High Court recalled that there must be *"weighed in all events the relevant circumstances in order to achieve the necessity and due proportionality between the accusation and the liability claimed,"* that is, the type and scope of the restriction, size of the market, market share of the company or companies involved, effects on competitors and on customers, and duration and repetition.

All of the above forgetting the High Court's doctrine according to which Council, when setting the amount of the fine, should have as *"…guiding principle for this type of evaluation of the adequacy of the sanctions for the seriousness of the violations, that the outcome of committing anti-competitive infringements must not be more beneficial for the infringing party than complying with the rules that were violated".*

In the present case, the infringement qualifies as very serious, given that the exchanges decided and carried out via the Association of individualised data of the companies on

prices and quantities has allowed the companies in the cosmetics sector, or at least a very large number of them and certainly the most important ones, to obtain timely and exhaustive information on the strategies of their competitors, drastically reducing the uncertainty as to the competition's behaviour, diminishing the independence of their commercial policies and removing incentives to compete. Taken together, these lead to concerted action by the companies.

And it has been demonstrated that this was the objective of STANPA's actions and that the information exchanged, by its nature, gives rise to a restriction of competition by object contrary to competition law for which STANPA is intentionally responsible.

Now then, taking into account the coverage of the sector attained by STANPA, which, according to its own declaration, [STANPA brings together 90% of the companies operating in the sector (HP 17)], practically all of the major cosmetics firms are involved, so the infringement affects the entire sector and has a nationwide dimension. Therefore, STANPA's has a very large capacity to harm competition. Also, the turnover of the companies that belong to STANPA is very large (HP 15 y 16). And what is more, the infringement was not a one-time action, but lasted at least from January 2004 to early 2008.

Consequently, for purposes of determining the fine, we have here an infringement of the utmost gravity and scope, carried on knowingly by a sector association with nationwide reach and composed of the most important companies in the sector, with the attendant presumption of financial strength. Thus, following the guiding principle established by the Supreme Court that breaking a law should not be more beneficial than obeying it, this Council finds that the STANPA Association should be subject to a very sizeable fine, and such would be levied were Act 15/2007 to be applied.

But because it is Act 16/1989 that will be applied, the Council is limited to the maximum of €901,518.16. Therefore, the Council believes that in order not to deviate any more than necessary from the fine that would be levied applying the criteria established by the High Court as regards proportionality and deterrence, the fine should be set at the maximum permissible under Act 16/89 for associations.

On the basis of the foregoing, the CNC Council, with the composition set out at the beginning of this document and having seen the legal provisions cited above and the relevant other general provisions, does hereby

RESOLVE

ONE.- To declare the existence of collusive conduct within the meaning of article 1 of the Competition Act 16/1989 of 17 July 1989, perpetrated by the ASOCIACION NACIONAL DE PERFUMERIA Y COSMETICA (STANPA), and consisting in an exchange of commercially sensitive information capable of restricting competition from 26 January 2004 to 8 May 2008.

TWO.- To levy upon the ASOCIACION NACIONAL DE PERFUMERIA Y COSMETICA (STANPA) as perpetrator of the infringing conduct a punitive fine of nine hundred one thousand five hundred eighteen euros and sixteen euro cents (€901,518.16).

THREE.- To instruct the ASOCIACION NACIONAL DE PERFUMERIA Y COSMETICA (STANPA) hereafter to abstain from engaging in practices such as the one sanctioned here or other similar ones that may hinder competition.

FOUR.- To order the ASOCIACION NACIONAL DE PERFUMERIA Y COSMETICA (STANPA) to publish, within two months and at its cost, the operative portion of this Resolution in two general information newspapers of the newspapers with the largest nationwide circulation.

FIVE- The ASOCIACION NACIONAL DE PERFUMERIA Y COSMETICA (STANPA) shall evidence before the Investigations Division of the CNC its fulfilment of all of the obligations imposed in the foregoing paragraphs. In the event of breach of any of those obligations, it will be subject to a coercive fine of €600 for each day of delay.

SIX.- The Investigations Division is instructed to oversee and ensure full compliance with this Resolution.

This Resolution shall be communicated to the Investigations Division of the CNC and notified to the interested party, informing the latter that the Resolution admits of no appeal in the administrative jurisdiction, but may be challenged by filing an application for judicial review before the National Appellate Court (Audiencia Nacional) within two months after the date of its notification.