

# QUESTION A 2019/2010

## SPAIN

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**Abstract:** The aim of this Report is the description and analysis under the Spanish Legal Framework of the notion of *discrimination* in *primary* and *secondary line* discriminatory anticompetitive practices. In the analysis, it will be emphasized to what extent the Spanish National Competition Authority (aka: CNMC<sup>2</sup>) in charge of enforcing and implementing the Spanish Competition Act (SCA) and Articles 101 and 102 TFEU, as well as Spanish National Courts, are dealing with cases of discriminatory and abusive anticompetitive practices. Furthermore, the Report will highlight to what extent under the provisions of the SCA, there are differences in the consideration of prices, terms, conditions and quality to different purchasers in relation to the Market Power and the importance of the concept of *effective* competition under the SCA taking into account whether the notion of *discrimination* from an economic approach must be one of the goals of this body of law or not.

## 1. The Notion of Discrimination Under Spanish Legal Framework: Overview

### 1.1. The Notion of *Discrimination* under Spanish Competition Policy and Law

The notion and treatment of *discrimination* and discriminatory competitive practices in Spanish Competition Policy and Law is enshrined under the Spanish Act 15/2007, of 3 July, for Defence of Competition (SCA<sup>3</sup>) as well as under the Act 3/1991, of 10 January, on Unfair Competition (hereafter SUCA<sup>4</sup>). Both bodies of law

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<sup>2</sup> In Spanish: Comisión Nacional de Mercados y de la Competencia (CNMC).

<sup>3</sup> Spanish Act 15/2007, of 3 July, for Defence of Competition, Official Gazette 2007, 159.

<sup>4</sup> Further details Section 5.1; Act 3/1991, on Unfair Competition (Ley de Competencia desleal), of 10 January, Official State Gazette 1991 (10), amended in 2009 by Act 29/2009, of 30 December, Official State Gazette 2009 (315) with the implementation of the Directive 2005/29 of the European Parliament and of the Council of 10 May 2005 concerning unfair business-to-consumer commercial practices in internal market, OJ 2005, L 149

contain provisions and a different treatment of the *discrimination* in anticompetitive practices (abuse of a dominant position) and unfair commercial practices (abuse of economic dependency in pricing discrimination)<sup>5</sup>.

The SCA regulates the abuse of a dominant position and other antitrust matters considered as discriminatory anticompetitive practices. Besides, the Defence of Competition Regulation (hereafter, CR<sup>6</sup>) implements specific Articles of the SCA such as the *de minimis* exceptions, which are applicable to the abuse of a dominant position practices, according to Article 5 of the SCA<sup>7</sup>. Furthermore, the CNMC has issued guidelines on termination of infringement proceedings by commitments in order to establish clear and secure proceedings for undertakings and interested parties<sup>8</sup>. As in other European Member States, Spanish Competition Authorities are also entitled to apply Articles 101 and 102 of the Treaty of Functioning of the European Union (hereafter, TFEU), where applicable.

Whereas this legal framework based on public enforcement of Competition law is enforced in Spain by the CNMC and by the regional authorities if the anticompetitive behaviour impacts only on the Autonomous Region where they have jurisdiction<sup>9</sup>, Civil and Commercial courts deal with the private enforcement of these cases.

Article 2 of the SCA sets out the anticompetitive unilateral conducts:

“Article 2. Abuse of a dominant position.

1. Any abuse by one or more undertakings of their dominant position in all or part of the national market is prohibited.
2. The abuse may, in particular, consist in:
  - a) The direct or indirect imposition of prices or other unfair trading or services conditions.
  - b) The limitation of production, distribution or technical development to the unjustified prejudice of undertakings or consumers.
  - c) The unjustified refusal to satisfy the demands of purchase of products or provision of services.
  - d) The application, in trading or service relationships, of dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others.
  - e) The subordination of the conclusion of contracts to acceptance of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of these contracts.
3. The prohibition set out in this article shall apply in cases in which the dominant position in the market of one or more undertakings has been established by legal provisions.”

Despite Article 2 of the SCA is almost identical to Article 102 of the TFEU, it is not identical. In the case of Article 102 of the TFEU, the list of prohibited practices is interpreted as an indicative list of prohibited practices. In the case of Article 2 of the SCA the essential element for a conduct to be considered, as anticompetitive is that must be *abusive*, even in the event that the practice is not encountered under any specific

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<sup>5</sup> J.I. Font Galán & L.M. Miranda Serrano, *Competencia desleal y antitrust: sistema de ilícitos*, Marcial Pons 2005; M. Zabaleta Díaz, El abuso de una situación de dependencia económica, ¿ilícito *antitrust* o ilícito desleal?, *Actas de Derecho industrial* 2006 (26), pp. 339-380; R. Maestre Benavente, *El abuso de situación de dependencia económica en el Derecho español*, Universidad de Córdoba 2009.

<sup>6</sup> Royal Decree 261/2008 of 22 February 2008, approving the Defence of Competition Regulation, *Official Gazette* 2008 [50] [11575 - 11604].

<sup>7</sup> See Article 3 on Objective justifications to Discriminatory practices.

<sup>8</sup> See Guidelines on termination by commitments of infringement proceedings of October 2010.

<sup>9</sup> Law 3/2013 established the creation of a single regulatory body in Spain, combining the functions of the former National Competition Commission (CNC) and the regulators of the following sectors: energy, telecommunications, media, post, railway transport, air transport and gambling. Law 1/2002 of 21 February regulates the allocation of cases between the national authority and the regional authorities. Regional authorities can only enforce their powers in relation to infringements whose effects are limited to its specific jurisdiction.

prohibited practices of the list given by this provision<sup>10</sup>. The CNMC has applied the concept of abuse of a dominant position, using a reasoning based on *per se* prohibitions, when a practice is, formally, similar to a previous assessment or to a one of the listed practices.

## 1.2. The Notion of Discrimination in Practice: Enforcement of the SCA by the CNMC and Spanish Courts

Spanish case law related to discriminatory anticompetitive practices follows the doctrine rendered by the CJEU for this type of conducts since the case *Hoffmann-La Roche v Commission*<sup>11</sup>. As in the case of Article 102 of the TFEU, Article 2 of the SCA does not provide a definition of abuse or of discrimination *per se*<sup>12</sup>. In this sense, the CNMC has followed the definitions provided for in the case law of the CJEU. European Court of Justice (CJEU).

Likewise, Spanish Supreme Court has indicated that, taking into account the similarity between Article 102 of the TFEU and Article 2 of the SCA, the European doctrine regarding the abuse of dominant position can be used as an auxiliary tool when interpreting the Spanish legislation to be implemented for national cases.

## 2. Identification of the Cases of Discriminatory Practices as *Primary* and *Secondary Line* Under the Spanish Legal Framework

Article 2 of the SCA does not make any difference between *primary line* or exclusionary abuse and *secondary line* or exploitative abuse or discrimination, i.e. price-based and non-price based<sup>13</sup>. Article 2 of the SCA has only established a mere reference of both types of practices by means of the above-mentioned list<sup>14</sup>. In that sense, according to Article 2 of the SCA, an anticompetitive *abuse* might consist in “directly or indirectly imposing unfair purchasing or selling prices or other trading conditions”<sup>15</sup>. On the other hand, *price discrimination* is referred to the application of *dissimilar conditions to equivalent transactions with other trade practices, thereby placing them at a competitive disadvantage*<sup>16</sup>.

Thus, the identification of the differences between these practices are found in the Spanish case law, which distinguishes among exploitative and exclusionary discriminatory practices, depending on the effects of the

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<sup>10</sup> Decision of the CNMC of 10 July 2014, Case S/0446/12, *Endesa Instalación*.

<sup>11</sup> ECJ, case C-85/76 of 13 February 1979, *Hoffmann-La Roche & Co v. Commission*, ECLI:EU:C:1979:36; J. Alfaro Águila Real, *Delimitación de la noción de abuso de una posición de dominio*, available at: [https://www.frdelpino.es/wp-content/uploads/2014/10/en\\_07-ALFARO.pdf](https://www.frdelpino.es/wp-content/uploads/2014/10/en_07-ALFARO.pdf), pp. 193-226, esp at 195.

