



Recommending the retail price is legal as long as a fixed or minimum price is not imposed or encouraged

Resolution of the Spanish Competition Authority (CNC) of 30 of December of 2011 (Case S/323/11 Industrial Farmacéutica Cantabria)

A company which sells pharmaceutical products through a web page filed a complaint with the CNC against a pharmaceutical company which manufactures and markets cosmetics and food supplements for an alleged resale price maintenance, refusal to supply and discrimination between traditional and electronic selling. According to the complainant, certain promotional packs were vetoed to the operators of electronic commerce. The CNC considers there is no indicia of infringement of the antitrust rules and decides to close the file on the complaint on the basis of the following arguments:

Resale price maintenance

The complainant put forward that the pharmaceutical company against which the claim was brought threatened not to supply its products if the resale prices on Internet were inferior to the 15% of the retail price recommended by the pharmaceutical company.

On this point the CNC reminds that antitrust rules sanction the establishment of a fixed or minimum resale price, but recommending a resale prices or establishing maximum prices is acceptable provided that the market share of each one of the parties does not exceed 30% and that the recommendation is not accompanied by pressure or incentives (threats, fines, suspension of deliveries) which would entail a “de facto” establishment of a fixed price.

In the reported case the pharmaceutical

company provided a list of recommended resale prices which expressly stated that it was “for guidance only, being the retailer free to set the retail price.” The CNC considered that the complainant was unable to prove the alleged threats received from the pharmaceutical company, and also it considered that there were no indications of such threats as various online parapharmacies were offering prices inferior to those recommended by the pharmaceutical company. Furthermore, the CNC consulted some of the competitors who declared that they can freely set the retail price.

Abuse of dominant position

With regard to the allegation of abusive behavior such as discrimination and refusal to supply, the CNC reminds that in order to determine the existence of an anticompetitive abuse the company against which the claim was brought must hold a dominant position in the relevant market.

In order to determine such position the CNC uses the criterion established in the Guidelines of the European Commission, according to which companies with market shares below 40% are not eligible to exercise market power, and the existence of a dominant position can be presumed when the market share exceeds 50%. Since the market share of the accused pharmaceutical company did not exceed 25%, it was concluded that there was no dominant position and, therefore, no abuse could be determined.