DISTRIBUTION OF DAILY CONSUMER GOODS:
COMPETITION, OLIGOPOLY AND TACIT COLLUSION

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1 Introduction

The existence of competitive markets is an essential condition to ensure the efficient allocation of production resources, economic growth and sustainable employment. Therefore, in parallel to a sanctioning function, competition authorities must carry out preventive monitoring of the markets and propose competitive remedies when the competition conditions in the markets fail to guarantee effective competition.

In recent years, the high concentration of retail distribution and its influence on the prices of essential goods and commercial relations with suppliers has generated an intense debate in many countries, accompanied by a call for greater regulatory intervention and involvement of the competition authorities. Recently, this debate has crossed national borders and reached a European dimension. At the end of 2007, the European Parliament adopted a Declaration calling for greater control of distribution and a community regulation for relations with manufacturers and producers. Similarly, at the end of 2008, the European Commission adopted a Communication in which the legal barriers and anti-competitive practices in retailing are associated with the inflationist trend of foodstuffs, and the need for greater control is emphasised. This Communication led to a Resolution from the European Parliament, approved in March 2009, in which the lack of action of the European Commission in this field is criticised and the need, among other measures, for greater intervention of the competition authorities to control abusive practices of large-scale distribution against suppliers and consumers is reiterated.

The Study “DISTRIBUTION OF DAILY CONSUMER GOODS: COMPETITION, OLIGOPOLY AND TACIT COLLUSION”, is the Basque Competition Court’s contribution to the analysis of competition conditions in the retailing of daily consumer goods. The relevance of this Study does not aim to prove that the retail distribution market has a highly concentrated structure (oligopoly) which leads to parallel conduct (tacit collusion), restricting competition in the market. Evidence of this has previously been presented by other national and international studies. The innovative nature of this Study lies in the diverse range of remedies proposed to ensure effective competition in this market. These remedies consist of liberalizing measures and, above all, the application of the competition regulations that are appropriate to the oligopolistic nature of the market. In this way, the competition regulations are recognised as a comprehensive legal system capable of guaranteeing competition in any market, including oligopolistic structures. This recognition, at a time when public intervention and regulation appear to be gaining ground on free competition, is more necessary, if possible, in the field of retailing.

Indeed, retailing has been subjected to a battery of regulations and administrative actions that have failed to increase competition and, in many cases, have highlighted the existing competition problems. For example, barriers to opening large grocery retail outlets have failed to protect the small business and have created local monopolies; the
regulation that forbids below-cost sales has not protected the consumer and has pushed prices up; and the regulation on deferred payments has only led to payment schedules that are far higher than product rotation.

If retailing is a representative example of the failure of legal and administrative intervention to foster greater competition, it is also necessary to recognise that the competition authorities have not been able to find effective remedies to promote increased competition in this market, beyond the recommendations (generally ignored by the Administrations) aimed at eliminating legal barriers. Perhaps it would not be unfair to consider that this passiveness has fed the seed of voluntary public intervention with disastrous results. The origin of this passiveness lies in the supposed inability of the competition regulation to resolve collusive practices in oligopolistic markets in which no company occupies an individual dominant position. To date, the efforts of the competition authorities have been limited to the control of oligopolies via the control of concentrations, which no matter how you look at it, is an insufficient solution.

However, following the clarification of the conditions that facilitate tacit collusion by the Economic Theory and the assimilation of the collusive oligopoly to the collective dominant position by the European Court of Justice, the competition authorities may and must control oligopolistic tacit collusion in terms of concentrations and anti-competitive practices. If a collusive oligopoly can produce just as harmful competition restrictions as a price cartel, limiting the application of competition regulations only to the latter implies admitting the existence of a legal loophole in competition regulations through which numerous markets can escape control, hence justifying another type of legal and regulatory remedies which are often inefficient.

Faced with public intervention that does not prevent the origins of market failures, but their effects (for example, the control of prices or margins), competition regulation allows the root of collusive practices to be attacked, transforming collusive incentives into competitive market dynamics. The mobile telephone is a paradigmatic example. The High Court has recently certified the legitimacy of the obligation to open networks imposed by the Telecommunications Market Commission on three mobile telephone operators with their own networks. This obligation, which has enabled the so-called mobile virtual network operators (without their own network) to enter the market, has been justified in the oligopolistic structure of the market and the parallel practices (collusive) of the existing operators, who occupy a collective dominant position. The obligation to open up networks would not have been possible in a traditional analysis limited to the verification of an individual dominant position of one of the three mobile telephone operators with its own network or an anti-competitive agreement between them.

In line with these principles, this Study is not only limited to verifying the existence of an oligopoly in Spanish retailing, it also goes into the analysis of collusive practices that restrict competition in this market and, innovatively, proposes a series of remedies to ensure the natural transformation of the retailing collusive oligopoly into a competitive oligopoly that promotes the constant well-being of consumers. In short, the remedies proposed must culminate in permanent competition in terms of price and services,
compared to the current model of sporadic price wars that do not break the predominant collusive dynamics. To achieve this competitive objective, it is proposed to: (1) eliminate legal restrictions in terms of the development of establishments, opening hours and prices (all of which are inefficient and counterproductive), (2) sanction anti-competitive practices of undertakings and local administrations in terms of sales floor, (3) prevent the emergence of local monopolies and eliminate existing monopolies by means of imposing divestiture that facilitates greater competition, (4) establish a more rigorous analysis of the business concentrations taking into account the oligopolistic structure of the market, (5) encourage competition in Internet sales, (6) eliminate abusive commercial payments and conditions, and steer competition in the supply market towards obtaining lower transfer prices that may be passed on to the consumers, and (7) ensure equal opportunities between private-label brands (own-label products) and the manufacturer’s brand, so that business efficiency and consumer demand determine the success of a product.

These solutions do not intend to protect one of the links on the distribution chain or individual undertakings against other more efficient or more competitive companies, but guarantee greater competition in retailing, to the benefit of consumers.

Successive drafts of this Study have been object of consultation with the CNC and the regional competition authorities. The solutions proposed herein shall be presented for the consideration of the “Working Group on Retail” established in the heart of the Council for the Defence of Competition, as well as other foreign competition authorities active in this field (United Kingdom, France, etc.). We trust that, as a result of the coordination and cooperation with the Public Administrations and the competition authorities, the competition regulations will emerge as the best legal tool to ensure effective competition in retailing, a key sector for the economy and employment.

Javier Berasategi Torices
Chairman
Basque Competition Court
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Competition Defence Court (TDC)
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Basque Competition Court (TVDC)
Telecommunications Market Commission (CMT)
General Council of the Judicial Power (CGPJ)
European Commission (Commission)
Competition Commission, United Kingdom
Office of Fair Trading, United Kingdom (OFT)
Competition Appeal Tribunal, United Kingdom (CAT)
Conseil de la Concurrence (French Competition Authority), France
Autorità Garante di Protezione della Concorrenza, Italy (AGCM)
Federal Trade Commission, United States (FTC)
Australia Competition and Commerce Commission, Australia (ACCC)
Commercio Commission, New Zealand
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3 Competence

The Study on “DISTRIBUTION OF DAILY CONSUMER GOODS: COMPETITION, OLIGOPOLY AND TACIT COLLUSION” (“Study”) has been approved by the plenary of the Basque Competition Court (“TVDC”) held on 20th April 2009, proposed by the SPEAKER, Mr. JAVIER BERASATEGI TORICES, in compliance with the consultative powers designated to the TVDC in Article 18 of Decree 81/2005, of 12th April, on the creation of the Basque Competition Court and the allocation of functions of the Competition Defence Service in the Basque Autonomous Community. This precept establishes the duty of the TVDC to foster effective competition in markets by means of consistent action in the performance of studies and research work into competition and the preparation of general reports on economic sectors and markets in terms of free competition.

The conclusions of this Study, and in particular, the existence of an individual or collective dominant position and the abusive or anti-competitive nature of specific practices, are not legally linked to third parties. Any infringement of Articles 1 and/or 2 of the Competition Act must be established within the framework of a sanctioning proceeding in light of proven facts during its processing.

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1 Article 18 Decree 81/2005 has been introduced by Decree 36/2008, 4th March, modifying the Decree which creates the Basque Competition Court and the allocation of the functions of the Competition Defence Service in the Basque Autonomous Community.

4 Background

The existence of legal restrictions and market failures in retailing and the supply of daily consumer goods is one of the most worrying questions for competition authorities throughout the world. In Spain, the former Competition Court (“TDC”) and the Competition Defence Service (“SDC”) have carried out several studies into this question³. In the international sphere, diverse institutions such as the European Commission (“Commission”) and the Organization for Economic Cooperation and Development (“OECD”), as well as numerous national competition authorities, have studied the existence of legal barriers and anti-competitive practices in this field.

4.1 National

In 2003, the TDC published its “Report on competition conditions in the retail distribution sector”⁴ (“TDC Study 2003”). The TDC acted at the request of the Ministry of Economy, which called for:

“…an analysis of competition, covering the following aspects:

• Study into the competition conditions in the commercial distribution sector – functioning of the sector and comparative analysis with other countries in our environment –, particularly in the grocery distribution segment, including procurement markets and retailing.
• Study into the evolution in recent years of the margins in this grocery distribution segment.
• Study into the relationship between prices at source and final prices in the same segment.
• Study into any other factor that may, in recent years, have influenced the evolution of competition conditions in grocery retailing and which may have led to a decline in the consumer surplus.”⁵

The TDC Study 2003 reported the existence of legal barriers that restrict competition and create “de facto spatial monopolies” with market power against suppliers:

“2. The Law on the Regulation of Retail Trade and the laws that regulate this sector in the Autonomous Communities, by restricting or limiting the opening of new establishments, form a legal barrier to entry in the sector, reducing competition at a local, county or regional level. This situation allows existing undertakings to be less efficient, which leads to higher prices and margins in comparison with those undertakings without this type of barriers to entry.

(…)

³ The new Competition Act has established a National Competition Commission (“CNC”), which includes an Investigation Division (successor to the SDC) and a Council (successor to the TDC).
⁵ TDC Study 2003, page 1.
4. By restricting the opening of large establishments, competition between them is also being limited and, therefore, the market power of existing establishments is strengthened, creating de facto spatial monopolies. This limitation affects prices, investment, employment, the consumers and suppliers of these establishments; allowing their expansion favours competition between them, which means increased offer and lower prices.

5. Increased competition, as a result of a rise in the number of establishments, will also lead to reduced market power of the establishments with respect to the suppliers. Procurement competition will generate more favourable supply conditions for the supplier.

(…) The current regulation on retail trade represents a market closure that prevents sufficient accountability to ensure supply and demand freedom. The lack of competition bestows privileges on existing leading undertakings, which fail to act to attract consumers, but instead, pressurize public authorities to maintain these privileges.

8. The activity of a sector is not alien to the global functioning of an economy. Restrictions on competition in a sector have an impact on employment, investment and finally, on the price level of a country’s entire economy.”

The TDC Study 2003 justified the need for the careful monitoring of competition in the retail sector, both in terms of the control of concentrations and practices. Similarly, in view of the interdependence of the retail trade market and the procurement market, the TDC considered that this monitoring needed to be extended to both markets:

“The current situation in the retail trade sector with high barriers to entry requires the close monitoring of its competition conditions, either preventive, examining changes in the structure, or a posteriori, monitoring the fulfilment of the conditions imposed on concentrations as well as any anti-competitive practices on a horizontal level and between retailers and their suppliers. This monitoring must therefore be carried out in two markets: the final market aimed at consumers and the procurement market, which is aimed at manufacturers and producers. Both are interrelated as greater market power in one of the markets has a symmetrical impact on the other. The strict action of the competition authorities in both markets is crucial to ensure that any deviation in genuinely competitive practices is supervised, investigated and resolved.”

Similarly, in 2004, the SDC published its “Preliminary report on the investigation into the distribution chain of specific fruits and vegetables” (“SDC Study 2004”), the purpose of which was to determine “the causes for the high increases in consumer prices and explain the differences in levels and variation rates at source and in consumption.”

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6  TDC Study 2003, Summary Pages 21-23.
4.2 International

The concentration of food retailers, their purchasing power compared with suppliers and the economic and legal barriers to entry are common phenomena in practically all of the national markets. Therefore, the analysis of this question in Spain cannot ignore the Studies carried out by supranational institutions and other national competition authorities.

The OECD was the first organization to study the possible anti-competitive effects of buyer power in the retail distribution sector in 1981. In 1998, it organised a Round Table with Member States which led to the publication in 1999 of a pioneer Study on buying power of the retail distribution sector (“OECD Study 1999”). In the same year, the Competition General Directorate of the European Commission (“Commission”) published a Study into the same question, in which the anti-competitive effects of the abuse of buyer power by companies with market power came to light (“Dobson Study 1999”). In 2000, the Competition Commission (United Kingdom) published its Study on retail distribution and its buyer power (“Comparison Commission Study 2000”). In 2001, the American Federal Trade Commission (“FTC”) published a Study on slotting allowances and other marketing practices (“FTC Study 2001”), which acted as a prelude to a theoretical and empirical study on the effects of slotting allowances published in 2003 (“FTC Study 2003”). In 2004, the French Competition Authority issued a Resolution related to the anti-competitive effects of commercial payments and compliance with competition regulations of an agreement between economic agents and consumers aimed at limiting them (“French Competition Authority Opinion 2004”). In 2005, the Israeli competition authority adopted a final Decision, as a continuation of its Preliminary Report adopted in 2003, imposing a series of obligations on leading retail suppliers and distributors to ensure greater competition in their commercial relations and category management. Similarly, the seven Nordic competition authorities published a Study on competition in distribution and supply, highlighting the anti-competitive risks of excessive concentration, the emergence of parallel practices (“tacit

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16 French Competition Authority, Opinion Number 04-A-18 related to a request for opinion submitted by the consumer association, Union Féderale des Consommateurs (UFC-Que Choisir), concerning the state of competition in the non-specialist large-scale retail sector, 2004.
collusion”) and the exclusionary risks of commercial payments and the preference given to private-label brands by distribution (“Nordic Authorities Study 2005”)\(^{18}\). The French Competition Authority also had the opportunity to make a statement on the French trade regulations and the control of local dominant positions (“French Competition Authority Opinion 2007”)\(^{19}\). In 2008, diverse national Studies in this field were also published. The independent Commission created by the French Government to propose social and economic reforms included a review of restrictive competition legislation in the retail distribution sector among its main economic recommendations (“Attali Report 2008”)\(^{20}\). The Competition Commission carried out another Study on competition in retail distribution and its supply, probably the most thorough study carried out to date, and has adopted numerous remedies to foster greater competition in both markets (“Competition Commission Study 2008”)\(^{21}\). Likewise, the Australian Competition and Consumer Commission (“ACCC”) published a Report on retail distribution and relations with suppliers (“ACCC Study 2008”)\(^{22}\). Finally, the Competition Committee of the OECD organized a seminar dedicated to barriers to entry as a result of land use restrictions (“OECD Study 2008”)\(^{23}\).

In the sphere of the European institutions, the European Parliament approved a Declaration at the end of 2007 requiring the Commission to study and propose remedies against the buyer power of large-scale distribution:

“A. Whereas, throughout the EU, retailing is increasingly dominated by a small number of supermarket chains,
B. Whereas these retailers are fast-becoming ‘gatekeepers’, controlling farmers’ and other suppliers’ only real access to EU consumers,
C. Whereas evidence from across the EU suggests large supermarkets are abusing their buying power to force down prices paid to suppliers (based both within the EU and overseas) to unsustainable levels and impose unfair conditions upon them,
D. Whereas such squeezes on suppliers have negative knock-on effects on both employment quality and environmental protection,
E. Whereas consumers potentially face a loss in terms of diversity of products, cultural heritage and retail outlets,

\(^{21}\) Competition Commission, “Market investigation into the supply of groceries in the UK”, 2008. The Competition Commission Study 2008 is particularly relevant because the competitive structure of the British retail market is very similar to that of the Spanish market, *vid.*, Section 8.24: “Grocery retailing, in terms of national sales shares in the UK, is relatively highly concentrated. As we set out in paragraph 3.4, the four largest grocery retailers have just over 65 per cent of national grocery sales. These four grocery retailers and four others (CGL, M&S, Somerfield, Waitrose) account for 90 to 95 per cent of all larger grocery stores in the UK (see paragraph 3.7), and nearly 90 per cent of all mid-sized and larger grocery stores in the UK (see paragraph 3.9).”
F. Whereas some EU countries have introduced national legislation attempting to limit such abuse, yet large supermarkets increasingly operate across national boundaries, making harmonised EU legislation desirable,

1. Calls upon the Competition Directorate General to investigate the impact that concentration of the EU supermarket sector is having on small businesses, suppliers, workers and consumers and, in particular, to assess any abuses of buying power which may follow from such concentration;

2. Requests the Commission to propose appropriate measures, including regulations, to protect consumers, workers and producers from any abuse of dominant position or negative impact identified in the course of this investigation."24

In mid-2008, the inflationist spiral of the price of certain foodstuffs led the Commission to adopt a Communication with various guidelines for action, among which the following can be highlighted:

“Investigating the functioning of the food supply chain. The Commission will set up a task force to examine the functioning of the food supply chain, including concentration and market segmentation of the food retail and distribution sectors in the EU, and will produce a first report on the situation by the end of 2008. This will feed, in particular, into the monitoring of the retail sector established further to the Single Market review. The Commission will also continue to work closely on these issues with national competition authorities and encourages Member States which have or are planning to reform restrictive regulation in the retail sector to continue their efforts.”25

On 28th April 2008, the Commission created the High Level Group on the Competitiveness of the Agro-Food Industry26. One of its task forces is analysing the structure of the food supply chain and, in particular, competition and pricing conditions27.

On the other hand, the June 2008 European Council asked the Commission to report on the rising price of food and the functioning of the supply chain by the end of the year.

24  Written Declaration on the investigation and remedying of the abuse of power by large supermarkets operating in the European Union”, EP 396.875, 10.10.2007.
Finally, on 10th December 2008, the Commission adopted a new Communication on food prices in Europe. In relation to the functioning of the supply chain, the Commission has admitted that the following competitive and regulatory restrictions may have contributed to the inflationist spiral:

- Entry restrictions to large grocery retail outlets raise prices and reduce productivity;
- Restrictions of below-costs sales set a price floor which limits competition and increases stock-management costs;
- Restrictions on opening hours increase the operational, logistics and infrastructure costs of distributors; and
- The concentration of manufacturers and distribution in the market may facilitate:
  - Cartels
  - Exclusive or collusive practices of purchasing centres that are not vertically integrated
  - Minimum price fixing
  - Exclusive supply agreements, tying practices or private-label brand sales may reduce in-store inter-brand competition and exclude competitors’ products
  - Exclusive distribution agreements may exclude other distributors.

Therefore, the Commission has proposed action in the Community and national sphere to eliminate legal restrictions (opening of large grocery retail outlets, below-cost sales and opening hours) and anti-competitive practices. In terms of supplier-retailer relations, the Commission has highlighted the need to discourage practices that distort the relationship between suppliers and retailers, such as, for example, late payments, unjustified or excessive fees paid for services provided by retailers. In this respect, the Commission welcomes the adoption of Codes of Practice, as an expression of retailers’ “social responsibility”.

The Commission has also included the drafting of a Communication on the monitoring of the retail market in its Work Programme 2009:

“This Communication will set out the findings of the market monitoring announced by the Single Market Review in retail distribution markets. The objective of the monitoring exercise is to identify possible market malfunctioning of the retail sector both from consumers’ and suppliers’ perspectives. This means that retail services will be analysed as key intermediary services in the modern economy, acting as the driving channel

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29 Idem, pages 8-11, including Table 1.
30 Idem, Sections 5.2 (Ensure a vigorous and coherent enforcement of competition and consumer protection rules in the food supply markets by the European Commission and National Competition and Consumer Authorities) and 5.3 (Review at national and/or EU level, as appropriate, regulations that have been identified as potentially problematic for the functioning of the food supply chain), pages 11-12.
between thousands of product suppliers and final consumers. The Communication will cover both the retail sector and its associated upstream and downstream markets.\footnote{Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Legislative and Work Programme 2009, Volume II, Priority Initiatives, pages 5-6, COM (2008) 712 final, 5.11.2008.}

In response to the Communication from the Commission, the European Parliament approved a “Resolution on Food Prices in Europe”\footnote{European Parliament, “Resolution on Food Prices in Europe”, P6 TA-PROV(2009) 0191, 26th March 2009.} on 26th March 2009. In its Whereas, the Resolution confirms that “there is evidence from across the European Union that suggests that big supermarkets use their buying power to force down prices paid to suppliers to unsustainable levels and impose unfair conditions upon them; whereas large retailers across the European Union are fast becoming "gatekeepers", controlling farmers" and other suppliers" access to consumers” (Whereas I), whilst, “although CAP funding has contributed over the years to securing low consumer prices, it is noticeable that consumer prices remain high or are not falling despite the fall in prices in the agricultural sector” (Whereas K).

In the section dedicated to “Food Market Imperfections”, the Resolution “believes that pricing below cost, while not viable in itself for any undertaking, can only be applied by big (diversified) undertakings for a short period of time and only to drive their competitors out of the market; considers that, in the long term, such practice benefits neither consumers nor the market as a whole” (paragraph 14) and “also expresses its concern for other instances where the trade sector makes use of its dominant position, including excessive payment deadlines, listing charges, threats of delisting, slotting allowances, retrospective discounts on goods already sold, unjustified contributions to retailer promotion expenses or insistence on exclusive supply” (paragraph 15). It also “stresses that, in some Member States, both the buying and the selling side of the market tend to be equally concentrated, thus aggravating the distorting effect on the market” (paragraph 16) and “is deeply concerned that, in the summary of the main practices which cause competition problems in the food supply chain, the above-mentioned Commission Communication on food prices in Europe fails to include the abuse of the dominant position observed at the retail stage and also, to a certain extent, at the wholesale stage; considers that anti-competitive practices employed by undertakings with a large market share, such as exclusivity agreements, or a product tying obligation, constitute a serious setback in terms of fair competition in the food supply chain” (paragraph 29).

The Resolution also tackles other questions such as the need to (1) examine “whether the criteria for establishing a dominant position in a market are still adequate considering the developments in the retail market” (paragraph 35), (2) adopt national measures to reduce or avoid unjustified regulatory interventions in the retail sector which would restrict competition and the smooth operation of the food supply chain at the expense of consumers (paragraph 39), (3) value that consumer well-being considers prices as well as the quality and variety of the products offered in the retail sector (paragraph 57), (4) promote the use of the Internet as a distribution channel (paragraph
59), (5) not overvaluing the manufacturer’s brand as a negotiating counterweight “compared to other very much more important factors such as imperfect competition or oligopolistic/monopolistic practices” (paragraph 64).

This Study covers all of the questions set out in the Resolution of the European Parliament in relation to regulations that restrict competition and the adaptation of competition law to the reality of modern retail distribution.
5 Scope of the Report

The TDC Study 2003 highlights the need to carefully monitor consumer goods retail distribution and the supply market in view of existing barriers to entry and competition restrictions\(^{33}\). Therefore, this Study focuses on the functioning of the “modern distribution channel”. The growing importance of self-service retailing compared to traditional stores and, therefore, supply through purchasing centres (vertical or horizontal) compared with traditional markets, has created a “modern marketing channel” with its own characteristics different to those of the “traditional channel”\(^{34}\). The modern channel (purchasing centres and self-service retail distribution) almost monopolizes the marketing of packaged food and non-food commodities, and has a significant presence in the fresh food segment. According to data from Nielsen, self-service retailing represents 95.7% of retail distribution of packaged food and 51% of fresh food retail distribution\(^{35}\).

The gradual leadership of self-service retailing and, in particular, in large grocery retail outlets (>1,000 m\(^2\)), can be seen in the table of estimated total food and beverages sales prepared by Nielsen:

<table>
<thead>
<tr>
<th>Year</th>
<th>Hipermercados</th>
<th>Supermercados 1000-2499 m(^2)</th>
<th>Supermercados 400-999 m(^2)</th>
<th>Supermercados 100-399 m(^2)</th>
<th>Supermercados &lt; 100 m(^2)</th>
<th>Tradicionales</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>25.7</td>
<td>24.6</td>
<td>23.9</td>
<td>23.2</td>
<td>22.5</td>
<td>21.5</td>
</tr>
<tr>
<td>2003</td>
<td>25.7</td>
<td>24.6</td>
<td>23.9</td>
<td>23.2</td>
<td>22.5</td>
<td>21.5</td>
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<tr>
<td>2004</td>
<td>23.9</td>
<td>20.3</td>
<td>26.2</td>
<td>23.2</td>
<td>23.9</td>
<td>20.3</td>
</tr>
<tr>
<td>2005</td>
<td>23.2</td>
<td>26.2</td>
<td>23.9</td>
<td>23.2</td>
<td>23.9</td>
<td>20.3</td>
</tr>
<tr>
<td>2006</td>
<td>22.5</td>
<td>31.2</td>
<td>28.3</td>
<td>31.2</td>
<td>31.2</td>
<td>33.2</td>
</tr>
<tr>
<td>2007</td>
<td>21.5</td>
<td>33.2</td>
<td>28.3</td>
<td>31.2</td>
<td>31.2</td>
<td>33.2</td>
</tr>
</tbody>
</table>

Source: Nielsen Report 2008

\(^{33}\) Vid., supra note 7.
\(^{34}\) SDC Study 2004, page 5.
The growth of self-service retailing is due to new purchasing habits of consumers, who tend to concentrate and space out their food shopping. The concentration of shopping in a single action is aimed at large grocery retail outlets, with a wide range of products and other commodities, simplifying shopping with car-parks and other associated services. On the other hand, traditional retailing and small-scale self-service retailing is reserved for convenience shopping and, in particular, the purchase of fresh products in which the specialization of traditional stores is still preferred by consumers.

The success of self-service retailing has been accompanied by the growth of companies and market concentration. Although size may facilitate greater efficiency, the existence of a limited number of companies (oligopoly) may trigger parallel conducts (collusive or anti-competitive oligopoly)\(^\text{36}\) if certain conditions arise, and encourage anti-competitive agreements to the detriment of consumers\(^\text{37}\). In Spain, both the retail procurement market and the self-service retail distribution market have a high concentration, which requires a detailed analysis ("careful monitoring" in the words of the TDC) of competition conditions. This analysis must bear in mind the specific nature of retailing in large grocery retail outlets, both from a relevant market and competitive dynamics perspective\(^\text{38}\).

\(^{36}\) This Study considers an “oligopoly” to be a market in which a limited number of companies compete and reserves the term “collusive oligopoly” for oligopolies (concentrated markets) in which companies develop parallel practices (tacit or implicit collusion) which restrict competition without anti-competitive agreements between them (express or explicit collusion).

\(^{37}\) Vid., TDC Resolution of 21st June 2007, Case 612/06, Aceites 2 (“Aceites 2 Resolution”), First Resolution, page 32: “Declare that the SOS CUETARA Group and the companies CENTROS COMMERCIAL CARREFOUR S.A., CAPRABO S.A., ALCAMPO S.A., EROSMER IBERICA S.A., MERCADONA S.A., DISTRIBUTORA INTERNACIONAL DE ALIMENTACIÓN S.A. (DIASA), GRUPO EL ARBOL DISTRIBUCIÓN Y SUPERMARKETS S.A. and EL CORTE INGLES S.A. have been involved in a practice forbidden by Article 1.1.a) of the Competition Act, by reaching agreements to establish a minimum price for the sale of their Carbonell 0.4º and Koipesol brands to the public. The Aceites 2 Resolution is subject to analysis in Section 9.3.1 infra.

\(^{38}\) Vid., Commission Decision M99/674 Rewe/Meinl, (“Rewe/Meinl Decision”), OJEC L 274, 23.10.99, paragraph 37: “The growing competitive importance of large stores is mainly due to the changes in the shopping habits of consumers (weekly shopping, monthly shopping) and the growing urbanization of the population. Another factor is the increasing variety in the range of products in food retailing, which makes it necessary to have adequate available space for storage and presentation. \textit{A priori,} this favours larger stores”; TDC Report, 4th May 2000, Case C-52/00 Carrefour/Promodéz (“Carrefour/Promodés Report), page 41: “Furthermore, it is worth pointing out that the presence of hypermarkets in the segment, the store format with greater productivity, is one of the essential elements of competitiveness, either in the analysis of retailer/consumer or retailer/supplier relations.”
6 Relevant Markets

The definition of relevant market aims to “identify in a systematic way the competitive constraints that the undertakings involved face”[^39]. The relevant market has two components: the product and its geographic dimension. The purpose of defining a market in both its product and geographic dimension is “to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure”[^40]. In particular, the definition of relevant market makes it possible “to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 81 EC”[^41].