<sup>12</sup> F. Diez Estella, Capítulo IV. La racionalidad económica de los precios discriminatorios, available at: [http://www.fernandodiezestella.com/discriminacion\\_precios/capitulo\\_4.pdf](http://www.fernandodiezestella.com/discriminacion_precios/capitulo_4.pdf), as the author argues there is still a misunderstanding between the economic sense of pricing discrimination and the legal term, due to this lack of definition under the legal texts.

<sup>13</sup> In Spanish: abusos por exclusión (*exclusionary*) y abusos por explotación (*exploitative*).

<sup>14</sup> See Section 1.2.

<sup>15</sup> See Section 1.2; J. Suderow & M. Cañadas, 11. Spain. In P. Këllezi, B. Kilpatrick & P. Kobel (eds.), *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*, Springer 2017, at pp.190-192.

<sup>16</sup> P. Papandroupoulos, How Should Price Discrimination be Dealt with by Competition Authorities?, *Concurrences Revue des droits de la concurrence*, 2007 (3), pp. 34-38; J. Suderow & M. Cañadas, 11. Spain. In P. Këllezi, B. Kilpatrick & P. Kobel (eds.), *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*, Springer 2017, pp. 187-200, at 188; O. Armengol I Gasull, La discriminación de precios como abuso de posición dominante, available at: [https://espacioinvestiga.org/wp-content/uploads/2015/09/DE006-011\\_Discriminacion\\_precios\\_como\\_abuso\\_posicion\\_dominante-Armengol.pdf](https://espacioinvestiga.org/wp-content/uploads/2015/09/DE006-011_Discriminacion_precios_como_abuso_posicion_dominante-Armengol.pdf), p. 302; F. Diez Estella, *La discriminación de precios en el derecho de la competencia*, Thomson-Civitas 2003, at pp. 74 et seq.

practice in the market by means of an economic approach, i.e.: protecting the effective competition and the consumers but not the competitors<sup>17</sup>.

The CNMC and Spanish Courts usually base their assessment on the doctrine of the European Commission and of the case law of the CJEU related to the identification of these practices<sup>18</sup>. The Spanish Supreme Court is still pending to analyse whether the effects of the exploitative abuses must be proven by providing an analysis of the possible real impact of the behaviour on the affected market or if it is not required to assess the abuse of the conduct in the market, as it has been stated out when an exclusionary abuse has taken place<sup>19</sup>.

The abuses are assessed based on their anticompetitive effects, using this economic approach when applying Article 2 of the SCA. Therefore, the nature of the conduct is not a key element, but rather a factor to be taken into consideration in the assessment of the effects of the practice. In this sense, the CNMC, the former Spanish Court of Defense of Competition Court, and the Spanish Supreme Court have defined the following conditions for the identification of a discriminatory abuse, namely in *pricing discrimination* situations:

- (i) Structural criteria: dominant position in a certain market (monopolistic markets with high barriers to entry and inelastic supply or demand taking into account the value-based pricing<sup>20</sup>);
- (ii) Comparative and economic criteria: abuse of this dominant position in the relevant market. For instance, abusive conditions through discriminatory practices by means of excessive prices that can be considered as *predatory prices*<sup>21</sup>.  
Predatory prices can be established in *regulatory prescriptions* (case *Endesa Instalación*, in which, the CNMC has stated out the differentiation between abusive and non-abusive prices in the Electricity Market); in different levels of the same relevant market but located in other Member States; and in distribution networks.
- (iii) Effects of the conduct on the relevant market and the competition process (without an objective economic justification)<sup>22</sup>.

Regarding exclusionary abuses, the Supreme Court Judgment dated February 5, 2018<sup>23</sup>, has recently dismissed an appeal filed by the State Bar against a ruling of the National Court that annulled the Decision of the CNMC in the *Correos* case<sup>24</sup>. According to the Spanish Supreme Court, as previously mentioned, the assessment of an abuse of dominant position requires that the competition authority certifies, after the corresponding analysis of the existing economic context, that the practice has been able to affect competition in the market<sup>25</sup>.

## 2.1. Investigation Against *Primary Line* and *Secondary Line* Discriminatory Practices by the Spanish Authorities of Competition

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<sup>17</sup> J. Alfaro Águila Real, Delimitación de la noción de abuso de una posición de dominio, available at: [https://www.frdelpino.es/wp-content/uploads/2014/10/en\\_07-ALFARO.pdf](https://www.frdelpino.es/wp-content/uploads/2014/10/en_07-ALFARO.pdf); For further details, Section 4.1.

<sup>18</sup> For instance, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C 45; AEDC (Asociación Española para la Defensa de la Competencia), Comentarios al *Discussion Paper on the Application of Article 82 of the EC Treaty to exclusionary abuses*, available at: <https://ec.europa.eu/competition/antitrust/others/aedc.pdf>

<sup>19</sup> J. Suderow & M. Cañadas, 11. Spain. In P. Kellezi, B. Kilpatrick & P. Kobel (eds.), *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*, Springer 2017, at pp. 191-192.

<sup>20</sup> J.A.Aguila Real, Precios personalizados y discriminación, Almacén de Derecho, 2017, available at: <https://almacenederecho.org/precios-personalizados-discriminacion/>

<sup>21</sup> Case *Endesa Instalación*, at p. 65.

<sup>22</sup> See Section 3; SGAE case, Decision of the CNMC, 6 November 2014, S/460/13.

<sup>23</sup> Supreme Spanish Court of 5 February 2018, nº 2808/2015 (ECLI:ES:TS:2015:2808).

<sup>24</sup> Decision of the CNMC of 21 January 2014, S/0373/11.

<sup>25</sup> A. Martínez, A. Pol & J. Rodríguez, El Tribunal Supremo restringe el concepto de abuso de posición de dominio, 2018, available at: <http://www.allenoverly.com/publications/es-es/Pages/El-Tribunal-Supremo-restringe-el-concepto-de-abuso-de-posicion-de-dominio.aspx>

The CNMC, as the regulatory body in charge of enforcing the SCA and Articles 101 and 102 of the TFEU<sup>26</sup>, has received complaints and has investigated *ex officio*, *primary line-* discrimination against rivals-as *exclusionary abuses* as well as *secondary line-*discrimination between customers as *exploitative abuses*. The CNMC invokes both Articles in its decisions (Article 102 lit c and Article 2 of the SCA) even if the discrimination has no effects on the commerce across the Member States or on the internal market.

A relevant amount of all these cases, which have been investigated by the CNMC, gave rise to sanctions based on the conditions explained along this National Report<sup>27</sup>.

### **2.1.1. Forms of *Primary Line* Discrimination Prohibited as Foreclosure Abuse**

Market foreclosure effects and discriminatory prices on downstream markets can be considered as an abuse of a dominant position (namely, vertical foreclosures<sup>28</sup>), even if the dominant undertaking or company is not participating as competitor on these downstream markets but its behaviour is able to distort competition between trade partners.

Nonetheless, as ALFARO stresses out, in order to identify an abuse of a dominant position (for instance in cases of predatory prices in vertical markets) it must be assessed in the first place if the company with the dominant position holds this position in both markets or not (both in the upstream and the downstream market)<sup>29</sup>.

### **2.1.2. Forms of *Secondary Line* Discrimination (*Exploitative Abuses*) as price discrimination**

The typical exploitative abuse analysed and sanctioned by the CNMC is related to *excessive pricing* as exploitative abuses are at the forefront of the CNMC's practice, in opposition to the current trend of the European Commission's practice, which, is mainly focused, in exclusionary practices<sup>30</sup>.

There are significant Decisions issued by the former Spanish Defense of Competition Court (in Spanish: Tribunal de Defensa de la Competencia) and Decisions rendered by the CNMC, concerning excessive and unfair prices as discriminatory and exploitative abuses, for instance:

- (i) Case *Viesgo Generación*<sup>31</sup>;

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<sup>26</sup> F. Marcos, Remedios y obligaciones impuestos por las autoridades de defensa de la Competencia, Cuadernos de Derecho Transnacional 2018 (10) 1, pp. 331-371.

<sup>27</sup> See Section 4.

