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# Cartel Regulation 2006, Spain

Edurne Navarro and Sergio Baches

Uría Menéndez Lawyers

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## Legislation and jurisdiction

### 1 What is the relevant legislation and who enforces it?

The main antitrust statute in Spain is Law 16/1989 on the Defence of Competition. The Competition Defence Act (the Act) contains rules prohibiting anti-competitive agreements and the abuse of a dominant position, as well as a system for controlling concentrations.

The Act has undergone several amendments since 1989. These amendments were introduced by Royal Decree 6/1996 and followed by Royal Decree 6/1999, Law 52/1999, Royal Decree-Law 6/2000, Royal Decree-Law 9/2001, Law 2/2001, Law 53/2002 and Law 62/2003.

In addition to the Act, the government has adopted two regulations to develop certain sections: Royal Decree 378/2003 (replacing Royal Decree 157/1992), which addresses block exemptions and the procedure to obtain individual exemptions for agreements prohibited under the Competition Defence Act; and Royal Decree 1443/2001 (replacing Royal Decree 1080/1992), which deals with mergers and acquisitions.

Royal Decree 378/2003 incorporates into Spanish law the EU block exemption regulations that apply to the following categories of agreements:

- Vertical agreements
- Motor vehicle distribution agreements
- Technology transfer agreements
- Specialisation agreements
- Research and development agreements
- Agreements in the insurance sector

The new decree also provides for the automatic implementation into Spanish law of the amendments that EU block exemption regulations may undergo in the future.

Competition rules in Spain are enforced by two antitrust agencies: the Service for the Defence of Competition (Servicio de Defensa de la Competencia, the Service) and the Tribunal for the Defence of Competition (Tribunal de Defensa de la Competencia, the Tribunal). The Service is a department of the Ministry of Economy and Finance, while the Tribunal, also known as the Competition Court (the Court), is an independent administrative court.

The main task of the Service is to investigate and prosecute alleged infringements. If, after the discovery phase, the Service finds that the conduct subject to investigation may amount to, or does amount to an infringement, it forwards the file, along with a report, to the Court. The Court has the power to declare the infringement, to order the cessation of the conduct, and to impose fines on the infringing parties.

Spanish regions (known as 'autonomous communities') are also entitled to enforce the Act in their respective territories. Following a 1999 decision of the Spanish Constitutional Court acknowledging this right of the Spanish regions to apply the Act in their territories, the Spanish Parliament enacted Law 1/2002, of 21 February (Law 1/2002) laying down the principles and procedures that govern the allocation of antitrust competences between the central authorities and the regional authorities. Matters which are kept under the exclusive competence of the central authorities are: rulings on merger control and state aid, issuing block exemption regulations, representation in matters relating to competition before other national and international authorities and organisations; and the application of EU competition rules in Spain.

Pursuant to Law 1/2002, central authorities remain competent to investigate and punish anti-competitive behaviour (ie agreements and concerted practices, abuses of dominant position and unfair competition behaviour affecting the public interest) that distorts or may distort competition in a supra-regional area or the entire Spanish territory. Accordingly, regional antitrust bodies will only exercise their enforcement powers, including the right to grant individual exemptions, with regard to conduct that restricts or may restrict competition in their respective territories. In the exercise of their powers, the regional competition authorities must comply with the antitrust procedure as set forth in the Spanish Competition Act. To date, several regions have established regional antitrust enforcement agencies although only the Catalan antitrust authorities are fully operative (Decree of 27 August 2002).

With regard to the private application of the Spanish Competition Act, the Supreme Court has traditionally questioned the competence of the civil courts to enforce national antitrust laws, although, in practice, there had been in the past a few judges and tribunals that have declared themselves competent to apply the Act. The White Paper on the Reform of the Spanish System for the Defence of Competition published on 20 January 2005 addresses this issue and proposes that judges should be empowered to directly apply domestic competition rules, declaring agreements that are contrary to Spanish antitrust regulations null and void and, if requested, awarding compensation for damages without having to wait for a final decision of the Tribunal.

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### 2 What is the substantive law on cartels in the jurisdiction?

The Competition Defence Act prohibits agreements, concerted practices and collective decisions that have as their object or effect the restriction of competition in the Spanish territory. The list of prohibited agreements includes:

- directly or indirectly fixing prices or other commercial service conditions (including price recommendations issued by an association of undertakings);
- limiting or controlling production, distribution, technical development or investment;

- sharing markets or sources of supply;
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applying unequal terms to commercial or service relationships for equivalent services, thereby placing some competitors at a disadvantage compared to others; and

- making an agreement subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement.

Agreements or collective decisions which produce or may produce an appreciable restriction of competition are illegal, unless they are exempted by either an individual authorisation granted by the Competition Court or they fall within the scope of one of the block exemptions listed in Royal Decree 378/2003. Cartel arrangements involving price fixing, bid rigging or market allocation are per se illegal and rarely benefit from an exemption.

