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LATIN AMERICAN COMPETITION FORUM

-- Session III: Strategies for Competition Advocacy --

Contribution from Spain - TVDC

8-9 September 2010, San José (Costa Rica)

The attached document from Spain - TVDC is circulated to the Latin American Competition Forum FOR DISCUSSION under session III of its forthcoming meeting to be held in Costa Rica on 8-9 September 2010.

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LATIN AMERICAN COMPETITION FORUM

8-9 September, San José (Costa Rica)

Session III: Strategies for Competition Advocacy

-- CONTRIBUTION FROM SPAIN - TVDC¹ --

¹ The TVDC (Tribunal Vasco de Defensa de la Competencia) is a Regional Competition Authority in Spain.

COMPETITION ADVOCACY: INTERACTION BETWEEN LAW ENFORCEMENT AND COMPETITION ADVOCACY

"Real Estate Agents of Biskaia and Gipuzkoa": TVDC Resolution of 6 November 2008 (Case 4/2008)

Note from the Deputy Chair of TVDC, Juan Luis Crucelegui

1. Competition advocacy

1. The steps taken by the majority of developed countries in recent decades to liberalise and privatise economic sectors have served to highlight the benefits that a competitive system brings in terms of consumer welfare, social welfare, and economic progress.

2. The competition authorities have played a key role in this process by preparing reports on the functioning of regulated markets where government interference was excessive, making recommendations to liberalise those markets further, and supervising their functioning through punitive powers.

3. Recent years have seen increased intervention by the competition authorities in the area of competition advocacy, involving primarily preventive actions to avoid the introduction of new regulations that may be disproportionate to their objectives and taking steps to enhance knowledge and awareness among social and economic stakeholders as to the benefits of competition. Following the definition used by the International Competition Network (ICN), competition advocacy should be understood as "those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition." Competition advocacy policy thus works through two channels: the capacity to influence the regulatory framework and the possibility to reach the citizenry, in order to foster a culture of competition within society. In this way, competition advocacy involves activities targeted at the regulatory authorities as well as efforts to raise public awareness of the benefits that a system of free competition brings in terms of economic growth, greater productivity, more innovation, and higher employment levels.

2. Competition advocacy policy in the Spanish system

4. In the Spanish system for the protection of competition, the authorities responsible for its application (the National Competition Commission and the Autonomous Authorities) have been entrusted with the function of developing a policy of competition advocacy. Article 26 of Law 15/2007 on the Defence of Competition (LDC) provides expressly that "the National Competition Commission shall promote the existence of effective competition in markets, in particular through the following actions:

a) Promote and conduct studies and research on competition matters

b) Prepare general reports on sectors, with any appropriate proposals for liberalisation, deregulation or regulatory modifications;

c) Prepare reports, periodically if necessary, on government actions and, specifically, on situations resulting from the enforcement of legal rules that obstruct the maintenance of effective competition in markets;

d) Prepare general or specific reports on the impact of government subsidies on effective market competition;

e) Submit proposals to governments to amend or delete restrictions on competition resulting from their actions, and any other measures that favor the maintenance or restoration of market competition;

f) Propose to the Minister of Economy and Finance, for submission as appropriate to the Council of Ministers, policy guidelines for the defence of competition in the context of economic policy and, in particular, the corresponding proposals for regulatory development and reform.

5. In light of the decentralised system for enforcing competition policy that has existed in Spain since 2003 (with entry into force of Law 1/2002 on coordination between the State and the Autonomous Communities in competition matters), which has given rise to the creation of autonomous competition authorities (at the present time, 11 of the 17 Autonomous Communities have established their own competition authorities), this LDC-mandated function extends to the autonomous authorities who are developing advocacy policies within their respective jurisdictions. In this way, the entire territory of Spain is now the scene of important and coordinated actions for competition advocacy at both the national and the autonomous community level. This joint, coordinated action for competition advocacy by the State and autonomous agencies is having a very positive effect on the functioning of markets, and some sectors that were closely bound by government powers of regulation have succeeded not only in effecting regulatory amendments but also in changing the way those powers are used. There is no doubt that the road ahead is still a long one, and the obstacles are many, but the authorities that make up the Spanish system for the defence of competition are aware of the need to take innovative measures to promote a solid culture of competition in all sectors of the economy.

3. Competition advocacy in the work of the Competition Tribunal of the Basque Country (TVDC)

6. The TVDC is no stranger to this way of acting, as it accords great and growing importance to competition advocacy in all its actions, both with government and with private agents.