<sup>28</sup> CJEU, case 525/16 of 19 April 2018, *MEO Serviços de Comunicações e Multimédia SA v Autoridade de Concorrência & GDA Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes, CRL*: ““With regard to the MEO66 ruling, the concept of *competitive disadvantage* of Article 102 lit c is clarified, which according to the CJEU "must be interpreted in the sense that it refers to, in a case in which a dominant company applies discriminatory prices to business partners in the downstream market, to that situation in which said behaviour may have as a consequence a distortion of competition between these business partners. The verification of this *competitive disadvantage* does not require proof that an effective and quantifiable deterioration of the competitive position has taken place, but must be based on an analysis of all the relevant circumstances of the specific case that allows concluding that said behaviour influences the costs, profits and benefits or other relevant interest of one or more of said partners, so that such behaviour may affect said position".

<sup>29</sup> J. Alfaro Águila Real, Delimitación de la noción de abuso de una posición de dominio, available at: [https://www.frdelpino.es/wp-content/uploads/2014/10/en\\_07-ALFARO.pdf](https://www.frdelpino.es/wp-content/uploads/2014/10/en_07-ALFARO.pdf), at 221.

<sup>30</sup> F. E. González-Díaz & B. Holles de Peyer, Spain, The Dominance and Monopolies Review 2018, available at: <https://thelawreviews.co.uk/edition/the-dominance-and-monopolies-review-edition-6/1171039/spain#footnote-021>

<sup>31</sup> Decision of the former Spanish Defense of Competition Court of 28 December 2006, Exp. nº 602/05; C. Fernández, A. Ward & J. Torrecilla, Precios excesivos de restricciones técnicas: Criterios relevantes de la Jurisprudencia del Tribunal Supremo, Gaceta Jurídica de la UE y de la Competencia, available at: [https://www.cuatrecasas.com/es/publicaciones/precios\\_excesivos\\_en\\_los\\_mercados\\_de\\_restricciones\\_tecnic](https://www.cuatrecasas.com/es/publicaciones/precios_excesivos_en_los_mercados_de_restricciones_tecnic)

- (ii) Case *Iberdrola Castellón*<sup>32</sup>;
- (iii) Case *Gas Natural*<sup>33</sup>;
- (iv) Case *SGAE-Conciertos*<sup>34</sup>

Among these Decisions, the largest fine imposed for excessive and abusive prices as an infringement of Article 102 and Article 2 of the SCA was given in the case *Mensajes Cortos*<sup>35</sup>. In this case, the CNMC imposed a fine of €119.96 million on the most relevant companies of the Spanish telecommunications Market: *Telefónica SAU*, *Vodafone Spain* and *Orange Spain*.

## 2.2 Digital Economy and Activity of the CNMC Concerning the Discriminatory Practices and Mergers

### 2.2.1. Digital Economy and Discriminatory Practices

The CNMC has put its efforts in the analysis of the development and wide impact of the digital economy in Spanish digital markets. In the Annual Report Plan of this year (2019)<sup>36</sup>, being a report of its activity and areas of interest within the enforcement of Competition law in Spain, the CNMC has strongly emphasized these aspects. Thus, the CNMC has stated out that: “An ambitious, in-depth analysis of competition rules in the digital economy will be carried out, particularly focusing on the operation of tech platforms, the use of algorithms and pricing policy, access conditions and the use of data, e-commerce and online advertising. It will also train staff in advanced technologies”<sup>37</sup>.

In addition to the above, the CNMC has also considered that: “it is crucial, in order to keep digital innovation alive, that significant players do not foreclose access to their data when firms in other related markets need them in order to develop new products or improve the quality of existing ones”<sup>38</sup>.

### 2.2.2. Digital Economy and Mergers

Regarding the Spanish experience and treatment of mergers related to the digital economy and platforms, it is worth noting that the CNMC has had the opportunity to evaluate several cases. Some examples of different types of businesses on the digital market can be found in the following cases:

- (i) *Schibsted/Mil Anuncios* (platforms of classified ads online)<sup>39</sup>;

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[as criterios relevantes a la luz de la jurisprudencia del tribunal supremo gaceta juridica de la ue y la competencia.html](#)

<sup>32</sup> Decision of 8 Mars 2007, Exp. nº 601/05.

<sup>33</sup> Decision of 14 February 2008, Exp. nº 624/07; and, Decision of 25 April 2008, Exp. nº 625/07.

<sup>34</sup> Decision of the CNMC of 6 November 2014, S/0460/13.

<sup>35</sup> Decision of the CNMC, of 19 December 2012, S/0248/10; J. Suderow & M. Cañadas, 11. Spain. In P. Këllezi, B. Kilpatrick & P. Kobel (eds.), *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*, Springer 2017, at 191-192.

<sup>36</sup> CNMC, Contribution on the implications of digitalization for Competition Policy, available at: <https://www.cnmc.es/sites/default/files/promocion/consultas/2018-10/CNMC%27s%20contribution%20on%20the%20implications%20of%20digitisation%20for%20competition%20policy.pdf>, at p. 7.

<sup>37</sup> C. Vila & J. Candel, CNMC Reviews 2018 and Publishes Action Plan for 2019, *Cuatrecasas Blog*, 21 June 2019, available at: <https://blog.cuatrecasas.com/competencia/cnmc-reviews-2018-and-publishes-action-plan-for-2019/?lang=en>

<sup>38</sup> CNMC, Contribution on the implications of digitalization for Competition Policy, <http://www.cnmc.es/sites/default/files/promocion/consultas/2018-10/CNMC%27s%20contribution%20on%20the%20implications%20of%20digitisation%20for%20competition%20policy.pdf>, at p. 9.

(ii) *Just Eat/La Nevera Roja* (platforms for food delivery and apps)<sup>40</sup>;

(iii) *Daimler/Hailo/My taxi/Negocio Hailo* (taxi hailing apps)<sup>41</sup>.

### 2.3. Discriminatory Practices as Anticompetitive Agreements Under Article 1 of the SCA

The notion of discrimination applied to anticompetitive agreements (cartels, horizontal agreements and vertical restrictions) is established in Article 1 of the SCA in a similar basis as in Article 101 of the TFEU.

In the same vein as in cases of infringements of Article 2 of the SCA, this definition and the explanation of the requirements established in Article 1 of the SCA must be found in the Spanish case law related to these infringements of Article 1 of the SCA.

### 2.4. Mergers and Discriminatory Practices

In Spain, there are some cases of Mergers in which, discrimination has been taken into account<sup>42</sup>. These cases of mergers authorised by the Spanish authorities are closely related to cases of discriminatory prices and abuse of a dominant position in the Market namely in situations of *retailation prices*, resale price maintenance and sales promotion in order to avoid situations of sales below cost (loss making sales of certain companies)<sup>43</sup>. Generally speaking, non-horizontal mergers are not a threat for the *effective* competition, unless otherwise, one of the companies involved in the merger has a significant market power (or dominant position) and there exists a risk to generate pricing discrimination if this company exercise an abuse of its dominant position.

In these cases, the CNMC (and previously, the former Spanish Court for Defense of Competition<sup>44</sup>) uses to assess the merger entity to price discriminate and its dominant position taking into consideration in the competitive analysis the definition of the relevant market, the market power of all the firms that are competing in the relevant market (after this market is located through an analysis of the geographical and product markets assessment), and the effects of the previous authorised merger including the prospective ancillary restrictions provoked by the merger. In this vein, what is relevant and it is basically taken into account by Spanish Authorities regarding the effects of the discriminatory practice and the market power of the merger entity is the goal of the merger but not the restrains. This goal must be the controlling of the prices.

## 3. Objective Justifications to Discriminatory Practices: Defense of *Objective Necessity* and *Efficiency*

As is well known, discrimination is not always prohibited due to the fact that it can be considered as an enhancement of the efficiency and social welfare<sup>45</sup>. Prohibitions are not absolute. Under the Spanish legal

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<sup>39</sup> Decision of the CNMC, C/0573/14.

<sup>40</sup> Decision of the CNMC, C/0730/16.

<sup>41</sup> Decision of the CNMC, C/0802/16.

<sup>42</sup> J. M. Beneyto, El control de concentraciones en España: un nuevo marco legislativo para las empresas, *Instituto de Estudios Europeos. Centro de política de Competencia*, 2001, pp. 1-51, at 37.