When determining the relevant market, the three main sources of competitive constraints faced by a company must be taken into account: demand substitutability, supply substitutability and potential competition. In particular, “demand substitutability constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions”[^42]. To calculate demand substitutability, competition law uses an econometric Test “of the hypothetical monopolist” (“Small but Significant Non transitory Increase in Price” or “SSNIP”):

“The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas would be included in the relevant market until the set of products and geographical areas were such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would be the supplier and the price test would serve to identify the alternative distribution channels or outlets for the supplier's products.”[^43]

However, as recognised by the TDC, the SSNIP Test is not easily applicable to the retail distribution sector:

“As indicated in previous competition studies in this market [London Economics, “Competition in Retailing”, Office of Fair Trading. September 1997], there are three important problems in the application of the US SSNIP test to the definition of the relevant product market: (1) it is a test essentially for products, and not for services, (2) it focuses on price competition, rather than other forms of competition used in this

[^40]: Idem.
[^41]: Idem
[^42]: Relevant Market Notice, paragraph 13.
[^43]: Relevant Market Notice, paragraph 17.
sector and, (3) the competitive strategies and practices of companies are not taken sufficiently into account. To apply the test to this sector, the market needs to be defined in terms of supply of services and products.\textsuperscript{44}

6.1 Product Markets

A relevant product market comprises all those products and services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, prices or their intended use.\textsuperscript{45}

6.1.1 Self-Service Retail Distribution of Daily Consumer Goods

The decisional practice of the Commission in terms of control of concentrations has shown that there is a differentiated self-service retail distribution market for foodstuffs and household goods\textsuperscript{46}. In relation to the Spanish distribution market, the Commission Decision of partial referral to Spain of the Carrefour/Promodès concentration established the following:

“The Commission has considered, in previous cases, that there is a separate product market in the retail of foodstuffs and non-food household goods which satisfies the daily needs of households. Food products that form part of the range of daily consumer goods represent an important part of the products offered and purchased. In Spain, this market is generally known under the name of free service retail distribution. Consequently, this market does not include retail trade in which the sale of foodstuffs and non-food household goods does not prevail. It does not cover specialised stores, selling foodstuffs or otherwise, that does not offer a range of daily consumer goods.”\textsuperscript{47}

These conclusions have been followed by the TDC in all of its decisions related to the control of concentrations\textsuperscript{48}.

In short, the existence of a product market that covers the self-service retailing of daily consumer goods is a consolidated doctrine in European and national circles.

\textsuperscript{44} Carrefour/Promodès Report, page 30
\textsuperscript{45} Relevant Market Notice, paragraph 7.
\textsuperscript{46} Commission Decision M97/277 Kesko/Tuko, ("Kesko/Tuko Decision"), OJ-EU L110, 26.4.97, paragraphs 19-20; and Rewe/Meinl Decision, paragraphs 12-16.
\textsuperscript{47} Decision of partial referral to Spain M.1684 Carrefour/Promodès, ("Carrefour/Promodès Partial Referral Decision"), 25.01.2000, paragraph 9, pages 3-4.
\textsuperscript{48} The SDC Report 2004, page 13, describes the SDC and TDC practice in this field: “When delimiting the retail distribution relevant market […], it is necessary to bear in mind that both the SDC and the TDC have considered that the self-service retail distribution market of daily consumer products, including the diverse forms of retail without personal service, constitutes a separate product market to that of the traditional sale of products (small stores and personal service) and that of sales via specialised stores, due to the existing asymmetric competition between them".
6.1.2 Retail Distribution in Large Grocery Retail Outlets

The existence of a product market that includes self-service retailing of daily consumer goods does not exclude the existence of sub-markets differentiated by their specific characteristics. Indeed, in its decisions regarding the control of concentrations, the Commission has left open the possibility of the existence of sub-markets within self-service retailing bearing in mind their size (large supermarkets and hypermarkets) and their pricing policy (“hard discount”)\(^49\).

In relation to large grocery retail outlets, the Commission has taken into account the asymmetric competition between them and the rest of self-service establishments. Therefore, the competitive analysis of the large establishment commercial format has played an important role in its three most relevant Decisions in this sector: Kesko/Tuko, Rewe/Meinl and Carrefour/Promodès.

In relation to the Spanish retail distribution market, the Carrefour/Promodès Referral Decision inclined towards the existence of a sub-market of large grocery retail outlets that included all hypermarkets and large supermarkets\(^50\), although it admitted the difficulty of establishing an accurate distinction between supermarkets included in this category and those excluded\(^51\). Therefore, the Commission left the final decision of integrating large supermarkets into the hypermarket segment in the hands of the national authority\(^52\). The Commission also considered that discount outlets presented differentiated characteristics that could indicate the existence of a differentiated product market, although it did not consider it necessary to adopt a final posture\(^53\).

\(^{49}\) Carrefour/Promodes Referral Decision, paragraph 12 and Rewe/Meinl Decision, paragraph 17.

\(^{50}\) Carrefour/Promodes Referral Decision, paragraph 13: “In terms of sales floor, location, product variety and range, number of references, proposed non-food products, areas of influence, services offered (parking facilities, fuel, opening hours, etc.), response to consumer wishes, the distinction between convenience stores and hypermarkets is particularly clear.”

\(^{51}\) Carrefour/Promodes Referral Decision, paragraph 16: “However, certain supermarkets tend to come close to hypermarkets, whilst other supermarkets present few differences with convenience stores. Only a specific appreciation of the competitive geographic context and the format of the stores present in each local area, can reach the conclusion that a supermarket should be distinguished from other retail sales formats, or on the other hand, play a similar role and present similar characteristics to those of a hypermarket or a convenience store.”

\(^{52}\) Carrefour/Promodes Referral Decision, paragraph 32: “Of course, only an in-depth examination will confirm or deny the existence of domination. Such an examination will refer to the precise delimitation of the perimeter of each area in question, existing commercial infrastructures, the presence of sales outlets of the competition, the possibility or otherwise of including similar supermarkets in the hypermarket segment, on the existence of barriers to entry, on the consequences on effective competition in the case of a pre-eminent position. In the present case, and bearing in mind the characteristics of the pertinent market, the national authorities shall proceed to such an examination and will draw the appropriate consequences.” (own underlining)

\(^{53}\) Carrefour/Promodes Referral Decision, paragraph 14: “On the other hand, discount stores present specific characteristics that differentiate them significantly from other types of commerce, particularly in terms of the attractive price level, availability of the products close to the wholesaler, the dimension of the range of products and the strong presence of retailers’ brands. The question of whether discount stores should be considered as a separate market in relation to the appreciation of the present concentration project from the point of view of competition may remain open. In general, the number of references proposed in this type of stores is considerably less than, for example, in ordinary supermarkets.
The TDC Carrefour/Promodès Report verified the different characteristics of self-service commercial formats and the different types of demand associated to each one.

From the point of view of supply, the TDC made an extensive description of the characteristics of hypermarkets (>2,500 m²), supermarkets (from 400 to 2,500 m²) and self-service outlets (< 400 m²) in terms of (a) sales floor; (b) selection of products; (c) range of brands and quality; (d) opening hours; (e) proximity/accessibility; (f) range of associated services; (g) price; and (h) payment card. From the point of view of demand, the TDC confirmed their heterogeneous behaviour. In particular, the consumer who is active in the labour market (or families in which both members are active in the labour market) “shops for provisions” in “the most suitable establishments for this type of shopping; or in other words, in hypermarkets or in supermarkets with a large surface area.” On the other hand, elderly consumers or those in which one member is not working represent “the majority demand for what is called “daily shopping”, and in which the format of neighbourhood supermarket or traditional store is the most demanded, as in this case the “proximity” variable is evaluated. The TDC referred to a report by the merged company (“Danone Report 1996”) which clearly differentiated between shopping for provisions, carried out in hypermarkets, and daily or complementary shopping carried out in supermarkets, self-service or traditional stores. This report showed asymmetrical competition between the different formats: hypermarket customer uses this establishment for all of his/her shopping (supply, daily and routine) and only uses the supermarket or specialised stores for top-up shopping. However, supermarket, self-service and discount store customers use the hypermarket for provisions and the customer of traditional stores uses both the hypermarket and the supermarket (presumably large supermarket if it is located in the local market and the consumer has sufficient mobility).

54 Carrefour/Promodès Report, pages 31-34
55 Carrefour/Promodès Report, page 36: “it is not homogenous given the diversification of consumer preferences and incomes”.
56 Carrefour/Promodès Report, page 37: “What is valued most in this type of demand is the ease of access for a large shop in which the use of a car is necessary, as well as the availability of a wide range of products and the diversity of brands from which to choose.” Diverse empirical studies have shown that modern consumer habits are aimed towards more spaced out shopping trips and of a greater volume, que which requires a commercial format with a larger sales floor and associated services, such as parking. Vid., in relation to modern consumer habits, Study “How do we shop? – the other side of the consumer”, Information Resources Inc. (IRI), 2003 (38% of households do a monthly shop). 57 Idem.
58 In another section of its Report, the TDC reiterates the asymmetric nature of competition between the traditional channel and the supermarket/hypermarket formats, page 39: “The Court understands that there is asymmetrical competition between the so-called traditional stores and the supermarket and hypermarket format, as the demand for goods and services by a consumer in a hypermarket cannot be substituted, at least at the same cost, by traditional stores. On the other hand, the unitary demand for products in traditional stores may, in light of a hypothetical closure of this store, be supplied by a supermarket, and even more so by a hypermarket”.
The TDC prepared a similar table in which it identified stocking-up with the hypermarket and supermarket format; top-up shopping with the supermarket and self-service format; and routine or daily shopping with the supermarket, self-service and traditional stores:

Cuadro nº 7
CARACTERÍSTICAS DE LA OFERTA Y LA DEMANDA

<table>
<thead>
<tr>
<th>OFERTA/DEMANDA</th>
<th>Hipermercados</th>
<th>Supermercados</th>
<th>Autoservicio</th>
<th>Especialidades</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compra de a</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>provisionamiento</td>
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<tr>
<td>Compra de relleno</td>
<td>X</td>
<td>X</td>
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<td></td>
</tr>
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<td>Compra rutinaria</td>
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</tr>
<tr>
<td>Compra del día</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

Source: Carrefour/Promodès Report, page 39.

In spite of the fact its analysis of the relevant market and, as will be explained later, the competitive analysis of the concentration, appeared to indicate the existence of a separate market for large grocery retail outlets (hypermarkets and large supermarkets), the Conclusions of the Carrefour/Promodès Report are ambiguous. The third conclusion talks about a self-service retail distribution market⁵⁹, whilst the Fourth Conclusion confirms the existence of a sub-market of hypermarkets within the self-service retail distribution market (asymmetric competition)⁶⁰.

⁵⁹ Carrefour/Promodès Report, Third Conclusion, page 66: “In summary, the Court has concluded that the relevant product market is the “daily consumer goods and services offered in self-service establishments”.

⁶⁰ Carrefour/Promodès Report, Seventh Conclusion, page 67: “The resulting group not only presents high market shares, but these are reached by operating in a large number of self-service formats: hypermarket, supermarket, discount stores and convenience stores. In the definition scenario of the relevant product market as the set of goods and services jointly offered by self-service establishments, it
In any case, the competitive analysis of the concentration carried out by TDC implicitly admitted the existence of a separate market for hypermarkets. The TDC delimited three types of area for the purposes of competitive analysis:

- Area 1: areas with high concentration but without overlapping and areas without a high concentration;
- Area 2: areas with overlapping and a high concentration but with the presence of important competitors; and
- Area 3: areas “in which, due to their structural characteristics, it is considered that the concentration operation may hinder effective competition in the market”.

In relation to Area 1, the TDC expressly differentiated between the self-service retailing market and the hypermarket sub-market.

Although in the tables for Areas 2 and 3, the TDC did not differentiate the hypermarket sub-market, its competitive analysis of Area 3 focused exclusively on the hypermarket “segment”. In this way, even in spite of the fact that in diverse areas, the market share of the merged company would not have been sufficiently high to generate a presumed dominant position, the TDC considered that the concentration would create or strengthen a dominant position in the hypermarket sub-market, and almost all of the suggested remedies were aimed at reducing the market power of the new company in this segment: the sale of 17 hypermarkets, the non-opening of a further 3 planned

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Cuadro n° 8.
MERCADOS LOCALES CLASIFICADAS EN EL GRUPO I

<table>
<thead>
<tr>
<th>Zona</th>
<th>Enseñas Presentes</th>
<th>Cuota Mercado Hipermercado (m²)</th>
<th>Cuota Mercado Libre servicio (m²)</th>
<th>Cuota Mdo del principal competidor Hipermercado</th>
</tr>
</thead>
<tbody>
<tr>
<td>HUELVA</td>
<td>CONTINENTE, DIA</td>
<td>49,2%</td>
<td>15,4%</td>
<td>51,8% Hipercor</td>
</tr>
<tr>
<td>CIUDAD REAL</td>
<td>CONTINENTE (2), DIA, SIMAGO</td>
<td>39,2%</td>
<td>12,8%</td>
<td>29% Eroski</td>
</tr>
<tr>
<td>LEÓN</td>
<td>CONTINENTE (2), DIA</td>
<td>65,4%</td>
<td>25,7%</td>
<td>34,6% Leclerc</td>
</tr>
<tr>
<td>LUGO</td>
<td>PRYCA, DIA</td>
<td>100%</td>
<td>25,3%</td>
<td>--</td>
</tr>
<tr>
<td>ORENSE</td>
<td>CONTINENTE (SIMAGO)(CONTINENTE)</td>
<td>100%</td>
<td>25,8%</td>
<td>--</td>
</tr>
<tr>
<td>PONTEVEDRA</td>
<td>CONTINENTE, CHAMPION</td>
<td>100%</td>
<td>20,5%</td>
<td>--</td>
</tr>
</tbody>
</table>

Source: Carrefour/Promodès Report, page 44.

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is defining that competition occurs between hypermarkets and between hypermarkets and supermarkets.” (own underlining)

61 Carrefour/Promodès Report, page 44: “The Court has followed dual criteria in the analysis of the location of the local markets that may be affected by the operation: location of hypermarkets belonging to the concentrated business groups and the location of the geographic areas in which the concentration of any of the stores of each group occurs.”

hypermartks and, as an exceptional case, the sale of a regional chain in Catalonia (Maxim).  

In its Eroski/Caprabo Report, the Council of the CNC has reiterated the TDC argument in relation to the retail distribution market. Although it formally defines the self-service retail distribution market that includes all of the commercial formats, it confirms the asymmetric nature of competition between commercial formats and, when necessary, makes a separate competitive analysis of the hypermarket segment (sub-market).

In short, it is unquestionable that there is a demand for shopping in large grocery retail outlets that cannot be satisfied by small supermarkets and traditional stores, which makes it necessary to delimit a sub-market of large grocery retail outlets within the widest retail distribution market for consumer goods (asymmetrical competition between commercial formats).

The large Spanish retailers have admitted the existence of a large grocery retail outlet market. In the Carrefour/Promodès concentration, Alcampo, El Corte Inglés and, particularly, Eroski defended the existence of this sub-market.

Eroski

“This competitor understands that the relevant market should refer to Hypermarkets, as determined by the French Competition Authority in a report in 1996, in which it stated that the retail sales market in hypermarkets was different to that of sales in supermarkets.

Furthermore, it considers that concentrated companies enjoy an absolute monopoly position in 5 Spanish cities and high market shares in numerous cities (document of 12th November). This situation worsens when taking into account the projects under construction and those that have been approved (12 more in total).”

Alcampo

“For this competitor ‘the CARREFOUR/Promodès concentration project hinders effective competition in the market in Spain’. From the provincial analysis carried out, they concluded that, first of all, in 12 provinces participation in sales rooms exceeded 30% of all retail distribution which includes hypermarkets, supermarkets and convenience stores; and in 21 provinces participation stood at between 20% and 30% 18

\[63\] Carrefour/Promodès Report, 9th Conclusion. The merged company enjoyed an extremely high market share in Catalonia but the overlap in the majority of local markets of this Community was limited to regional establishments under the name of Dia. However, the TDC recommended the divestiture of the Maxim chain of hypermarkets and supermarkets, along with a further 6 hypermarkets.


\[65\] Eroski/Caprabo Report, page 20, note 19; and page 28, note 31.

\[66\] *Vid.,* For example, competitive analysis of retail distribution in Majorca in Eroski/Caprabo Report, pages 39-45 and, in particular, Table 13 – Large Commercial Stores in Majorca, page 40.

\[67\] Carrefour/Promodès Report, section 1.6.7., page 12.
agglomerations are also listed, defined as populations close to CARREFOUR hypermarkets, in which it is estimated that there is dominance or a concentration of the CARREFOUR Group.\textsuperscript{68}

El Corte Inglés

“This group shares the definition proposed by the European Commission: ‘self-service retailer of daily consumer goods’. The argument presented states:

‘We agree with this definition as, an exchange may exist between the different marketing formulae by type of article. However, the repercussion of the regulations that affect each of the models, depending on the surface area, and the difference in the marketing and presentation of the food supply, means that the effects within food retailing must be taken into account, due to their special repercussion’.\textsuperscript{69}

On the other hand, the existence of a daily consumer goods distribution market in large grocery retail outlets has been confirmed by other competition authorities such as the FTC in the United States\textsuperscript{70}, the Competition Commission in the United Kingdom, the French Competition Authority\textsuperscript{71} or the Autoritá Garante de la Concorrenza e del Mercato (“AGCM”) in Italy\textsuperscript{72}.

In particular, the Competition Commission Study 2008 has reaffirmed the decisional practice in terms of control of concentrations: large grocery retail outlets of more than 1,400 m\textsuperscript{2} form a separate market within the retail distribution market (asymmetrical competition) in accordance with these characteristics: the number of product lines (epigraphs 4.22 to 4.24); food delivery and other services within the store (epigraphs 4.25 to 4.32); company strategy in relation to consumers and the presence of large chains in different commercial formats (epigraphs 4.33 to 4.37); statistical data on consumer habits in relation to the different commercial formats (4.38 to 4.42); an econometric demand model for the different commercial formats (epigraphs 4.43 to

\textsuperscript{68} Carrefour/Promodès Report, section 1.6.5., page 10.
\textsuperscript{69} Carrefour/Promodès Report, section 1.6.13.
\textsuperscript{70} FTC Consent Order, \textit{Koninklijke Ahold N.V. and Bruno's Supermarkets, Inc.}, File No. 011 0247, Docket No. C-4027, Analysis of the Draft Complaint and Proposed Decision Order to Aid Public Comment, 7th December 2001, pages 2-3: “The draft complaint alleges that the relevant line of commerce (i.e., the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire one-stop shopping for food and grocery products. Supermarkets carry a full line and wide selection of both food and non-food products (typically more than 10,000 different stock-keeping units ("SKUs")), as well as an extensive inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.” In short, “supermarkets” in the United States are equivalent to European hypermarkets of 2,500-3,000 m\textsuperscript{2}.
\textsuperscript{71} French Competition Authority, Opinion Number 00-A-06 of 3rd May 2000, related to the \textit{acquisition of Promodès by Carrefour}. The French Competition Authority defines a sub-market comprising of hypermarkets of over 2,500 m\textsuperscript{2}, although it considers that there may exist a competition relationship with large supermarkets of a similar size.
\textsuperscript{72} AGCM, \textit{Schemaventuno-Promodes/Gruppo GS}, Bollettino n. 25/1998. The AGCM defines a sub-market of large stores of over 1,500 m\textsuperscript{2}.
4.48); and economic data on the impact of new establishments on the revenue of the different existing commercial formats (4.49 to 4.52).\textsuperscript{73}

In relation to the competitive strategies of the leading companies\textsuperscript{74}, the Competition Commission showed that Asda and Morrisons aimed their offer at consumers with a weekly shopping demand. On the other hand, CGL and Somerfield focused on consumers with additional daily or convenience shopping in a convenience store. Finally, Sainsbury’s and Tesco cover all consumers. The former had large establishments with a minimum limit of 1,400 m\textsuperscript{2}, whilst the latter did not exceed this limit. Tesco and Sainsbury’s operated in all sizes, which was consistent with their wish to reach all consumers. The conclusion was reached that customers associate the size of the store with a differentiated type of service.\textsuperscript{75}

In relation to consumer habits, the Competition Commission considered that a significant proportion of consumers that do a large weekly shop require a store of a certain size and with parallel services.\textsuperscript{76} Similarly, these consumers represent approximately 75% of the revenue of these stores and they are less likely to switch to smaller stores even in the case of a slight price increase\textsuperscript{77}. Similarly, customers that switch to another store following a worsening of the offer at their current store switch to another store in the same size bracket, particularly in relation to their weekly shopping trip.\textsuperscript{78}

On the other hand, analysis of the effect of new stores on the revenue of existing large stores also shows that the entry of a large store has a much greater effect on the revenue of existing large stores than the entry of a medium-sized store.\textsuperscript{79}

In short, all of the analysis parameters used by the Competition Commission showed that in the eyes of the customers, large stores of more than 1,000-2,000 m\textsuperscript{2} are only

\textsuperscript{73} Competition Commission Study 2008, pages 50-51.
\textsuperscript{74} The leading British retail distribution companies are Tesco, Asda, Sainsbury’s, Morrisons, CGL and Sommersfield.
\textsuperscript{75} Competition Commission Study 2008, pages 56-57, sections 4.35-4.37. In particular, section 4.37: “(…) Again, this is consistent with a view that different customers may associate stores of different sizes with a different retail offer”.
\textsuperscript{76} Competition Commission Study 2008, page 58, section 4.41: “Figure 4.8 shows the distribution of household shopping trips by store size where shopping trips are defined in terms of large weekly shopping trips (more than 60 per cent of household weekly grocery expenditure) and other shopping trips. This shows that, for large weekly shopping trips, a high proportion occur in stores larger than 1,400 sq metres.”
\textsuperscript{77} Competition Commission Study 2008, page 59, section 4.42: “Customers doing large weekly shopping trips at stores larger than 1,400 sq metres are likely to be less willing to switch to smaller stores following a small price increase. For stores larger than 1,400 sq metres, customers on these shopping trips are the most important type of customer, accounting for around three-quarters of revenue.”
\textsuperscript{78} Competition Commission Study 2008, page 60, section 4.47: “The results show that the vast majority (ie more than 90 per cent) of those customers that switch to another store following a worsening of the offer at their current store switch to another store in the same size bracket if one is available (see Table 4.3)”.
\textsuperscript{79} Competition Commission Study 2008, page 61, section 4.51.
substitutable for other stores in the same size bracket, or in other words, following a small yet significant increase in prices, the vast majority of marginal consumers will switch to another store of more than 1,000-2,000 m².

For all of the above reasons and, in particular, bearing in mind the preliminary conclusions of the Carrefour/Promodès Referral Decision, the competitive analysis of the markets of large grocery retail outlets carried out by the TDC in the control of concentrations and the practice of other national competition authorities, it must be concluded that in Spain there is a daily consumer goods distribution sub-market in large grocery retail outlets.

Although this conclusion appears to be unquestionable, the definition of the lower market limit for large grocery retail outlets raises difficulties, as recognised by the Commission in its Carrefour/Promodès Referral Decision. Logically, hypermarkets form part of this sub-market but in reality, there appears to be a competitive relationship between hypermarkets and large supermarkets. Indeed, in recent years in Spain, the implementation rate of hypermarkets has slowed down whilst the implementation of large supermarkets of more than 1,000 m² has increased. In line with this evolution, since 2003, the consultant, Alimarket, has considered that hypermarkets and large supermarkets (1,000 to 2,499 m²) make up a single category of large grocery retail outlets.

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</thead>
<tbody>
<tr>
<td>Traditional</td>
<td>31,617</td>
<td>29,532</td>
<td>28,198</td>
<td>27,423</td>
<td>26,746</td>
<td>26,144</td>
</tr>
<tr>
<td>Supermarkets &lt; 100 m²</td>
<td>11,576</td>
<td>10,973</td>
<td>10,586</td>
<td>10,305</td>
<td>10,095</td>
<td>9,925</td>
</tr>
<tr>
<td>Supermarkets 100-399 m²</td>
<td>7,811</td>
<td>7,502</td>
<td>7,367</td>
<td>7,591</td>
<td>7,821</td>
<td>7,903</td>
</tr>
<tr>
<td>Supermarkets 400-900 m²</td>
<td>4,027</td>
<td>4,147</td>
<td>4,261</td>
<td>4,397</td>
<td>4,465</td>
<td>4,574</td>
</tr>
<tr>
<td>Supermarkets 1000-2499 m²</td>
<td>1,539</td>
<td>1,742</td>
<td>1,913</td>
<td>2,096</td>
<td>2,298</td>
<td>2,537</td>
</tr>
<tr>
<td>Hypermarkets</td>
<td>343</td>
<td>359</td>
<td>365</td>
<td>379</td>
<td>387</td>
<td>399</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>56,913</strong></td>
<td><strong>54,255</strong></td>
<td><strong>52,690</strong></td>
<td><strong>52,191</strong></td>
<td><strong>51,812</strong></td>
<td><strong>51,482</strong></td>
</tr>
</tbody>
</table>

Source: Nielsen Report, 2008

This phenomenon of replacing hypermarkets with large supermarkets (1,000 to 2,500 m²) obeys to a large extent the legal barriers to the implementation of hypermarkets of

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80 Competition Commission Study 2008, section 4.55: “Some consumers prefer larger grocery stores (ie stores larger than 1,000 to 2,000 sq metres) because of the greater product range, for both grocery and non-grocery products, as well as the associated amenities available at these stores, such as car parking, various food counters and other services. Shopping statistics show that consumers have a significant preference for conducting their large weekly shopping trips at larger stores although they seem relatively indifferent to store size when conducting other shopping trips. The pattern of store size provision by grocery retailers, and its relationship to the stated strategy of each retailer in terms of attracting consumers, is consistent with consumers having preferences for different store sizes for different shopping trips.”

81 Competition Commission Study 2008, page 62, section 4.56: “The results from the consumer demand model and the impact of entry on store revenues clearly show that other larger stores are the closest substitute to larger stores. Following a small but significant price increase at a larger store, the vast majority of marginal consumers will switch to another larger store.”
2,500 m² or more. However, there may also be some justification in the search by companies for the optimum sales floor for grocery shopping. For example, Alimarket considers that hypermarkets with a sales floor of 2,500 to 5,000 m² dedicate only 60% of this area (1,500 to 3,000 m²) to the sale of consumer products; whilst large supermarkets of 2,000 to 2,500 m² dedicate 80% of their sales floor to consumer goods (1,600 to 2,000 m²). In any case, large retailing companies appear to have adapted their commercial offer to these new legal and consumer dynamics. For example, the commercial formats of Eroski comprise hypermarket (4,500 to 12,000 m²); the large supermarket (700 to 2,000 m²); and the small supermarket or convenience store (approximately 450 m²). In short, the analysis of competitive positioning of Eroski’s different commercial formats indicates that some Eroski Center have a competitive position equivalent to that of the Eroski Hypermarkets.

Therefore, it may be conservatively concluded that hypermarkets and supermarkets of 1,000 m² represent the relevant market of large grocery retail outlets, although in some specific local markets, some larger supermarkets may not be in direct competition with hypermarkets (for example, if a supermarket of more than 1,000 m² does not have parking facilities to facilitate grocery shopping).

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82 TDC Report of 19th December 2003, Case No. C-83/03, Caprabo/Alcosto (“Caprabo/Alcosto Report”), page 61: “Secondly, regional authorities have altered the morphology of commercial establishments with their regulations, discriminating initially the hypermarket compared to medium sized stores and a new discrimination of medium sized and discount stores compared to small stores is beginning to be detected [footnote: The hypermarket format systematically increased its participation until 1996, since when it has reduced its market share, measured in surface area, by more than six percentage points, standing at 26.9% in January 2003. The supermarket market, considered in all of its categories, has maintained a growing trend, reaching a market share of 60.8% in January 2003. It is worth pointing out in this respect, that in recent years, medium sized and large supermarkets have undergone greater development], so much so that companies are adapting their structures more for legislative reasons than in search of greater efficiency and improved customer service.”