7. Since its creation in March 2006, one of the priority activities described in the strategic plan presented by the TVDC to the Basque parliament has been to take steps to promote understanding and a culture of competition in Basque society. These efforts have been pursued through various means and instruments, including the following:

- publication of articles and sector studies;
- preparation of a study on the competitive outlook for the Basque economy;
- hosting of conferences, seminars and courses;
- presentation by the authority to the most important public and private institutions;
- meetings with public entities, business associations and trade unions;
- cooperation with public and private universities;

- technical collaboration with professional associations;
- reports and recommendations to government departments of the Autonomous Community to institute and amend those forms of management that are not respectful of competition rules and to avoid establishing measures that would restrain competition (barriers to entry or to business activity) that are not justified or are disproportionate from the viewpoint of the public interest;
- measures to conduct competition advocacy in specific economic sectors, in interaction with antitrust enforcement.

8. With respect to this last item, relating to actions that combine antitrust enforcement with competition advocacy activities, the TVDC has taken a number of steps in cases dealing with the professional services sector, sporting federations and the Basque sport of *cesta puntal* (known elsewhere as "jai alai"). Of particular interest is the TVDC resolution of 8 November 2008 (*APIS de Biskaia y Gipuzkoa*) in which a series of competition advocacy measures were established to improve the competitive functioning of the professional services sector, and in particular the "membership" professions (i.e. those with their own professional association or society), beginning with a resolution that in principle applied only to the association of real estate agents in the two territories of the Autonomous Community of Euskadi (CAE).

4. The Real Estate Agents (APIS) of Biskaia and Gipuzkoa case

9. This case arose as a result of an investigation initiated by the Antitrust Service of the Basque Country (SVDC), the body responsible for conducting investigations and initiating prosecution before the TVDC, into the practice of the Associations of Real Estate Agents of Biskaia and Gipuzkoa, which had established indicative or "guideline" schedules for prices and *visado* (certification of work) charges.

10. In this case, after conducting the pertinent investigations, the SVDC proposed to the Tribunal that it should not to initiate penalty proceedings but instead should undertake competition advocacy activities. Nevertheless, the TVDC reached another conclusion, after an exhaustive analysis of the regulations applicable to professional associations and the administrative practice of the European Commission, through its decisions and communications, and also the reports and resolutions of the former Competition Tribunal (TDC) and the current National Competition Commission (CNC).

11. As expressed in the TVDC resolution, professional associations have traditionally sought to exclude of their activities from the scope of competition regulation. Consequently, the Tribunal decided to undertake a historical analysis of the progressive application of national and Community competition rules to the activities of professional associations and, in particular, to agreements, recommendations and decisions regarding prices.

12. In its analysis, the Tribunal took into consideration the following documents:

- The Professional Associations Act (*Ley de Colegios Profesionales*, LCP), adapted to the new democratic framework by Law 74/1978 of 26 December, governing the internal regulations of professional associations, which contained numerous and substantial restraints on free competition.

- The TDC Report on the Free Exercise of Professions (1992) which focused on that law². In that report the TDC complained that legislators had been "captured" by the associations and it identified three categories of restrictions on free competition: barriers to entry, restrictions on competition (territorial, advertising, business structure, etc.) not directly related to prices, and price-related restrictions, which explained their "exceptional privileges". In its report the TDC proposed, among other legislative changes, the deletion of article 5.6 of the Professional Associations Act (LCP), which allowed professional associations, within their territorial scope, "to regulate minimum professional fees if such fees are not chargeable in the form of customs duties, administrative tariffs or dues." The TDC also levelled criticism at the collegial *visado*, a practice unique to Spain, but it did not consider its immediate suppression a matter of priority.
- Law 7/1997, which amended article 2.1 of the LCP to establish the primacy of Law 16/1989 overall primarily economic aspects (offer of services and remuneration) of the rules of professional associations³. Along the same lines, Law 7/1997 amended article 2.4 of the LCP to reflect the primacy of Law 16/1987 over all agreements, decisions or recommendations issued by the professional associations⁴. With respect to article 5 of the LCP, the power to regulate minimum fees was replaced by the power to "establish fee scales, which shall be merely indicative" (article 5.ñ). As well, following the recommendations of the TDC, a second sentence was added to article 5 .q), worded as follows: "to certify the professional work of members, when this is expressly established in the general statutes. This certification shall not include fees or other contractual terms which are set by free agreement between the parties" (article 5.q).
- The decisions adopted by the TDC and the CNC penalising agreements and minimum price recommendations adopted by professional associations were also analyzed. In particular, reference was made to a CNC resolution of 27 December 2007 imposing a fine of €385,000 on the Official Association of Dentists and Stomatologists of Las Palmas for violating article 1 of Law 16/1989 by recommending minimum professional fees.
- The TVDC resolution also examined various decisions of the European Commission analyzing this situation. Thus, in 1993 the European Commission adopted its first decision penalising a professional association, in which it declared that the setting of minimum rates by Italian customs agents for customs clearance services, under protection of their national legislation, was contrary to article 85 of the EEC Treaty (currently, article 101 of the TFEU). In another decision, in 1995, the Commission found that the compulsory scale of minimum charges approved by the Spanish

