

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Competition Issues in Labour Markets – Note by Spain****5 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

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1. Introduction

1. The Spanish Competition Authority is aware of the demands for reform from the perspective of competition being asserted in social debate in recent years, primarily because indicators of economic growth for most developed countries are not associated with a pattern of wage increases. This translates into a decline in the contribution of income from work to GDP and an increase in inequality in those countries. Whatever the reasons for the slowdown in wage growth and the resulting impact on the public interest, one underlying element in most analyses is that the problem is due to a lack of competition among companies. Furthermore, they more or less openly propose fighting the concentration of economic power as a solution.

2. The question now arises whether competition authorities will be capable of expanding their focus to incorporate concentration in labour markets. Incorporating this new approach is certainly no simple matter, because it should not be forgotten that, a priori, for the conduct of a monopsonist with a dominant position in the labour market to be considered anticompetitive, and therefore, pursued by a competition authority, it must be possible to demonstrate the negative impact of said conduct on competition.

3. Generally, in the sphere of Spanish competition, no cases have been submitted which involve a concentration of employment demand power (or of purchasing employment) or in a certain entity in relation to a reference market made up of providers of work (workers).

4. The CNMC (National Commission on Markets and Competition) has studied cases of collusive conduct restricting competition, and therefore prohibited by Article 1 of Act 15/2007, of 3 July, on the Defence of Competition (LDC) and, as applicable, by Article 101 of the Treaty on the Functioning of the European Union (TFEU), which included among such actions agreements whose aim was to restrict competition in the labour market.

5. It is necessary to bear in mind that such conduct is markedly objective in nature: it is enough for the conduct to have the ability to distort or falsify competition for it to be illegal. Therefore, it is not necessary to demonstrate the impact on the market, which has eliminated the need to conduct any research on the affected labour market. It should also be noted that in none of the cases analysed did the agreements reached or the exchanges of commercially sensitive information exclusively contain aspects relating to the company's workforce or its conditions of employment. Instead, these were incorporated into broader and more complex agreements that included other strategic variables such as prices, market segmentation strategies, division of tenders, etc.

6. Other common characteristics of these agreements are, firstly, that they are usually informal or verbal in nature and that the evidence uncovered consists of reference to the same, and secondly, that they are preceded by friction in the labour market shared by the companies that reach said agreements, such as problems recruiting workers, risk of industrial unrest, very specific jobs with the need for ongoing professional development in certain areas, etc.

7. Regarding to collective bargaining and competition, it is necessary to qualify that the cases to which we refer below in relation to trade unions are rather a special case of

‘oligopoly of labour supply’ for very particular markets in Spain related to Puertos del Estado (operator of state-owned ports), in which a highly concentrated supply of workers, represented by trade union entities and with a strong protectionist tradition in the sector, attempts to impose anticompetitive conditions on the companies that hire their members.

8. The CNMC has addressed some competition issues in labour markets with advocacy instruments such as reports and market studies two of which are exposed below.

2. Labour Monopsony Power: Enforcement of competition law in relation to employers’ monopsony power.

9. Specifically, in actions taken by the Spanish Competition Authority against cartels, two types of actions restricting competition have been identified in the sphere of labour, with the effect of creating a labour monopsony by means of a cartel:

2.1. No-Poaching agreements.

10. These agreements were analysed in the following cases: **S/0120/08 Transitarios**¹ and **S/0086/08 Peluquería Profesional**,² both cases originating from a leniency application and both resulting in the companies involved being charged with one single and continuous infringement, constituting a cartel.

11. The first cartel included no-poaching agreements between the companies involved in that cartel, which for a substantiated period of eight years coexisted with other agreements on rate increases, common strategy to pass on direct costs to customers and price increases for a certain range of customers.

12. In the second cartel, the companies involved exchanged present and future commercial information of various types, along with information relating to the pay for salespeople (fixed and variable), commissions and daily expense allowances for each employee and number of employees. A so-called gentlemen’s agreement to not recruit their salespeople (sales staff) was also uncovered.