In addition, the Act establishes a de minimis rule, applicable to certain anti-competitive conducts. Under this rule, Spanish antitrust authorities may decide not to prosecute prohibited practices that, given their minor importance, are not capable of having an appreciable effect on competition. The de minimis rule however does not render the agreement legal and therefore its provisions may still be null and void.

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### 3 Are there any industry-specific offences/defences?

Agreements, decisions, recommendations and practices resulting from the application of, or authorisation by, a law are exempted from the general prohibition. This exemption does not apply to conduct that may violate Article 81 of the EC Treaty and fall within the jurisdiction of the Spanish antitrust authorities.

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### 4 Does the law apply to individuals or corporations or both?

The Competition Defence Act normally applies to undertakings. However, the Act empowers the Competition Court to impose a fine of up to €30,050 on legal representatives, or on the individuals in management who are responsible for the undertakings involved in the infringement.

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### 5 Does the regime extend to conduct that takes place outside the jurisdiction?

The Act applies to actions taken outside the Spanish jurisdiction that have effects in the Spanish markets.

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### 6 Are there any current proposals for change to the regime?

The government has announced its intention to enact a new Competition Act (See 'Update and trends' below).

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## Investigation

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### 7 What are the typical steps in an investigation?

Infringement proceedings may be initiated by the Service ex officio, or upon the receipt of a complaint from a third party. Any person or entity may file a complaint with the Service. The Service will initiate proceedings if it finds sufficient evidence of an antitrust infringement. Frequently, this happens after an in-depth preliminary investigation, which may last several months. If sufficient evidence is not found, the Service will close proceedings. The Service must inform the Competition Court of any complaint proceedings that have been dismissed and the orders issued for the initiation of infringement proceedings.

The facts that may amount to an infringement will be included in a statement of objections which will be forwarded to the alleged offenders giving them 15 days to reply and, if appropriate, propose a list of items for discovery that they consider relevant. The parties are then granted a period of 10 days to submit their pleadings on the results of the evidence submitted. Once the initial phase has been concluded, the Service will either dismiss the case after hearing from all the parties involved, or will forward the file to the Court together with a report on the conduct investigated.

Once the file and the report have been received by the Court, it will make the whole file available to all interested parties within 15 days. During this period all interested parties may request a hearing and propose a list of items that they deem necessary for discovery. The Court will decide within five days whether such list of items for discovery is reasonable.

The Court will grant a hearing only if it deems it necessary. Otherwise, it will then grant the interested parties a period of 10 days during which they may submit their pleadings on the facts or statements resulting from the evidence submitted. Once the parties have evaluated the evidence, the Tribunal will either summon the parties to an oral hearing or grant them 15 days to submit their conclusions. Thereafter, the Court must issue its decision within 20 days.

There is a limit of 12 months for the discovery phase conducted by the Service, and 12 months for the phase before the Court.

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### 8 What investigative powers do the authorities have?

The officials of the Service have broad powers of investigation and inspection. They can investigate and search premises of the undertakings concerned. However, officials of the Service are not empowered to search private cars or domiciles of the companies' managers or directors.

Access to the premises can be obtained with the consent of the occupants once officials produce an order authorising the search issued by the director of the Service. If access is denied, the inspector can gain access with a search warrant granted by an ordinary administrative court. According to the Act, the ordinary court must decide on the Service's request within 48 hours.

Officials of the Service are entitled to copy and seize all kinds of documents and computer records, with the exception of attorney-client privileged correspondence. Nevertheless, attorney-client privilege does not apply to correspondence between the company and its in-house corporate lawyers. In addition, inspectors can ask the employees of the investigated company any questions during the search. These questions may go beyond a mere clarification of the meaning of information found during the search.

Individuals interrogated by the inspectors have the right to remain silent only if the question posed to them by the officials directly incriminates the company. In other cases, employees have a duty to cooperate, provide all the information requested and answer all questions addressed to them by the inspectors related to the investigation. A refusal to cooperate with the Service during an inspection will be reflected in the search report, which is drawn up by the inspectors after the inspection, and might eventually be considered an aggravating circumstance if the Competition Court declares that the Act has been infringed.

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## International cooperation

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9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Royal Decree 2295/2004 of 10 December, on the application in Spain of the Community competition rules has laid down the main regulations for the cooperation between the Spanish competition authorities and that of other member states. The Service is considered as the competent authority to cooperate with the competition authorities of other member states in applying Articles 81 and 82 of the EC Treaty. In this regard, Article 6(2) of the Royal Decree refers, in particular, to the performance of inspections in the Spanish territory in accordance with Article 22(1) of Regulation 1/2003.