² The core of this report was a proposal to amend some aspects of existing legislation that impeded the free play of competition in the provision of professional services. As we shall see, this was a modest proposal that did not call for eliminating all the restrictions enjoyed by these professions – for example mandatory membership in the association – but proposed simply to do away with those most harmful to the national economy: rules that prevented the free setting of prices for professional services. The reform also sought to remove other restrictions to competition (advertising, business structure, etc.) which, although seemingly less important, are also damaging and have no justification. The purpose of the reform is to bring the regime governing the provision of professional services system into line with the regime to which most activities in the country are subject: the free competition regime proper to a market economy.

³ "The membership professions shall be practised on terms of free competition and shall be subject, as regards the supply of services and the setting of remuneration therefor, to the LDC and to the Unfair Competition Law. Exercise of the professions shall in all other respects remain governed by general and specific legislation on the applicable substantive provisions relating to each profession."

⁴ "Agreements, decisions and recommendations of the associations which have economic significance shall comply with the limits set in Article 1 LDC, without prejudice to the right of the associations to apply for the individual authorisation under Article 3 of that Law."

Association of Industrial Property Agents (COAPI), under protection of article 5 of the LCP, constituted a decision by a business association that appreciably restricted competition in a manner contrary to article 85.1 of the EEC Treaty, and was not covered by the exemption provided in article 85.3 of that treaty.

- Finally, the TVDC analyzed initiatives pursued since 2000 in this sector at the European level⁵.

13. It should be noted that, on the eve of adoption of TVDC resolution, on 15 September 2008, the CNC published a "Report on the Professional Services Sector and Professional Associations" in which it recommended reducing the restrictions on competition found in two types of regulations that restricted the free exercise of professions:

1. Regulations that establish barriers to access or entry, which in turn may be of two kinds: qualification requirements and affiliation requirements, and
2. Regulations that impose limits on free exercise.

14. With respect to indicative fee schedules, the CNC report indicated, in particular: "The National Competition Commission has recently recommended the elimination of this possibility [footnote deleted] reiterating that, as the TDC held in its 1992 report, the setting of guideline rates constitutes 'consciously parallel practice', with effects similar to those of price-fixing. It does not amount to establishing a cartel, but participants all conduct themselves in the same manner, because they can reasonably anticipate how their competitors will behave. In effect, price recommendations not only present extremely dubious advantages but are likely to reinforce possibilities for price collusion between firms established in the market."

5. The TVDC Resolution

15. The TVDC resolution held that guideline fee rules for real estate agents of COAPI Biskaia and the guideline professional charges of COAPI Gipuzkoa contained collective pricing recommendations that could infringe article 1 of the LDC.

16. It held furthermore that such conduct was not protected by the LCP nor could it qualify for the legal exemption provided in article 4 of the LDC, as the associations argued it should.

⁵ In 2000 the OECD published its report on "Competition in Professional Services", Committee on Competition Law and Policy, OECD, 22 February 2000, DAF/CLP (2000) 2. <http://www.oecd.org/dataoecd/35/4/1920231.pdf>; "Economic impact of regulation in the field of professional services in different member states", a study prepared for the Competition DG of the European Commission by the Institute for Advanced Studies (IHS) in Vienna, January 2003 http://ec.europa.eu/comm/competition/sectors/professional_services/studies/studies.html; European Commission, "The independent study undertaken by the Institute for Advanced Studies in Vienna (IHS) found that in a large number of Member States professionals are subject to highly restrictive rules which distort competition and would be considered unacceptable in most spheres of economic activity", Communication from the European Commission, "Report on competition in professional services", COM (2004) 83 final, 9 February 2004 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0083:FIN:ES:PDF>; in 2005, the Commission published a communication with its "Follow-up report" to the Report on competition in professional services, in which it called on member states to eliminate regulatory restraints on free competition in the liberal professions and encouraged the national competition authorities to take action against decisions and recommendations of professional associations that restrict competition.

17. Finally, it considered that the imposition of a professional certification (*visado*) price that bore no relation to the actual economic cost of the service provided was conduct that could constitute abuse of dominant position, prohibited by LDC article 2.