<sup>43</sup> J. M. Beneyto, El control de concentraciones en España: un nuevo marco legislativo para las empresas, *Instituto de Estudios Europeos. Centro de política de Competencia*, 2001, pp. 1-51, at 51; .Decision of the former Spanish Defense of Competition Court of 5 October 1998, on the Merger Analysis of Ebro Agrícolas, Compañía de Alimentación S.A., y Sociedad General de Azucarera de España, Exp. n° 31/98.

<sup>44</sup> Report of the former Spanish Defense of Competition Court of 19 December 2003 on the Merger analysis of CAPRABO/ALCOSTO Supermarkets, Exp. n° C/83/03.

<sup>45</sup> F. Díez Estella, Capítulo V. Justificaciones a la discriminación de precios. In, F. Díez Estella, *La discriminación de precios en el Derecho de la Competencia* pp. 211-246, available at: [http://www.fernandodiezestella.com/discriminacion\\_precios/capitulo\\_5.pdf](http://www.fernandodiezestella.com/discriminacion_precios/capitulo_5.pdf); J. A. Águila Real, Precios personalizados y discriminación, Almacén de Derecho, available at: <https://almacenederecho.org/precios-personalizados-discriminacion/>

framework, there are also, – as in other legal systems of Competition law and under European law–, objective justifications to discriminatory practices, specifically in *pricing discrimination*<sup>46</sup>.

Main objective justifications under Spanish legal framework are as follows: reasons of public policy and interest (including protection of the environment, protection and safety of public health, preservation of natural resources, and so on and so forth); improvement of production; improvement of distribution; promotion of technical and economic progress<sup>47</sup>; maintenance of employment (in accordance with Article 3 of the SCA to improve conditions of production)<sup>48</sup>; reduction of purchasing prices; and, equitable participation in the benefits (of users and consumers).

Demonstration of the *objective necessity* of the conduct will rely ultimately on the investigations and assessment of the CNMC. Nonetheless the burden of proof of this objective justification to discriminatory practices will rely on the company, which has a dominant position in the Market. This company has to demonstrate its compliance with the objective justifications established in the SCA and other bodies of law and, that its behaviour cannot be considered as a discriminatory practice. Furthermore, the nature of the products and services at issue in the relevant Market where the operators or companies are competing are also to be considered. The criteria for assessing what products or services should be taken into account are basically the same in both provisions (Article 1 and Article 2 of the SCA).

The CNMC will determine this *objective necessity* of the discrimination on the basis of external factors to the company with a dominant position in the Market. The main argument given by the Companies with a dominant position, even if its behaviour can exclude other competitors, is based on the reasons provided by Article 5: Conducts of minor importance<sup>49</sup>.

Besides, Article 6 of the SCA sets out the findings of inapplicability. It provides that the CNMC might adopt declarations of inapplicability to discriminatory practices provided by Article 1 and Article 2 of the SCA<sup>50</sup>.

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<sup>46</sup> F. Díez Estella, La discriminación de precios en el Derecho de la Competencia, Capítulo V. Justificaciones a la discriminación de precios, pp. 211-246, available at: [http://www.fernandodiezestella.com/discriminacion\\_precios/capitulo\\_5.pdf](http://www.fernandodiezestella.com/discriminacion_precios/capitulo_5.pdf)

<sup>47</sup> The notion of *economic progress* is wide. It may allow the exemption of agreements aimed at guaranteeing the supply of scarce products, saving energy, improving the environment, recycling of waste, or the removal of nuclear fuels, promoting the economic development of disadvantaged regions or protecting the health and safety of citizens, regulating the distribution of potentially dangerous products.

<sup>48</sup> For instance, *Stevedores-SAGEP* case; in this case, the stowage was been privileged by the Royal Decree Law 2/1986 on Stowage, a special regime that established a reservation of activity, which involved priority and exclusive hiring of workers linked to the *Dockers' Management Public Limited Liability Company* (hereafter SAGEP). The agreement was articulated through (i) a collective bargaining agreement and (ii) the Stowage companies holding shares of SAGEP. Twenty-eight years later, a judgment issued by the CJEU declared the failure of Spain to consider this regime contrary to the freedom of establishment guaranteed by Article 49 of the TFEU (CJEU case C-576/13, of 11 December 2014, *European Commission v Spain* (ECLI:EU:C:2014:2430). To comply with the ruling, the Government approved the Royal Decree Law 8/2017, of 13 May, amending the employment scheme for workers providing post cargo handling services, in compliance with the judgment of the CJEU of 11 December 2013, which established full freedom to hire workers and eliminated the obligation of stevedoring companies to participate in SAGEP. This preliminary ruling suspended the sanctioning proceeding initiated in November of 2017; see, Analysis of the Stowage Framework Agreement of the CNMC, of 12 June 2019, S/ DC/ 0619/17, only available in Spanish at: [https://www.cnmc.es/sites/default/files/2541615\\_4.pdf](https://www.cnmc.es/sites/default/files/2541615_4.pdf)

<sup>49</sup> Article 5 of the SCA reads as follows: “The prohibitions included in Articles 1 to 3 of this Act shall not apply to conduct which, due to their scant importance, are not capable of significantly affecting competition. The criteria for demarcating conduct of minor importance shall be determined according to regulations, taking into account, among other the market share”.

<sup>50</sup> Article 6 of the SCA: “Where the public interest so requires, the National Competition Commission, by decision adapted ex officio, may find report by the Competition Council, that Article 1 is not applicable to an agreement, decision or practice, either because the conditions of Section 1 are not fulfilled, or because the conditions of Section 3 of this article are satisfied. The finding of inapplicability may also be made with regard to Article 2 of this Act”.

The Royal Decree 261/2008<sup>51</sup>, which approves the Regulation for the Defence of Competition (hereafter RDC) establishes in its Article 43, this procedure of declaration of inapplicability. According to this Article, and in connection with the provisions of Article 6 of the SCA, the Directorate of Investigation may initiate the procedure *ex officio*, either by its initiative or by the initiative of the Board of the CNMC. The Directorate has to draft a proposal of inapplicability if the company meets the conditions provided in Article 6 of the SCA, submitting this proposal to the CNMC Council<sup>52</sup>. The CNMC Council, after reception of the proposal of inapplicability will assess the proposal within a month and finally, will send the report to the Competition Defence Council<sup>53</sup>.

Likewise, the CNMC Council may submit for public consultation the proposed declaration of inapplicability, for a period of at least fifteen days.

### 3.1. Justifications to Discriminatory Practices Pertaining to an Anticompetitive Agreement

An anticompetitive agreement can be compatible with the prohibition set out in Article 1 of the SCA, when it complies with any of the exemptions by category contemplated in the European Union Regulations implementing Article 101 paragraph 3 of the TFEU.

Likewise, the SCA provides that the Government, by means of Royal Decrees can declare the non-application of the prohibition of Article 1 of the SCA to certain types of conducts or agreements, in accordance with the report of the Council for the Defence of Competition and the CNMC. For example, the Royal Decree 602/2006<sup>54</sup>, which approves the exemption regulation for certain categories of exchange agreements of information about late payment.

There are four cumulative conditions (two conditions are positive, and two conditions are negative) set out in Article 1 of the SCA for not considering an anticompetitive agreement as a discriminatory practice for the *effective competition*:

- (i) If the agreement is participating in the improvement of the production or distribution of goods, or to the promotion of technical or economic progress. According to the CJEU seminal case law the improvement of production or distribution "cannot be identified with all the advantages that contracting parties obtain from the agreement in terms of their production or distribution activity". The improvement must, above all, present significant objective advantages, able to compensate for the inconveniences result on competition<sup>55</sup>.

-Agreements based on specialization can contribute to the *improvement of production* insofar as these agreements allow each party to concentrate on the manufacture of a certain product, increasing the productivity of these parties which have entered into the agreement. When the specialization is accompanied by research and development programs in common in a cutting-edge sector, companies are also allowed to overcome the *learning curve* linked to the need to repeat development work in the same category in order to be able to completely master the technology that is applied to it<sup>56</sup>.