84 Eroski webpage, “EROSKI Hypermarkets: Everything the customer needs. Stores that occupy between 4,500 and 12,000 square metres and offer more than 50,000 products. Located in commercial centres and in large cities or administrative centres, they stand out for their quality, variety and price in fresh products. Another of their strong points is their range of bazaar and textile articles and electrical appliances.”
http://www.eroski.es/es/ establecimientos/localizador/eroski

85 Eroski webpage, “EROSKI/Center: nearby with a large selection. With sales floors of between 700 and 2,000 square metres, they offer a wide range of products. Their large range of fresh products stands out as well as their unbeatable prices in foodstuffs, particularly in basic products. They have free car parking.
http://www.eroski.es/es/ establecimientos/localizador/eroski-center

86 Eroski webpage, “EROSKI/City: Master and more convenient shopping. Located in urban areas, they are stores of almost 450 square metres focusing on fast and convenient daily shopping. Their strengths are an extensive range of fresh products and competitive prices in basic articles, accompanied by personal customer service.”
http://www.eroski.es/es/ establecimientos/localizador/eroski-city
The lower limit of 1,000 m² in the definition of the sub-market of large grocery retail outlets coincides with the Commission evaluation in its Kesko/Tuko⁸⁷ and Rewe/Meinl⁸⁸ Decisions and with the classification of the Competition Commission for the purposes of application of a Competition Test in relation to the opening or expansion of large grocery retail outlets⁸⁹.

On the other hand, it must be analysed whether stores with limited services, focusing on price ("hard discount") are a competitive alternative to the large grocery retail outlets. To date, the TDC has considered that discount stores are equivalent to supermarkets or self-service stores and belong to the self-service retail distribution market.⁹⁰ However, asymmetrical competition between large grocery retail outlets and the remaining commercial formats also appears to be extended to discount stores. Customers of discount stores may consider them to be interchangeable with large grocery retail outlets, but it is questionable whether customers of large grocery retail outlets consider discount stores to be a viable alternative if these were to increase their prices by 5-10%. In short, the characteristics of both commercial formats imply that discount stores are an incomplete alternative to the services and products offered by large grocery retail outlets⁹¹.

Therefore, it seems appropriate to exclude hard discount stores of 1,000 m² or more from the daily consumer goods retail market in large grocery retail outlets.

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⁸⁷ Kesko/Tuko Decision, paragraph 12: “For the reasons mentioned above, and as the Finnish population is rather small and dispersed, it is not unreasonable to assess the advantages resulting from having a strong position as regards large retail outlets on the basis of selling areas of 1,000 m².”

⁸⁸ Rewe/Meinl Decision, paragraph 10: “In food retailing, there are diverse distribution methods, which are differentiated, among other factors, by their range and depth of products and by their sales floors (for example, supermarkets with 5,000 to 10,000 articles, with fresh produce sections and a sales floor of 400 to 1,000 m², or hypermarkets with a sales floor of at least 1,000 m²)” and paragraph 37: “In comparison with its competitors, Rewe/Billa and Meinl have a particularly well developed network of large highly productive stores. Whilst the number of businesses in this sector has been reduced by half over the past thirty years, that of supermarkets (400-999 m²), and particularly hypermarkets (>1,000 m²), has increased significantly (from 706 stores in 1980 to 1,907 stores in 1995)”.

⁹⁰ TDC Report of 2nd November 2006, Case No. C-100/06, Carrefour/Dinosol (“Carrefour/Dinosol Report”), page 20: “Discount stores are included within the sphere of the product market (which may also include supermarkets and self-service stores for the purposes of the previous classification), characterised by extremely low prices compared to those of other types of retail, in return for a reduced selection of products, limited variety of brands and a significant number of products marketed under the retailer’s own brand or generic brands”.

⁹¹ Vid., The decisional practice of the Commission and the TDC, which differentiates a cash & carry market from the rest of wholesalers: Kesko/Tuko Decision, paragraphs 24-31 and TDC Report of 20th April 2006, Case No. C-95/06, Miguel Alimentación/Puntocash (“Miguel Alimentación/Puntocash Report”), page 28: “In short, considering products and services that typical consumers may consider to be substitutes due to their inherent characteristics, prices and habitual uses, it may be indicated that the wholesaler market of daily consumer goods in the cash & carry format represents a reference product market which can be differentiated from other wholesaler models, for the different characteristics of these services, and for the specific requirements of their clients.”
6.1.3 Procurement of Daily Consumer Goods

Within the framework of the control of concentrations on a community scale, the Commission has defined the market for the supply of daily consumer goods by product categories.

In the Rewe/Meinl Decision, the Commission identified nineteen product categories:

1. Meat and Cold Meats
2. Poultry and eggs
3. Bread and pastries (fresh and packaged cakes, excluding frozen ones)
4. Dairy products (milk, butter, yoghurt, curd cheese, fresh milk-based desserts, all types of cheese)
5. Fresh fruit and vegetables
6. Beer
7. Wines and Spirits
8. Soft drinks (including mineral water)
9. Hot beverages (coffee and tea)
10. Confectionary
11. Basic foodstuffs (including flour, sugar, pasta, rice and spices)
12. Preserved foods (non perishable food products in tins or other packaging, with the exception of frozen products)
13. Frozen foods (including ice-cream)
14. Baby food
15. Pet food
16. Body-care products (creams, lotions, etc., the purpose of which is mainly preventive) and cosmetics (make-up and perfumes)
17. Detergents and cleaning products
18. Other drugstore products (for example, medicinal products available over the counter, health foods, personal hygiene products)
19. Other non-food products normally found in supermarkets (for example, clothes, newspapers and magazines, leisure and entertainment items).92

On the other hand, the Commission also considered it necessary to differentiate the supply market in accordance with the sales channel, hence limiting the supply market to the food retailing trade:

“The Commission therefore proceeds on the assumption that the supply market may be objectively subdivided into the abovementioned product categories. This does not rule out the possibility that some of these markets may have comparable structures and can be lumped together in the analysis. Moreover, there are, for the reasons set out above, strong arguments in favour of subdividing the supply market according to sales channels, so that supply to the food-retailing trade may constitute a separate market.”93

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92 Rewe/Meinl Decision, paragraph 77.
93 Rewe/Meinl Decision, paragraph 81. However, the Commission did not consider it necessary to take a final decision on the question.
The Commission took into account that food retailing trade represented approximately 50% of sales for the majority of products and although there were other sales channels (specialised stores, cash & carry warehouses, other wholesalers, specialised delicatessens, drugstores or the export trade), they were not readily interchangeable because of different container sizes, presentation and packaging requirements, diverse sales strategies, the need for a variety of knowledge and contacts for different distribution channels, and logistics differences. Similarly, the Commission’s investigations determined that “an immediate, smooth substitution of a lost food-retailing trade customer by selling through other sales channels is impossible in most product categories” and in any case, “it would require considerable investment and adaptation of the firm’s production and sales structure and cost structures.”

In the Carrefour/Promodès Decision, the Commission defined twenty-three product categories:

Daily Consumer Products
1. Beverages
2. Drugstore
3. Perfumery/Personal Hygiene
4. Dehydrated food
5. Para pharmacy
6. Perishable self service products

Fresh Products
7. Meat
8. Fish
9. Fruit and Vegetables
10. Fresh Bread and Confectionary
11. Cold Meats

Bazaar
12. DIY
13. Household
14. Culture
15. Games and Entertainment

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94 Rewe/Meinl Decision, paragraphs 79-80 and 96.
95 Rewe/Meinl Decision, paragraphs 79-80 and, in particular, paragraph 97: “For these reasons and because of the large role played by the food-retailing trade in the sale of products in the above categories in Austria, it follows that a "lost" food retailing trade customer is as a rule difficult for producers to replace. The producers surveyed stated that they could replace without difficulty only small food-retailing trade customers (accounting on average for less than 5% of turnover). Even food-retailing customers accounting for 5-10% of turnover are, according to the same source, not easy to replace. Switching to other sales channels is normally out of the question owing to the difficulties referred to above. And especially the larger producers - both international and Austrian - have already as a rule attained a very high degree of distribution through all sales channels and in particular through all the major food retailers. This clearly shows that in Austria, the opportunities for producers to switch to other buyers are much more limited than the opportunities for buyers to switch to other producers.”

96 Commission Decision M. 1684, Carrefour/Promodès ("Carrefour/Promodès Decision), 25.01.2000, paragraph 16.
16. Gardening  
17. Automobile Spare Parts  
Electrical and Electronic Appliances  
18. Large electrical appliances  
19. Small electrical appliances  
20. Photography  
21. Sound  
22. Television and Video  
Textile  
23. Textile and Footwear

In line with its Rewe/Meinl Decision, the Commission reached the conclusion that, by virtue of the its relative economic importance, its special characteristics and the difficulty of replacement for other channels, the supply of the food retail trade represents a separate market. In relation to the Spanish supply market, the Carrefour/Promodès Referral Decision confirmed the following:

“In its decision n° IV/M.1221- Rewe/Meinl, the Commission highlighted the exercise of buying power with a view to obtaining better purchasing conditions and the interdependence between the distribution market and the supply market. The supply markets comprise the sale of daily consumer goods by producers to wholesalers, retailers and other companies and organisations. Although the importance of the different channels varies, the food retail trade sector represents by far, the main exit from this market (in Spain more than 70%). Therefore, an examination of the supply market must include a separate study of the global supply situation as well as supply to the food retail sector in particular.”

Returning to the decisional practice of the TDC, it must be pointed out that the principles established by the Commission have been followed in relation to the existence of different supply markets in accordance with the product category sold by the retail trade:

“Due to the fact that manufacturers normally produce a single product or category of products, it would not be possible to refer economically to a single supply market in wholesale trade. However, considering the homogeneity of demand – which does not vary significantly from one group of products to another – the Court has considered, like the European Commission [footnote: Vid. M.946 Intermarché/Spar, M.991 Promodès/Casino, and M.1087 Promodès/Simago Decisions], that, from the point of view of defence of competition, it would be sufficient to appreciate the buying power of the parties in relation to all daily consumer goods.”

However, the practice of the TDC in relation to sales channels is more ambiguous. In the definition of the relevant market, the TDC appears to differentiate the food trade

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97 Carrefour/Promodès Decision, paragraphs 19-20 and 94-97.  
98 Carrefour/Promodès Referral Decision, paragraph 18.  
sales channel from other sales channels, including both the retail trade and the wholesaler.

“This market comprises the sale of daily consumer goods by the producers of these goods to their clients: wholesalers and retailers of these products.”

However, the TDC analysis of market shares and competitive structure appears to confine itself to the food retail procurement market. The confusion may arise from the Carrefour/Promodès Decision, which began confirming that the procurement market comprises the sale of daily consumer goods to wholesalers, retailers and the HORECA (Hotels, Restaurants and Cafeterias) sector, yet in the end, it differentiates the retail trade sales channels.

In short, the definition of the procurement market must differentiate the product categories (without detriment to the fact that for practical purposes, a joint analysis would be sufficient) and the predominant food retail sales channels.

6.2 Geographic Markets

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

6.2.1 Retail Market

The retail market has a local geographic dimension because there is insufficient replacement of supply and demand between wider geographic areas. The SDC Study 2004 described the TDC practice in relation to the geographic area of the self-service consumer goods retail market as follows:

“It has traditionally been considered that the catchment areas of self-service outlets are defined geographically by a radius of approximately 20 minutes (between 10 and 30 minutes) driving time. This area may vary for diverse reasons such as the size of the outlet, its associated commercial infrastructures, communications links and the quality of its services.

In reports on large grocery retail outlets that have been commissioned since the entry into force of [Law 2/1996 on the Regulation of the Retail Trade], on analysing existing competition conditions in the market in which a new large grocery retail outlet will

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100 Eroski/Caprabo Report, page 20.
101 Decision Carrefour/Promodès, paragraph 14: “Les marchés de l’approvisionnement comprennent la vente de biens de consommation courante par les producteurs à des clients tels que les grossistes, les détaillants ou d’autres entreprises (par exemple les cafés/hôtels/restaurants). Vid also, Carrefour/Promodès Referral Decision, paragraph 16.
102 Relevant Market Notice, paragraph 8.
operate, the TDC has defined the geographic relevant market in isochrones which will be 15 minutes in the case of stores that are located in the urban centre and 30 minutes, when they are located in rural areas or when there is other similar establishment in the area considered.\textsuperscript{103}

The TDC has followed this methodology in all of its control of concentrations cases. The CNC literally cited these considerations in its Eroski/Caprabo Report.\textsuperscript{104}

The TVDC considers that, nowadays, the progressive implementation of large grocery retail outlets, the growth of urban areas, the increase in road congestion and the importance of the time factor call for a reduction in the isochrones (geographical area of competition). Therefore, a travelling time of up to 15 minutes (10-20 minutes) to a large grocery retail outlet (procurement shopping) appears to be more in line with today’s supply and demand parameters. Travelling 120 kilometres (return trip) or 60 minutes (return trip) driving time for a shopping trip may have reflected the reality in 2000 but does not satisfy today’s consumer dynamics.\textsuperscript{105} On the other hand, the geographic competition between medium-sized supermarkets (400 to 1,000 m\textsuperscript{2}) is obviously less (5-10 minutes driving time) and the remaining smaller establishments have a geographic impact that is reduced even further (0-5 minutes), in accordance with their differential element: proximity/convenience. In short, bearing in mind the asymmetrical nature of competition between commercial formats, in relation to both the type of shopping and the geographic movement required, the following geographic impact principles may be established:

(a) Large grocery retail outlets compete with each other in an isochrone of 15 minutes driving time.
(b) Medium-sized supermarkets are faced with competition from similar stores in an isochrone of 10 minutes driving time and large grocery retail outlets in an isochrone of 15 minutes driving time.
(c) Self-service stores and small supermarkets are faced with competition from similar stores in an isochrone of 5 minutes driving time; from medium-sized supermarkets in an isochrone of 10 minutes driving time; and large grocery retail outlets in an isochrone of 15 minutes driving time.

Logically, these principles may need to be adapted in view of specific conditions of local supply and demand (for example, in isolated rural areas).

These conclusions are similar to those of the Competition Commission Study 2008. Having analysed the opinions of the large retailers in relation to the geographic area of competition between their stores (epigraphs 4.91 to 4.97); the scale of national and local incentives (epigraphs 4.98 to 4.101); consumer habits and the location of stores (epigraphs 4.102 to 4.103); an econometric demand model (epigraphs 4.104 to 4.105); geographic variations in profit margins of stores (epigraphs 4.106 to 4.113); the impact

\textsuperscript{103} SDC 2004 Study, pages 14-15.
\textsuperscript{104} Eroski/Caprabo Report, pages 27-28.
\textsuperscript{105} \textit{Vid.}, Carrefour/Promodès Referral Decision, paragraph 26.
of new stores on the revenues of established stores (epigraphs 4.114 to 4.116); an impact simulation model of a price rise in a store, provided by a retailer (Tesco) (epigraphs 4.117 to 4.131); and the impact of Internet shopping (epigraphs 4.132 to 4.133), the Competition Commission concluded that asymmetrical competition between commercial formats has the following geographic dimension (epigraph 4.145):

(a) Large grocery retail outlets compete with each other in an isochrone of 10-15 minutes driving time.
(b) Medium-sized supermarkets are faced with competition from similar stores in an isochrone of 5-10 minutes driving time and large grocery retail outlets in an isochrone of 10-15 minutes driving time.
(c) Self-service stores and small supermarkets are faced with competition from similar stores in an isochrone of 5-10 minutes driving time; from medium-sized supermarkets in an isochrone of 5-10 minutes driving time; and large grocery retail outlets in an isochrone of 10-15 minutes driving time.

In the analysis of a large number of local markets, the Competition Commission generally uses isochrones of 10 minutes or 15 minutes depending on the cases\(^{106}\).

However, both the TDC and the CNC have admitted that “in the behaviour of the existing operators in this market, and in particular, the large retail chains, not only are variables related to the different local areas in which the stores are present considered, but also wider geographical considerations are taken into account [and] the strategy of the large chains may be national”\(^{107}\). In the Eroski/Caprabo Report, it must be taken into account in the analysis of Eroski’s competitive position in local markets that its pricing strategy, at least partially, had a much wider geographic dimension:

“Furthermore, in the opinion of the GRUPO EROSKI, these percentages must be analysed bearing in mind the total lack of autonomy of store managers of the GRUPO EROSKI at a local level to determine their pricing or promotional policy. Therefore, the GRUPO EROSKI establishes its trading policy for each of its stores in accordance with large geographic areas, which generally correspond to one or several Autonomous Communities. Moreover, on many occasions, this policy is uniformly and coherently established nationwide, with the launch of advertising campaigns in the national media and the printing of similar promotional leaflets for the entire area in which it operates, hence guaranteeing the application of similar prices in all of its stores, regardless of their location or their market share at a local level.”\(^{108}\)

Similarly, in its analysis of the complaint filed against retailers operating in Valencia, following a prior request for information from the companies involved, the SDC declared the following:

\(^{106}\) Competition Commission Study 2008, page 83.
\(^{107}\) Eroski/Caprabo Report, page 22.
“[I] The Mercadona and El Corte Inglés pricing policies are national, without detriment to the fact that they may be adapted to the local competitive situation, whilst Carrefour and Alcampo have a local pricing policy. Even in this latter case, both companies appear to run national advertising campaigns, pricing and promotions.”

In short, although the relevant markets are local, it cannot be ignored that large companies interact in a much wider sphere, both in the retail market and in the procurement market, so the structure of the national and regional retail market has a special impact on local competition conditions and vice-versa.

6.2.2 Procurement

Both the Commission and the TDC/CNC and other national competition authorities have considered that the procurement market has a national dimension. Therefore, the Spanish procurement market has a national geographic scope.

7 Application of Competition Law to Oligopolies

The emergence of concentrated markets in the hands of a limited number of companies in numerous important economic sectors (oligopolies) is one of the outstanding characteristics of the contemporary economy. At the end of the XIX century and during the first half of the XX century, the first theory models of oligopolistic interdependence were formulated (Cournot, Bertrand, Edgeworth, Stackelberg models). However, Chamberlain was the first economist to warn about oligopolistic interdependence generating a specific risk of market failure: under certain conditions, oligopolies may adopt parallel conduct which increases prices without the need to enter.

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109 SDC Decision in relation to the complaint filed by the OCU against various retailers in (“SDC Decision 2006”), reference 2680/06, page 3.
110 Vid., Carrefour/Promodès Referral Decision, and Eroski/Caprabo Report, page 28, which cites the background of the Commission and the TDC.
into negotiations or agreements between them. Academic interest in oligopolies was highlighted thanks to Chamberlain’s Studies and the gradual oligopolization of the global economy. In particular, the discipline of “industrial economy” has dedicated a great deal of effort to unravelling the conditions that move an oligopoly towards tacit collusion instead of towards competition. The Harvard School focused its attention on the structural aspect of the oligopoly, coining the S-C-R (“Structure-Conduct-Performance”) paradigm to describe the influence that a concentrated structure has on the conduct of companies and the results of these conducts. Emphasis on the market structure as a determining factor of conduct in the market led economists of the Harvard School to propose structural remedies to fight off oligopolies. Since the 1960’s, postulates of the Chicago School have gained greater pre-eminence. This School defended the notion that a concentrated market structure could be the result of greater efficiency of large companies and maintained that the oligopoly’s slide towards tacit collusion may only occur under certain conditions. As a result, the Chicago School rejected the adoption of structural measures per se for concentrated markets, proposing instead, a casuistry approach focusing on collusive behaviour in the market. In particular, the academia, Richard Posner, defended the application of Section 1 of the Shearman Act, equivalent to Article 81 of the European Community Treaty (“ECT”), to tacit collusion, alleging that it is nothing more than a cartel. In the 1970’s, a Post-Chicago current was born, called the New Industrial Economy, which applied the Theory of Games and, in particular, the so-called “prisoner’s dilemma”, to show that strategic interaction between competitors may reduce competition in the market and justify the involvement of competition law. The gradual increase in the functioning of oligopolies has culminated in a synthesis by economists of the New Industrial Economy of four cumulative conditions likely to generate tacit collusion: (1) Collective understanding of the terms of coordination; (2) ease of detection of deviations; (3) punishment mechanisms against deviations; and (4) lack of competitive reaction of potential competitors and customers.

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7.1 European Competition Law

The economic origins of competition law have reflected the evolution of the economic theory in terms of oligopolies. During the era of the Harvard School, concern about concentrated markets can be observed in the first decisions by the Commission related to the control of concentrations within the scope of the Treaty of the European Coal and Steel Community (ECSC) and in other general documents. The arrival on the scene of the Chicago School and, in particular, Richard Posner’s proposals of comparing proven tacit collusion to explicit collusion (cartel), led the Commission to explore the application of the notion of “concerted practice” set out in Article 81 of the ECT to tacit collusive conduct. However, the European Court of Justice (ECJ) adopted a more restrictive view of Article 81 of the ECT. In its “colourings” Judgment, the ECJ defined the concerted practice as a “form of coordination between companies that, without having reached an agreement in itself, consciously replaced the risks of competition with practical cooperation between them.” The requirement of a consensual element excluded parallel conduct from the sphere of concerted practice as a result of normal market conditions (tacit collusion). The “colourings” Judgment ruled out that mere tacit collusion could be punishable as a concerted practice, but opened up a new front of uncertainty: the test of the existence or otherwise of market conditions encouraging tacit collusion. This conflict emerged in the famous “wood pulp” Judgment. The Commission considered that the identical nature of the dates and the amount of the price rises announced by different operators could only be explained by means of the existence of an agreement or concerted practice between competitors. However, the ECJ, having requested partial economic studies into the market, concluded that “the oligopolistic tendencies of the market” explained the parallel conduct and overturned the Decision.

Some authors have attributed the legal convictions of the judge dictating the Judgment as a great weight in this case: Judge Joliet had expressed in a previous academic article, his opposition to the application of Article 81 of the ECT to tacit collusion and the risk of extensively applying the notion of concerted practice without a thorough economic analysis of the markets.

In short, the “colourings” Judgment closed the door to the application of Article 81 of the ECT to tacit collusion and the “wood pulp” Judgment required the Commission to

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123 Idem, paragraph 53: “Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.”
carry out a strict economic analysis to apply Article 81 of the ECT to parallel conduct which could not follow tacit collusion between competitors.

The limited possibilities of action against oligopolies in the framework of Article 81 of the ECT led the Commission to explore the application of "abuse by one or several companies in a dominant position" as set out in Article 82 of the ECT, to oligopolies. In its VIII Report on Competition Policy, the Commission declared that European integration had weakened individual dominant positions on a national scale but had not prevented the creation of national oligopolistic markets dominated by two or three companies. In its IX Report on Competition Policy, the Commission reemphasised this question, pointing out that the "close" oligopoly rising in the predominant market model with the consequent risk for competition in the market.

In its XVI Report on Competition Policy, the Commission proposed a definition of collective dominant position which included "implicit (tacit) collusion":

"Deux éléments principaux caractérisent le concept de position dominante collective: un nombre restreint d'entreprises réalise la plus grande part du chiffre d'affaires au marché en cause, sans toutefois qu'aucune entreprise n'occupe à elle seule de position dominante; une interdépendance élevée existe entre les décisions des entreprises. Un des objectifs de la politique de concurrence est de veiller à ce que certains types de comportements des entreprises concernées n'empêchent pas une concurrence suffisante dans de tels marchés. Dans le cas d'un oligopole étroit, la réduction de l'intensité de la concurrence ne requiert pas nécessairement l'apparition d'une collusion tacite. Une collusion implicite peut en effet résulter du fait que les membres de l'oligopole ont pris conscience de leur interdépendance et des conséquences vraisemblablement défavorables d'adopter un comportement concurrentiel" (own underlining).

Therefore, along with the application of Article 86 of the ECT, the Commission defended the use of the control of concentrations to prevent the emergence of collusive oligopolies:

"Indépendamment des possibilités d’appliquer l’article 86 pour réprimer de tels comportements [de collusion tacite], la politique de concurrence doit viser à prévenir..."
l’apparition de situations créant de très fortes incitations à un comportement de colusion tacite. C’est un des objectifs du projet de contrôle préalable des fusions au niveau de la Communauté.  

The Commission applied the concept of a collective dominant position to an oligopoly for the first time in the case of “flat glass”, a Decision related to the concerted practice against Article 81 of the ECT in an oligopolistic market. Although the Court of First Instance (“CFI”) overruled a large part of the Decision, it admitted that the economic ties between companies could give rise to a collective dominant position, opening up way which until then had been unexplored. The CFI “Flat Glass” Judgment gave the Commission a legal tool to control tacit collusion in the heart of the oligopolies, although uncertainty over the scope of the term “economic links” and their new powers of intervention in relation to concentrations focused their attention on the preventive control of tacit collusion through the control of concentrations. The growing use of the concept of collective dominant position in the control of concentrations gave rise to various appeals against the Commission Decisions which defined the notion of “economic links” and its application to tacit collusion. In particular, the “Gencor” Judgment clarified that the notion of economic links includes the relationship of interdependence between parties to an oligopoly, and the “Airtours” Judgment established that the conditions that could give rise to tacit collusion, adapting the legal term “collective dominant position” to the economic concept of oligopolistic tacit collusion: (1) common understanding on the terms of coordination (collusive conduct); (2) ease of detecting deviations (transparency); (3) deterrent mechanisms against deviations (dissuasion); and (4) absence of competitive reaction of potential competitors.

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132 Commission Decision IV/31.906 – Flat Glass, OJEC L 33/44, 1989. CFI Judgment of 10th March 1992, Accumulated Cases T-68,77,78/89, Societa Italiana Vetro Spa, Fabbrica Pisana Spa and PPG Vernante Pennitalia Spa v. Commission, Rep. 1992, II-1403, paragraph 358: “Initially, it cannot be ruled out that two or more economically independent undertakings are found in a specific market, united by such economic links that, due to this fact, they jointly hold a dominant position with respect to other operators in the same market.”  
134 CFI Judgment, 25th March 1999, Case T-102/96, Gencor v. Commission, Rep. 1999, II-753, paragraph 276: “Furthermore, there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another’s behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.”
and customers (lack of external competition). These conditions have been developed in the Commission Guidelines on horizontal concentrations.

Although in the years between the “Flat Glass” Judgment and the “Airtours” Judgment, the control of oligopolistic tacit collusion had been limited to the control of concentrations, it must be pointed out that, during this time, the Commission applied Article 82 of the ECT (collective dominant position) jointly with Article 81 of the ECT at various maritime conferences (“French ship-owners’ committees”, “Cewal” and “TACA”). An appeal against the Cewal Decision gave the ECJ the opportunity to extend its case law on tacit collusion in the sphere of control of concentrations to Article 82 of the ECT. However, the express and final legal declaration that tacit collusion gives rise to a collective dominant position for the purposes of Article 82 of the ECT came without the voluntary support of the Commission. In the “Laurent Piau” Judgment, the CFI took advantage of the opportunity from an appeal against an archive Decision of a complaint against the FIFA (Football Association International Federation) for abuse of a dominant position, to extend the “Airtours” case law to Article 82 of the ECT and hence terminate a long path of case law initiated in the “Flat Glass” Judgment aimed at joining the economic concept of oligopolistic tacit collusion to the legal concept of collective dominant position, both in the control of concentrations and in Article 82 of the ECT.