18. Consequently, the Tribunal rejected the SVDC's proposal not to pursue the case: bearing in mind that, according to the report submitted by the SVDC, the use of "guideline fee scales" by professional associations as collective pricing recommendations was a generalised practice, the TVDC proposed to subsume the SVDC's findings with relation to COAPI Biskaia and COAPI Gipuzkoa into a broader action intended to eradicate conduct of the professional associations contrary to LDC articles 1 and 2 definitively. That action will be directed against all professional associations active in the Basque Autonomous Community and implies granting all of them, including COAPI Biskaia and COAPI Gipuzkoa, a reasonable length of time to amend their statutes, agreements, decisions and recommendations to bring them into line with the provisions of the LDC. Once that time limit has expired, the SVDC will recommend, and the Tribunal will decide, on sanctions against those professional associations that have not ceased their violations of the LDC.

19. In summary, the Tribunal ordered the SVDC to take the following actions:

- The SVDC will communicate this resolution to all professional associations of the Basque Autonomous Community and will give them six months to proceed voluntarily to withdraw: the guideline fee schedules equivalent to collective price recommendations; the abusive prices and terms of certification services; and any other conduct prohibited by LDC articles 1 or 2.
- The SVDC will offer its cooperation to those professional associations that so request to help them adapt their statutes and other internal regulations to the LDC.
- At the end of the six-month period, the SVDC will take legal action against any professional association that has not ceased conduct prohibited by articles 1 or 2 of the LDC.
- The SVDC will communicate this resolution to the Department of Justice, Employment and Social Security of the Basque Government and will seek to suspend the registration of all proposed association statutes that contain conduct prohibited by LDC articles 1 or 2.
- The SVDC will offer its cooperation to the Department of Justice, Employment and Social Security of the Basque Government in analyzing the LDC conformity of the draft association statutes submitted for its consideration.

6. Conclusions

20. The resolution was notified and put into practice within the territorial jurisdiction of the CAE. The SVDC, as the enforcement body for TVDC resolutions, notified all professional associations of the mandate handed down and gave them six months to comply with it.

21. This is a case of a resolution adopted under antitrust law on the basis of an investigation that, in principle, concerned the practices of only two professional associations. However, the situation prevailing in the professional association sector and the obvious lack of competition in the exercise of certain professional services and in certain associations in that sector led the TVDC to target its resolution at eradicating a series of anticompetitive practices that had been pursued for many years with full impunity and protected under the cloak of professional association regulations that are obsolete for our time, highly debatable, and absolutely inappropriate and disproportionate from the viewpoint of free competition. The TVDC resolution establishes a *sui generis* manner of acting, taking advantage of a decision on a

disciplinary case to use the advocacy channel in order to combat a serious competition problem, giving the associations adequate time to rethink their practices and their market effects and to modify them in order to make a better-functioning and more competitive market for professional services.

22. It must be noted that the time limit initially granted by the Tribunal has been extended in light of the procedural difficulties that some professional associations faced in amending their statutes in such a short time. However, since the date of the resolution there have been a series of regulatory amendments issued that have an important impact on the sector. In particular, the legislative amendment introduced by the Omnibus Act, whereby Spain is implementing the European Services Directive, has served to modify the most hotly disputed provisions and to eliminate the legal uncertainty provoked by the Professional Associations Act as to whether certain practices permitted by that Law were compatible with competition legislation. Similarly, the government is currently considering a draft law that would affect this sector directly and result in a new regulation governing professional certifications.

23. Currently, as a result of this TVDC resolution, nearly all professional associations in the Basque Country are working to bring their statutes into line with the LDC. The Basque Antitrust Service notified the resolution to 82 professional associations that were active in January 2009, and it sent reminders in May 2009 to 57 of those associations that had ignored the first letter. The reaction of the professional associations to this form of action has been varied, but in general positive. According to data available in the SVDC, 31 professional associations have now completed the task of adjusting their statutes and another 34 are in the final stages. Some associations have requested a time extension in light of the regulatory amendments that still must be made and the need to clarify their legal situation. Finally, there are a few associations that have refused to perform the work required. One of them is now the object of enforcement action that is to be decided by the TVDC during the course of the year.

24. Clearly, the TVDC considers the advocacy route highly appropriate for carrying out its essential work, which is to see to the proper functioning of markets. On this occasion it has taken advantage of an enforcement case to intervene in a non-coercive manner in an essential sector of our economy that represents 8% of GDP. The results to date are positive but the most important effect is to have introduced in the professional associations sector a concept that until very recently was nearly unknown.