-The *improvement of distribution* has been recognized in the case of exclusive distribution agreements, which do not impose restrictions regarding the resale of the products by the exclusive distributor. The manufacturer may limit the number of authorised resellers to distribute the products and impose an obligation on them not to sell directly or indirectly to unauthorized agents (selective distribution).

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<sup>51</sup> Royal Decree 261/2008, of 22 February.

<sup>52</sup> Article 43 paragraph 1 and 2 of the RDC.

<sup>53</sup> Article 43 paragraph 3 y 4 of the RDC.

<sup>54</sup> Royal Decree 602/2006, of 19 May

<sup>55</sup> J. Massaguer Fuentes, *Comentario a la ley de defensa de la competencia*. Civitas (2012), at p. 281

<sup>56</sup> Decision of the CNMC, S/DC/0594/16, *Anele case*, esp. at p. 147.

- (ii) Consumers and users participate equitably in such benefits; under Spanish Competition law, the *user* is understood not only as a final consumer, but also as the industrial or commercial user. Hence, it is not required for the participants to show that the benefit resulting from the agreement is represented in the final consumer. The users are usually third parties that are not part of the agreement.
- (iii) Essential nature of the agreement (indispensable nature) to achieve the benefits in the Market to contribute with technical progress and promotion of economic progress; the concept of *benefits* is understood as well as the notion of *user* in a broad sense under Spanish Competition law. It does not only refer to the high reduction of prices, but also, encompasses advantages that users could achieve from this agreement.

-The exemption does not apply if the agreement contains restrictions that, due to their nature, are not *indispensable* or essential. The appreciation of the *essential* nature of the restriction allows the Authority to exercise a wide discretionary power. For example, prohibitions on exporting are not *essential* within the meaning of Article 1, paragraph 3 of the SCA. However, limited protection may be allowed as justification, when it is temporary, or when it is a matter of putting a party in a position to perform necessary investments for the manufacture or sale of products that are not yet widespread.

- (iv) Internal and external Competition in the given Market is not hindered by the agreement: to apply this objective justification, it is necessary to take into account what *potential competition* is. Potential competition is a result of the pressure exercised by third parties capable of entering the market to compete under the same conditions. It is also necessary to assess if a possible elimination of the other competitors will be temporary or not regarding the products and services at issue provided by the companies<sup>57</sup>.

As previously mentioned<sup>58</sup>, Article 6 of the SCA provides that the CNMC, for reasons of public policy or interest, *ex officio* and after a favourable report of the Spanish Board of Defence of Competition, might adopt a decision considering that the prohibition of Article 1 of the SCA is not applicable to the alleged discriminatory agreement, decision or practice in the following cases:

- (i) When the conditions indicated in paragraph 1 of Article 1 are not met: when behaviours have no effect of preventing, restricting or distorting competition in all or part of the national market.
- (ii) Or when the conditions established in paragraph 3 of Article 1 with regard to related to agreements, decisions, recommendations and practices that contribute to the improvement of the production or marketing and distribution of goods and services or to promote technical or economic progress, are met.

#### **4. Objectives Justifying the Prohibition of Discriminatory Practices Under Spanish Competition Act: *Effective Competition and Fairness in the Markets***

##### **4.1. Notion of *Effective Competition* Under Spanish Competition Policy and Law**

Competition policy has public and private goals, being *effective competition* understood under Spanish Competition Law as the main principle and purpose of Competition policy. As it was previously mentioned, Spanish competition policy and law are under the influence of the European Competition law principles, and the

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<sup>57</sup> This aspect entails the likelihood that the parties into the agreement have the opportunity of hindering the activity of other competitors.

<sup>58</sup> See Section 3 above.

ECJ Case law related to antitrust cases with an effect across the Member States<sup>59</sup>. Due to the above, *effective competition* is repeatedly stressed out in several Articles of the SCA as well as in its Preamble<sup>60</sup> entailing this main public goal of the EU Competition policy.

As a consequence, where a dominant operator in the Spanish Market is excluding other similar competitors, regardless of their efficiency, by means of discriminatory competitive practices, even if there is an objective justification applicable to their discriminatory anti-competitive practices, the CNMC and Spanish Courts have to take into consideration the principle of *effective competition* to restore competition in the market and prohibit these abuses and discriminations which are not compatible with this principle<sup>61</sup>.

#### 4.2. Notion and Treatment of *Fairness* Under Spanish Legal Framework of Competition

The re-establishment of *fairness* is understood as one of the side effects of the sanctions against primary and secondary line discrimination practices. It is considered as an implied goal, because there is no explicit wording under the SCA for restoring *fairness* as a defined goal, unlike the protection and preservation of *effective competition*, which is unambiguous. *Fairness* is part of the competition process; it is inherent to the freedom of competition. Furthermore, in a market economy, competitors are expected to compete, and their market power cannot be controlled in excess, being the function of the Unfair Competition laws to regulate the fairness or unfairness in commercial practices but not of the Competition law as a primary goal<sup>62</sup>.

Such lack of consideration of the *fairness* as a primary goal of the SCA is a consequence of the application of the *more economic approach* (ordo-liberal system) that is still established under European Competition law and

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<sup>59</sup> Title II, Chapter I, Article 12 of the SCA, taking into account that, nowadays and since 2013, by means of Spanish Law 3/2013, of 4 June, *Official State Gazette* (234), of 5 June (in Spanish, Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de Mercados y Competencia), the CNMC was created, and the Spanish National Competition Commission was replaced by this organism to preserve, guarantee and promote the existence of effective competition in Spanish national markets as well as to ensure the enforcement and coherent application of this Act; see F. Díez Estella, Los objetivos del Derecho *antitrust*, Gaceta Jurídica de la Unión Europea y de la Competencia, 2003 (224), pp. 32-53; A.L. Calvo Caravaca & J. Carrascosa González, El Derecho Europeo de la Competencia: Objeto, fuentes y sistemática. In A.L. Calvo Caravaca & P. Blanco-Morales Limones, *Derecho europeo de la competencia*, Colex 2000, at p. 174.

<sup>60</sup> From the very beginning the SCA in its Preamble has established this aim: “[...] The existence of *effective competition* between businesses constitutes one of the defining elements of the Market economy and disciplines the action of businesses and reallocates the productive sources in favour of the most efficient operators or techniques”; [...] “With regard to the criteria of substantive assessment, the Act clearly separates those that will guide decision-making by the National Competition Commission, focused on the maintenance of *effective competition* in the markets, from those on which government intervention may be based, related to the protection of the general interest of society”; [...] “The third title refers to the National Competition Commission, the body responsible for applying this Act, promoting and protecting the maintenance of effective competition in all the production sectors and throughout the national territory. In this sphere, the Act is structured in two chapters: the first regulates the general aspects of the National Competition Commission and the second its management organs”; Spanish Competition Act 15/2007, of 3 July, *Official State Gazette* (159), of 4 July 2007, available in English at: <https://webcache.googleusercontent.com/search?q=cache:YCng6yocbYwJ:https://www.cnmc.es/file/64176/download+&cd=2&hl=es&ct=clnk&gl=es>

<sup>61</sup> The CNMC is also authorised with power to bring actions before the Administrative acts and regulation; further details in A. Rallo Lombarte, La Comisión Nacional de los Mercados y la Competencia: los reparos de las instituciones europeas sobre la independencia del Regulador, UNED Teoría y Realidad Constitucional, 2014 (34), pp. 193-234; 11. J. Suderow & M. Cañadas, Spain. In P. Këllezi, B. Kilpatrick & P. Kobel (eds.), *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*, Springer 2017, pp. 187-200; P. Navarro Rodríguez, La Nueva Comisión de los Mercados y la Competencia: naturaleza, régimen jurídico e independencia, Revista Administrativa de Derecho, 2013 (34), available at: <http://laadministracionaldia.inap.es/noticia.asp?id=1502431>

<sup>62</sup> W. Fikentscher *et al.*, *FairEconomy: Crises, Culture Competition and the Role of Law*, Springer 2013, at pp. 75-76: “Fairness is the key to a functioning market”.

of the Member States, including Spanish Competition law<sup>63</sup>. Restoring *fairness*, as explained by Competition Authorities and Spanish Scholars such as ALFARO, is essentially, a result of the sanction imposed<sup>64</sup>.