136 Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (“Guidelines on horizontal concentrations”), OJEC C 031, 2004, paragraphs 39-57. Paragraph 41 establishes the following: “Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.”
138 ECJ Judgment, 16th March 2000, Accumulated cases C-395/96 P and C-396/96 P, Compagnie Maritime Belge and others v. Commission, Rep. 2000, I-1365, paragraph 45: “However, the existence of an agreement or other legal relations is not essential to confirm that a collective dominant position exists, verification that may result from other correlation factors and will depend on an economic appreciation and, particularly, on an appreciation of the structure of the market in question”. In three previous cases, the ECJ had considered the collective dominant position but they had special circumstances: juxtaposition on dominant positions in neighbouring geographic markets (ECJ Judgment, 27th April 1994, Case C-393/92, Almelo and others v. Commission , Rep. 1994, I-1477 and ECJ Judgment, 5th October 1994, Case C-323/93, La Crespelle, Rep. 1994, I-5077) and dominant position of a company and its subsidiary (CFI Judgment, 7th October 1999, Case T-228/97, Irish Sugar v. Commission , Rep. 1999, II-2969).
139 CFI Judgment of 26th January 2005, Case T-193/02, Laurent Piau v Commission , paragraph 111: “Three cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy (Case T-342/99 Airtours v
In its Working Document on Article 82 of the ECT, the Commission summarised all of the previous case law and the contents of its Guidelines on Horizontal Mergers in the section dedicated to collective dominant position. Likewise, the Glossary of Competition Terms prepared by the DG for Competition considers collective dominant position and oligopolistic dominant position to be interchangeable terms.

In short, the “Airtours” Judgment in the field of control of concentrations and its equivalent in the scope of Article 82 of the ECT, the “Laurent Piau” Judgment, have definitively clarified that oligopolistic tacit collusion is equivalent to a collective dominant position and have exposed the four theoretical conditions required to prove its existence. Since then, in accordance with conflicts raised by the application of Article 81 ECT to parallel pricing, the controversy has shifted to the proof of the existence of a collective dominant position. The concentration of disco graphic activities of Sony/Bertelsmann has given community courts the opportunity to provide the first clarification of the economic analysis required to prove the existence of a collective dominant position. The Commission Decision concluded that the Sony/Bertelsmann concentration would not create oligopolistic tacit collusion. The Association of Independent Record Companies, Impala, appealed the Decision and the CFI “Impala” Judgment provided relevant considerations for the purposes of Article 82 ECT. The CFI determined that in the analysis of the existence of oligopolistic tacit collusion, the four conditions established in the “Airtours” Judgment could ‘in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant”.

In particular, the CFI considered that the existence of a “close alignment of prices over a long period”, especially if they are above a competitive level, might suffice to demonstrate the transparency of the
market, “even where there is no firm direct evidence of strong market transparency”\textsuperscript{143}. In relation to elements of dissuasion, the CFI coincided with the Commission that the existence of “retaliatory measures” in the past would have been evidence of its existence\textsuperscript{144}. At appeal, the ECJ considered that the evaluation of the importance of indicia and items of evidence relating to the conduct of the companies in the market, came under the CFI’s liberty of assessment of different items of evidence\textsuperscript{145}, although it required the factors facilitating collusion to be analysed overall\textsuperscript{146} and in accordance with the supposed oligopolistic conduct identified\textsuperscript{147}.

Finally, although community case law has admitted the existence of a collective dominant position derived from oligopolistic tacit collusion, neither the Commission nor the European courts have pronounced on the necessary remedies to suppress the abuse derived from this oligopolistic tacit collusion. Article 7.1 of Regulation 1/2003\textsuperscript{148} allows the Commission to impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end, although “the structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy”. Whereas 12 of the Explanatory Preamble clarifies that “imposing changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking”.

Recently, in a presentation given to authorities, lawyers and Spanish companies, the Director of Competition Policy and Strategy of the DG for Competition has expressed that, compared with the traditional focus, which associated structural measures with the control of concentrations, now the Commission may consider structural remedies, including divestiture, within the scope of Article 82 del ECT\textsuperscript{149}.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{143}] Idem, paragraph 252.
\item[\textsuperscript{144}] Idem, paragraph 269.
\item[\textsuperscript{145}] ECJ Judgment, 10th July 2008, Case C-413/06 P, Bertelsmann and Sony Corporation of America/Impala, paragraphs 127-128.
\item[\textsuperscript{146}] Idem, paragraph 125.
\item[\textsuperscript{147}] Idem, paragraph 126: “In that regard, the assessment of, for example, the transparency of a particular market should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. It is only if such a hypothesis is taken into account that it is possible to ascertain whether any elements of transparency that may exist on a market are, in fact, capable of facilitating the reaching of a common understanding on the terms of coordination and/or of allowing the competitors concerned to monitor sufficiently whether the terms of such a common policy are being adhered to. In that last respect, it is necessary, in order to analyse the sustainability of a purported tacit coordination, to take into account the monitoring mechanisms that may be available to the participants in the alleged tacit coordination in order to ascertain whether, as a result of those mechanisms, they are in a position to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in that coordination is evolving.”
\item[\textsuperscript{148}] Council Regulation 1/2003 of 16th December 2002 related to the application of the competition regulations set out in Articles 81 and 82 of the Treaty, OJEC L 1, 4.1.2003.
\item[\textsuperscript{149}] Carles Estevà Mosso, Presentation of the book published following the Fourth Seminar on Competition Law and Economy: “Remedies and Sanctions in Competition Law”, Rafael del Pino Foundation, 17th September 2008.
\end{itemize}
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Indeed, the Commission appears to be determined to use structural remedies within the scope of Article 82 of the ECT, as reflected in its actions in the German gas and electricity markets. In relation to the electricity market, the Commission opened a sanctioning proceeding against EON for a possible abuse of a dominant position in the electricity generation and transmission markets. However, anticipating a sanctioning decision from the Commission, setting a sanction and ordering structural measures, EON has offered the Commission a proposal to divest assets from generation and transmission activity aimed at resolving the potential competition problems and facilitating a conventional end to the proceeding\textsuperscript{150}. Similarly, RWE has offered the divestiture of its gas transmission assets in order to reach a conventional end to the proceeding on abuse of dominant position which is open against it\textsuperscript{151}.

7.2 Spanish Competition Law

Article 2 of the Competition Act forbids the abuse of a collective dominant position and Chapter II of the Competition Act (control of concentrations) forbids concentrations that restrict competition, particularly, through the creation or strengthening of a collective dominant position.

In line with the decisional practice of the Commission, the SDC and the TDC have prioritized the monitoring of oligopolistic markets in the control of concentrations. They have also adopted the principles of analysis established in the “Airtours” Judgment and developed in the Guidelines on Horizontal Concentrations\textsuperscript{152}.

However, the emphasis on the control of concentrations has not stopped the SDC from proposing and the TDC from concluding on diverse resolutions, that Article 2 of the Competition Act is applicable to oligopolistic practices. In line with the strategy used by the Commission, of indirect approximation to oligopolistic behaviour as a collective

\textsuperscript{150} “Commission welcomes E.ON proposals for structural remedies to increase competition in German electricity market”, MEMO/08/132, 28/02/2008; and “Commission market tests commitments proposed by E.ON concerning German electricity markets”, MEMO/08/396, 12th June 2008: “In particular, E.ON offered to divest generation capacity in Germany from different types of technology and fuels, i.e. run-off-river, lignite, hard coal, gas, pump storage and nuclear, to remedy the Commission's concerns on the wholesale electricity market. In addition, E.ON proposed to divest its transmission system business consisting of its Extra-High-Voltage (380/220 kV) line network and the system operations currently run by E.ON Netz to meet the Commission's concerns on the electricity balancing markets. The High-Voltage (110 kV) line network which is also currently operated by E.ON Netz would remain with E.ON under this commitment proposal”; Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/B-1/39.388 — German Electricity Wholesale Market and COMP/B-1/39.389 — German Electricity Balancing Market, DOCE C 146, 12.6.2008.


\textsuperscript{152} \textit{Vid.}, For example, TDC Reports of 7th March 2007, Case C-103/2007, \textit{Mahou San Miguel/Alhambra}; 2nd August 2007, Case C-104/2007, \textit{Balearia/Buquebus}; and 7th September 2007, Case C-105/2007, \textit{Air Berlin/LTU}. 
dominant position, the TDC first declared the existence of a collective dominant position in relation to an undertaking and its subsidiary.\textsuperscript{153} In diverse cases, the SDC and/or the TDC have also considered the collective dominant position to be applicable to parallel conduct of undertakings united by structural or contractual links: Azúcar,\textsuperscript{154} Líneas Áereas,\textsuperscript{155} Propiedad Intelectual Audiovisual\textsuperscript{156} and Agencias de Viaje.\textsuperscript{157} Therefore, like the Commission, the TDC has taken advantage of a case that is not linked to oligopolistic behaviour to demonstrate the application of Article 2 of the Competition Act to non-concerted parallel conduct. In the Autoescuelas de Alcalá case, the TDC expressed the following \textit{obiter dictum}:

“Although there are many driving schools, agreeing prices and conditions via the Driving Schools Association based in Alcalá de Henares, they all act with certain uniformity as if they were a non-competitive monopoly or oligopoly and abuse their collective dominant position.”\textsuperscript{158}

Anyway, following the confirmation by European courts of the application of Article 82 of the ECT to the collusive behaviour of an oligopoly, the interpretation of Article 2 of the Competition Act must follow the same lines.\textsuperscript{159} This conclusion is supported by Spanish telecommunications regulations and the recent High Court Judgment of 12th January 2009.\textsuperscript{160} In relation to the appeal filed by Telefónica Móviles against the Telecommunications Market Commission (“CMT”) Resolution of 2nd February 2006.\textsuperscript{161} This Resolution established an obligation to open the networks of Mobile Network Operators (MNO) to facilitate entry into the mobile telephone market for

\begin{itemize}
  \item TDC Resolution, 19th February 1999, Case 427/1999, \textit{Electra Caldense}, similar to the CFI Judgment in Case T-228/97, \textit{Irish Sugar v. Commission}.
  \item TDC Resolution, 15th April 1999, Case 426/1998, \textit{Azúcar}. The SDC found four sugar companies guilty of abuse of a collective dominant position but the TDC did not assess the existence of the collective dominant position as it did not consider that the supposed abuse was proven.
  \item TDC Resolution, 29th November 1999, Case 432/1998, \textit{Líneas Áereas}. The SDC found four air lines guilty of abuse of a collective dominant position but the TDC did not assess the existence of the collective dominant position as it did not consider that the supposed abuse was proven. The SDC valued the existence of inter-line agreements between them.
  \item TDC Resolution, 27th July 2000, Case 465/1999, \textit{Propiedad Intelectual Audiovisual}. The TDC considered that the three management agents of audiovisual intellectual property rights occupied a collective dominant position because the law obliged them to reach a consensus on the distribution of the sole remuneration to be paid by the users of the rights.
  \item TDC Resolution, 25th October 2000, Case 476/1999, \textit{Agencias de Viaje}. The TDC only assessed the existence of an anti-competitive agreement but considered that the structural (joint undertaking) and contractual links (no competition agreement) between the agencies could position them in a collective dominant position.
  \item TDC Resolution, 9th March 2000, Case 461/1999, \textit{Autoescuelas Alcalá}, FD 3º.
  \item Supreme Court Judgment, 25th September 2007, Rec. 2171/2002, \textit{Asnef Equifax}, FD 2º: “There is no doubt of the application of Article 81 of the Treaty, either directly, or through interpretation, given that Articles 1 and 3 of the Competition Act, respond to the same criteria as those of that precept”.
  \item CMT Resolution approving the definition and analysis of the access and call origination market in public mobile telephone networks, the designation of operators with significant market power and the imposition of specific obligations, and its notification to the European Commission is agreed, BOE 40, 16.2.2006.
\end{itemize}
operators without their own network (known as Mobile Virtual Network Operators or MVNO)\textsuperscript{162}. The CMT considered that, in spite of the fact that the mobile telephone retail market was operating in a competitive environment, there were some “problems and deficiencies”, summarised by the High Court as follows:

“- Existence of a limited and permanent number of competitors, licensed to use the spectrum and, therefore, with very similar competitive strategies. As a result of such a situation, the market encounters difficulties to discipline these operators and push the transfer of productivity improvements towards users.  
- Neither has the evident level of competition been enough to improve transparency in turnover or to adapt offers to the needs of a wide range of users.

\textsuperscript{162} The CMT Resolution and subsequent lawsuits before the High Court are based on the regulatory control of undertakings with Significant Market Power (“SMP”), established in Directive 2002/21/EC of the European Parliament and of the Council of 7th March 2002, on a common regulatory framework for electronic communications networks and services (“Framework Directive”). The Framework Directive expressly defines the SMP as equivalent to the dominant position in Article 14: “An undertaking shall be deemed to have significant market power if it enjoys a position that allows it to behave independently of competitors, customers and ultimately consumers”. Similarly, the Framework Directive leaves the adoption of a recommendation on relevant product and service markets within the electronic communications sector susceptible to \textit{ex ante} regulation and some Guidelines that facilitate the definition of the market and competitive analysis for national telecommunications authorities, in the hands of the Commission. By virtue of this legal mandate, the Commission adopted a Recommendation, of 11th February 2003, on relevant product and service markets within the electronic communications sector susceptible to \textit{ex ante} regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. The Recommendation identifies those markets whose characteristics may warrant the imposition of the regulatory obligations set out in the specific directives. The “Market 15” corresponds to the wholesale call access and origination market on mobile telephone networks, whose analysis in Spain gave rise to the CMT Resolution of 2nd February 2006. The Commission adopted some Guidelines on market analysis and the evaluation of significant market power within the regulatory framework for electronic communications networks and services [OJEC C 165, 11.7.2002]. Paragraph 19 of the Guidelines states: “With respect to each of these relevant or reference markets, NRAs will assess whether the competition is effective. A finding that effective competition exists in a relevant market is equivalent to a finding that no operator enjoys a single or joint dominant position in that market. Therefore, for the purposes of applying the new regulatory framework, effective competition means that there is no undertaking in the relevant market which holds individually or together with other undertakings a single or collective dominant position”. Section 3.12., paragraphs 86-106, is dedicated to the analysis of the collective dominant position.

General Law 32/2003, of 3rd November, on Telecommunications, and Royal Decree 2296/2004, of 10th December, adopting the regulation on electronic communications markets, network access and numbering, have transposed into Spanish law this system of regulation of the electronic communications sector consisting of the definition of markets, competition analysis, classification and if appropriate, operators with Significant Market Power and establishment of \textit{ex ante} obligations. In particular, Article 3 of Royal Decree 2296/2004 identifies SMP with the dominant position (paragraph 2) and, for the first time, legally recognises the collective dominant position of collusive oligopolies (paragraph 3): “The Telecommunications Market Commission may consider that two or more operators jointly have significant power in a reference market when, even without structural or any other type of links between them, they operate in a market whose structure is considered to favour coordinated effects and they are seen, to customers and competitors, in the same position as a sole operator with significant power in this market. In practice, the lack of competition may be due to the existence of certain links between the aforementioned operators or when, even without structural or any other type of links between them, they operate in a market whose structure is considered to favour coordinated effects…”. 

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- It appears that the similar structure of the operators, all with spectrum licenses for different technological generations, has mainly been aimed, first of all, at attracting new users and their loyalty and secondly, at the introduction of new technologies.
- This structure and homogeneity is more influential than the position of agents in the market, in terms of market share.
- This has all led to a situation of relatively stable prices over time with a downward tendency which apparently does not correspond to the far higher increase in activity, the unquestionable economies of scale and scope associated with the market evolution and the evolution of costs.
- In this respect, users will not receive these productivity improvements (due to deficiencies in market operation) which are retained by operators or passed on exclusively to those users with demands related to new services and terminals.
- Lack of price transparency and the billing method for voice traffic services and, although to a lesser degree, data (basically, SMS). This lack of transparency limits the capacity of users to choose between those offers that best match their interests.
- Difficulty experienced by operators without spectrum resources to compete with mobile operators in converging activities, which is allowing, with increasing intensity, mobile operators to capture a large part of these operators’ traffic. This difficulty is detrimental to users as it limits the availability of integrated data and contents landline and mobile services.
- The development of a pricing system with a lot of crossed subsidies between the different mobile services, particularly between traffic services to terminals and access services and off-net services to on-net services. Subsidies that limit the ability to choose for those users that are not interested in the new services and new more sophisticated terminals or those whose habits or conditions drive them to communicate in different mobile and landline networks.”

The interdependence of the MNO on the retail market is also reflected in the wholesale market, in such a way that none of them have economic incentives to offer third party operators (MVNO) access to their networks, whereby the CMT concluded that the Telefónica, Vodafone and Orange MNO enjoyed a collective SMP situation (dominant position) in the mobile telephone wholesale market and they must open their networks to third parties with reasonable terms. The High Court Judgment has ratified the CMT Resolution and has indirectly clarified the scope of the collective dominant position set out in Article 2 of the Competition Act. First of all, the High Court has admitted that the existence of a competitive environment does not necessarily exclude the presence of competitive “deficiencies” of an oligopolistic nature. Secondly, the High Court has emphasised that the barriers to entry requirement is not limited exclusively to the

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163 High Court Judgment, F.J. 2, Section 2 (“Competition conditions in the defined market and presence in it of operators with significant power (SMP)”, Letter A (“Situation of the retail market as a referential element for the analysis of the wholesale market”).

164 High Court Judgment, F.J. 7, Section 1º (Existence and express declaration of the presence of appropriate levels of competition in the retail market): “In short, although the appellant sufficiently alleges and argues certain facts which allow the existence of some good competition conditions to be confirmed, this does not prevent the existence of other aspects - «problems and deficiencies» - that legitimize public intervention.”

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impregnable markets\textsuperscript{165}. Therefore it has established, in response to the allegations of Telefónica Móviles\textsuperscript{166}, that the holding of a tender process to award radio electric spectrum in April 2005 is not indicative of the absence of barriers to entry barriers, because the competitive structure of the market encourages incumbent bids (and discourages bids from third parties)\textsuperscript{167}. Thirdly, the High Court has confirmed that the SMP (collective) is in essence a dominant position (collective) and, therefore, must follow the criteria for analysis and case law of the competition regulations\textsuperscript{168}. Finally, the High Court has validated the CMT’s competition analysis, concluding that the

\textsuperscript{165} High Court Judgment, F.J. 7, Section 2 (“Conditions of the wholesale market, sufficiency and validity of criteria (number of competitors, transparency and barriers) and as a result declaration of significant market power”): “This series of allegations cannot be accepted by the Court as the Administration, at no time refers to the insuperability of the barriers but refers to the adverse structural conditions that prefigure a panorama in which business rationality makes the presence of new operators highly unlikely or extremely difficult.”

\textsuperscript{166} High Court Judgment, F.J. 7, Section 2 (“Conditions of the wholesale market, sufficiency and validity of criteria (number of competitors, transparency and barriers) and as a result declaration of significant market power”): “And with particular relevance the placer refers to the tender process held in April 2005 for the award of spectrum (2x10 MHz) in the GSM 900 band for which only existing operators presented bids, so that it will be shown, based on the thesis of the appellant, that there is no real demand for spectrum, which eventually would allow the magnitude of the «barriers» to be minimized.”

\textsuperscript{167} High Court Judgment, F.J. 7, Section 2 (“Conditions of the wholesale market, sufficiency and validity of criteria (number of competitors, transparency and barriers) and as a result declaration of significant market power”): “On the other hand the reasons for such an absence of bidders in the aforementioned tender process (question which would prima facie be relevant) are explained by the Public Prosecutor in his response to the demand, without all these reasons being contradicted in conclusions by the appellant or tested in any way to distort them. These reasons, which far from excluding the presence of barriers, to the contrary foster the idea of their real existence are: (i) existing operators had their networks spread out in such a way that they would obtain an additional economic advantage in this tender process over their potential opponents, which was the improvement of the performance and capacities of their networks; (ii) Such agents operated in a market that would provide them with high and stable profitability over time, which granted them greater financial strength when bidding for these licenses in the tender process; (iii) the frequency batches put out to tender did not allow new entrants to compete on the same terms as the incumbent operators as the quality of the communications they could offer in high population density areas was very low; the geographic terms could reach national coverage but this deployment should be completed with base stations operating on a 1800 band to provide service to areas with high density and traffic. All of this incorporates a reasonable, plausible and uncontradicted explanation of what happened in this tender process which leads to the perception of the real presence of all these barriers.” Entry barriers in tender processes have been studied by numerous economists, among whom the Oxford University economist and designer of the tender process for 3rd Generation licenses in the United Kingdom, Paul Klemperer (member of the United Kingdom Competition Commission from 2001 to 2005) stands out, “Bidding markets”, Journal of Competition Law and Economics, 2007, 3, 1-47.

\textsuperscript{168} High Court Judgment, F.J. 7, Section 3 (“Legislation and case law applicable to the declaration of significant market power and particularly to its declaration in a collective form”), Letter A (“Significant Market Power”): “From the transposition of these Guidelines [from the Commission ] we obtain: a) that the classification of Operator with Significant Market Power must be in accordance with the criteria established in Competition Law; and b) that the case law concept of «dominant operator» coincides with that of Significant Market Power in Article 14 of the Framework Directive”. Similarly, Letter B (“Collective Significant Power and joint dominance”): “The legitimacy of whether this condition of Operator with Significant Market Power reaches diverse undertakings, either jointly or collectively, is not object of debate in this case. Such a thing is permitted by Article 82 of the EC Treaty («one or several companies») and Article 2.1 of Law 15/2007, 3rd July, Competition Act («The abusive exploitation by one or several undertakings [our own italics] of its dominant position in the whole or part of the national market is forbidden»).”
mobile telephone retail market is a “tight” oligopoly (collusive) that justifies the existence of a collective dominant position of the three leading operators and the imposition of ex ante remedies:

“This converges in the auto market, which, due to its «tight oligopoly» structure (Gencor Judgment, of the CFI), limitation of operators, limited spectrum and a high level of transparency, deserves the consideration of a market that favours coordinated effects. Therefore, the existence of an agreement or pact of any type between operators, which if one did exist, would lead to a classification of collusionary conduct and the application of a different legal system than the one used in this case, is not necessary, but merely, the existence of such conditions in a tight oligopoly that favours coordinated efforts.”\(^{169}\)

On the other hand, in relation to Article 1 of the Competition Act, it must be remembered that the Competition Act is one of the few competition legislations that expressly extends the application of regulations related to anti-competitive agreements or concerted practices (Article 1 of the Competition Act), to “consciously parallel practices”. In the “video film” case, the TDC associated the “consciously parallel practice” to the oligopolistic conduct described in the economic theory:

“harmonised behaviour of various undertakings in the market, without any type of express or tacit agreement between them, which is merely the result of each developing the respective actions in order to avoid conflict, whereby each undertaking is previously aware of the purposes and resources of the rest.”\(^{170}\)

However, from a methodological point of view, it is preferable to apply the analysis set out in Article 2 of the Competition Act to determine the existence of a collusive oligopoly, without detriment to the fact that its abusive practices may be remedied within the framework of Article 1 or Article 2 of the Competition Act.

Finally, Article 53 of the Competition Act regulates the applicable remedies in terms of the defence of competition, considering conduct and structural conditions, although the latter “may only be imposed in the absence of others of equivalent effectiveness or when, in spite of the existence of behaviour conditions, these are more serious for the company in question than a structural condition”.

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\(^{169}\) High Court Judgment, F.J. 7, Section 3 (“Legislation and case law applicable to the declaration of significant market power and particularly the declaration of a collective nature”), Letter A (“Significant Market Power”).

8 Competition in the Retail of Daily Consumer Goods

The services offered by retailers compete on at least two parameters: location and quality/price ratio of the service. The spatial parameter of competition implies that no store is a perfect substitute for another in the eyes of a consumer. Therefore, each commercial outlet has a certain degree of market power, although conditioned by the presence of other stores in the neighbouring geographic area with a similar quality/price ratio. The closer the store, the greater the replacement ratio. In short, retail responds to the imperfect competition model and spatial location is a competition parameter that acquires considerable relevance, and in some cases, it is decisive.

8.1 Framework of Analysis

The practice of the Commission in this field is reflected in its Kesko/Tuko, Rewe/Meinl and Carrefour/Promodès Decisions.

In the case of Kesko/Tuko, the Commission estimated that the merged company would control approximately 55% of the self-service retail sales of daily consumer goods. The market shares were the following:

<table>
<thead>
<tr>
<th></th>
<th>Sales MEcu</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kesko (incl. Stockmann)</td>
<td>3 564,3</td>
<td>39,9</td>
</tr>
<tr>
<td>Tuko (incl. Whuri &amp; Sentra)</td>
<td>1 753,9</td>
<td>19,7</td>
</tr>
<tr>
<td>SOK</td>
<td>1 958,3</td>
<td>21,9</td>
</tr>
<tr>
<td>Tradeka/Elanto</td>
<td>1 087,0</td>
<td>12,2</td>
</tr>
<tr>
<td>Others</td>
<td>561,6</td>
<td>6,3</td>
</tr>
<tr>
<td>TOTAL</td>
<td>8 925,1</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Kesko/Tuko Decision, page 23

The Commission concluded that the operation would create a dominant position by virtue of the high market share of the merged company, as well as other competitive advantages derived from (a) its leadership in the large stores segment (>1,000 square metres); (b) its control of spaces in commercial centres, (c) its loyalty cards; (d) its presence in private-label brands; (e) its distribution system; and (f) its leadership in the supply market.
In the Rewe/Meinl Decision, the Commission considered that the operation would create a dominant position of the merged entity and demanded considerable divestiture. The market shares are shown below:

<table>
<thead>
<tr>
<th>Empresa</th>
<th>Cuota de mercado con almacenes de descuento</th>
<th>Cuota de mercado sin almacenes de descuento</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rewe/Billa</td>
<td>[27-33]%</td>
<td>[33-38]%</td>
</tr>
<tr>
<td>Meinl</td>
<td>[5-10]%</td>
<td>[5-10]%</td>
</tr>
<tr>
<td>Spar</td>
<td>[23-28]%</td>
<td>[27-32]%</td>
</tr>
<tr>
<td>ADEG</td>
<td>[8-13]%</td>
<td>[10-15]%</td>
</tr>
<tr>
<td>Hofer</td>
<td>[&lt;15]%</td>
<td></td>
</tr>
<tr>
<td>Löwa</td>
<td>[&lt;10]%</td>
<td>[&lt;10]%</td>
</tr>
<tr>
<td>Otros</td>
<td>[&lt;10]%</td>
<td>[&lt;10]%</td>
</tr>
</tbody>
</table>

Source: Rewe/Meinl Decision, page 7

The market share of the merged entity would not have exceeded 50% (33-43% including discount stores and 38-48% excluding them), but the Commission particularly took into account that (a) Rewe was market leader (paragraph 22 et seq.); (b) the merger would have increased the distance from its competitors (paragraph 28 et seq.); (c) the merged companies were the leading suppliers in the key region of Austria (paragraphs 31 et seq.); (d) the merged companies had a significant presence in the segment of large grocery retail outlets (paragraphs 37 et seq.) and in metropolitan areas (paragraphs 42 et seq.); (e) Rewe was a centrally managed company, unlike its competitors (paragraphs 49 et seq.); and (f) the dominant position of the merged company in the supply market would have strengthened its competitive advantage in the distribution market (paragraph 54 et seq.).

In the Carrefour/Promodès Decision, the Commission analysed the retail distribution market in France and Spain.

In relation to France, the Commission showed that the national market share of the merged company would have increased to 25-30%. The market shares are shown below:

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Kesko/Tuko Decision, paragraph 106: “The combined market share of Kesko and Tuko of at least 55%, whether assessed at local, regional or national level creates a presumption of dominance. This presumption is further strengthened by Kesko's and Tuko's position as regards large retail outlets, their control of a significant part of all business premises suited for retail outlets in Finland, their customer loyalty schemes and private label products, their distribution systems and, not least, by the position of their central organs as buyers of daily consumer goods.”

Although the company would only have been leader in some regional areas: Central-east and south-east Paris region (Carrefour/Promodès Decision, paragraph 40).
The Commission estimated that, unlike the scenario contemplated in the Rewe/Meinl Decision, in France there were active competitors on a national scale with a structure and competitive strength comparable to that of the merged entity, so it could not be concluded that the concentration would give rise to an individual dominant position in the retail market\(^{173}\).

However, the Commission concluded that the concentration would give rise to a dominant position in the supply market\(^{174}\) and, by virtue of the mutual interdependence of both markets, it considered that the merged entity would extend its dominant position in the supply market to the distribution market\(^{175}\). Therefore, the Commission analysed for the first time, the possible creation of a collective dominant position in the supply market\(^{176}\).