13. The Spanish Competition Authority considers agreements regarding employee hiring to be a competitive strategy with an impact on costs and margins, with the same depressive effect on the market as price agreements, replacing free and individual business autonomy in adopting certain decisions with a sort of pact, with the ability to falsify competition.

14. This was indicated in the 31 July 2010 decision in case **S/0120/08 Transitarios**:

‘The fact that companies can steal employees from each other will do nothing but raise their market value, which generates a cost increase, in this case labour costs, in addition to the disruption in the company’s production processes which the unexpected loss of an employee may cause, even more so the more skilled and strategic to the organization they are. Therefore, this agreement is necessarily closely related to cost increases and their impact on margins.’

¹ Decision of 31 July 2010, available at <https://www.cnmc.es/expedientes/s012008>.

² Decision of 2 March 2011, available at <https://www.cnmc.es/expedientes/s008608>.

15. It also recognizes that such actions have a negative impact on the employee's negotiating capacity and their remuneration. Said decision states:

'This coordinated action makes it possible, at the least, to begin from a better negotiating position with customers than would have been possible in the absence of the agreement, under normal competition. This is also potentially applicable to workers in the case of the no-poaching pact ... The risk that a competitor could take your employees gives the latter greater negotiating capacity and the capacity to demand more attractive remuneration, appropriate to the demand for this worker in the marketplace. If it is agreed that there will be no recruitment or that this will not take place without consent, workers lose negotiating capacity, which impacts their remuneration.'

16. In this decision, the Spanish Competition Authority does not accept that a no-poaching pact is not anticompetitive in nature based the argument that it does not entail uniformity of conditions of trade, given that it considers it to be an input on which influence is placed in order to reduce competition between the companies involved in the cartel, so that:

'Hiring workers is a parameter of competition among companies, given that the job factor is necessarily an input for the business activity, and the intent and effect of the pact reached are to reduce competition among the cartelized companies in acquiring this input. In addition, the pact is also liable to affect the conditions of said input to the detriment of workers.'

17. Insofar as a no-poaching agreement affects the prices of the input in question (wages), reducing them or eliminating uncertainty about the price of that input for competitors, the Spanish Competition Authority has interpreted the definition of 'price-fixing practices' broadly to include other less obvious activities, but which have the same aim of limiting said competition, and interprets the definition of cartel in Additional Provision 4 of the LDC in the following way in its 2 March 2011 decision, case **S/0086/08 Peluquería Profesional**:

'In the second element of the definition of cartel, "price-fixing, fixing production or sales quotas, dividing up markets, including fraudulent bidding, or the restriction of imports or exports," from which it is obvious that the legislator did not wish to include only the most obvious types of the practices listed, as "price-fixing" can be undertaken in very different ways and effective regulations in defence of competition must be able to encompass not only the clearest types of price-fixing (such as plain and simple setting of retail prices), but also more or less subtle agreements and practices which are intended to limit competition in prices. Therefore, the CNC Council considers that the substantiated practices can be classified as a cartel in the sense of AP 4 of the LDC, given that their aim was to restrict price competition, quantities and other competitive variables equivalent to price-fixing.'

18. Although it is not necessary an analysis of the effects of this conduct that constitutes an infringement under Article 1 LDC and 101 TFEU, in this decision the CNMC recognizes consequences of a no-poaching agreement exceeding the LDC infringements, affecting the free movement of workers:

'The severity of the substantiated facts is unavoidable, demonstrating how the meetings were utilized ... agreeing to exchange commercially sensitive information, eliminating any uncertainty in their operations in the marketplace with regard to

the actions of their main competitors, and agreeing on a no-poaching pact. Therefore, the consequences exceed the infringements of the LDC, as this represents a limitation on the free movement of their workers.'