#### **4.3. Goals and Types of the Sanctions-Remedies Against *Secondary Line Discrimination* Under the SCA: Enabling Market Entry and Restoring the *Effective Competition***

Spanish Scholars and practitioners agree that sanctions against discriminatory practices (regardless of its characterisation as primary or secondary line discriminatory practice) are considered as a tool to restore *effective competition* in the markets and to enable the market entries on customer segments again<sup>65</sup>.

Therefore, the goals of the sanctions imposed by the CNMC and Spanish Courts against discriminatory anticompetitive practices can be summarised as follows: (i) to penalise (as punitive tools) and (ii) to deter the operators (as deterrence tools)<sup>66</sup>. Furthermore, every sanction, depending on the anticompetitive practice, serves a different purpose and goal<sup>67</sup>. On the other hand, as was previously mentioned<sup>68</sup>, the CNMC, the regional Competition Authorities and National Courts are entitled to impose fines, remedies and injunctions such as: (i) declaratory remedies (positive and negatives) and; (ii) alternative remedies based on public interest and with corrective and reactive purposes<sup>69</sup>: preliminary injunctions<sup>70</sup>; cease and desist orders<sup>71</sup>; removal of the effects; restitution; and, imposition of commitments. In its competence to impose these remedies, Spanish organisms have wide discretion, depending on the circumstances and effects of the practice in each case.

According to MARCOS, in cases of infractions of Article 102 TFEU and Article 2 of the SCA, it is usual that the CNMC completes or finishes the investigation proceedings without a *pecuniary sanction*; however, the

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<sup>63</sup> P. Akman, International Report. In P. Kellezi, B. Kilpatrick & P. Kobel (eds.), *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*, Springer 2017, pp. 3-26.

<sup>64</sup> However, some Spanish Scholars have denied that fairness is a goal *per se* of Competition Law in general, and of Spanish Competition Law in particular, J. A. Águila Real, Reflexiones sobre los objetivos del Derecho tomando el Derecho de la competencia como ejemplo, Almacén de Derecho, 23/03/2017, available at: <https://almacenederecho.org/reflexiones-los-objetivos-del-derecho-tomando-derecho-la-competencia-ejemplo/>: the author argues that *fairness* is not a goal but a consequence or result of the due and good functioning of the market economy and of a system of Competition law in a competitive marketplace; *a sensu contrario*, J. A. Soto Pineda, Vías de aplicación del Derecho de la competencia, Universidad Autónoma de Madrid 2012, at pp. 98 *et seq.*

<sup>65</sup> F. Marcos, Remedios y obligaciones impuestos por las autoridades de defensa de la Competencia, Cuadernos de Derecho Transnacional 2018 (10) 1, at p. 334 and p. 336; A. Robles Martín Laborda, Sanciones y remedios contra las restricciones de la competencia y principio de efectividad, Almacén de Derecho, 10 April 2018, available at: <https://almacenederecho.org/sanciones-remedios-las-restricciones-la-competencia-principio-efectividad/>

As the author argues, the deterrence effect has incidence to the public interests and, in especially to the private operators/competitors which also get a compensation aimed at the restoring of their position in the Market.

<sup>66</sup> See Section 2.1.; Comisión Europea, Multas por incumplir el Derecho de la Competencia, available at: [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_es.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_es.pdf); A. Robles Martín Laborda, Sanciones y remedios contra las restricciones de la competencia y principio de efectividad, Almacén de Derecho, 10 April 2018, available at: <https://almacenederecho.org/sanciones-remedios-las-restricciones-la-competencia-principio-efectividad/>

<sup>67</sup> See Section 2.1

<sup>68</sup> With regard to the public enforcement of Competition law by the Spanish National and Regional Competition Authorities and Spanish Courts; see Article 1.1.

<sup>69</sup> F. Marcos, Remedios y obligaciones impuestos por las autoridades de defensa de la Competencia, Cuadernos de Derecho Transnacional 2018 (10) 1, at p. 333.

<sup>70</sup> Being one of the most used remedies, F. Marcos, Remedios y obligaciones impuestos por las autoridades de defensa de la Competencia, Cuadernos de Derecho Transnacional 2018 (10) 1, at p. 342; see for instance, Decisions of the CNMC, of 18 May 2017, MC/004/16 *ICAM Colegiación*, of 26 November 2015, MC/AJ/002/15 *Madrid City Tour*; Decision of the former Spanish Defense of Competition Court, of 18 July 1996, Exp. n° MC/10/96 *Airtel Telefónica*.

<sup>71</sup> As declaratory remedy imposed before the conduct desist, but even so, if the conduct was produced, the cease and desist orders are aimed at the avoiding of producing again the conduct.

procedure is usually completed employing an *obligational* remedy. This *obligational* remedy has a double consequence: it is retrospective (as curative), and at the same time, it is prospective (as preventive)<sup>72</sup>.

## 5. Relevance of Other Legal Areas to Apprehend Discriminatory Practices Under Spanish Legal Framework

### 5.1. Spanish Unfair Competition Law and its Relationship with Discriminatory Practices

In Spain, the SUCA is the most relevant legal framework to sanction discriminatory practices that are not covered by the SCA. Discrimination can arise through price discrimination (abuse of economic dependency), for instance, by the use of customised prices considered as an act of unfair competition against the Market under Spanish framework. In this vein, customized pricing shall be difficult to justify from a competition standpoint in the sense that it is generally directed towards consumers<sup>73</sup>.

Similarly, concerning the creation of an abuse of dominant position case provided for in Article 2 of the SCA – which is certainly the competition law figure that encompasses most situations of discriminatory practices – a situation of dominance must be proven<sup>74</sup>. Companies with a dominant position in the market must demonstrate that their conduct is objectively necessary and that it generates substantial efficiencies that compensate any anti-competitive effects on consumers<sup>75</sup>. In this context, it is analysed if the behaviour is indispensable and proportionate to the objective supposedly pursued by the dominant company, or if it must be considered as an abuse of a dominant position.

Thus, the SUCA is a well-suited instrument to cover those commercial practices that by their own nature escape from the scope of the SCA rules. Under the SUCA one has to differentiate if the price discrimination was directed towards consumers (*business to consumers*), which are an important element to consider in the economic analysis of the economy markets and free competition<sup>76</sup>, or the whole market. For instance, regarding price discrimination with consumers, Article 7 of the SUCA, under the influence of the Directive on Unfair Commercial Practices<sup>77</sup>, contains the prohibition of misleading omissions as a way of undue influence on consumers. This could be the case if consumers' freedom of choice is distorted by the commercial practices of the competitors. Virtually, if by using a contractual hypothesis, a consumer would have changed its decision if it had known that he was purchasing a product or service with customized pricing, discovering that they are within the group to whom they charged the highest price, this might constitute a misleading omission based on discrimination.

In connection to the whole market, discriminatory practices as an abuse may also be sanctioned under paragraph 2 of Article 16 of the SUCA<sup>78</sup>. Regarding the former, the said provision precludes any discriminatory treatment of consumers in terms of prices or other sales conditions, unless being justified. Thus, the discrimination would consist of treating consumers on an equal footing with each other differently. Likewise, regarding the latter, the law prohibits the exploitation on behalf of a company of a situation of economic dependence of business

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<sup>72</sup> F. Marcos, Remedios y obligaciones impuestos por las autoridades de defensa de la Competencia, Cuadernos de Derecho Transnacional 2018 (10) 1, at p. 347.

<sup>73</sup> See Section 1 above.

<sup>74</sup> See Section 2 above.

<sup>75</sup> See Section 2 and 3.

<sup>76</sup> J. A. Águila Real, Precios personalizados y discriminación, Almacén de derecho, available at: <https://almacenederecho.org/precios-personalizados-discriminacion/>

<sup>77</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business to consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, DIRECTIVE 97/7/ec, 98/27/EC and 2002/63/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) OJ L 149.

<sup>78</sup> M.Zabaleta Díaz, La explotación de una situación de dependencia económica como supuesto de competencia desleal, Marcial Pons 2002.

customers or suppliers which do not have an equivalent alternative at hand for the exercise of their business activities (for instance, the only manufacturer of a particular product which is essential for the production process of other businesses to which it supplies decides to unilaterally undertake a price increase threatening to stop supplying the companies which refuse to pay).