The Service also cooperates with antitrust agencies of other European Union member states through the meetings of the Advisory Committee of the European Commission Directorate for the Defence of Competition, which are usually held with directors and other European Commission officials, and also through bilateral contacts.

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10 How does the interplay between jurisdictions affect the investigation, prosecution and sanction of cartel activity in the jurisdiction?

Spanish antitrust authorities have jurisdiction over conduct infringing Article 81 of the EC Treaty that has restrictive effects on the Spanish market, as long as the European Commission has not initiated any proceedings regarding the same infringement.

Only in exceptional circumstances (for example, when national proceedings are unduly drawn out) will the Commission initiate proceedings in a case pending before the national authority.

In practice, the allocation of tasks is the result of bilateral agreements between the Commission and the Spanish authorities. Conflicts have only been made public in merger control cases.

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## Adjudication

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11 How is a cartel matter adjudicated (eg in the regular courts or before a specialised agency)?

Although in theory civil courts may have jurisdiction over alleged antitrust infringements, in practice only the Service and the Competition Court have dealt with cartel cases.

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12 What is the appeal process, if any?

Decisions of the Competition Court may be appealed to the National Court (Audiencia Nacional) within two months after the parties have been notified of the decision. Located in Madrid, the National Court is a tribunal with national jurisdiction.

Judgments of the National Court may be appealed to the Supreme Court.

Appeals of decisions adopted by the Catalan Tribunal for the Defence of Competition are heard before the the High Court of Justice of the region of Catalonia.

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13 With which party is the onus of proof?

Generally, the onus of proof lies with the antitrust authorities. However, in certain cases, the Service may only provide evidence of a concerted practice based on the parallel behaviour of the corporate defendants (for example, if the Service claims that the only explanation for the identical or quasi-identical prices or conditions being offered by competitors is the existence of a price-fixing cartel among them). The burden of proof then shifts from the Service to the corporate defendants, who must in turn prove that there is an alternative explanation for the parallel behaviour.

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## Sanctions

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14 What criminal sanctions are there for cartel activity (eg fines, imprisonment)? Are there maximum/minimum fines/sanctions?

The Act does not provide for criminal sanctions for antitrust infringements. There have been some attempts to bring criminal actions against price-fixing cartels but these have been unsuccessful so far.

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15 What civil or administrative sanctions are there for cartel activity?

The Act provides civil and administrative sanctions for antitrust infringements. Agreements infringing the Act are void. Anti-competitive agreements which have or may have an appreciable effect on competition are illegal, unless exempted either by an individual authorisation or by one of the block exemptions listed in Royal Decree 378/2003.

In addition to the nullity sanction, the Act empowers the Competition Court to impose administrative fines of up to 10 per cent of turnover on each of the companies that deliberately or negligently infringe antitrust laws. For those defendants that do not produce any turnover, such as in the case of an association of undertakings, the maximum fine is €901,518.10.

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16 Are private damage claims or class actions possible?

Infringing companies may also be sued for damages before civil courts by third parties which have suffered a loss as a result of the anti-competitive conduct. Actions for damages may not be initiated until the administrative or, if applicable, judicial decision is final (see 'Update and trends' below). This implies that if there are subsequent appeals, a period of seven to eight years or more may elapse before an action for damages can be brought before a civil court. This, in conjunction with the difficulties involved in calculating the damages suffered, has discouraged plaintiffs from bringing such actions.

Under Spanish civil procedural law, a group of injured consumers or users (including, inter alia, consumer associations) may bring a damage claim provided that (i) the individuals belonging to such group are identified or easily identifiable and (ii) the group bringing the action represents the majority of the injured individuals. In this case, however, the judgment only binds the members which are being represented by the claiming group, but not the rest of the possible injured consumers or users.

With regard to class actions (those referring to a group of consumers which are not identified or whose identification is difficult), the Civil Procedure Act, No. 1/2000 of 7 January, only grants consumer associations the right to bring such actions. In such cases the judgment may benefit the whole class of injured consumers being represented by the consumer association.

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17 What recent fines or other penalties are noteworthy? What is the history of fines? What is the number of times fines have been levied? What is the maximum fine possible and on what basis are fines calculated?

Factors taken into account when fixing the level of fines include:

- the nature and scope of the restriction of competition;
- the dimension of the market affected;
- the market share of the relevant companies;
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the effect of the restriction on competitors or potential competitors, consumers and users;

- the duration of the restriction of competition; and
- the repetition of the performance of the prohibited conduct.

