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An exclusivity clause with a duration of more than 5 years may be valid if it does not significantly affect competition

Resolution of the Spanish Competition Authority (CNC) of 30 July 2012 (Case S/369/11 Texaco)

Disputes among wholesale distributors of fuels and the operators who run service stations have resulted in a number of judgments of the Spanish courts, resolutions of the CNC and the European Commission, and even several interpretative judgments of the ECJ. One of the many issues discussed in such lawsuits is the validity of exclusive supply agreements with a duration of more than 5 years. The judgments vary according to the specific circumstances of each case, and a special relevant point is whether the wholesaler owned the grounds and the premises of the service station or not, as well as the version of the Regulation on vertical agreements in force at the moment of bringing the claim.

Minimum purchase obligations may imply de facto exclusivity

In the present case, the contested practice consisted of the signing of an agreement with a duration of more than 5 years which established the obligation to purchase each year 80% of the amount of fuel purchased the previous year, with a minimum annual purchase. According to the evidence provided by the plaintiff, the minimum purchase volumes established by contract exceeded the total demand of fuel of the service station, therefore the fulfillment of the contractual obligations de facto prevented the access to alternative sources of supply.

On the basis of such circumstances, the CNC considers that, although the literal wording of the agreement did not demand exclusive supply, the minimum purchase conditions turned it into an exclusive supply agreement with a duration of more than 5 years, and therefore it would not be covered by the exemption foreseen in the Regulation on vertical restrictions (Texaco did not own the service station).

Significant effects on competition

Although the agreement is not covered by the exemption of the Regulation on vertical restrictions, the CNC decides not to initiate disciplinary proceedings against Texaco on the basis of article 3 of the Antitrust Regulation (RD 261/2008), in virtue of which the CNC may consider that the prohibitions of the Competition Law do not apply to certain conducts of minor importance.

Applying the Delimitis test, the CNC concludes that the agreement against which the claim was brought does not affect competition in a significant manner because, from the analysis of the economic and legal context of the case, one can deduct that: (i) the market is not difficult to access by competitors (45% of the service stations of the relevant market are not exclusively bound to one wholesaler), and (ii) the agreement against which the claim was brought does not contribute significantly to the closure of the market due to the total of similar agreements that might have a cumulative effect (Texaco has a market share of 15%, so the annulment of the questioned agreement would practically not alter the percentage of free service stations).