Discriminatory practices stemming from the violation of competition rules can be enforced through Article 15 of the SUCA in connection with Article 3 of the SCA<sup>79</sup>, which regulates any violation of laws and specifically competition rules. Finally, Article 4 of the SUCA as a general clause can be used as a fallback position of any commercial practice, which is hindering the good functioning in the Market provided that it is not explicitly categorized under the other provisions of the SUCA. Thus, the said provision can serve if certain discriminatory practices that do not adequately fit in any other legal requirement such as, for instance, boycott acts<sup>80</sup>.

## 5.2. Other Bodies of Law and the Protection Against Discriminatory Practices

Respectively, the Law 20/2013, of 9 December, guaranteeing market unity also precludes discriminatory practices about administrative actions and regulation issued by public administrations that may hinder the integration of the market (hereafter LGUM). Thus, the said regulation protects businesses against regulatory constraints introduced by public authorities (mainly, by Autonomous Communities and local entities, but also by the State) that are hindering the freedom to conduct business in the whole of the Spanish territory set out in the Article 38 of the Spanish Constitution. The LGUM introduces several instruments destined to control and supervise public interventions that may artificially fragment the unity of the national market, avoiding or minimising distortions stemmed from the decentralisation of public authorities.

In this sense, the principle of non-discrimination is enshrined in Article 3 of the said regulation, declaring that any economic operator has the same rights without the possibility of conferring more or less about the place of establishment or residence.

Economic operators may file complaints with the Secretary of the Council for the Unity of the Market if they believe that a particular public intervention (legal provision, administrative action, the inaction of administrative bodies) hinders their freedom of establishment or freedom of movement, contravening LGUM provisions (*ex- Article 26.1 LGUM*). Another alternative is to directly file an administrative appeal or lawsuit against the legal requirements or administrative act at issue, former Article 26 paragraph 3 LGUM.

Besides all of the above, the LGUM also provides for the possibility that the CNMC, at its initiative (*ex officio*) or at the request of a third party (*ex parte*), files a contentious-administrative appeal against any public intervention that it considers to be contrary to the freedom of establishment or movement.

In the same vein, under Spanish Consumer Law, for instance, the Royal Decree-Law 1/2007, of 16 November, approving the consolidated text of the General Law for the Defense of Consumers and Users and other complementary laws, there are also precluded other discriminatory practices towards consumers. For instance, Article 49 k, l and m defines as infringements: the refusal to meet the demands of consumers or any other type of discrimination concerning the rendering of the service when not justified, the use of disloyal commercial practices with consumers and users and discriminatory conducts regarding access to goods and services, especially those against gender equality, respectively.

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<sup>79</sup> *Inter alia*, A. Robles Martín Laborda, Libre Competencia y Competencia Desleal: examen del artículo 7 de la Ley de defensa de la competencia, La Ley 2001; J. I. Font Galán & L.M. Miranda Serrano, Competencia desleal y antitrust: sistema de ilícitos, Marcial Pons 2005.

<sup>80</sup> For instance, one of the latest Decisions of the CNMC was motivated on the general clause of the SUCA and Article 3 of the SCA, Decision of the CNMC, of 19 June 2019, S/DC0552/15 AGIC, *Endesa Energía XXI, S.L.U.*

Data Protection regulation can also be seen as a well-fit instrument to fight against discriminatory practices<sup>81</sup>. However, the scope is very different from that of competition rules, since the range of protection deals with the need for companies to seek the consent of consumers while engaging in commercial activities. Henceforth, the *Spanish Data Protection Agency* has imposed heavy fines to companies breaching data protection rules such as Facebook with regard to its acquisition of *Whatsapp* or *Google* (fine which was recently annulled by the Spanish Supreme Court), but always regarding this specific area of law even if these practices can also be related to other competition law infringements).

Finally, *regulated sectors* such as electricity supply<sup>82</sup>, hydrocarbons<sup>83</sup>, or telecommunications<sup>84</sup> all of which have specific obligations and regulation depending on the features of these markets, set out as well that the said operators must allow the use of their facilities and infrastructure by other competitors in a transparent and non-discriminatory manner in order to provide the said services to the final consumers.

### **5.3. Analysis of the Utility of the Other Bodies of Law Enacted by the Spanish Legislator Against Discriminatory Practices**

The abovementioned provisions are not necessarily more efficient and appropriate in dealing with discriminatory practices. These bodies of law deal and treat the discriminatory practices from a different perspective than the SCA. In other words, the legal interests under protection by antitrust and unfair commercial practices laws, regulated sectors, data protection or consumer standpoint are not the same, even if sometimes are closely related. Each body of law is devoted to protecting specific interests and areas.

Hence, what is needed is the coordination and cooperation between regulators and the enforcement authorities to ensure the protection of the different legal interests at issue, avoiding undesired overlapping or collisions or excessive regulation that can jeopardise the *effective competition*.

### **5.4. Sectorial Regulations *Ex Ante* and Conditions to Compete in Open Markets: Effects of Liberalization in the Spanish Markets**

In Spain, the liberalization of certain key sectors such as gas, electricity or telecommunications (mostly fostered by compliance with EU regulation which lead to a gradual opening up of these sectors to competition through the implementation of legislative packages promoting liberalization) lead to, naturally, the adoption of certain obligations necessary to open up the market such as access to infrastructures or unbundling, precluding discrimination from incumbents against new entrants.

For instance, in the electricity and gas sectors, the legislative framework adopted by Spain in 1997 for electricity and in 1998 for gas implemented the European directives that were applicable at the time (the Electricity Directive of 1996<sup>85</sup> and the Gas Directive of 1998<sup>86</sup>). Under the said Directives, a system of third-party access to infrastructure had to be introduced and unbundling (the separation of market functions traditionally provided by vertically integrated undertakings into functionally independent parts) limited to the accounting.

Spanish legal framework went further than the European Directives by introducing regulated third-party access to the network and an unbundling regime under which the transmission system operators, e.g.: Red Eléctrica Española (REE) and the gas network operator (*Enagás*) were operated through separate legal entities (legal unbundling). Similarly, in 1997, legal limitations regarding the shareholding were introduced in the electricity

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<sup>81</sup> Act 3/2018, of 5 December, on Personal Data Protection and guaranteeing digital rights.

<sup>82</sup> Act 24/2013, of 26 December, regulating the Electricity Sector, article 30 g and k.

<sup>83</sup> Act 34/1998, of 7 October, on the Hydrocarbons Sector, article 68 c and d.

<sup>84</sup> Act 9/2014, of 9 May, on Telecommunications Market, article 14 b.

<sup>85</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

<sup>86</sup> Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas.

sector; no individual or company could hold more than 10% REE's share capital and no active operators in the electricity sector could hold a combined share of more than 40%. The said limitations on REE's share capital were reduced to 3% in 2002 and 1% in 2005.

These legal restrictions regarding shareholding were introduced in the gas sector in 2000 under which no individual or company could hold more than 35% of *Enagás's* share capital. This limitation was reduced to the companies active in the energy sector to 5% in 2003 and to 3% in 2015 (companies active in sectors other than the energy sector can hold up to 5%). Equally, operators active in the energy sector cannot hold a combined share of more than 30%.

In this regard, access to infrastructure in a non-discriminatory manner is provided for in Article 30 g and k of Law 24/2013, of 26 December, regulating the Electricity Sector, and Article 68 c and d of Law 34/1998, of 7 October, on the Hydrocarbons Sector.

Likewise, the Spanish telecommunications sector has witnessed dramatic changes moving from a monopolised closed industry to an open market, having completed the liberalisation of the sector as of December 1998. In principle, any company can now enter to render services through the unbundled access to facilities of the incumbents in a non-discriminatory manner (*ex-Article 14 b*) of General Law 9/2014, of 9 May, of Telecommunications).