The Competition Court has imposed significant fines on offenders, a policy which reveals a strong commitment on the part of the Spanish antitrust authorities to cracking down on cartels, and especially price-fixing and market-sharing cartels. There are several examples of cartels being found to be contrary to the Act and which attracted heavy fines for their participants. In 1997, fines totalling €7 million were imposed on 48 industrial dairy companies for engaging in price-fixing (confirmed by the Supreme Court on 12 February 2002). In 1999, the highest fines were imposed on a single undertaking and a group of undertakings in a case that involved four sugar producers that were found to have been engaging in price-fixing practices. The single and joint fines were €5 million and €8.7 million respectively.

In October 2000 a fine of €5.7 million was imposed on a bid-rigging cartel formed by four travel agencies, and a joint venture established by them to coordinate their behaviour in relation to the public tenders called by the Ministry of Social Affairs to award contracts for the yearly holiday programmes organised for the elderly. The four travel agencies and the joint venture were found to have engaged in a concerted practice that consisted of fixing both price and service conditions for their tenders, as well as sharing among themselves the award of the contracts.

More recently, the Supreme Court has confirmed a decision issued by the National Court (confirming a decision of the Competition Court), finding seven companies belonging to the same group to have infringed Article 7 of the Act (which prohibits unfair practices which have the effect of seriously distorting competition). The seven companies had submitted seven bids in a public tender to acquire certain amounts of oil from the Senpa (an administrative body belonging to the Agricultural Ministry in charge of dealing with agricultural surpluses). According to the bidding conditions, each bidder could only bid for 2,000 tonnes of oil. As a result of the combined bidding strategy, the group obtained a higher amount of oil. The authorities could not initiate infringement proceedings under Article 1 of the Act, as the companies belonged to the same group (thus no agreement within the meaning of Article 1 of the Act could be found). However, the Court ruled that the behaviour of the group could qualify as an unfair practice which, given its scope and effects on the other competing bidders, constituted an infringement of Article 7 of the Act.

In June 2003 the Court found that three shipping companies providing transport services for passengers and freight on the route between Algeciras and Ceuta (two Spanish cities) had infringed Article 1 of the Act. The infringement consisted of setting up a ticket exchange system whereby each shipping company undertook to accept passengers with tickets from the other companies, and having agreed on the schedules of their services. The Court imposed a fine of €600,000 on each shipping company.

During 2004, the Catalan Tribunal for the Defence of Competition issued a decision declaring that 21 driving schools operating in the region of Catalonia had infringed Article 1 of the Spanish Competition Act by agreeing the prices they would charge for driving lessons. The total

amount of the fines imposed was Å177,000.

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## Sentencing

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18 Do sentencing guidelines exist?

No sentencing guidelines or leniency policies exist under the Spanish antitrust system. However, antitrust authorities will take into account mitigating circumstances, such as whether a company has cooperated with the authorities or whether it ceased the anti-competitive practices soon after proceedings were initiated. (See 'Update and trends' below).

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19 Are sentencing guidelines binding on the adjudicator?

Not applicable.

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## Leniency/immunity programmes

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20 Is there a leniency/immunity programme?

Not applicable (see answer to 18 above).

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21 What are the basic elements of a leniency/immunity programme, if one exists?

Not applicable.

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22 What is the importance of being 'first-in' to cooperate?

Not applicable.

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23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

Not applicable.

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24 What is the best time to approach the authorities when seeking leniency/immunity?

Not applicable.

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25 What confidentiality is afforded to (a) the leniency/immunity applicant and (b) any other cooperating party?

Not applicable.

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26 What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

Not applicable.

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27 What is the effect of leniency/immunity granted to a corporate defendant on employees of the defendant?

Not applicable.

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28 What guarantee of leniency/immunity exists if a party cooperates (eg are they binding on prosecutors, decision-makers, etc)?

Not applicable.

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29 What are the practical steps in dealing with the enforcement agency?

Not applicable.

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## Defending a case

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30 Can counsel represent employees under investigation as well as the corporation? Do individuals involved require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Yes.

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31 Can counsel represent multiple corporate defendants?

Yes. However, in practice each corporate defendant normally has its own counsel.

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32 Can a corporation pay the legal costs and/or penalties imposed on its employees?

Companies may reimburse employees for the fines imposed on them.

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## Getting the fine down

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33 What is the optimal way in which to get the fine down?

There is no plea-bargaining procedure under the Spanish antitrust system, nor can negotiations be held with the Spanish antitrust agencies to reduce fines. However, authorities will normally reduce fines if the offenders have cooperated in the investigation or suspended the anti-competitive conduct before or soon after the proceedings were initiated.

It is also possible to reduce fines, or even avoid them, if the corporate defendant can prove that the authorities have never before found the conduct in question to be an infringement of the Act, or that the applicable legislation which resulted in an antitrust infringement was subject to various interpretations. Evidence that the administration prompted, backed, or sponsored the anti-competitive deal, giving the parties a legitimate expectation that the deal was compatible with Spanish legislation, may also lead to lower fines but does not grant immunity.