In relation to Spain, although in the Carrefour/Promodès Referral Decision the analysis of the local retail distribution markets had been issued to the TDC, the Commission also

\(^{173}\) *Vid.*, Carrefour/Promodès Decision, paragraph 43: “On doit cependant noter qu’en France, à la différence, par exemple, de la situation du marché autrichien (voir affaire M 1221 Rewe/Meinl), il existe un certain nombre de concurrents actifs au niveau national et disposant de parts important comme Leclerc (12-17%), Intermarché (12-17%), mais également Auchan (10-15%) Casino (10-15%) ou Cora (<10%). Bien que les parties soient numéro un sur le format « hypermarché » (25-35%), Leclerc et Auchan ont respectivement des parts de (20-30)% et (15-20)%. Sur la base de ces parts de marché, l’on pourrait donc conclure, en considérant le marché aval indépendamment des développements éventuels sur le marché amont (vois ci-après), que la présente concentration ne mènera pas à la création d’une position dominante des parties sur le marché aval au niveau national”.

\(^{174}\) *Vid.*, infra Section 9.1 of this Study. Curiously, in the procurement market the Commission used the same competitive analysis as in the Rewe/Meinl Decision in relation to the retail market.

\(^{175}\) *Vid.*, Carrefour/Promodès Decision, paragraph 87: “Les parts et volumes d’achat importants de Carrefour, combinés à certains atouts dont disposera le nouveau groupe sur l’aval, pourraient entraîner la création d’une situation qui conférerait à la nouvelle entité des avantages permanents en terme de conditions commerciales par rapport à ses rivaux. Une telle situation pourrait permettre à Carrefour de creuser encore l’écart avec ses concurrents sur les marchés de l’amont ce qui aurait pour effet mécanique de renforcer ainsi sa position à l’aval. Le renforcement des positions à l’aval aura lui-même un effet d’entraînement sur les positions à l’amont et ainsi de suite (See supra, paragraphs 45 and 46)”.

\(^{176}\) *Vid.*, infra Section 9.1 of this Study.
considered it opportune to analyse the competition in national and regional distribution, due to its close relationship with the supply market. Therefore, the Commission’s competitive analysis overlapped to a certain extent with that of the TDC and the market share estimates varied according to the sources. In any case, according to the different estimates carried out by the TDC and the Commission, the aggregate market share of the merged company in the national sphere would have varied between 23.6% and 30.7%, depending on the different sources and calculation methods. The market shares, in terms of turnover, estimated by the TDC, taking the data from the Alimarket Consultant as a reference are shown below:

<table>
<thead>
<tr>
<th>EMPRESA</th>
<th>FACTURACION 1998 (MILLONES DE PTAS)</th>
<th>CUOTA DE MERCADO (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>G. PROMODÉS</td>
<td>908.934</td>
<td>14,4</td>
</tr>
<tr>
<td>C. C. PYCA</td>
<td>595.324</td>
<td>9,2</td>
</tr>
<tr>
<td>G. EROSKI</td>
<td>643.653</td>
<td>9,9</td>
</tr>
<tr>
<td>G. AUCHAN</td>
<td>437.305</td>
<td>6,7</td>
</tr>
<tr>
<td>HIPERDÉCIC</td>
<td>447.033</td>
<td>6,4</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>386.195</td>
<td>5,2</td>
</tr>
<tr>
<td>UNICRO</td>
<td>194.830</td>
<td>3</td>
</tr>
<tr>
<td>SUPERDÉPILO</td>
<td>174.741</td>
<td>2,7</td>
</tr>
<tr>
<td>CAPRABO</td>
<td>158.000</td>
<td>2,4</td>
</tr>
<tr>
<td>MAKO</td>
<td>138.191</td>
<td>2,1</td>
</tr>
<tr>
<td>DADISA</td>
<td>138.600</td>
<td>2,4</td>
</tr>
<tr>
<td>LIDL</td>
<td>92.500</td>
<td>1,4</td>
</tr>
<tr>
<td>AHOLD</td>
<td>76.696</td>
<td>1,2</td>
</tr>
</tbody>
</table>

(1) Se ha tomado como denominador 6.5 billones de pesetas.
Fuente: Elaboración propia partiendo de datos de ALIMARKET, Octubre 1999.
Nota: El grupo resultante de la fusión se colocaría, a nivel nacional con una cuota de mercado del 23%. La cuota del siguiente operador, ALCAMPO, supone un tercio de la del líder.

Source: Carrefour/Promodés Resolution, page 56, taking Alimarket data for October 1999 as a reference.

The TDC also estimated the market shares in terms of sales floor, taking Alimarket data as a reference:

<table>
<thead>
<tr>
<th>EMPRESA</th>
<th>TOTAL NF</th>
<th>Cuota de Mkt (1)</th>
<th>ENSEÑAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>PROMODÉS</td>
<td>1.040.218</td>
<td>14,05</td>
<td>Día, Día, Día, Champion</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>743.421</td>
<td>10,05</td>
<td>Pyca, Super, Mayor, Superstop, Maxim</td>
</tr>
<tr>
<td>EROSKI</td>
<td>675.434</td>
<td>9,13</td>
<td>Consum, Erosal, Mani, Erosi</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>449.249</td>
<td>6,07</td>
<td>Alcampo, Sabeco</td>
</tr>
<tr>
<td>UNICRO</td>
<td>326.780</td>
<td>4,42</td>
<td>El Arbol, Superspar</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>312.543</td>
<td>4,23</td>
<td>Mercadona</td>
</tr>
<tr>
<td>CAPRABO</td>
<td>235.956</td>
<td>3,16</td>
<td>Caprabo</td>
</tr>
<tr>
<td>SUPERDÉPILO</td>
<td>226.101</td>
<td>3,06</td>
<td>Ecomar, Ecomatone, Superbol, Hiperdino</td>
</tr>
<tr>
<td>EL CORTE INGLES</td>
<td>223.690</td>
<td>3,02</td>
<td>Hipercor, El Corte Ingles</td>
</tr>
<tr>
<td>LIDL AUTOSERVICIOS</td>
<td>162.616</td>
<td>2,26</td>
<td>Lidl</td>
</tr>
</tbody>
</table>

(1) Se han tomado como denominador 7.395.654 m² de superficie de libre servicio según Alimarket.
On the other hand, the market shares, in terms of turnover, estimated by the TDC increased considerably if data from Nielsen was used as a reference:

<table>
<thead>
<tr>
<th>GRUPO CARREFOUR</th>
<th>31.7</th>
</tr>
</thead>
<tbody>
<tr>
<td>GRUPO EROSKI</td>
<td>11.3</td>
</tr>
<tr>
<td>GRUPO ALCAMPO</td>
<td>8.8</td>
</tr>
<tr>
<td>GRUPO CORTE INGLÉS</td>
<td>7.9</td>
</tr>
<tr>
<td>TOTAL TOP 4</td>
<td>59.7</td>
</tr>
<tr>
<td>TOTAL MERCADO</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Carrefour/Promodès Resolution, page 58, using data from Nielsen as a reference.

On the other hand, the Commission had estimated an aggregate market share for the merged company of 25-30%:

In short, it can be considered that the merged company would have acquired a national market share of 25-30%.

In relation to the analysis of competition in the Spanish retail market, the Carrefour/Promodès Decision declared that the operation could further strengthen the leadership of the merged company (with a share three times that of its closest rivals, Auchan, Eroski and El Corte Inglés), and considered that the entry of new operators and, in particular, the opening of new stores of more than 2,500 square metres faced legal barriers (paragraph 114). The Commission also estimated that the merged company would benefit from its presence in all of the self-service commercial formats and a majority presence in the most productive segment: the hypermarket (paragraphs 116-118). However, the Commission considered that its closest competitors were important companies in a position to compete effectively against the merged company in the field of loyalty cards, advertising campaigns and financial resources, helped by legal barriers to the entry of operators, from which they also benefited (paragraphs 119-122). Finally, the Commission also stated that, in addition to national competitors, there were also regional retailers that were willing to expand to compete against the merged company (paragraph 124).
In parallel to the national market analysis carried out by the Commission, the TDC Carrefour/Promodès Report valued the effects of the operation on competition in local markets in accordance with dual criteria: the location of the hypermarkets of the concentrated business groups and the location of the geographic areas in which there was a concentration of either of the labels of each group (page 44). The analysis identified three categories of effects, according to areas of concentration. Group I comprised the areas in which the concentration levels were high but did not correspond to share increases, as one of the two labels was not present, or the final share of the resulting group was not significant in the area. Group II brought together the areas in which the total share of the concentrated group was high but did not restrict competition given the presence of important competitors in the area. Group III included the areas in which the TDC considered that the concentration operation hindered effective competition in the market due to their structural characteristics (page 44):

<table>
<thead>
<tr>
<th>ZONA</th>
<th>Entidades Presentes del Grupo Carrefour</th>
<th>Cuenta Mercado Libreservicio Grupo CP</th>
<th>Cuenta Mercado Libreservicio/Competidor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aragón</td>
<td>PRYCA, CONTINENT, DIA</td>
<td>35,4%</td>
<td>11,7% CONSÚM</td>
</tr>
<tr>
<td>Cádiz</td>
<td>PRYCA, DIA, CHAMPION</td>
<td>24,2%</td>
<td>34,0% SUPERSOL (793 m²)</td>
</tr>
<tr>
<td>Puerto Santa María</td>
<td>PRYCA, DIA</td>
<td>30,1%</td>
<td>33,4% SUPERSOL (886 m²)</td>
</tr>
<tr>
<td>Jerez</td>
<td>PRYCA, CONTINENT, CHAMPION</td>
<td>27,9%</td>
<td>15,9% SUPERSOL (1122 m²)</td>
</tr>
<tr>
<td>Vila Real</td>
<td>PRYCA, CONTINENT, DIA</td>
<td>30,6%</td>
<td>15,0% SUPERSOL (605 m²)</td>
</tr>
<tr>
<td>Cartagena</td>
<td>PRYCA, CONTINENT, DIA</td>
<td>33,2%</td>
<td>28,1% SUPERBÉ (1003 m²)</td>
</tr>
<tr>
<td>Málaga</td>
<td>PRYCA, CONTINENT, DIA</td>
<td>20,1% (39,2%)</td>
<td>32,6% ALMEMA (536 m²)</td>
</tr>
<tr>
<td>Valencia</td>
<td>PRYCA, CONTINENT, DIA</td>
<td>34,7%</td>
<td>19,0% ALCAMPO</td>
</tr>
<tr>
<td>Barcelona</td>
<td>PRYCA, CONTINENT, CHAMPION, DIA</td>
<td>45,6%</td>
<td>13,9% CONDIS</td>
</tr>
<tr>
<td>Cataluña Occidental</td>
<td>PRYCA, CONTINENT, CHAMPION, DIA</td>
<td>31,4%</td>
<td>9,5% CAPRABO (869 m²)</td>
</tr>
<tr>
<td>Tarragona</td>
<td>PRYCA, CONTINENT, SUPRECO, MAYOR, DIA</td>
<td>37,4%</td>
<td>11,1% DISTOP (303 m²)</td>
</tr>
<tr>
<td>Huesca</td>
<td>PRYCA, SUPRECO, DIA</td>
<td>42,0%</td>
<td>14,0% LLCHET (225 m²)</td>
</tr>
<tr>
<td>Zaragoza</td>
<td>PRYCA, CHAMPION, DIA</td>
<td>33,2%</td>
<td>31,7% PLUGROS (87 m²)</td>
</tr>
<tr>
<td>Gerona</td>
<td>MAXIMA, MAYOR, SUPERSTOP, DIA</td>
<td>25,3%</td>
<td>28,3% CAPRABO</td>
</tr>
</tbody>
</table>
In this way, the TDC proceeded to a competitive analysis of each local market:

2. Cádiz-Jerez-Puerto de Santa María- San Fernando (Area 3)\(^{179}\)
The TDC considered a market potential for 8 hypermarkets, a figure which coincided with the number of existing hypermarkets (1 of them underway), of which 4 would have corresponded to the merged company. Therefore, The TDC considered that “it is not easy to set up new stores, particularly if following the merger, 4 out of these 8 hypermarkets are allowed to belong to the same group”. Similarly, the sales floor share, considering the entire area was 18.7% according to the notifying party and 25-30% according to the TDC. In any case, the TDC considered that there was a “dominant position in the hypermarket segment, especially bearing in mind that it was practically a mature market, understanding by this, that the number of economically viable stores has been reached”. Therefore, the TDC proposed the sale of one hypermarket.\(^{178}\)

3. Málaga (Area 6)\(^{180}\)

<table>
<thead>
<tr>
<th>Area</th>
<th>Hypermarket</th>
<th>Sales Floor Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cádiz-La Línea-Los Barrios (Area 2)</td>
<td>SUPERSTOP</td>
<td>27.3%</td>
</tr>
<tr>
<td>Algeciras</td>
<td>MAXOR, DIA</td>
<td>21.5%</td>
</tr>
<tr>
<td>Cádiz-Puerto de Santa María- San Fernando (Area 3)</td>
<td>SUPERSTOP, DIA</td>
<td>18.4%</td>
</tr>
<tr>
<td>Cádiz</td>
<td>MAXIM, DIA</td>
<td>22.6%</td>
</tr>
<tr>
<td>Cádiz</td>
<td>MAXIM, DIA</td>
<td>17.3%</td>
</tr>
<tr>
<td>Málaga</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>31.7%</td>
</tr>
<tr>
<td>Seville</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>29.5%</td>
</tr>
<tr>
<td>Seville</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>23.6%</td>
</tr>
<tr>
<td>Seville</td>
<td>PRYCA, CHAMPION, DIA</td>
<td>64.7%</td>
</tr>
<tr>
<td>Seville</td>
<td>PRYCA, CHAMPION, DIA</td>
<td>23.6%</td>
</tr>
</tbody>
</table>

\(^{177}\) Carrefour/Promodès Report, pages 47-48.

\(^{178}\) Competition Law 16/89, predecessor to the current Competition Act, established that the TDC Report on the control of concentrations should be submitted to the Government, who would have the last word on the notified concentration.

\(^{179}\) Carrefour/Promodès Report, page 48.

\(^{180}\) Carrefour/Promodès Report, page 49.
The TDC counted 5 hypermarkets in Malaga and its surrounding area, of which two belonged to the merged company and one to Eroski. TDC estimates were 30.8% in sales floor share for Malaga capital and 25.2% for the area of Malaga. In value, the shares were 29.1 and 26.4% respectively. The TDC considered that it would lead to deterioration in competition:

“The estimated shares themselves do not reveal a worsening of competition conditions, unless, like in Seville, it is observed that the hypermarket share would rise to 48.9%. The theoretic number of hypermarkets, in accordance with 820,000 inhabitants in the widely defined area, would be around 10. Considering only the 528,000 inhabitants of the municipality of Malaga, this number falls to around 6. Therefore, the deterioration in competition conditions is clear when there is an increase in market share of 10.9% percentage points following the merger.” Therefore, the TDC proposed the sale of one hypermarket.

4. Seville (Area 7)\(^{181}\)
The TDC focused its analysis on two different areas (Seville city centre and its catchment area; and Camas-San Juan de Aznalfarache). The sales floor share of the merged company was 37.7% and 32.2% in value in the Camas-San Juan de Aznalfarache area; and 20.4% in sales floor and 33.6% in value in Seville city centre. The TDC estimated a market potential for 12 hypermarkets, whilst 9 were already operational, of which 6 belonged to the Carrefour Group (54.41% in surface area), 2 to Hipercor and 1 to Alcampo. There was an important presence of Grupo Hermanos Martín in the area, but its largest store did not exceed 2,500 m\(^2\), with an average of 800 m\(^2\). Therefore, the TDC considered that “this concentration operation would involve a considerable reduction in effective competition in this area” and proposed the sale of one hypermarket.

5. Palma de Mallorca (Area 9)\(^{182}\)
The TDC established that the merged company controlled three hypermarkets in the urban and surrounding area of Palma de Mallorca, compared to a sole competitor by the name of Alcampo. Shares in sales floor were 24.2% and 34.8% in value. The TDC proposed the sale of one hypermarket in view of the fact that “the hypermarket segment is practically saturated in Palma de Mallorca, and this situation is worsened by regional legislation, given the minority existence in the granting of licenses for large commercial establishments for the whole island”.

6. Murcia (Area 13)
The TDC estimated that the merged company would have a share of 31.9% or 35.5% (capital plus surrounding areas) in value. The TDC estimated a market potential of 5-6 hypermarkets and the merged company controlled 4 of the 5 existing hypermarkets and held a licence for a new hypermarket. Therefore, the TDC proposed the sale of one hypermarket.

\(^{181}\) Carrefour/Promodès Report, pages 49-50.
\(^{182}\) Carrefour/Promodès Report, page 50.
7. Cartagena (Area 14)\textsuperscript{183}
The TDC estimated a market potential for 2 hypermarkets, a figure which coincided with the existing 2 hypermarkets, both belonging to the merged company. Eroski had applied for a license in San Javier “located 20 minutes from Cartagena”. The market shares for the municipality of Cartagena were 33.2 % in sales floor and 44.3 % in value, according to the Tribunal. The TDC proposed the sale of one hypermarket.

8. Avilés (Area 15)\textsuperscript{184}
The TDC established that the planned opening of another hypermarket would increase the market share to 39.2% and “given such a high level of hypermarkets in the two neighbouring geographic areas, Gijón and Oviedo, the introduction of a new competitor in the near future would not be plausible if the planned opening were to take place”. Therefore, the TDC proposed that the planned hypermarket should not be opened.

9. North of Madrid (Area 19)\textsuperscript{185}
The Tribunal estimated a sales floor share of 34.7 % and 41 % in value for the merged company, which controlled 2 of the 3 existing hypermarkets and planned to open a third one. Therefore, the TDC proposed the sale of one hypermarket.

10. North of Barcelona (Area 22)\textsuperscript{186}
The TDC established that the merged company controlled 4 of the 6 existing hypermarkets (including 2 hypermarkets underway, one of which belonged to the merged company) with a sales floor share of 45.5%. Therefore, the TDC proposed that the planned hypermarket should not be opened.

11. Vallès Occidental (Area 24)\textsuperscript{187}
The TDC attacked the disintegration of two local markets (Tarrasa and Sabadell on one hand and Barberá on the other hand), although it considered that there was a competitive overlap. The merged company controlled the two existing hypermarkets in Tarrasa, and 2 of the 3 hypermarkets in Barberá. The sales floor market shares were, according to the Tribunal estimates, 31.4 % and 37.4 % for the two disintegrations. In value, these shares were 41.4 % and 50.6 %. Therefore, the TDC proposed the sale of one hypermarket in each area.

12. Bages (Area 27)\textsuperscript{188}
The TDC estimated a market share of 32.4 % in sales floor according to Nielsen and 64.5% in value, according to its own calculations. There was no overlapping in hypermarkets (the two existing hypermarkets belonged to the buyer), but even so, the TDC considered that “the high share prior to the merger already reveals an extremely high market concentration” and proposed the sale of one hypermarket.

\textsuperscript{183} Carrefour/Promodès Report, page 51. 
\textsuperscript{184} Carrefour/Promodès Report, page 51. 
\textsuperscript{185} Carrefour/Promodès Report, page 51. 
\textsuperscript{186} Carrefour/Promodès Report, page 52. 
\textsuperscript{187} Carrefour/Promodès Report, page 52. 
\textsuperscript{188} Carrefour/Promodès Report, page 52.
13. Lérida (Area 30)\textsuperscript{189}

In the municipality of Lérida, the group emerging from the operation ran the “Pryca hypermarket, an establishment operating Champion, with 2,496 m\textsuperscript{2} and various DIA stores”, with a market share of 33.2 % in sales floor and 33.8 % in value. The TDC proposed the sale of Champion.

14. Gerona (Areas 31, 32, 35 and 36)\textsuperscript{190}

The TDC estimated that the merged company would reach a high market share in the whole province which, added to the strong presence in Catalonia, made the divestiture of the Maxim chain of supermarkets in Catalonia necessary.

15. Valencia (Area 40)\textsuperscript{191}

The TDC estimated that the merged company controlled 5 of the 9 existing hypermarkets (including 1 competitor’s hypermarket underway). Its market share in sales floor was 24.4 %, less than the market share of the leader, Mercadona (32.9 %), which ran supermarkets of 916 m\textsuperscript{2} on average. The TDC considered that there was a market potential for 9 hypermarkets in the municipality of Valencia and a further 6 in the surrounding municipalities. However, there was a moratorium of licenses for large grocery retail outlets. Therefore, the TDC proposed the sale of one hypermarket.

16. Burgos (Area 42)\textsuperscript{192}

The TDC established that the merged company controlled 2 of the 3 existing hypermarkets and its estimated market share in sales floor and value was slightly above 30%. The TDC considered that the market potential was already covered: “An increase in demand in this market is not expected so, following the merger, it would be unlikely to expect the entrance of a new competitor. Therefore, the merger will visibly alter competition conditions”. Therefore, the TDC proposed the sale of one hypermarket.

17. Palencia (Area 44)\textsuperscript{193}

The TDC established that the merged company controlled the only existing hypermarket, which is followed by a Champion store. The market share of the merged company was 41.4 %. The TDC considered that the population of the area did not justify the presence of a second hypermarket, at least a large one. Therefore, “the only way of encouraging a competitor to enter this market is for the group emerging from the operation to sell the second largest establishment”.

18. Valladolid (Area 43)\textsuperscript{194}

The TDC established that the merged company controlled 3 of the 4 existing hypermarkets and its estimated market share was 30 % in sales floor and 36 % in value. The TDC estimated that the market potential was covered by the 4 existing hypermarkets and, furthermore, a potential entrant “would have to face a strong
competitor with a significant presence in the area”. Therefore, the TDC proposed the
sale of one hypermarket.

19. Badajoz (Area 46)\textsuperscript{195}
The TDC established that the merged company controlled the 2 existing hypermarkets
and its estimated market share was 40% in sales floor and 46% in value. The TDC
considered that the market potential was covered by the 2 existing hypermarkets and the
entry of a new competitor was not foreseeable. Therefore, the TDC proposed the sale of
one hypermarket.

In short, in the Carrefour/Promodès concentration, the merged company would not have
reached significant market shares in the local retail markets. However, the TDC
attributed special relevance to legal, economic and strategic barriers that limit the entry
of new competitors in the large grocery retail outlet segment and prioritized keeping a
reasonable number of competitors in these markets. In short, it may be concluded that
the TDC, either significantly reduced the level of requirements in relation to the
existence of an individual dominant position in the large grocery retail outlet market or
it implicitly applied a competitive analysis based on the creation or strengthening of a
collective dominant position, as proposed in this Study\textsuperscript{196}.

Soon after its Carrefour/Promodès Report, the TDC analysed the competitive situation
of the retail and cash & carry markets in the Canary Islands, using strict criteria in its
Pío Coronado/Cemetro Report\textsuperscript{197}. In relation to the retail market, the TDC considered
that the addition of a Cemetro store of 629 m\textsuperscript{2} would take the market share of Pío
Coronado in Corralejo (Fuerteventura) from 35% to approximately 44%. The TDC
admitted that there were other regional chains installed in Corralejo: Supermercados
Marcial (15%) and Super Rita (12%). The TDC also recognised that, although it was
necessary to obtain a second commercial license for surface areas over 750 m\textsuperscript{2}, there
was nothing to stop other competitors from opening stores of a similar size to those of
the merged company. However, the TDC considered that the presence of Pío Coronado
and the second commercial license would create significant barriers to entry. Therefore,
the TDC considered that it could not “allow a company that already had a considerable
share in a certain geographic market, to continue increasing its presence, especially
when the share increase is obtained from the purchase of stores already operating rather
than as a result of the company’s own expansion, and when Pío Coronado would own
the establishments with the largest sales floor on the market”\textsuperscript{198}. Therefore, the TDC
proposed the divestiture of the Cemetro store in the town of Corralejo.

As far as the cash & carry wholesaler market share is concerned in the defined relevant
geographic market (Gran Canaria), the market share of Pío Coronado as a result of the
operation reached 49.4%, following the addition of 2.1 % corresponding to a Cemetro
establishment of 800 m\textsuperscript{2}. The TDC considered that “the presence on the island of

\textsuperscript{195} Carrefour/Promodès Report, page 54.
\textsuperscript{196} \textit{Vid.}, infra Section 10.1.5 of this Study.
\textsuperscript{197} TDC Report, 27th April 2001, Case C- 64/01, \textit{Pío Coronado/Cemetro (“Pío Coronado/Cemetro Report”)}.
\textsuperscript{198} Pío Coronado/Cemetro Report, page 44. \textit{Vid.}, Recommendation 4, page 46.
competitors of the magnitude of Makro (8,400 m² in Gran Canaria) and other regional establishments such as Supermercados Mercacento (2,000 m²) and Yánez (2,000 m²), would not take away importance from the fact that with Cemetro, Pío Coronado could accumulate 50% of this market” and proposed the divestiture of the Cemetro cash & carry establishment\textsuperscript{199}.

In 2002, the TDC also requested divestiture in the Caprabo/Enaco Report\textsuperscript{200}. The market share of the merged company in Blanes rose from 36% to 52% in terms of sales floor and it controlled the two existing large grocery retail outlets in the market.

<table>
<thead>
<tr>
<th>ESTABLECIMIENTOS DE COMERCIO MINORISTA</th>
<th>CUOTAS DE MERCADO EN SUPERFICIE. BLANES. AÑO 2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nº</td>
<td>M²</td>
</tr>
<tr>
<td>ENACO (AMIC)</td>
<td>1</td>
</tr>
<tr>
<td>CAPRABO</td>
<td>4</td>
</tr>
<tr>
<td>CONDIS</td>
<td>4</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>1</td>
</tr>
<tr>
<td>LOL</td>
<td>1</td>
</tr>
<tr>
<td>DIA</td>
<td>3</td>
</tr>
<tr>
<td>CHAMPION</td>
<td>1</td>
</tr>
<tr>
<td>PROXIM</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
</tr>
</tbody>
</table>

Source: Caprabo/Enaco Report, page 30

The TDC considered that the leadership of the merged company, in particular in the large grocery retail outlet segment, and the existing legal barriers, implied a restriction on competition\textsuperscript{201} and proposed the divestiture of one of the two large grocery retail outlets of the merged company, eliminating all increases in market share as a result of the merger\textsuperscript{202}.

However, subsequently, the TDC, in an apparent contradiction of the doctrine set out in the Carrefour/Promodès Report, appears to have relaxed its analysis of the existence of an individual dominant position in the retail market and ignored the analysis of the existence of a collective dominant position.

For example, in its Miquel Alimentació/Puntocash Report, the TDC established that the merged company reached 50% of the wholesaler cash & carry market in Ibiza.

\textsuperscript{199}  Pío Coronado/Cemetro Report, Recommendation 6, page 46.
\textsuperscript{200}  TDC Report, 28th May 2002, Case C-70/02, Caprabo/Enaco (“Caprabo/Enaco Report”).
\textsuperscript{201}  Caprabo/Enaco Report, p. 40.
\textsuperscript{202}  Caprabo/Enaco Report, 4th Conclusion and Ruling.
In the section on “Conclusions”, the TDC reflected the special competitive situation on the island of Ibiza, however, it rejected imposing divestiture on the merged company, contradicting the Draft Report submitted by the Rapporteur, who recommended the sale of one commercial wholesale establishment with a sales floor in excess of 2,000 m², so that the cash & carry market share of the merged company would not exceed 30%.

The dissenting vote of the Rapporteur and the Chairman (today the current Chairman of the CNC) argued for remedies on account of the (1) oligopolistic nature of the market and (2) the presence of significant economic and legal barriers to entry:

“1.- Without the aforementioned divestiture, the operation would allow a market structure, comprised essentially of three suppliers with similar market shares of 25%, to become a duopoly in which the dominant company (the notifying party, Miquel Alimentació) would hold 50% of the market, supporting the conclusion of the Report that the concentration may deteriorate the effective competition in this market.

2.- The impregnability of the Ibiza market in the cash & carry wholesale trade of daily products has been sufficiently demonstrated in the Report. The analysis of the legal barriers in the Balearic Islands to access retail and wholesale markets and the empirical evidence in relation to the most recent and now distant opening of establishments in Ibiza clearly show this.”