2.2. Agreements fixing conditions of employment for workers.

19. These are agreements that increase the 'purchasing power of employment' turning the companies in the cartel, in practice, into 'a single employer'. They also come under the prohibition established in articles 1 LDC and 101 TFEU, as they agree on uniform conduct with regard to different strategic variables, such as the employment conditions of their workers. Case S/DC/0612/17 Montaje y Mantenimiento Industrial (still in proceedings) is highly descriptive of the complexity and scope of these agreements, fixing not only wages by employee category (that as well), but also what they call 'administration time', including base salary, overtime, expense allowances, prorated training expenses, supplementary payments, bonuses for safety conditions on the job, etc.

2.3. Conclusions

20. These agreements are harmful to workers because they increase the purchasing power of employers, in the form of both fixing conditions of employment and no-poaching agreements cannot but be anticompetitive. Nevertheless, this fact should be specified more forcefully in competition regulations in order to facilitate express decisions on these aspects. Lastly, it should be mentioned that there has been no case of labour monopsony in the area of concentration oversight that has required the study of reference labour markets.

3. COLLECTIVE BARGAINING AND RIGHT TO COMPETITION: Limits of competition regulations with regard to the power of the labour market.

21. The CNMC has had the occasion to handle, in various cases, aspects that directly or indirectly affect the labour market. Those which it has handled have involved, in particular, considering trade unions to be economic operators, applying the rules of competition to agreements resulting from collective bargaining, and their possible collusive nature, sanctioning those cases for infringement of Article 1 LDC and, if applicable, Article 101 TFEU, due to the fact that they include restrictions on competition in the labour market, among other things. In its decisions, the CNMC has consistently maintained that, notwithstanding the regulated nature of the labour market and the special protection enjoyed by workers' rights, agreements resulting from collective bargaining are subject to the legal system as a whole, including the rules of competition, and they may be considered agreements between companies, which may restrict free competition. Therefore, following recorded case law³, the CNMC concludes that collective agreements are not

³ The EU Court of Justice has already stated that agreements entered into within the context of collective bargaining between management and labour, intended to improve employment and working conditions, should not be considered included, in view of their nature and object, within the scope of application of Article 101 TFEU paragraph 1. [Albany judgement, paragraph 60; Brentjens', paragraph 57; and Drijvende Bokken, paragraph 47; judgements of 12 September 2000, Pavlov and Others, C-180/98 to C-184/98; and 21 September 2000, van der Woude, C-222/98, paragraph 22.] Therefore, a contrario sensu, if these requirements are not met, they are included in the scope of application of Article 101 TFEU paragraph 1.

unconditionally and absolutely excluded from application of LDC. However, the rules of competition are applied by the CNMC, case-by-case, and contingent on compliance with the minimum requirements, established by national and community case law (in the well-known *Viking* and *Albany* judgements). That is to say, in order to safeguard recognition of the fundamental right to collective bargaining and to be able to exclude collective agreements from application of the rules of competition, it is necessary for the agreements not only to be such in nature, but also to regulate the matters inherent to them.

22. Therefore, all that which exceeds or does not comply with these two determining factors will enable the competition authority to undertake their analysis and apply, if appropriate, the rules of competition.

23. In fact, the CNMC conducts this analysis in several of its decisions, stating an opinion on the different aspects related to the labour market, but always from the perspective of the rules of competition and safeguarding the legitimacy befitting the labour authorities.

24. The main conclusions are discussed below.

3.1. Trade unions as economic operators:

25. Given the broad concept of company that holds in the sphere of competition, when the actions of trade unions exceed union representation, affecting other spheres or activities, the provision of goods and services, their status as economic operator cannot be denied and it is possible to analyse whether their actions infringe the rules of free competition⁴.

