Entering into long term agreements may constitute an abuse of a dominant position

Resolution of the Spanish Competition Authority (CNC), of 24 October 2011, (Case S/004/08, Teleshopping)

Background

In this case, the CNC analyzes, among other issues, whether the fact that the department store El Corte Inglés entered into several agreements with television operators to broadcast teleshopping programmes constitutes an infringement of the Spanish Competition Law and, especially, an abuse of a dominant position.

The market share as a reference value

The CNC concludes, in the first place, that in this particular case the value of the market share of El Corte Inglés has only a relative importance. Although El Corte Inglés holds between 56% and 66% of the teleshopping market share, the CNC considers that this percentage does not place it in a situation of economic power that would enable the company to act with a considerable degree of independence with regard to its competitors. The CNC reaches this conclusion by assessing first that El Corte Inglés has a considerable degree of dependence in relation to the television operators that are its main suppliers, and by emphasizing the dynamic character of the market in question. The CNC reminds that in order to assess the dynamism of a market it has to take into account not only the current market situation but also its expected future evolution.

Exclusionary agreements

Dominant companies that raise barriers to the entry of new competitors into the market may incur in an abuse of a dominant position. A classic example of this situation takes place when a dominant company enters into long term agreements with its clients, thereby preventing other operators from entering the market.

If the conduct of the dominant company produces this effect, it will be of little use to the company to defend itself by putting forward that the parties' intent was not to generate illegal entry barriers. On the contrary, it would indeed be helpful to argue that there are objective justifications, related in any case with the type of product concerned or with the market in question, for entering into these long term agreements.

In this line, the CNC points out that if the conduct of the dominant company responds to competition based on the merits of the products and services as provided, and it results to be proportionate, then the restrictive effects on competition that may be caused are justified and must be accepted. In general, companies holding a market share of more than 40% must make a cautious analysis of any agreement involving exclusivity clauses with a duration of over one year. Exclusivities of longer duration are by no means prohibited but it is necessary to make an analysis of the agreement in its legal and economic context in order to determine that there is no risk of infringing the Spanish Competition Law.