Equally, an independent telecommunications regulator (the Telecommunications Market Commission (CMT)) was created in 1996 to control the liberalisation process and to safeguard effective competition in the telecommunications sector. In 2013, the CNMC created as a super-regulator integrating the different sectorial regulators, including the CMT.<sup>87</sup>

#### **5.4. *Ex Ante* Regulation and *Ex Post* Regulation**

*Ex-ante* regulation and *ex-post* competition enforcement are two different instruments that are essential for ensuring effective competition in certain sectors, like the ones indicated above. As mentioned, regulation has been used by European legislators to open up markets to competition, as an instrument of liberalization. This is typically the case in network industries (businesses that tend to benefit from network effects), often former state-owned monopolies, such as telecommunications, transport and energy, but also postal services. In these sectors, it is not enough to undertake liberalization measures and to rely on individual enforcement of the competition rules. Prior to that, it is necessary to lay down conditions for a competitive environment in which new entrants can expand. Equally, *ex-ante* regulation is often necessary to tackle structural problems, opening markets to competition.

For instance, the telecommunications sector is a great example of the complementary nature between regulation and competition. During the liberalization packages, *ex-ante* regulation was crucial to pave its way to a competitive environment prepared for market entry. For instance, unbundling of infrastructure such as local loops was necessary to solve the problem of enduring economic bottlenecks (namely nonreplicable legacy facilities).

However, as the liberalization process was gradually completed, regulation progressively took a more minor role being currently the exception rather than the rule.

Despite this, *ex-ante* regulation and *ex-post* control are both necessary where structural competition problems persist, for instance, for granting access to market players in fibre networks deployed by incumbents. Access to new infrastructure in network industries ensures that dominant companies are not allowed to leverage ownership to other services, which would lead to a new monopolisation of the sector in question. Indeed, some sectors,

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<sup>87</sup> Act 3/2013, of 4 June, creating the National Markets and Competition Commission.

such as telecommunications, which naturally tend towards market failures (in particular, monopoly) and, thus, competition enforcement is not enough by itself to ensure effective competition in these markets.

## **6. Future of the Prohibition of Discriminatory Practices on a Competition Law Perspective under Spanish Regulation and Enforcement**

### **6.1. Evolution of the Treatment of the Prohibition of Discriminatory Practices by CNMC and Spanish Courts**

In accordance with the previous Articles, under the Spanish legal framework, Spanish experience follows, up to a certain degree, the doctrine of the European Commission and the case-law of the CJEU. However, as explained, there are some differences in the assessment of certain discriminatory practices, given by the CNMC and Spanish Courts, namely the Spanish Supreme Court.

Nevertheless, from our view, during the investigations, the current challenge of Spanish enforcers of the SCA is how to deal with the problem of being capable of demonstrating that companies' behaviour is illicit as an exploitative and exclusionary abuse, instead of a natural consequence of a competitive market. Policies of discriminatory prices applied by dominant companies are not *per se* prohibited if they do not encounter the requirements to be anticompetitive<sup>88</sup>.

### **6.2. Discriminatory Practices and Digital Sectors**

Companies that are doing business and compete in the digital sector may easily trigger discriminatory practices. Digital markets are still being and considered as a *terra incognita* and, as a consequence, companies have a strong interest in consolidating their position in this digital arena. This may cause them to be tempted to develop anticompetitive practices. As a matter of fact, the CNMC has stated that Digital platforms' market power may induce a strategy of leveraging their power to other markets. One potential case that the CNMC has recently analysed in a market study is Fintech<sup>89</sup>.

In addition to the above, it cannot be denied that digital platforms, usually operating as intermediaries have flourished in the digital markets, e.g.: *Airbnb* or *Uber* and both have been reluctant about the debates on the effects on competition of their activity.

Nevertheless, the digital sector may also pose other challenges apart from the conflicts between traditional and new companies. The biggest challenge that Competition Authorities will have to face is to determine between anti-competitive conduct and conduct that is the mere result of the use of artificial intelligence.

### **6.3. E-Commerce, Geo-Blocking and Discriminatory Practices in the Digital Sectors**

Specific regulations applicable to the digital sector might be very useful to complete the existing tools at hand in Competition law against discriminatory practices. In our view, there is no need in enacting more rules in Competition law to fulfil the loophole that exists in this area. It could be enough if specific regulations on digital sectors are better adapted to deal with discriminatory conducts in the digital sector. There is a lack of experience concerning different mechanisms that enterprises are using to circumvent the competition rules to the digital sector.

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<sup>88</sup> O. Armengol I Gassul, La discriminación de precios como abuso de posición dominante, available at: [https://espacioinvestiga.org/wp-content/uploads/2015/09/DE006-011\\_Discriminacion\\_precios\\_como\\_abuso\\_posicion\\_dominante-Armengol.pdf](https://espacioinvestiga.org/wp-content/uploads/2015/09/DE006-011_Discriminacion_precios_como_abuso_posicion_dominante-Armengol.pdf), pp. 300-312, at p. 302.

<sup>89</sup> CNMC's contributions on the "Implications of Digitalisation for Competition Policy" for the Conference on "Shaping Competition Policy in the Era of Digitisation, 2018, available at: <https://www.cnmc.es/sites/default/files/promocion/consultas/2018-10/CNMC%27s%20contribution%20on%20the%20implications%20of%20digitisation%20for%20competition%20policy.pdf>, at p. 5

The CNMC has pointed out that the relationship between competition policy and digital environment: “if competition policy wants to foster digital innovation, the specific characteristics of the digital environment need to be taken into account. For instance, dynamic competition leads to frequent firm entry and exit in digital markets, which should be considered a sign of vibrancy. Moreover, non-physical capital is particularly important in digital industries, which translates into negligible marginal costs. As a result, market structures in digital industries will feature a natural tendency towards market power concentration. Nevertheless, this tendency should not shy competition authorities away from preventing anticompetitive practices and mergers that stifle innovation, which would, in turn, enhance the ‘natural’ market power of big players.”<sup>90</sup>

Moreover, the CNMC considers that nowadays, current antitrust laws are strong-based, robust well adapted to the new challenges in the Markets, and as a consequence, able to cope with the challenges posed by the digitalisation of the economy.<sup>91</sup>

#### **6.4. Economic Analysis of Market Power and Activity of Dominant Firms in the Digital Economy: Price and Non-Price Discriminatory Practices**

Economic analysis of all anti-competitive behaviours will face challenges due to the above explained. In Spain, the CNMC has established a new economic intelligence unit aimed at fostering *ex-officio* investigations based on statistical techniques and involve detection of prohibited conduct with data analysis<sup>92</sup>.

Besides, the CNMC has also affirmed in relation to the regulation and control of anticompetitive practices and, namely, concerning discriminatory practices in the digital platforms, being a part of the whole digital sector that: “economic assessments of digital platforms should adapt to the type of antitrust or compliance activity, whether it deals with prohibited agreements, abuse of dominant position or merger control. And within each category, given the heterogeneity of economic sectors and the wide range of business strategies, competition authorities are bound to adopt an *ad hoc* approach to assess every single case”<sup>93</sup>.

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<sup>90</sup> CNMC’s contributions on the “Implications of Digitalisation for Competition Policy” for the Conference on “Shaping Competition Policy in the Era of Digitisation, 2018, available at: <https://www.cnmc.es/sites/default/files/promocion/consultas/2018-10/CNMC%27s%20contribution%20on%20the%20implications%20of%20digitisation%20for%20competition%20policy.pdf>, at p. 6

<sup>91</sup> CNMC’s contributions on the “Implications of Digitalisation for Competition Policy” for the Conference on “Shaping Competition Policy in the Era of Digitisation” available at: <https://www.cnmc.es/sites/default/files/promocion/consultas/2018-10/CNMC%27s%20contribution%20on%20the%20implications%20of%20digitisation%20for%20competition%20policy.pdf>, at p. 9

<sup>92</sup> R. García Gallardo, Spain: Cartels and Leniency 2019, available at: <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/spain>

<sup>93</sup> CNMC’s contributions on the “Implications of Digitisation for Competition Policy” for the Conference on “Shaping Competition Policy in the Era of Digitisation, 2018, available at: <https://www.cnmc.es/sites/default/files/promocion/consultas/2018-10/CNMC%27s%20contribution%20on%20the%20implications%20of%20digitisation%20for%20competition%20policy.pdf>