26. This appears in the decisions of the Spanish authority in the following cases:

- S/377/96 Pan de Barcelona (Bread of Barcelona), confirmed by the 10 September 2010 judgement of the Spanish National Court.
- S/506/00 Transporte Mercancía Vizcaya (Vizcaya goods transport).
- S/2805/07 Empresas estibadoras (Cargo-handling companies). In its decision,⁵ it is indicated that *‘without prejudice to the preceding, the concept of company in the sphere of competition is very broad and encompasses any entity which engages in an economic activity, regardless of its legal status or its method of financing, as the Albany judgement indicates in point 77, referring to the repeated case law of the CJEU. Therefore, although it is not necessary to give an opinion on the classification of trade unions as companies for the rules of competition to apply to an agreement, it may be said that in certain circumstances and under certain conditions, trade unions may be responsible for their involvement as necessary collaborators in introducing restrictions on competition into the markets.’*

⁴ In the 4 May 2010 judgement of the Spanish National Court (case S/2805/07 EMPRESAS ESTIBADORAS): *‘Both this Court and the Supreme Court have ruled on the circumstance that any economic agent is subject to the Defence of Competition regulations, with reference to any actor operating in the marketplace, including the public administrations themselves.’*

⁵ Confirmed by the 5 July 2013 judgement of the Spanish National Court and made final by the 8 March 2016 judgement of the Spanish Supreme Court.

3.2. Application of the LDC to collective agreements:

27. Agreements resulting from collective bargaining are agreements between competitors and in this regard, they involve aspects, which restrict competition. Although their aim of protecting workers constitutes a fundamental right, which can, in theory, justify a restriction on one of the fundamental freedoms guaranteed by the Treaty, said measures must be appropriate to obtain the legitimate aim and must not go beyond what is necessary to achieve this.⁶

28. There is no generic prior exemption from application of the competition regulations.⁷

29. Consequently, the necessary protection of the objectives of social policy and the right to collective bargaining require a dual analysis of the nature and object of the controversial agreement to determine whether it is subject to the LDC. The dual filter that was established in due course in the Albany judgement (case C-67/96, STJUE of 21 September 1999).

30. Thus, collective agreements entered into in good faith between business owners and workers regarding the matters inherent to collective bargaining, such as wages and working conditions, which do not directly affect third parties or other markets, must enjoy automatic immunity with regard to examination in accordance with the competition rules.

31. However, when the agreement or settlement goes beyond these spheres, in cases where there are indications of exceeding or overstepping, a new analysis could be done, from the perspective of competition, and it would be possible to apply the LDC. This was the result in the cases in which it has been possible to analyse the agreements from the perspective of the LDC, either because they protect a fictitious collective agreement (nature) or because they overstep in their content, affecting third party companies, workers or markets.

32. Therefore, when the agreement goes beyond its inherent scope, the competition authorities, in accordance with the principles of the Albany judgement, must analyse its nature and object before deciding whether it falls under the rules of competition or it is excluded from these. And in that analysis, special attention must be paid to not only the matters covered by the agreement, but also and most especially, to whether it establishes obligations for third parties or impacts other markets in a manner not justified by the objective of the collective bargaining⁸.

⁶ 26 July 2018 CNMC Council decision in case S/DC/0596/16 ESTIBADORES VIGO in reference to the 11 December 2007 judgement of the Court of Justice of the European Union, preliminary ruling in Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line (2007) ECLI:EU:C:2007:772.

⁷ Albany judgement (case C-67/96, STJUE of 21 September 1999).

⁸ 24 September 2009 decision of the Council of the National Commission on Competition, case S/2805/07 Empresas estibadoras, confirmed by the 5 July 2013 judgement of the Spanish National Court and made final by the 8 March 2016 judgement of the Spanish Supreme Court.