The particular vote referred to the TDC doctrine, reflected in its Pio Coronado/Cemetro Report and warned of the detrimental effects for competition and consumers of relaxing the control exercised by the TDC in this field:

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203 Miquel Alimentació/Puntocash Report, 6th Conclusion: “The Tribunal considers that on the island of Ibiza, the increase in market power of Miquel Alimentació, shown by an increase in its market share exceeding 50% and the reduction of the already scarce number of suppliers, not including Makro, shall be further strengthened by the restrictive trading legislation in the Balearic Islands which subjects the opening of wholesaler establishments, like cash & carry, to obtaining a regional license. Furthermore, since the coming into force of Regional Law 8/2005, 21st June, on transitory measures for the granting of the regional license for large commercial establishments in the Balearic Islands, the granting of licenses requested after 21st May 2005 has been suspended.”

204 Miquel Alimentació/Puntocash Report, Particular Discrepant Vote by Members Berenguer Fuster and Castañeda Boniche, pages 60-61.
“The break away from the previous doctrine of the Tribunal, which we believe to be better founded and well known by the Plenary, is particularly evident when considering the economic concentration case C64/01 Pío Coronado/Cemetro. In this precedent, the Tribunal, without there being legal barriers to entry, recommended the disposal of a small Cemetro cash & carry establishment in Gran Canaria which represented a sales floor of a mere 800 m², equivalent to 2%, due to the fact that the resulting market share would have come close to 50%, a recommendation which was approved by the Government (See page 45 of the public version of this report).

In short, the recommendation to the Council of Ministers approving the concentration operation between Miquel Alimentación and Puntocash without conditions on Ibiza will more than likely lead to a serious deterioration of effective competition in a basic market for the procurement of daily consumer goods, more specifically, for the small and medium sized tourist companies on this island. A strongly intervened wholesale market, in which the freedom of the company and the freedom of establishment are totally encroached and in our opinion, the Tribunal should have been more vigilant faced with the elimination of truly irreplaceable competitors, as a result of this concentration, vigilance that is essential, at least, while such a decisive obstacle to access the market persists.”

Neither did the CNC Eroski/Caprabo Report demand any divestiture, in spite of the fact that the merged company obtained high market shares in diverse geographic areas. For example, in the regional sphere, the merged company obtained a market share of 30-40% in Aragón, 40-50% in the Balearic Islands and 40-50% in Navarra.

<table>
<thead>
<tr>
<th>Comunidad Autónoma</th>
<th>EROSKI Cuota (%)</th>
<th>CAPRABO Cuota (%)</th>
<th>EROSKI+CAPRABO Cuota (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aragón</td>
<td>[20-30]</td>
<td>[0-10]</td>
<td>(30-40)</td>
</tr>
<tr>
<td>Castilla La Mancha</td>
<td>[0-10]</td>
<td>[0-10]</td>
<td>(10-20)</td>
</tr>
<tr>
<td>Castilla-León</td>
<td>[0-10]</td>
<td>[0-10]</td>
<td>(10-20)</td>
</tr>
<tr>
<td>Cataluña</td>
<td>[0-10]</td>
<td>[10-20]</td>
<td>(20-30)</td>
</tr>
<tr>
<td>Baleares</td>
<td>[30-40]</td>
<td>[10-20]</td>
<td>(40-50)</td>
</tr>
<tr>
<td>La Rioja</td>
<td>[20-30]</td>
<td>[0-10]</td>
<td>(20-30)</td>
</tr>
<tr>
<td>Madrid</td>
<td>[0-10]</td>
<td>[10-20]</td>
<td>(10-20)</td>
</tr>
<tr>
<td>Navarra</td>
<td>[20-30]</td>
<td>[10-20]</td>
<td>(40-50)</td>
</tr>
</tbody>
</table>


In the municipal area, the CNC identified 40 municipalities in which the sales floor market share of the merged company exceeded 30% (criteria used for the previous delimitation of problematic local markets).

205 Miquel Alimentación/Puntocash Report, Particular Discrepant Vote by Members Berenguer Fuster and Castañeda Boniche, page 61.
206 Vid., Eroski/Caprabo Report, Footnote 7, page 23: “Note that in previous precedents, the Tribunal set this share at 25%, as it was the reference threshold for these operations used by the Service in the First Phase to rule out anti-competitive effects. On this occasion, in accordance with the precedents and following the verification of the extreme improbability of the existence of effects that hinder effective
However, the subsequent definition of the relevant geographic market, grouped the 30 problematic municipalities into 14 local areas, in which the market shares were not so high:

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competition in the market below the 30% threshold, the Tribunal [sic] adapts these criteria as maintained by the Service in its report."
In view of the data obtained in the different geographic areas, the CNC decided to limit its competitive analysis to 4 geographic areas: Pamplona and surrounding area, Cariñena and surrounding area, La Almunia and surrounding area, and the islands of Majorca and Ibiza (pages 35 et seq.).

Finally, in its assessment of the effects of the concentration, the CNC established the growing concentration on a national and regional level, but concluded that the competitive dynamics (presence of established competitors and evidence of new establishments) in the 4 selected geographic areas counteracted the leadership of the merged company.

<table>
<thead>
<tr>
<th>Ámbitos geográficos</th>
<th>EROSKI</th>
<th>CAPRABO</th>
<th>TOTAL</th>
<th>Principal competidor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carriena + alrededores</td>
<td>[20-30%]</td>
<td>[10-20%]</td>
<td>[30-40%]</td>
<td>Galiénas Primeiro [40-50%]</td>
</tr>
<tr>
<td>Carriena</td>
<td>[10-20%]</td>
<td>[20-30%]</td>
<td>[30-40%]</td>
<td>Galiénas Primeiro [40-50%]</td>
</tr>
<tr>
<td>La Almunia + alrededores</td>
<td>[10-20%]</td>
<td>[20-30%]</td>
<td>[30-40%]</td>
<td>Carrefour [30-40%]</td>
</tr>
<tr>
<td>La Almunia</td>
<td>[20-30%]</td>
<td>[30-40%]</td>
<td>[30-40%]</td>
<td>Carrefour [20-30%]</td>
</tr>
<tr>
<td>Guadalajara, Azuqueca + alrededores (con Alcalá)</td>
<td>[0-10%]</td>
<td>[10-20%]</td>
<td>[10-20%]</td>
<td>Mercadona [10-20%]</td>
</tr>
<tr>
<td>Guadalajara, Azuqueca + alrededores (sin Alcalá)</td>
<td>[10-20%]</td>
<td>[20-30%]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Toledo + alrededores</td>
<td>[0-10%]</td>
<td>[20-30%]</td>
<td>Carrefour [20-30%]</td>
<td></td>
</tr>
<tr>
<td>Illescas + alrededores (con Parla)</td>
<td>[0-10%]</td>
<td>[10-20%]</td>
<td>[10-20%]</td>
<td>Carrefour [20-30%]</td>
</tr>
<tr>
<td>Illescas + municipios Sur Madrid</td>
<td>[0-10%]</td>
<td>[20-30%]</td>
<td>[10-20%]</td>
<td>Carrefour [20-30%]</td>
</tr>
<tr>
<td>Segovia + alrededores</td>
<td>[10-20%]</td>
<td>[20-30%]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cornellá + alrededores</td>
<td>[0-10%]</td>
<td>[20-30%]</td>
<td>Carrefour [20-30%]</td>
<td></td>
</tr>
<tr>
<td>Sant Cugat + alrededores</td>
<td>[0-10%]</td>
<td>[20-30%]</td>
<td>Carrefour [20-30%]</td>
<td></td>
</tr>
<tr>
<td>Islas de Ibiza</td>
<td>[30-40%]</td>
<td>[20-30%]</td>
<td>Hipercentro [20-30%]</td>
<td></td>
</tr>
<tr>
<td>Islas de Mallorca</td>
<td>[20-30%]</td>
<td>[20-30%]</td>
<td>Mercadona [10-20%]</td>
<td></td>
</tr>
<tr>
<td>Madrid Sur</td>
<td>[0-10%]</td>
<td>[20-30%]</td>
<td>Carrefour [20-30%]</td>
<td></td>
</tr>
<tr>
<td>Madrid Norte</td>
<td>[0-10%]</td>
<td>[20-30%]</td>
<td>Carrefour [20-30%]</td>
<td></td>
</tr>
<tr>
<td>Pamplona + alrededores</td>
<td>[10-20%]</td>
<td>[20-30%]</td>
<td>Carrefour [20-30%]</td>
<td></td>
</tr>
<tr>
<td>Tudela + alrededores</td>
<td>[20-30%]</td>
<td>[0-10%]</td>
<td>Carrefour [20-30%]</td>
<td></td>
</tr>
</tbody>
</table>

Source: Eroski/Caprabo Report, page 34

207 Eroski/Caprabo Report, page 54: “As far as the other relevant product market is concerned, that of self-service retail distribution of daily consumer goods, this Commission verifies that EROSKI will become the second national operator in this market, with a share of [10-20%], up five points with the share corresponding to the acquired company. At a national level and after the concentration, the leading operator in this market will continue to be CARREFOUR with a share of [10-20%] and MERCADONA will be in third place with a share of [10-20%] very close to that of the notifying party following the concentration operation.”

208 Eroski/Caprabo Report, page 55: “From a more disintegrated geographic perspective, such as that of the Autonomous Communities, the level of overlapping of commercial establishments of the companies involved in the concentration and therefore, the resulting market share diverges a great deal between regions. This Commission observed that following the concentration, there would be a strengthening of EROSKI’s position in the Autonomous Communities of Aragón, Navarra and the Balearic Islands ([30-40%], [40-50%] and [40-50%], respectively), whilst in the rest of the Communities, the strengthening is null or limited.”

209 Eroski/Caprabo Report, 5th Conclusion: “This Commission considers that elements such as the existence of competitors with a strong presence now and future projection may act as a balance in those geographic areas in which there is an increase in the market share of the notifying group.”
8.2 Collective Dominant Position in the Spanish Market

In this section, the characteristics of the Spanish retail distribution market that facilitate the emergence of parallel conduct (tacit collusion) are analysed: (a) high concentration; (b) homogenous products; (c) transparency; (d) capacity of competitive dissuasion; and (e) absence of competitive reaction by other competitors and consumers.

In this oligopolistic market, the three leading companies on a national scale and in the majority of regional markets, Carrefour, Mercadona and Eroski, fulfil the competitive advantages that the Commission and the TDC (now CNC) have associated with the existence of an individual or collective dominant position: (a) they occupy a prominent position in the national retail distribution market and, in particular, in the large grocery retail outlet sub-market; (b) they alternate leadership in regional and local markets, which multiplies their interaction and the possibilities of dissuasion; (b) they sell a considerable and growing volume of private-label brands; (c) they have an integrated procurement and distribution system; and (d) they enjoy a leadership position in the supply market.

The collusive characteristics of the market have facilitated pricing parallelism between the retailers in different local markets which leads to supra-competitive prices, which adversely affects consumers.

The SDC reached the same conclusions in 2006 in relation to the retail distribution market in Valencia. The SDC investigation originated from a complaint filed by a consumer association which alleged that the prices of 21 products were identical in Alcampo, Consum, Mercadona, Carrefour and El Corte Inglés, in Valencia. The SDC considered that the main characteristics of the retail distribution market of daily consumer goods are the following:

“Strong interdependence of operators, as a result of the homogeneity in the zonal distribution of the outlets; high cross-elasticity and the limited capacity of an operator to increase its market share if it is not at the expense of its competitors; and finally, but no less important, the high transparency in prices in the market.

Entry possibility of new competitors, as a result of the practical inexistence of barriers, so the securing of extraordinary benefits by established operators is not only protected but on the other hand, is subject to strong competition, not so much in branded products as in private-label brands.

Price competition may be practically conceived as a game of zero-sum and even negative-sum. In other words, starting off from a balanced situation, if an operator lowers its prices in order to increase its market share, it may only do so at the expense of the market share of its competitors, which would force these to reduce their prices, in a situation in which demand is practically invariable, the prices would be lower and therefore the profit of each individual company would be reduced.”

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210 SDC Proceeding 2006. The particular vote in the Aceites 2 Resolution refers to SDC Decision 2006 by justifying the identity of prices detected in the oligopolistic structure of the market.

In its legal evaluation of the similarity of prices, the SDC concluded that it was the result of the oligopolistic conduct of the companies:

“Analysing the facts within the framework of the market described, it does seem acceptable that the similarity of prices is due to a perfect competition situation, as it can be confirmed that the operators have different average costs, although there is no evidence to support this.

However, there are not enough elements to eliminate the leadership theory, according to which, any change in prices in the company recognised as leader is followed by the rest, as on one hand, the reported parties have shown their adaptation to the competition’s prices without specifying whether the price movements are always initiated by the same company, the leader, and followed by the rest, and on the other hand, it has not been proven that the movements are simultaneous.

Even rejecting the previous theses (perfect competition and leadership) it cannot necessarily be considered that the similarity of prices is due to a concentration or consciously parallel conduct. (…)

In accordance with the above, when determining whether the facts set out in the above case – consistent with price equality for a series of products - may be classified as concerted practice or consciously parallel conduct, it must be taken into account that it concerns a market with a reduced number of companies with a high sales share of a homogenous product, with a particularly elastic demand due to the basic nature of the product. Under these conditions, the structure of the market limits the possibilities of effective competition which would be expected of the operators involved, whereby there is a high probability of parallel conduct, which may constitute a more rational strategy from the economic point of view than competing against each other, given, on the other hand, the scarcity of arms of the majority of operators in the market to take advantage of a competitive strategy.

Furthermore, as mentioned, the operators in this market have an information system that enables them to know the sales prices of all of their competitors at any time, which enables them to react quickly to any reduction initiated by their competitors. The operators are aware of their interdependence and adopt a price alignment with the dominant operators. In this context, each operator knows that a competitive action aimed at increasing its share (lowering prices) causes an identical action by the rest.

In a market such as this, operators with little power do not have the possibility to challenge the market position of leading operators, in terms of brand promotion, advertising, loyalty or distribution at a national level (some are only regional operators), so they may not act as competitors in prices in the short or long term.

All of this leads to the conclusion that this is a market in which each operator may consider its interests, which coincide to some degree with common interests, and lower and keep its prices at the same level as that of its competitors without the need for an agreement or recurring to a concerted practice, particularly in branded products that act as a “hook” because of their aim to attract customers and avoid them from changing to
other establishments of the competition, although in a market price which enables them to mark the difference with the prices of their own brands and their offers.

All of the circumstances analysed lead to the conclusion that price coincidences in a market such as this may occur without coordination between companies in this market being involved\textsuperscript{212} (own underlining).

In short, in light of the evidence of the oligopolistic nature of the market, the SDC considered that the existence of price equality was not likely to be penalised as an agreement or concerted practice contrary to Article 1 of the Competition Law, because it was a “natural” consequence of the oligopolistic nature of retail distribution.

The SDC Decision 2006 allows two essential conclusions to be drawn. First of all, the analysis of individual dominant position, both in the control of concentrations and in the sanctioning procedure, is not effective to prevent collusive oligopolistic conduct. In fact, in its Carrefour/Promodès Report, the TDC had recommended the sale of a Carrefour hypermarket in the local market of Valencia to prevent the creation of a dominant position likely to restrict competition in the market\textsuperscript{213}. Perhaps this divestiture avoided the creation or strengthening of an individual dominant position but did not avoid the creation (at that time or subsequently) of an oligopoly with similar anticompetitive effects. Secondly, a reduced number of companies, including the three national leaders, enjoyed a leadership position in the Valencia market without any of them having an individual dominant position: Mercadona (26.61%), Consum (16.51%) and Carrefour (15.3%). The competitive structure of the retail market in Valencia in 2005 today appears to be extrapolable to the majority of Spanish local markets and hence to the national market\textsuperscript{214}.

<table>
<thead>
<tr>
<th>Group</th>
<th>Number of Establishments</th>
<th>Sales Floor (m²)</th>
<th>Market Share (%)</th>
<th>Number of Establishments</th>
<th>Sales Floor (m²)</th>
<th>Market Share (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CARREFOUR</td>
<td>3001</td>
<td>1,798,241</td>
<td>17.74%</td>
<td>221</td>
<td>182,119</td>
<td>15.30%</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>960</td>
<td>1,205,498</td>
<td>11.89%</td>
<td>266</td>
<td>316,586</td>
<td>26.61%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>1,236</td>
<td>840,059</td>
<td>8.25%</td>
<td>6</td>
<td>18,435</td>
<td>1.54%</td>
</tr>
<tr>
<td>CAPRABO</td>
<td>581</td>
<td>555,515</td>
<td>5.48%</td>
<td>60</td>
<td>69,728</td>
<td>5.86%</td>
</tr>
<tr>
<td>CORTE</td>
<td>268</td>
<td>407,770</td>
<td>4.02%</td>
<td>38</td>
<td>41,400</td>
<td>3.48%</td>
</tr>
</tbody>
</table>

\textsuperscript{212} SDC Decision 2006, pages 8-10.
\textsuperscript{213} \textit{Vid.}, Section 8.1 \textit{supra}.
\textsuperscript{214} \textit{Vid.}, Following Section
The interdependence between the leading retail companies and their effects on aggregate prices (both rising and falling) is a reality recognised by the companies themselves. At the Annual Conference of the AECOC Association held at the end of October 2008, the chairman of Eroski made some declarations aimed at avoiding a detrimental price war for the whole sector, which were collected by a press agency and published in numerous media:

“The Chairman of the Eroski retail group, Constan Dacosta, today called for the responsibility of operators of the sector to avoid entering into a “price war” during the economic crisis and pledged for “playing for everyone to win”. "Part of the rules in this game is if anyone makes a move that leads to a loss, it is not followed by the rest, because that is the moment of evil", commented Dacosta within the framework of the Aecoc Conference 2008. The Chairman of the Basque Group pointed out that the current risk in the market not only focuses on "struggling" with the operating account, but in attempting that "not everybody loses resulting in the loss of consumers".

8.2.1 High Concentration

In the control of concentrations, the TDC and the CNC have used different sources of data to calculate the retail market shares and the large grocery retail outlet sub-market (Nielsen, Alimarket, etc.). These sources use different criteria to define the self-service retail market and, therefore, offer diverging results.

However, the diverse sources enable various general conclusions to be drawn: (1) There is a gradual concentration of the retail distribution market, which is highlighted as the relevant geographic area contracts (national, regional and local dimension); (2) Carrefour, Mercadona and Eroski are leaders in the national retail market; (3) There is a

---

**Table:**

<table>
<thead>
<tr>
<th>Retailer</th>
<th>Shares</th>
<th>Market Share</th>
<th>Units</th>
<th>Sales</th>
<th>Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>INGLES S.A.</td>
<td>508</td>
<td>395,412</td>
<td></td>
<td></td>
<td>3.90%</td>
</tr>
<tr>
<td>DINOSOL</td>
<td>271</td>
<td>386,865</td>
<td>12</td>
<td>33,926</td>
<td>2.85%</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>390</td>
<td>308,331</td>
<td>53</td>
<td>42,750</td>
<td>3.59%</td>
</tr>
<tr>
<td>LIDL</td>
<td>1,969</td>
<td>270,461</td>
<td>319</td>
<td>196,463</td>
<td>16.51%</td>
</tr>
<tr>
<td>COOP. COVIRAN</td>
<td>427</td>
<td>251,910</td>
<td>1</td>
<td>898</td>
<td>0.07%</td>
</tr>
<tr>
<td>CONSUM</td>
<td>367</td>
<td>212,869</td>
<td>6</td>
<td>898</td>
<td>0.07%</td>
</tr>
</tbody>
</table>


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215 According to the AECOC webpage, “With around 24,000 associated companies, AECOC is one of the largest business associations in our country and the only one in which producers and retailers work together to improve the sector for the benefit of the consumer”.

216 “Eroski appeals to the sector to avoid a ‘price war’ in the crisis and opts for “everyone winning”, Europe Press, 30th October 2008. This teletype was published in El Economista, Cinco Dias and El Periódico de Aragón.”
leadership of Carrefour, Mercadona and Eroski, in different combinations, in the retail distribution market in the majority of Autonomous Communities, provinces and local markets; (4) There is an even more prominent leadership of Carrefour, Mercadona and Eroski in the large grocery retail store sub-market (>1,000 square metres) in all geographic dimensions.

8.2.1.1 Relevant Criteria: Sales Floor and Turnover

The estimate of business market shares is a necessary yet insufficient approximation, to determine the existence of an individual or collective dominant position in the relevant market. In the retail distribution sector, market shares are measured in terms of sales floor or turnover. Turnover criterion is a more reliable reflection of market power than sales floor, but it is often more difficult to quantify. If the sales floor is analysed, it must be considered that hypermarkets generally produce more sales per square metre than large supermarkets and, in turn, these generate more sales per square metre than the small and medium-sized supermarkets. According to Nielsen, in 2008, sales per square metre for hypermarkets was 5,714 euros, 5,087 euros for large supermarkets (1,000 to 2,499 m²), 3,434 euros for medium sized supermarkets (400 to 999 m²) and 3,847 euros for small supermarkets (100 to 399 m²)\footnote{Vid., Annex 12.2 “Economic Performance of the Commercial Formats (Nielsen, 2008)”}. The TDC has also indicated the advisability of adjusting the market shares by virtue of the greater profitability of the large grocery retail outlets\footnote{Carrefour/Dinosol Report, page 17: “Furthermore, the Tribunal recognises that the use of the sales floor for each operator expressed in square metres as an approximate variable produces an infra-valuation of the market share, both in terms of value and volume, of those business groups in which the hypermarket is relatively more used. Empirically, the higher profitability per square metre of hypermarkets compared to other retail distribution formats, such as the supermarket, is sufficiently proven. For this analysis of the effects of the concentration operation in relevant markets, it will not be necessary to attempt to quantify and separate the unit price contributions and stock rotation in the final profitability. Therefore, in the Tribunal calculations, there will be a tendency to overvalue the market shares of operators that compete proportionately with a smaller sales floor than a hypermarket.”}.

In short, increased profitability per square metre of large grocery retail outlets implies that companies with a higher relative presence in the hypermarket segment, and to a lesser degree, in the large supermarket segment (both segments make up the large grocery retail outlet sub-market) will have a higher market share in terms of turnover than their market share measured according to sales floor. The Carrefour/Promodès Decision confirmed this assumption: turnover shares were greater than sales floor shares in the case of the merged company, Auchan, El Corte Inglés and Mercadona, whilst they were similar for companies with a reduced presence in the large grocery retail outlet segment (Eroski, Caprabo and Superdiplo)\footnote{Vid., Carrefour/Promodès Report, page 42: “Aware that the differences in quantity and value in this case are highly significant and that, in general, quantity shares undervalue the real participation of the large stores in the geographic market, the Tribunal, has carried out diverse tests to estimate this variable.”}: 

\begin{itemize}
  \item \footnote{Vid., Annex 12.2 “Economic Performance of the Commercial Formats (Nielsen, 2008)”} \textit{Vid., Carrefour/Dinosol Report, page 17: “Furthermore, the Tribunal recognises that the use of the sales floor for each operator expressed in square metres as an approximate variable produces an infra-valuation of the market share, both in terms of value and volume, of those business groups in which the hypermarket is relatively more used. Empirically, the higher profitability per square metre of hypermarkets compared to other retail distribution formats, such as the supermarket, is sufficiently proven. For this analysis of the effects of the concentration operation in relevant markets, it will not be necessary to attempt to quantify and separate the unit price contributions and stock rotation in the final profitability. Therefore, in the Tribunal calculations, there will be a tendency to overvalue the market shares of operators that compete proportionately with a smaller sales floor than a hypermarket.”} \textit{Vid., Carrefour/Promodès Report, page 42: “Aware that the differences in quantity and value in this case are highly significant and that, in general, quantity shares undervalue the real participation of the large stores in the geographic market, the Tribunal, has carried out diverse tests to estimate this variable.”}
Since then, Eroski has developed an aggressive buyer strategy, opening large grocery retail outlets, positioning it in third place in this sub-market (763,668 m², of which 343,900 m² belong to the hypermarket segment). Carrefour continues to be the company with the largest sales floor share in the hypermarket segment, although it has fallen to second place in the large grocery retail outlet sub-market (868,508 m², of which 685,700 belong to hypermarkets), making way for Mercadona, which has focused its growth strategy on large supermarkets, without opening a single hypermarket (1,321,027 m²).

In short, the retail sales floor shares of Carrefour, Mercadona and Eroski undervalued their retail sales shares.

### 8.2.1.2 Historical Evolution: Gradual Concentration

In relation to the evolution of the market, although it must be admitted that the concentration process of self-service retail distribution is a global phenomenon, it can be reported that it has been identified with special intensity in recent years in Spain. With high atomization as a starting point, the concentration of Spanish retail distribution has soared in recent years, positioning Spain among the most concentrated countries of the EU. For example, according to Professor Dobson, in the period 1993-1999, the joint market share of the leading 5 Spanish retailers increased from 21.6% to 40.6%, the second highest increase of the EU-15 for that period²²⁰.

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In a subsequent article, Professor Dobson estimated that the joint market share of the five leading retailers in Spain had risen to 52% in 2002\(^{221}\).

The SDC Study 2003 established that the seven leading operators held approximately 60% of the market, although, “in relative terms, the degree of market concentration may be considered to be intermediate and in the process of consolidation”\(^{222}\). The process of consolidation envisaged in the SDC Study 2003 has followed its course so much so that today, regardless of the source consulted, the Spanish retail market may be considered to be highly concentrated.

### 8.2.1.3 Self-Service Retail Market

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\(^{222}\) SDC Study 2003, page 23.
The analysis of the retail concentration indicates an upward ratio when it is restricted to the geographic area. This peculiarity may be explained by the regional origin of the Spanish distribution chains and the density economy associated with retail distribution. According to data from the book “Los canales de distribución de productos de gran consumo: Concentración y Competición” (Concentration and Competition in Grocery Retailing), in 1994, 1997 and 1998 “the concentration rate of the four leading companies for the whole of Spain is less than the rates corresponding to the different Autonomous Communities and provinces (with the only exception of the province of Ávila in 1997)”, data which was confirmed by the work hypothesis whereby the local concentration exceeded the national concentration.

8.2.1.3.1 National Geographic Area

Market shares differ according to the sources consulted and the parameters considered in their calculation (sales floor or turnover, foodstuffs or daily consumer goods, weighting of the surface area dedicated to daily consumer goods within the store, etc.). According to the different sources consulted, the participation of Carrefour, Mercadona and Eroski in the retail market varies between approximately 43% in terms of sales floor (Alishmarket) and approximately 55-65 in terms of turnover (TNS Panel, ASEDAS and Nielsen). Logically, the market share in terms of turnover gives a better reflection of the market power that retailers may exercise.

223 Carrefour/Promodès Referral Decision, page 6: “These differences at a local level also occur at a regional level. Apart from Promodes via Dia, the rest of the competitors are to some extent specialised at a regional level, like Carrefour and Caprabo in Catalonia, Eroski in the Basque Country, Mercadona in the region of Valencia, Ahold in Asturias, Castile and León and Extremadura, Superdiipo in the Canary Islands, etc.”; and Carrefour/Dinosol Report, page 32: “The operation does not contribute to strengthening the relative specialisation of retail distribution in Spain [Footnote: Demonstrated by the Tribunal but nowadays it is more of a national expansion process from consolidated regional areas], as an operator present in the entire national territory, CARREFOUR GROUP, acquires business from an operator, DINOSOL, also present in most of Spain, which has predominant leadership in the Canary Islands.”

224 Eroski/Caprabo Report, page 52: “Furthermore, at a wider geographic level, when retail operators draw up their expansion strategy and choose the sites to locate their new stores, they consider the logistics and procurement structure of the operator, so that they save costs. The absence of a logistics network hinders the penetration of operators in geographic areas in which they are not established. This partly explains the relatively “regionalised” nature of the retail distribution structure in Spain, with the presence of important operators focused on certain areas.”

225 Ignacio Cruz Roche (coord.), Los canales de distribución de productos de gran consumo: Concentración y Competición (Concentration and Competition in Grocery Retailing), Ed. Pirámide, 1999, (“Cruz Roche Study 1999”), page 75.

226 Cruz Roche Study 1999, page 72: “The behaviour hypothesis that emerges from the previous approaches and which verifies the pertinence of the territorial analysis of the concentration is that as the analysis of the concentration supply of the self-service retail of daily consumer goods becomes more localised, the higher the concentration values”.