3.3. Cases in which the LDC is applicable:

3.3.1. Fixing conditions of trade. Maintaining the legal reserve in an industry undergoing deregulation:

- S/2805/07 Empresas estibadoras (Cargo-handling companies). Final decision by the 8 March 2016 judgement of the Spanish Supreme Court, which states that the agreement in question, in its content, goes beyond the strictly labour context of collective agreements, by extending its subjective and functional scope of application, including complementary activities performed by non-cargo handling companies and by affecting workers not part of this type of company. Therefore, it is unquestionable that the legality of the aforementioned Agreement IV can also be judged from the perspective of the right to competition, when it includes clauses whose object is to restrict competition in the complementary port services market, which affects all ports of public interest, to the benefit of the cargo-handling companies.
- S/DC/0596/16 Estibadores Vigo (Vigo Dockers). An assessment was done of three agreements which get round the deregulation introduced (i) two of them maintain the legal reserve (ii) another agreement permits free recruitment only in cases where demand exceeds the workforce of the SAGEP (port docker management limited company), limited to maximum number of workers (appealed before the Court).

3.3.2. Limitation on production, distribution, technical development or investments:

- S/377/96 Pan de Barcelona (Bread of Barcelona). This was deemed a group agreement to determine who manufactures and what product they manufacture, limiting commercial freedom, and that it had nothing to do with regulating relations between company and workers.

3.3.3. Price-fixing/recommendation

- S/506/00 Transporte Mercancía Vizcaya (Vizcaya goods transport). S/607/06 Ayudas a domicilio (In-home help).
- S/0076/08 Convenio de Contact Center (Contact centre agreement).
- S/0077/08 Convenio de Seguridad (Security agreement).

3.4. Cases in which the rules of competition do not apply:

33. S/0197/09 Convenio de seguridad (Security agreement), whose decision was overridden by the Spanish National Court: Although the then Spanish Competition Authority sanctioned this, judging the terms of the agreement to represent a barrier to entry in a highly concentrated market, by imposing the replacement of personnel with enormous costs and dissuading new companies from entering, the 29 November 2013 judgement of the Spanish National Court overrode the decision, deeming the LDC not applicable in this case:

- Because the challenged clause: 1) was agreed in the context of collective bargaining, and 2) its content relates to working conditions (replacement) which seek to guarantee the job stability of employed workers.

- It is excluded from the scope of oversight of the Spanish Competition Authority due to lack of authority and falls under the control of the legality of the agreements, which is the responsibility of labour regulation.
34. S/0398/12 Loomis Prosegur. Closed.
35. S/0090/08 Coordinadora Estatal de Trabajadores del Mar (State Coordinator of Sea Workers). Closed.

3.5. Conclusions:

36. The LDC does not apply to agreements that are by nature collective agreements, which deal with essential aspects of collective bargaining inherent to labour authorities. What is more, although they may in effect restrict competition, these cases are excluded from the scope of oversight of the competition authority, which may not undertake to analyse them.

37. The LDC does apply, and it is appropriate to conduct a competition analysis, when the agreements or actions are not covered by labour legislation (due to not being legitimate collective agreements) and they affect relations between business owners and third parties. In that case, they can be sanctioned if their aim or effect is to restrict competition.

4. COMPETITION ADVOCACY IN THE LABOUR MARKET

38. Competition authorities can also use their advocacy tools in cases related to the labour market when it is suitable. The CNMC has addressed competition issues in labour markets with advocacy instruments such as reports and market studies. Below, two examples of advocacy actions related to labour conditions are exposed.

4.1. The case of air traffic controllers

39. In 2018, the CNMC published a Study on Air Traffic Services in Spain, in which it assessed the partial liberalization of these services undertaken in Spain in 2010. The liberalization covered both air traffic and training services.

40. The Study highlights the strong relationship between the labour and service markets in this sector. Considering that air traffic controllers are the main input for the provision of air traffic services, and that their training is subject to strict regulatory requirements, the efficient functioning of the labour market (supply of air traffic controllers) is indispensable for the efficient functioning of the service market (demand for air traffic controllers).

41. Act 9/2010, of April 14, opened aerodrome air traffic and training services to competition in Spain. As a result, these air traffic services have been tendered out in 18 airports and three new providers have entered the market (FerroNATS, SAERCO and INECO). Up until that point, a public monopolist, ENAIRE, provided these services. The liberalization has had a very positive effect in terms of efficiency, which has grown 60% on average, and quality, which has improved by 7% in the tendered control towers.