227 Logically, distribution companies give more relevance to turnover data than sales floor data. For example, Eroski referred to the market shares in terms of turnover published by TNS Panel and Nielsen to analyse the market concentration in its appearance before the Basque Government’s Commission of Industry, Trade and Tourism, 6th May 2008 (“Appearance of Eroski before the Basque Parliament”).
According to the data published by Alimarket in 2008, retail market shares in terms of sales floor indicate the clear leadership of Carrefour (18.3%), Mercadona (13.4%) and Eroski (12.1%) compared to the rest of retailers.\textsuperscript{228}

### Self-Service Retail Market

<table>
<thead>
<tr>
<th>GROUP</th>
<th>m²</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>CARREFOUR</td>
<td>2,006,627</td>
<td>18.3%</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>1,474,775</td>
<td>13.4%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>1,332,234</td>
<td>12.1%</td>
</tr>
<tr>
<td>EL CORTE INGLES</td>
<td>485,990</td>
<td>4.4%</td>
</tr>
<tr>
<td>AUCHAN*</td>
<td>403,714</td>
<td>3.7%</td>
</tr>
<tr>
<td>CONSUM. COOP.</td>
<td>393,145</td>
<td>3.6%</td>
</tr>
<tr>
<td>LIDL SUPERMARKETS, S.A.U.</td>
<td>360,823</td>
<td>3.3%</td>
</tr>
<tr>
<td>DINOSOL SUPERMARKETS, S.L..</td>
<td>316,433</td>
<td>2.9%</td>
</tr>
<tr>
<td>COVIRAN, S.C.A.</td>
<td>278,043</td>
<td>2.5%</td>
</tr>
<tr>
<td>GRUPO EL ARBOL DIS. Y SUP., S.A.</td>
<td>204,607</td>
<td>1.9%</td>
</tr>
<tr>
<td>GADISA (GRUPO)</td>
<td>186,194</td>
<td>1.7%</td>
</tr>
<tr>
<td>CONDIS SUPERMERCATS (GROUP)</td>
<td>177,837</td>
<td>1.6%</td>
</tr>
<tr>
<td>ALDI SUPERMARKET, S.L.</td>
<td>151,098</td>
<td>1.4%</td>
</tr>
<tr>
<td>ALIMERKA</td>
<td>136,138</td>
<td>1.2%</td>
</tr>
<tr>
<td>GRUPO FROIZ</td>
<td>127,842</td>
<td>1.2%</td>
</tr>
<tr>
<td>AHORRAMAS</td>
<td>125,496</td>
<td>1.1%</td>
</tr>
<tr>
<td>MIQUEL ALIMENTACIÓ</td>
<td>123,000</td>
<td>1.1%</td>
</tr>
<tr>
<td>UNIDE S.COOP.</td>
<td>116,252</td>
<td>1.1%</td>
</tr>
<tr>
<td>GRUPO HERMANOS MARTÍN, S.A.</td>
<td>113,993</td>
<td>1.0%</td>
</tr>
<tr>
<td>COOP. SAN RAFAEL</td>
<td>107,834</td>
<td>1.0%</td>
</tr>
<tr>
<td>UVESCO, S.A.</td>
<td>101,023</td>
<td>0.9%</td>
</tr>
<tr>
<td>RESTO</td>
<td>2,250,141</td>
<td>20.5%</td>
</tr>
<tr>
<td><strong>TOTAL STATE</strong></td>
<td>10,973,239</td>
<td>100%</td>
</tr>
</tbody>
</table>

### Source:


* The CNC approved the acquisition of Galerias Primero by Auchan on 05/12/2008 with certain conditions.

---

\textsuperscript{228} Eroski/Caprabo Report on page 31: market shares in terms of sales floor using data from Alimarket (2007) were estimated: “As can be seen from the sales floor data of the leading operators in the Spanish retail distribution market, the planned concentration operation between Eroski and Caprabo would make the resulting company the 2nd operator on a national level ([10-20%] share), behind CARREFOUR GROUP. MERCADONA would be immediately behind ([10-20%]). The three operators are followed by a long distance by the rest of their competitors.”
According to data from the Consultant, TNS, the combined market share of Carrefour, Mercadona and Eroski (prior to the purchase of Caprabo) reached 50% in 2007.

**Market Share Leaders in the countries of origin of the Food and Drugstore and Perfumery Companies**

![Market Share Leaders Chart]


**ASEDAS**

The Spanish Association of Distributors, Self-service and Supermarkets (Asedas) has published data on sales floor and turnover of the five leading retailers for 2007, although it only offers market shares in terms of sales floor. The ASEDAS data shows the supremacy of Carrefour, Mercadona and Eroski in relation to retail turnover. Carrefour, with a sales floor share of 21.6%, invoiced 14,386 million euros in 2007. Eroski occupied second place in sales floor (13.5%) and had turnover of 9,800 million euros. Mercadona took third place in terms of sales floor (11.8%). However, its invoicing of 13,986 million euros exceeded Eroski by far and almost equalled that of Carrefour.

Taking Carrefour as a reference and considering market shares in sales floor and turnover to be equivalent, Mercadona and Eroski would have a turnover share of 20.9% and 14.7% respectively of retail distribution. In other words, the combined share of the three companies in turnover would be 57.2%, a conservative estimate because the sales floor market share of Carrefour is taken as a reference.

**Retail Market**

<table>
<thead>
<tr>
<th></th>
<th>Carrefour</th>
<th>Mercadona</th>
<th>Eroski</th>
<th>Auchan</th>
<th>Corte Inglés</th>
<th>C3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of</td>
<td>3,163</td>
<td>1,137</td>
<td>1,738</td>
<td>288</td>
<td>318</td>
<td></td>
</tr>
</tbody>
</table>

229 These market shares, merely approximate, are coherent with the position of the three companies in the relevant market of large stores (which includes hypermarkets and large supermarkets of >1,000 m²): Mercadona occupies first position in sales floor (1,321,027 square metres) although it does not have any hypermarkets; Carrefour occupies second place (868,508 square metres), although it has a strong position in Hypermarkets, the most productive format; Eroski occupies third place (763,668 square metres), with a balance between hypermarkets and large supermarkets.
<table>
<thead>
<tr>
<th>Stores</th>
<th>Square Metres (million)</th>
<th>Sales Floor (%)</th>
<th>Turnover (million)</th>
<th>Approximate Turnover Share (Ref. Carrefour)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2.7</td>
<td>1.47</td>
<td>1.68</td>
<td>0.695</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.6705</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>5.85</td>
</tr>
<tr>
<td></td>
<td>21.6%</td>
<td>11.8%</td>
<td>13.5%</td>
<td>5.6%</td>
</tr>
<tr>
<td></td>
<td>14,386</td>
<td>13,986</td>
<td>9,800</td>
<td>4,160</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,160</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>46,942</td>
</tr>
<tr>
<td></td>
<td>21.6%</td>
<td>20.9%</td>
<td>14.7%</td>
<td>6.24%</td>
</tr>
<tr>
<td></td>
<td>14,386</td>
<td>13,986</td>
<td>9,800</td>
<td>4,160</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,160</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>46,942</td>
</tr>
<tr>
<td></td>
<td>21.6%</td>
<td>20.9%</td>
<td>14.7%</td>
<td>6.24%</td>
</tr>
<tr>
<td></td>
<td>14,386</td>
<td>13,986</td>
<td>9,800</td>
<td>4,160</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,160</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>46,942</td>
</tr>
</tbody>
</table>

Source: TVDC estimate on data from ASEDAS, 2008.

*The acquisition of Galerías Primero by Auchan has not been taken into account

**Nielsen**

The Appearance of Eroski before the Basque Parliament cited a comparison by Nielsen of the combined market share of the top five retailers in various countries. According to data from Nielsen, the combined share of the top five retailers (Carrefour, Mercadona, Eroski, Auchan and El Corte Inglés) reached 66% in 2006.

![Concentración de los mercados: Cuotas de mercado en % de los 5 primeros distribuidores (2006)](image)


Logically, the combined market share of the top five retailers and, in particular, of Carrefour, Mercadona and Eroski increased significantly from 2005 to 2008 (for example, Eroski and Auchan acquired Caprabo and Galerías Primero, respectively). The Business Association that groups together diverse manufacturers of daily consumer goods, PROMARCA, carried out an estimate of market shares, using data from Nielsen 2008. According to these estimates, the combined sales share of daily consumer goods (excluding fresh produce) of Carrefour, Mercadona and Eroski reached 61% and, if the estimate is confined to the self-service retail distribution relevant market, it rose to 63.6%.
8.2.1.3.2 Regional Geographic Area

Alimarket provides market shares in terms of sales floor on a national and regional scale, which shows that concentration in the regional geographic sphere has risen significantly in relation to the national geographic sphere. In all of the Autonomous Communities, the national concentration level of the three leading companies (C3=43.9%) is exceeded. In 2 Autonomous Communities, the C3 is close to 45%; in 3 Autonomous Communities, the C3 stands at 45-50%; in 1 Autonomous Community, the C3 rises to 50-60%; in 9 Autonomous Communities, the C3 rises to 60-70% and it exceeds 70% in 2 Communities.

Concentration of Regional Markets

<table>
<thead>
<tr>
<th>C3</th>
<th>Autonomous Communities</th>
</tr>
</thead>
<tbody>
<tr>
<td>45%</td>
<td>Castile and Leon, Catalonia</td>
</tr>
<tr>
<td>45-50%</td>
<td>Andalusia, Castile-La Mancha, Madrid</td>
</tr>
<tr>
<td>50-60%</td>
<td>Murcia</td>
</tr>
<tr>
<td>60-70%</td>
<td>Aragon*, Asturias, Balearic Islands,</td>
</tr>
<tr>
<td></td>
<td>Canary Islands, Cantabria, Extremadura,</td>
</tr>
<tr>
<td></td>
<td>Galicia, Rioja, Valencia</td>
</tr>
<tr>
<td>+70%</td>
<td>Navarra, Basque Country</td>
</tr>
</tbody>
</table>


* The acquisition of Galerías Primero by Auchan has been taken into account.

---

230 Vid., Annex 12.3 “Market shares in the Spanish Regions (Alimarket 2008)”. 
The top three companies in the national market are present in practically all of the Communities and occupy leading positions in the majority of them.

### Regional Presence of Carrefour, Mercadona and Eroski

<table>
<thead>
<tr>
<th>AUTONOMOUS COMMUNITY</th>
<th>CARREFOUR</th>
<th>MERCADONA</th>
<th>EROSKI</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANDALUSIA</td>
<td>1</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>ARAGÓN*</td>
<td>2</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>ASTURIAS</td>
<td>3</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>BALEARIC ISLANDS</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>CANARY ISLANDS</td>
<td>6</td>
<td>3</td>
<td>**</td>
</tr>
<tr>
<td>CANTABRIA</td>
<td>2</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>CASTILE-LA MANCHA</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>CASTILE AND LEON</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>CATALONIA</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>EXTREMADURA</td>
<td>1</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>GALICIA</td>
<td>3</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>LA RIOJA</td>
<td>3</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>MADRID</td>
<td>1</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>MURCIA</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>NAVARRA</td>
<td>2</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>BASQUE COUNTRY</td>
<td>2</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>VALENCIA</td>
<td>3</td>
<td>1</td>
<td>6***</td>
</tr>
</tbody>
</table>


* This classification takes the acquisition of Galerías Primero by Auchan into account.

** Urban planning problems have delayed the opening of two Eroski hypermarkets by 10 years

*** Eroski occupied second place until its separation from the Cooperative, Consum.

Carrefour heads retail distribution in terms of sales floor in 5 Autonomous Communities (Andalusia, Castile and Leon, Catalonia, Extremadura and Madrid), like Eroski (Balearic Islands, Galicia, La Rioja, Navarra and the Basque Country), whilst Mercadona is the leader in 3 Autonomous Communities (Castile-La Mancha, Murcia and Valencia), whereby these 13 Autonomous Communities represent practically all of the Spanish population. The three leading companies on a national scale occupy the first three positions in 4 Autonomous Communities and two of them are among the top three companies in 14 Autonomous Communities. The leadership of the three leading companies in the regional sphere would be even greater if Mercadona had entered
Navarra and the Basque Country (unexplainable absence in economic terms) and Eroski had not faced urban problems in the Canary Islands or corporate disagreements in Valencia. In any case, it must be taken into account that the Alimarket data refers to the sales floor of all self-service establishments. If the large grocery retail outlet market in the regional sphere is taken as a reference, the market concentration and leadership of the three companies should be significantly higher²³¹.

8.2.1.3.3 Local Geographic Area

At a local level, the geographic dimension traditionally associated with the relevant market, there also appears to be a greater concentration than in the regional sphere and to a greater extent, nationally. The three national leaders in distribution also stand out in this geographic area. For example, analysis of the Eroski/Caprabo Report showed that of the 19 regions in which there was a significant increase in the market share of the merged company, the closest competitor was Carrefour or Mercadona in 14 of them (73%).

²³¹ *Vid.*, market analysis of large stores *infra* Section 8.2.1.4.
8.2.1.4 Retail Distribution Market in Large Grocery Retail Outlets

The available data shows that, the higher the barriers to entry (legal and economic), the concentration in the large grocery retail outlet sub-market is even greater than in the retail distribution market and, similar to what happens in this market, the concentration increases as it is confined to the geographic area analysed.

\(^{232}\) This higher concentration in the large store market appears to be a common characteristic in all states. *Vid.*, Dobson, “Retailer Buyer Power in European Markets…”, op. cit., Footnote 9, pages 7-8: “In the UK, for example, the Competition Commission (2000) found that the top five retailers accounted for
8.2.1.4.1 National Geographic Area

If the concentration analysis is confined to the hypermarket segment or large grocery retail outlet sub-market (hypermarkets and large supermarkets), it can be observed that the concentration, at a national level, increases significantly in relation to the retail market.

<table>
<thead>
<tr>
<th>GROUP</th>
<th>m²</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>CARREFOUR</td>
<td>685,700</td>
<td>41.1%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>343,900</td>
<td>20.6%</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>288,500</td>
<td>17.3%</td>
</tr>
<tr>
<td>EL CORTE INGLES</td>
<td>184,500</td>
<td>11.1%</td>
</tr>
<tr>
<td>DINOSOL SUPERMARKETS</td>
<td>41,095</td>
<td>2.5%</td>
</tr>
<tr>
<td>E.LECLERC</td>
<td>23,330</td>
<td>1.4%</td>
</tr>
<tr>
<td>BON PREU, S.A.</td>
<td>22,125</td>
<td>1.3%</td>
</tr>
<tr>
<td>REST</td>
<td>77,582</td>
<td>4.7%</td>
</tr>
<tr>
<td>TOTAL STATE</td>
<td>1,666,732</td>
<td>100%</td>
</tr>
</tbody>
</table>


8.2.1.4.2 Provincial/Local Geographic Area

69.2% of sales of grocery and daily products but that the top five grocers accounted for 75.6% of stores over 600 sq.m. and 89.3% of stores over 1,400 sq.m. (i.e. of superstore/hypermarket size).”
The concentration in the large grocery retail outlet market appears to be greater at a regional level than a national level. For example, the stability and high concentration of large grocery retail outlet markets in the three provinces of the Basque Country can be seen between 2000 and 2008.

**Market of Large Grocery Retail Outlets in the Basque Country (2008)**

<table>
<thead>
<tr>
<th></th>
<th>BIZKAIA</th>
<th>GIPUZKOÀ</th>
<th>ARABA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eroski</td>
<td>63%</td>
<td>54%</td>
<td>64%</td>
</tr>
<tr>
<td>Carrefour</td>
<td>18%</td>
<td>16%</td>
<td>26%</td>
</tr>
<tr>
<td>Auchan</td>
<td>10%</td>
<td>19%</td>
<td>8%</td>
</tr>
<tr>
<td>C3</td>
<td>91%</td>
<td>89%</td>
<td>98%</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th></th>
<th>BIZKAIA</th>
<th>GIPUZKOÀ</th>
<th>ARABA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eroski</td>
<td>62%</td>
<td>49%</td>
<td>52%</td>
</tr>
<tr>
<td>Carrefour</td>
<td>25%</td>
<td>20%</td>
<td>34%</td>
</tr>
<tr>
<td>Auchan</td>
<td>6%</td>
<td>21%</td>
<td>11%</td>
</tr>
<tr>
<td>C3</td>
<td>93%</td>
<td>90%</td>
<td>97%</td>
</tr>
</tbody>
</table>


In its Carrefour/Promodès Report, the TDC established that Carrefour would control the three hypermarkets located in the city of Palma and proposed the divestiture of one of them. The Council of Ministers did not follow the TDC recommendation and almost 8 years later, the situation had only improved slightly with the opening of a small Caprabo hypermarket (acquired by Eroski).²³³

²³³ The Mercadona and Alcampo supermarkets in Calvià and Marratxinet respectively are located approximately 15 minutes from the city of Palma, so they exercise marginal competitive pressure on the hypermarkets in the city.
Cuadro nº 13: Grandes superficies comerciales en la Isla de Mallorca.

<table>
<thead>
<tr>
<th>Nombre</th>
<th>Población</th>
<th>Superficie (m²)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. ALCAMPO</td>
<td>MARRATXINET</td>
<td>[...]</td>
</tr>
<tr>
<td>2. CAPRABO</td>
<td>PALMA DE MALLORCA</td>
<td>[...]</td>
</tr>
<tr>
<td>3. CAPRABO</td>
<td>SANT LLORENÇ DES CARDASSAR</td>
<td>[...]</td>
</tr>
<tr>
<td>4. CARREFOUR</td>
<td>PALMA DE MALLORCA</td>
<td>[...]</td>
</tr>
<tr>
<td>5. CARREFOUR</td>
<td>PALMA DE MALLORCA</td>
<td>[...]</td>
</tr>
<tr>
<td>6. CARREFOUR</td>
<td>PALMA DE MALLORCA</td>
<td>[...]</td>
</tr>
<tr>
<td>7. HIPER CENTRO</td>
<td>INCA</td>
<td>[...]</td>
</tr>
<tr>
<td>8. HIPER CENTRO</td>
<td>MANACOR</td>
<td>[...]</td>
</tr>
<tr>
<td>9. MERCADONA</td>
<td>CALVIA</td>
<td>[...]</td>
</tr>
</tbody>
</table>


8.2.2 Transparency

The daily consumer goods retail market is characterised by high (i) homogeneity of consumer goods; and (ii) a high level of transparency in prices and services.

First of all, the homogeneity of the products sold is the rule in the large grocery retail outlet distribution market. They all offer the consumer the possibility of doing their regular grocery shop (shopping basket) in the same commercial space. In particular, all large grocery retail outlets offer the same leading brand products (absolute homogeneity), a decisive segment in competitive dynamics because it acts as an “anchor” to attract consumers to the establishments\(^{234}\). Although the retailer’s own private-label brand has been acquiring progressive relevance, it must be taken into account that its format, contents and quality is referenced to manufacturers’ branded products and rival private-label brand products, which allows the consumer to compare and replace it easily with other manufacturers’ products or rival private-label brand equivalents (substantial homogeneity)\(^{235}\).

---

\(^{234}\) Vid., CNC Press Release, The Competition Defence Court sanctions SOS Cuéntara and eight large distribution chains for agreeing on the sales price of two brands of oil, 28th June 2007: “With the adoption of these agreements, SOS Cuéntara attained more stable prices for its products, by preventing distribution chains from using its brands of oil as “anchor”, object of frequent price discounts or offers to attract clients. The large distributors eliminated an element of strong competition, namely the price of the most sold oils, so they did not have to excessively lower their profit margins in own brand oils which, for commercial strategy reasons, usually remains at a lower price than the more prestigious commercial brands”.

\(^{235}\) Vid., ACCC Study 2008, pages 361-362, in which the two leading Australian distribution chains explain how the price/quality of their own brand lines are established in relation to manufacturer's products and rival own brand equivalents: ”As noted above, each MSC has changed its private label strategy from a focus on lower priced/lower quality products to tiered products that are differentiated in terms of price and quality, and which compete directly with propriety branded products. Coles told the inquiry that it has adopted a three-tiered strategy. Its Coles Smart Buy label is the budget/tier 1 label
Even admitting that the location/services of each commercial establishment may constitute a differentiating factor within the relevant market, companies may value it in their pricing policy, assuming a leadership role or adapting their prices (with a certain positive or negative differential) to those of the leader or reference company\textsuperscript{236}.

Secondly, price transparency is an essential characteristic in large grocery retail outlet distribution. As establishments are open to the public, rivals can immediately find out about price variations of products stocked at a large grocery retail outlet, thanks to systematic control mechanisms of competitors’ pricing\textsuperscript{237}. Companies dedicate

\textsuperscript{236} Vid., in this respect, Decision 448 of the Commerce Commission (New Zealand), Progressive Enterprises Limited and Woolworths (NZ) Limited (“Progressive/Woolworths Decision”), 14th December 2001, paragraphs 161-162.

\textsuperscript{237} Vid., Competition Commission Study 2000, “The main parties pricing behaviour: 2.234. All the main parties undertake regular monitoring of their competitors’ pricing, and this is the principal means they employ both to ensure that they are competitive on individual product lines, and to maintain their overall price position relative to other retailers. When monitoring the prices of other companies, the parties often assemble different representative ‘baskets’ of goods. These usually include a basket comprising high-selling or high-profile product lines. Larger baskets, containing both KVIs and some other products, will also sometimes be compared. Less frequent checks are typically also carried out on a wider range of slower-selling, ‘background’ products. 2.235. It seems clear that for most of the parties there is a core group of products that are particularly important for comparative purposes and on which they tend to concentrate their price monitoring activity. As well as core lines or KVIs, budget own-label products are also intensively monitored by all the parties that stock them. Although representing a small proportion of the total number of products stocked, these categories of product account for a very much higher proportion of the parties’ total revenue. Some parties also identify a group of products on which they will not allow themselves to be undercut. 2.236. Some price monitoring exercises are used to ensure that an overall price target is achieved that maintains a company’s price position relative to other grocery retailers. In such cases, individual product lines might be allowed to deviate from the relative price rule so long as the target is achieved at category level, or for the overall basket. Many of the parties told us that their buyers were expected to know competitor prices for all the product lines under their control” (page
considerable resources to monitoring the prices applied by their competitors. The Competition Commission Study 2000 revealed that the large distribution companies control the prices of all products representative of the typical shopping basket (called “Known Value Items” or “KVI”), including variations to bear in mind “savings baskets” and their own private-label brands. Price monitoring is extended to hundreds and even thousands of products that represent the majority volume of retail distribution sales.  

Companies may also recur to indirect information mechanisms to perfect the monitoring of competitors’ prices. These indirect mechanisms can leave the task of controlling prices to consumers and suppliers.

In relation to consumers as sources of information, it is worth highlighting “lowest price” campaigns, which consist of a guaranteed lowest price and the refund of the price difference between a product sold in its own stores and the same product sold by the competition.

The use of suppliers as an informal source of information lies in the constant commercial interaction between both parties and may benefit both parties. For example, if a leading supplier acts as a category manager for one or several distributors, it is likely that information on retailers prices will flow among all competitors. Likewise, if a supplier is interested in positioning its products in a high quality and price segment, it may contribute to homogenizing the retail prices at a certain level, acting on the retail

58); Competition Commission Study 2008, Sections 4.66-4.68 “Grocery retailers’ monitoring of their competitors”, pages 64-65; and Progressive/Woolworths Decision, paragraph 48: “Staff from all three supermarket chains described systematic, thorough and quite sophisticated procedures for the monitoring and analysis of rival supermarkets’ prices. Typically, individual lines are grouped into three or four categories. The top category (key lines) of approximately 150 lines is checked against those of competitors on a weekly basis, the next category fortnightly, and so on. Over a full cycle of six or eight weeks, thousands of lines have been processed in this way. The Commission regards it as significant that these procedures are directed almost entirely towards other supermarkets”.  

238 Competition Commission Study 2000, “Focused Competition”, section 2.335., page 74: “…Tesco said that its National basket of products, which now contained nearly 4,000 lines, was representative of the whole of its business and comprised a significant proportion (49 per cent) of its turnover. All the products in the National basket had substitutes outside it, so National basket prices acted as ‘anchors’ for the prices of all of its products, not as a focus for competition. Tesco argued that its price monitoring was not the driver of its pricing policy, but rather the means by which it checked the success of its pricing strategy; it checked over 4,000 lines every week and also undertook extensive monitoring outside this weekly routine…Sainsbury told us that it monitored 2,000 product lines every four weeks and carried out irregular monitoring of its wider range, to ensure its competitiveness…Safeway told us that it carried out a weekly check on its top 1,000 lines, including KVIs and budget own-label products, and additionally undertook further checks on all KVIs and budget own-label lines. It made occasional checks on all lines…Asda said that its weekly check of 1,400 high-selling items and monthly check on a further 600 items were evaluative tools…Somerfield told us that it checked 1,000 of its most important products, mainly KVIs, against Asda, Safeway, Sainsbury and Tesco. These were 4 per cent of its lines but represented 40 per cent of its sales value…”

239 Competition Commission Study 2008, sections 8.14 and 8.15, page 150.
price and channelling complaints from distributors against those that are reducing their retail price in excess\textsuperscript{240}.

Finally, there are also price monitoring and comparison mechanisms developed by consumer associations\textsuperscript{241} and the Ministry of Industry, Trade and Tourism. In particular, the latter launched the Retail Price Observatory in November 2008, which takes a sample of more than 4,000 establishments throughout Spain in the 52 province capitals as well as Gijón, Vigo, Jerez de la Frontera and Talavera de la Reina, and covers 188 products. Information is presented quarterly at capital of province and autonomous community level, by type of establishment (hypermarket, supermarket, municipal markets, discount stores and specialised stores) and chain of stores\textsuperscript{242}.

8.2.3 Capacity of Dissuasion within the Oligopoly

The economic theory of the collusive oligopoly requires oligopolistic companies to have sufficient tools available to dissuade other members of the oligopoly to adopt or, if appropriate, maintain competitive practices, hence ensuring the persistence of the tacit coordination (price parallelism) when faced with sporadic competition episodes.

The retail distribution market and, in particular, the large grocery retail outlet sub-market, allows competitors’ prices to be monitored in real time, hence enabling immediate retaliation. The leading companies are aware that they may lead, in economic terms, to zero or negative sum: a company’s lowering of prices increases its sales at the expense of another company, which in turn, reacts by further lowering its prices to offset the lost sales in a series of discounts which may even lead to both companies making a loss (destructive competition).

\textsuperscript{240} Competition Commission Study 2008, page 151; “8.19 Our review of e-mails between buyers at Tesco and Asda and their suppliers for the five-week period between 18 June 2007 and 22 July 2007 provided some instances of suppliers providing information to retailers in relation to rival retailers (see Appendix 9.1). The review consistently showed suppliers providing information to retailers on the current retail price at which competitors were selling goods, as well as details of current product promotions at competitors. There were also some examples where suppliers offered information to grocery retailers regarding the future plans of competitors. Our review did not, however, involve a search for evidence of any of these offers being accepted by grocery retailers.” Similarly, the French Competition Authority, Decision 07-D-50, 20th December 2007, related to anti-competitive practices in the toy distribution sector (“Toy distribution resolution of the French Competition Authority”), paragraph 534: “Le dossier contient plusieurs indices à caractère général montrant que fournisseurs et distributeurs conviennent entre eux des prix auxquels les jouets dits «de Noël» doivent être proposés aux consommateurs. Ils mettent notamment en relief le rôle de référence joué, pour la plupart des fournisseurs, par le prix d’achat négocié avec les GSA [grandes surfaces alimentaires], auquel s’ajoute la TVA pour former le prix de vente aux consommateurs: les GSS [grandes surfaces spécialisées] s’alignent sur ce prix, quelles que soient les conditions obtenues des fabricants. Même Maxi Toys, qui pourtant s’approvisionne à des conditions différentes en Belgique est incité à s’aligner sur ce prix de référence. Le rôle actif joué par les fabricants ne permet pas de considérer qu’il s’agit d’un alignement spontané.”

\textsuperscript{241} \textit{Vid.}, infra Section 8.4.1.

\textsuperscript{242} \textit{Vid.}, web page of the Price Observatory: http://www.observatorioprices.es
This circumstance does not exclude the appearance of sporadic price wars, for example when a company enters a local market and needs to compete to acquire sufficient critical mass. However, these episodes immediately produce a generalised lowering of prices, which stabilises the market shares of the companies and their prices, so that tacit collusion between competitors and the adoption of supra-competitive prices is once more imposed as the optimum strategy for all concerned. For example, the opening in 2003 of a Carrefour hypermarket in Vigo and its aggressive price policy led to a price war with the Continente hypermarket, which was carried over to the rest of retail distribution. However, following an initial period of instability, the local market returned to the stability of collusive prices.