42. However, the process stagnated after 2011 since no other control towers have been tendered out and the liberalization has not been extended to other air traffic services, such as approach services, which have been opened to competition in the rest of European countries that have liberalized aerodrome air traffic services. Therefore, the public firm

ENAIRES is still the only aerodrome air traffic services operator in all but 18 airports and the monopolist of the rest of air traffic services.

43. The 2010 reform also liberalized the provision of training services for air traffic controllers. Thus, they may be offered by any organization that has been certificated by a Member State supervision authority. However, this market has suffered a lack of dynamism, partly due to the absence of hiring processes of air traffic controllers until 2016. On the one hand, ENAIRES cut short its recruitment between 2010 and 2016 due to budgetary restrictions. On the other hand, entrant firms hired controllers when they started their operations in the liberalized towers (between 2012 and 2014) but had no need to hire any more until 2016, when ENAIRES started to do so.

44. The lack of hiring in the air traffic services market during these years led to low activity in the training market. There were low incentives to offer training as demand for it was also low: Training is costly, takes several months (up to a year) and the validity of licenses expires if its holder does not work within the periods established by the regulation. Before 2015, only one private firm entered the market of initial training (FTEJerez in 2011) to compete with the incumbent public firm (SENASA). Afterwards, two air traffic services providers started to compete: in 2015, SAERCO and in 2018, FerroNATS.

45. ENAIRES's 2016 recruitment process caused a significant movement of workers from the three private air traffic services providers to this firm because of the considerably higher salary offered by ENAIRES. These three firms had to hire new controllers to guarantee the continuity of the service provision, but the scarcity of candidates was an obstacle to fill the vacancies rapidly.

46. In this context, all the air traffic services providers signed a Protocol for a correct and orderly movement of air traffic controllers in October 2017, which aimed at limiting the effects of ENAIRES's recruiting on private operators.

47. To this end, the Protocol imposed publicity obligations on ENAIRES concerning its hiring policy. Moreover, among other commitments, the companies agreed not to hire controllers that worked for any of their competitors if the current employer gave notice in writing that they had not been replaced. The clause was however never applied in practice and the Protocol was eventually repealed in October 2018. This case illustrates how competition and labour relations affect one another: the lack of competition in the air traffic services market had adverse effects on the training market, impeding its development. At the same time, the absence of dynamism in the training market affects the labour market of air traffic controllers, since it makes it more difficult for air traffic services providers to substitute controllers who leave.

48. After analysing this sector, the CNMC concluded that the best way to solve these problems was to intensify competition in the provision of air traffic services. It recommended extending the scope of the liberalization both to more control towers and to approach control services. Apart from improving efficiency in the ATS market, this would make the training market more dynamic as well as competitive, and would facilitate the filling of air controllers' vacancies.

4.2. Subrogation clauses in public concessions

49. According to EU regulation, where competent authorities require public service operators to comply with certain social standards, tender documents shall list the staff

concerned and give transparent details of their contractual rights and the conditions under which employees are deemed to be linked to the services.

50. The CNMC recently examined a case concerning the allocation of intercity bus transport routes. According to the Spanish legislation, intercity bus transport is a public service, and routes are allocated in public tenders to private operators (concessionaries) who monopolize the service. The CNMC analysed a clause that obliged the winner to assume labour costs and staff of the previous concessionary as regards drivers and other staff. The CNMC was concerned by the fact that the tender gave ample discretion to the incumbent to designate the staff that would be assumed by the successful winner. Indeed, whereas a requirement for designated drivers was that they had to have been mainly dedicated to the route, there were no similar requirements as regards other staff members. As a result, the incumbent could have an advantage in the tender, given the asymmetry of information and the fact that she could use such designation strategically to increase new entrants' costs.

51. In the CNMC's initial assessment, the clause was contrary to the general principles of equal treatment of competing operators, proportionality and transparency. The sectorial competent authority finally notified the CNMC that the tender procedure was cancelled.