Likewise, promotion campaigns, associated with a reduced number of products and limited duration, which are carried out by almost all companies, are fully compatible with an oligopolistic market in which the global price tendency is inflationist and in fact, they serve to relax the competitive tension on the rest of the products that are not included in the promotion (the large majority). In any case, promotions should be widely publicised and with sufficient notice to be effective, hence facilitating a proportioned and equally effective reaction from competitors. For example, in September 2005, Carrefour launched a “3x2” campaign on television which was immediately copied by its main competitors:

“Carrefour has launched a TV advertising campaign to publicise its current offer of 3x2 products (take away 3 for the price of 2). It would not have appeared to be anything exceptional if it were not for the fact that all of its competitors were simultaneously on television with identical campaigns: Hipercor (2nd unit at 50%), Caprabo (3x2) or Eroski (2nd unit at 50%). Following the return to school, distributors appear to be anxious to capture clients. However, by stealing them from each other, they only succeed in reducing their margins and profitability. It is necessary to be extremely clever to avoid open price wars.”

In 2009 a price war between the three leading distribution companies was initiated, revolving around public campaigns with substantial discounts (a high % of the sales price) in a series of products. Within a context of severe economic crisis with deflationist effects in all sectors, what triggered the price war in large scale distribution appears to have been Mercadona’s decision to eliminate 800 non-competitive references from its shelves and study the possible elimination of a further 1,200, to offer its customers an estimated saving of 10% in the typical shopping basket. The publicity generated by Mercadona’s initiative has had an immediate response from its competitors. In particular, “Carrefour is being one of the most aggressive distribution groups in its price lowering policy (…). Carrefour has also recurred to comparative advertising at street level. For several months, it has been hanging up large signs at the

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entrance to its stores, which read “We are cheaper than Mercadona”. It also displays the same message on a large panel and a comparative price table at the doors to its stores. This is not an advertising strategy used in all of the French group’s stores in Spain, but only in those located in towns in which the Valencian chain of supermarkets has important influence246. Finally, Eroski has also joined this price war with discounts of up to 40% on a list of products, in spite of the fact that its Chairman warned of its negative effects for all competitors, at the annual conference of the AECOC Association, held at the end of October 2008247.

Faced with sporadic price wars, the leading companies can develop dissuasive campaigns which show other competitors their willingness to enter into a price war in order to prevent its appearance. Carrefour, the leading company in the hypermarket segment and one of the three leading companies in the retail distribution market and in the large grocery retail outlet sub-market, has been developing a national lowest prices campaign since at least 2007: Carrefour promises to equal in its hypermarkets lower prices offered by the competition and refund the difference between products purchased in another establishment and those sold in its hypermarkets within a period of 24 hours. This campaign which is indefinite in duration affects all products stocked in its hypermarkets and acts as a deterrent for competitors: it legally obliges Carrefour to equal lower prices offered by the competition, hence discouraging competitors from competitive fickleness”248.

The effectiveness of Carrefour’s lowest price campaign has been put to the test in a newspaper article. A comparison with Eroski and Lidl, only revealed higher prices in 7 products (6 of Eroski, 1 of Lidl). Anyway, once Carrefour was informed of this situation, it proceeded to equal its prices and in some cases, improve them. However, the adjustment process was slower in relation to one product (Pepsi, 2 litres). Carrefour began by lowering the price from 1.45 to 1.03 euros, a figure equivalent to its cost price, yet still four cents (5%) higher than the price set by Eroski. Therefore, Carrefour explained to the journalist that he had to buy the article to justify the reduction in order to equal the competitor’s price, a proviso that is permitted by the law which forbids sales below costs.249

Carrefour’s lowest price campaign is typical behaviour of the collusive leader in oligopolistic markets that contribute to discipline the market and discourage competitors from initiating price wars.

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247  Idem: “A few months ago at the Aecoc Conference, which brought together the majority of the food sector, the Chairman of Eroski, Constan Dacosta, warned against the dangers of entering a price war. “If we fall into a dynamic of lowering prices to boost sales, we will all end up losing”, he claimed. However, the Basque Group has had no choice but to enter the conflict. Coinciding with its 40th anniversary, the group has launched a promotion with discounts of 40% in a large number of products.”
248  Vid., supra note 216.
8.2.4  Absence of External Competitive Reaction

The economic theory and case law of European courts consider that tacit collusion in an oligopolistic market is only possible if there are barriers to entry or expansion and consumers do not have enough weight to counteract tacit collusion.

8.2.4.1  Barriers to Entry

The CNC has defined barriers to entry as “all those obstacles and costs that discourage or directly impede the entry of companies to a certain market”, indicating that “the more costly these are to overcome, the greater will the possibility of existing companies to exploit the monopolistic or oligopolistic revenue that may exist, with the subsequent losses of efficiency (less goods and services are produced at a higher cost with worse quality) and equity (if the consumer decides to buy, he/she is forced to make an income transfer to the organization in excess of what a similar quantity would cost if there were competition)”. In relation to the categories of barriers to entry, the CNC has differentiated between legal and economic barriers: “The essential difference between economic and legal barriers lies in the fact that the latter, by definition, are introduced voluntarily by the public authority, using its regulatory capacity, whilst the former are based on the nature of the goods required to put the activity in question into practice or on the strategic behaviour of the competitors.”

8.2.4.1.1  Legal

The enormous legal barriers that restrict retail and wholesale activity of daily consumer goods and produce monopolist income for the established companies, have repeatedly been reported by international and national organisations.

In the international sphere, the International Monetary Fund (IMF), OECD and the Commission have commented on these legal barriers and their effects on competitiveness and inflation. The annual IMF studies on the Spanish economy have regularly reported the legal barriers in this field and have called for their elimination. The restriction indexes in the retail trade prepared by the OECD have shown that Spain is one of the countries with the most restrictive regulations in the retail trade.

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253  The OECD only measures state regulation that restricts competition in retail distribution, which has been on the increase in recent years, to which regional and municipal restrictions must be added.
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The OECD 2007 Annual Report for Spain went into this question:

“The strengthening of competition in the product markets, which is another official priority, is crucial to obtain static and dynamic efficiency savings. Stronger competition increases the pricing discipline in the product market, particularly in the sector that is not exposed to foreign trade, stimulates innovation, the adoption of new technologies and, finally, productivity growth. Although the regulation has become more favourable of competition since 1998, according to the OECD Indicators on the Regulation of the Product Markets, the progress made has not been faster than in other places, and there is still a huge margin to free market forces.(…). Although these general measures will be
beneficial, more needs to be done to increase competitive pressure in diverse individual sectors. For example, large supermarkets unjustified barriers to entry imposed by the Autonomous Communities. The authorities could make use of the future European Directive on Services to eliminate these obstacles. In any case, in spite of the small initiatives that have already been taken in the retail sector, firmer measures need to be taken to reduce the abundance of regional regulations aimed at fragmenting the Spanish market.\textsuperscript{254}

Finally, in its 2004 Report on the Progress of the Lisbon Agenda, the Commission stated that there was not enough competition in the retail of daily consumer goods in Spain\textsuperscript{255}.

In the national sphere, the Bank of Spain has prepared an indicator of the degree of regulation of the retail trade at a regional level for the period 1997-2007, which includes the regulation on global weekly opening times, opening on Sundays and bank holidays, sales periods, definition of establishments which require a license from the Autonomous Community, regional license requirement for hard discount stores, moratoriums and specific taxes on large grocery retail outlets (weightings have been established for each legal barrier considered). This indicator does not consider the legal barriers that are common to all Autonomous Communities or those imposed by the local authorities. The Bank of Spain conclusion is that, in general, there is now a more restrictive regulation in the retail sector than at the beginning of the period analysed (1997)\textsuperscript{256}.

\textsuperscript{254} OECD Economic Study on Spain, 2007 (Summary), page 10.
\textsuperscript{256} M.ª de los Llanos Matea and Juan S. Mora, “Una aproximación a la regulación del comercio al por menor a partir de indicadores sintéticos”, General Directorate for Studies Service, Bank of Spain, Economic Bulletin 100, October 2007, pages 90-100.
On the other hand, The TDC has commendably yet unsuccessfully reported all types of legal barriers that restrict competition. The TDC Study 2003 reported the legal barriers on establishment and opening hours and recommended their abolition. The TDC has taken advantage of its consultative function in the control of concentrations to report and request the abolition of these legal barriers. For example, in the Caprabo/Enaco Report, the TDC stated the following:

“In short, in spite of its generally competitive nature, retail distribution is subjected to numerous, long-winded and inconsistent regulations in Spain. Its immediate result paradoxically consists of limiting competition. In particular, the quantitative restrictions related to the sales floor in a geographic area restrict competition by rejecting the entry of possible new entrants to the market. Hence, there is a risk of creating local monopolies immune to competition, entrenched in geographic markets under community and municipal regulations.

On the other hand, as already mentioned in this report, retail trade not only competes in prices but also in proximity to the consumer. Once the best locations have been taken,
entry becomes extremely difficult. The interventionist regulation allows spatial monopoly situations to be consolidated in some market areas.\textsuperscript{257}

In the Eroski/Caprabo Report, the CNC has continued with the task of reporting legal barriers introduced by the TDC, pointing out that “they consolidate local monopolies of companies that are already established”, hence leading to the “transfer of consumer income, via higher prices, towards small and medium-sized distributors and in favour of already established business groups, often with large grocery retail outlets, free from potential competition”:

“In the commercial distribution sector, legal barriers are becoming the main obstacle to entering the market, increasingly influencing accessibility to this type of markets. On repeated occasions, the Tribunal has analysed the impact on effective competition of commercial distribution regulation in Spain [Footnote: Vid. Concentration Reports C52/00 Carrefour/Promodè; C70/02 Caprabo/Enaco; C78/03 Leroy Merlin/Brico; C79/03 Día/El Árbol, C83/03 Caprabo/Alesto, C92/05 Dinosol/Mercacentro and C95/06 Miquel Alimentació/Puntocash, as well as the Tribunal Report on competition conditions in the commercial retail sector, 4th June 2003 (I 100/02)]. The Tribunal has particularly highlighted the following legal barriers to entry in retail distribution in commercial establishments:

1. The excessive regulatory dispersion in the regulation on commercial activity in Spain [Footnote: “This dispersion not only acts as a barrier to entry by increasing company information costs, but, initially in the medium term, it has deteriorated the market unit, reducing the overall level of competition in the sector”]. This dispersion is a result of the extremely heterogeneous development of diverse points of the Law 7/1996, 15th January, Regulation of the Retail Trade [footnote omitted] through regional legislation.

2. The increasingly restrictive nature of current commercial regulations at both a municipal and particularly at a regional level. In particular, the specific commercial license required by large commercial establishments at a regional level [footnote omitted] (the so-called second license) ineffectively overlaps with the municipal license required by virtue of the powers of Local Authorities in terms of regional planning. The restrictive nature of the regional regulation reaches its anti-competitive peak with the so-called moratoriums, which by means of transitory measures, have affected and continue to affect diverse Autonomous Communities [footnote omitted], and with the creation of specific taxes that are levied on Large Grocery Retail Outlets [footnote omitted]. These barriers to entry limit geographic competition, preventing new establishments from entering the market and introducing economic inefficiency so that:

a) They make it difficult for improvements in commercial distribution to be fully taken advantage of by consumers.

b) By imposing the need for licenses to open stores of a certain size, they ineffectively alter the morphology of the commercial establishments commercial, discriminating between formats, leading companies to adapt their structures for legislative reasons rather than in search of increased efficiency or better service for the consumer.

c) They consolidate local monopolies of companies that are already established.

\textsuperscript{257} Caprabo/Enaco Report, page 39.
d) By restricting the entry of new operators, consumer income may be transferred via higher prices, towards small and medium-sized distributors and in favour of already established business groups, often with large grocery retail outlets, free from potential competition.”

8.2.4.1.1 The Services Directive and Economic Criteria

The coming into force of the Services Directive and the modification process of Law 7/1996, on the Regulation of the Retail Trade ("LORCOMIN"), present a new scenario in relation to legal barriers. Article 9 establishes that Member States may condition access to a services activity and the exercise of an authorisation scheme for reasons of public interest, provided that the authorisation scheme is proportioned and not discriminatory. Whereas 56 of the Services Directive clarifies that “according to the case law of the Court of Justice, public health, consumer protection, animal health and the protection of the urban environment constitute overriding reasons relating to public interest. Such overriding reasons may justify the application of authorisation schemes and other restrictions”. On the other hand, Article 14 lists the requirements that cannot be included in an authorisation scheme and, among them, section (5) includes:

“The case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest”

Whereas (66) of the Services Directive clarifies the last part of Article 14.5: “(. . .)., The prohibition of economic tests as a prerequisite for the granting of authorisation should cover economic tests as such, but not requirements which are objectively justified by overriding reasons relating to the public interest, such as the protection of the urban environment, social policy or public health. The prohibition should not affect the exercise of the powers of the authorities responsible for applying competition law.”

In short, although the Services Directive has abolished the economic test of the authorisation scheme for the establishment or extension of any commercial establishment, it allows the competent authority (national, regional or municipal) to apply an authorisation scheme based on urban or environmental criteria. Therefore, it may be concluded that for practical purposes, the authorities may uphold existing legal barriers to the opening of commercial establishments, provided that they are based on urban development or environmental criteria.

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This conclusion appears to be supported by the legislative amendments to the Basque Law on Commercial Activity, approved to adapt this law to the Services Directive. In its Preliminary Recitals, Whereas 1 states without any ambiguity its preferences for urban trade (necessarily smaller) over peripheral trade (associated with large grocery retail outlets):

“This urban model, characteristic of the majority of the countries of the European Union, is typical of our lifestyle and is a factor that identifies us. Trade in the historical centres of our villages, cities and neighbourhoods contrasts with peripheral trade models, characteristic of urban structures that are alien to us from the cultural and regional occupation point of view and which lead to an over dimensioning of the road network and the subsequent use of private vehicles, with the consequences that this entails. It is therefore necessary to maintain the compact city and socially cohesion model that exists today, in which trade maintains its historical function. In order to develop and maintain the city model, the requirement of ensuring sustainability in the use of land is added, hence avoiding the harmful effects on the environment and citizens’ mobility as a result of their indiscriminate consumption in commercial premises located outside the urban environment.”

Whereas 2 of the Basque Law on Commercial Activity emphasises the urgent reasons of public interest which may justify the trade regulation by the Administration without having to recur to the “economic test”:

“The aforementioned Services Directive, among other questions, restricts the individual economic test procedure in administrative authorisation for the development of commercial activities and points toward a new point of view associated with the application of regional and urban planning, environmental and social cohesion criteria linked to the public interest. The concept of ‘overriding reasons relating to the public interest’ to which reference is made in certain provisions of this Directive has been developed by the European Court of Justice and covers at least the following grounds: public order, public security, civil protection, public health, animal welfare, the preservation of the financial balance of the social security system, the protection of consumers, recipients of services and workers, acting in good faith in commercial transactions, the prevention of fraud, the protection of intellectual and industrial property, social and cultural policy objectives, the preservation of national historical and artistic heritage and the protection of the environment and the urban environment, including town and country planning. It must be taken into account that, as set out in Whereas 9, this Directive applies only to requirements which affect access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as rules concerning the development or use of land, town and country planning, which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.”

In line with these considerations, the new Article 13 of the Basque Law on Commercial Activity classifies all surface areas >700 square metres (Section 2) as a large commercial establishment and subjects them to the regulations set out in the Basque Government’s Sectorial Territorial Plan for Commercial Premises (Section 4), a regional planning instrument that may restrict the opening and location of large grocery retail outlets without formally constituting an “economic test”. It is set out that Town Halls must consider the commercial retail use as a specific use for the purposes of urban planning, “specifying, when appropriate, the land on which this use may be carried out via the development of large commercial establishments and, if appropriate, their compatibility with other uses, in accordance with the rules set out in the following sections” (Section 1). The law obliges the corresponding Town Hall to request from the competent body of the Basque Government the issue of a report on the suitability of the planned activity with the criteria set out in the Sectorial Territorial Plan for Commercial Premises (Section 5). It also conditions the land classification for the development of large commercial establishments in urban centres or suburbs, to the restructuring of obsolete areas or the occupation of empty spaces, in accordance with the Sectorial Territorial Plan for Commercial Premises and preferably also follows the planning criteria set out in the law (Section 6). Should Town Halls not wish to follow this criteria, they must justify their decision by means of a sustainability study, that should be submitted to the Regional Planning Commission of the Basque Country, along with a reasoned report which must be incorporated into the planning formulation, modification or review file and which will refer to the following points: (a) Analysis of the proportionality and suitability of the development for commercial use with respect to the urban environment; (b) Condition and appropriateness of existing infrastructures, such as lighting, roads, water and telecommunications, among others, to provide a service to the planned development; (c) mobility studies for people and vehicles and existing infrastructures serving this mobility; and (d) Impact on urban planning and environmental protection of the regional area in which the development is planned (Section 7).

In short, although the Services Directive aims to eliminate legal barriers justified by economic criteria, and in particular, the protection of the small business, it will not affect regional and municipal town planning, which may represent just as harmful a barrier as the previous one. For example, the Basque Law on Commercial Activity is likely to hinder or even prevent the development of large grocery retail outlets, (1) prioritising urban trade over peripheral trade (natural environment for large grocery retail outlets); and (2) conditioning the development of large urban grocery retail outlets on the restructuring of obsolete areas or the occupation of empty spaces. On the other hand, in their urban planning, Town Halls must consider the commercial retail use as a specific use and specify the land on which this use may be carried out via the development of large commercial establishments and, if appropriate, their compatibility with other uses”, which is the same as creating a legal authorisation system for large grocery retail outlets subject to the discretion of the Town Halls.

It is not so unlikely to think that other regional legislators will follow the Basque model and will adopt stipulations in favour of urban trade and municipal discretion, with the aim of providing an obstacle to the development of large grocery retail outlets.
8.2.4.1.1.2 Land Legislation

The Services Directive has eliminated the most obvious legal barrier to the development of large grocery retail outlets: the quantitative limitations justified by economic criteria. However, land legislation allows regional and local urban planning to continue restricting the development of large grocery retail outlets on urban and environmental grounds. To measure the adverse effect of land policies on competition in commercial retail, housing and any other economic sector linked to land, it is worth remembering the TDC Study “Political Remedies that Favour Free Competition in Services Sector and Correct the Harm caused by Monopolies” (“TDC Study 1993”). In this study, the TDC established that competition in the land market is more restrictive than in any other sector of the economy and defended the need to make it less restrictive. This lack of competition in the land market particularly affects the services sector, creating spatial monopolies and inflationist tendencies. In particular, the TDC condemned the division of land into different uses (for example, commercial retail distribution), so that they do not compete between each other, the discretional regulation of land via urban plans, which may be used to fund the Administrations in exchange for local

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262 TDC Study 1993, page 66: “The second important conclusion drawn from the Report is the need to deregulate the land market. In this market, competition is more restrictive than in any other sector of the economy. Particularly harmful is the fact that the decision on land use is not in the hands of buyers and sellers. It can be perfectly understood that public authorities regulate heights, densities, need for infrastructures, removal of disruptive or insalubrious activities, etc. but what cannot be justified is that the use of land – fulfilling all of the restrictions that are considered necessary – cannot be decided by supply and demand. This means that the different uses cannot compete with each other and in short, the land market is practically non-existent in Spain, but instead, it is segmented into numerous sub-markets, which presents an obstacle to the correct allocation of resources.”

263 TDC Study 1993, page 66: “Everything requires the use of land, particularly any services sector task. In order for the services sector to develop free of inflation, the liberalisation of the employment market and the liberalisation of the land market is essential. For the setting up, development and adaptation of services companies to demand, companies must have flexibility when hiring workers and when locating wherever there is demand. If operators do not have these facilities when there is a demand growth, existing services companies become monopolies and from there, in times of demand growth, price inflation in the services sector rises at exorbitant rates.”

264 TDC Study 1993, page 149: “That land use should be controlled by public authorities is not denied and this is what happens in other countries. The problem in Spain is the type of control. The problem in Spain is that, instead of establishing general rules in defence of public interest, the urban authority decides everything, up to the extreme of determining in detail the use of each area. By preventing owners from deciding on the use of the area, the land market is segmented, in such a way that the different uses do not compete on the use of the land. It is as though, instead of there being a single market, there are eighty-one tiny markets. This lack of competition between alternative uses, generates a poor allocation of resources and gives rise to the emergence of monopolistic income. The compartmentalization of the market diminishes the offer for each of the uses and forces prices.”

265 TDC Study 1993, page 151: “In Spain “plans” have been granted to the discretion of urban authorities, which suggests a certain idea of stability, but in practice, these so-called "plans" are completely changeable.”
monopolies\textsuperscript{266}, to the benefit of interested parties (large established companies)\textsuperscript{267}. The TDC identified the retail of daily consumer goods as the main exponent of the adverse effects of land legislation:

“The Tribunal began to realise the importance of introducing competition to the land market on studying competition in other sectors such as, for example, commercial retail. Following deregulation in 1985, large grocery retail outlets have been developed in Spain, which has been extremely positive for the consumer, however its full benefits are not being obtained as in Spain and, unlike other countries, there is limited competition between large grocery retail outlets. The main reason is that often there is a type of pact or exchange between the authorities that classify the land for commercial use and large retailers. The classification is granted if the large grocery retail outlet builds, for example, a sports centre or a bridge for the Town Hall.

What is behind these pacts? In reality, what is behind them is a monopolistic concession. Following the same example, large grocery retail outlets are not non-profit institutions that give something in return for nothing. The urban authority guarantees them a monopoly with which consumers in the area can be exploited and, as the revenues obtained are higher than the cost of a sports centre or bridge, they accept the deal. However, the operation from an economic point of view is unquestionably efficient. Any other type of imposition on citizens is more reasonable and efficient than the monopolistic imposition. Citizens would obtain far more advantages if the large grocery retail outlets were able to compete against each other. Prices would fall and, through the tax system, the local authorities would obtain the income to pay for the public requirements.” (own underlining)\textsuperscript{268}

The TDC modestly recommended the creation of a “Commission” to review land regulation in Spain in accordance with competitive principles\textsuperscript{269}. The TDC

\textsuperscript{266} TDC Study 1993, page 154: “It is true that in the current system, some local authorities act like speculators, restricting the offer of land to incredible extremes and in parallel, forcing up the price of the land, but this is an economically justifiable conduct given the problems of Local Tax Authorities in Spain. The lack of appropriate funding to face social pressures that require significantly increased expenditure have led local authorities to recur to the concession of local monopolies as an essential source of income.”

\textsuperscript{267} TDC Study 1993, page 153: “(…) A lot of time would be required to become aware of the problems of our land legislation. In this case, it is not just a question of interested parties. Not only are the local authorities and large companies interested in maintaining the current "status quo" but the majority of the population would probably fear a change in the regulations, in this case endangering public interest. The idea that the owner serves no purpose and the more that is expropriated and the further away from the system, the more land prices will fall and urban development will be better organised is real, but this is due to the fact that nobody has provided an alternative vision.” (underlined by the TVDC)

\textsuperscript{268} TDC Study 1993, pages 148-149.

\textsuperscript{269} TDC Study 1993, pages 154-155.” a) On urban land: seek formulas to highlight the regulatory character of its classification, ensuring the right to build for all operators in accordance with general rules and effectively submitting these rules to public authorities without privileges. Principle of equality: in terms of heights, volumes, densities, etc., justifying any differences globally. b) On Urbanisable land: Allow private landowners to decide on the use of the land as long as certain general rules are fulfilled. Justified and reasoned rejections by public authorities. Use of urbanisable land for urban development in accordance with the initiatives of private landowners. c) Non-urbanisable land: Determine which land should not be urbanisable throughout the territory. On the rest of the land, urbanisation should be allowed subject to general rules. Change the current viewpoint, defining the areas of national territory that are not urbanisable in accordance with a public priority plan in accordance with environmental, landscape and
recommendations failed to prosper and the inflationist spiral of property assets and daily consumer goods appear to have confirmed the predictions of the TDC. In recent years, the intervention of municipalities on land planning, anti-competitive effects in the retail of consumer goods has been a recurrent phenomenon. For example, in the Caprabo/Alcosto Report, the TDC pointed out:

“The Tribunal has observed that barriers to entry are created at a municipal level that exceed regional barriers, hence further hindering market response. As an example, the license system for opening commercial establishments in excess of 750 m² in accordance with the urban regulations of Madrid Town Hall, are particularly significant. The General Plan for Urban Development in Madrid, in chapter 7.6 (Specific Conditions for the Use of Tertiary Services), second section (Trade Conditions), Article 7.6.7 (Large grocery retail outlets), refers to a themed study following the resolution on the insertion of large grocery retail outlets in the city. The proposal will revolve around a "Special Tertiary Plan for Large Grocery Retail Outlets". However, as a transitory provision, until the “Special Plan” is approved, a retail establishment in which the commercial activity is carried out in an independent outlet, intended for the sale of food, with a sales floor in excess of 750 square metres will be defined, among others, as a “Large Commercial Establishment”. Until the Special Plan is drawn up, only large grocery retail outlets in areas of Incorporated Planning in which the planning would have expressly authorised their existence, as well as in areas of Incorporate Urbanisable Land in which they have been planned may be authorised. Similarly, large grocery retail outlets in those areas of Development Planning in which the detailed definition of uses expressly allows it, may be authorised. Therefore, the opening of new supermarkets with a sales floor of more than 750 square metres is practically impossible in certain areas of the urban quarter of the city of Madrid, due to the restrictions set out in the aforementioned General Plan of Urban Development.”

There are numerous examples of barriers related to the urban planning regulation, regardless of regional barriers, throughout the national geography. For example, Eroski’s project to open a commercial centre in Ourense has been “a decade” without materialising due to the illegalization of successive municipal urban development plans, which has led the company’s Head of Expansion to declare: “[Judgments like the present one] symbolize the risk of urban development in Spain and it is something all of us who want to carry out a project of this calibre have to put up with. Legislation is awfully complicated in this country.” Similarly, the opening of two Eroski hypermarkets in the Canary Islands (Las Palmas and Tenerife) has been stopped for “ten ecological values. The rest of the territory should be urbanisable. d) In Local Tax Authorities: study systems of financing local authorities which enable them to be self-funding without the need to recur to monopolistic concessions.”

270 Caprabo/Alcosto Report, pages 64-65.
271 “Eroski plans to start work on its multi-store centre this summer”, Faro de Vigo, 27th April 2008.
years” due to problems with local urban planning and, recently, local traders’ associations have called for the expiry of the two regional licenses272.

Urban development problems that distort the large grocery retail outlet market have also been subject to study and reporting in other countries such as Australia273, France274, United Kingdom275 and the Nordic Countries276.

272 Eroski’s licenses are going to be upheld and won’t be considered to have expired, La Provincia, 2nd June 2008. http://www.laprovincia.es/secciones/noticia.jsp?pRef=2008060200_4_154886__Las-Palmas-GC-licenses-Eroski-mantener-daran-caducadas

273 Allan Fels, Stehen Beare & Stephanie Szakiel, “Choice Free Zone”, Frontier Economics, Australia, May 2008, Executive Summary, page 13: “Over time, countries that have allowed the retail sector to take advantage of economies of scope and scale have experienced some of the higher rates of productivity growth in the retail sector. Given observed differences in productivity growth in international studies, the potential gains to retail productivity growth from a more flexible planning system in Australia could reasonably be considered to be in the range of 1 to 1.5 per cent per annum. Over 50 years, in net present value terms, this additional productivity growth in retail services could equate to between $52-$78 billion of NSW Gross State Product, and $197-$296 billion in Australian Gross Domestic Product. As with productivity increases, job creation has follow on effects. Every additional retail sector job has been estimated to create an additional 1.42 jobs in the Australian economy. The full impact of a 10 per cent increase in retail floor space on employment could then be 147,000 jobs Australia wide, 47,000 jobs in NSW and 16,500 jobs in metropolitan Sydney. Restrictions on the level of retail development also have employment impacts. Where there is limited floor space, there is also limited job availability. Allowing for increased labour productivity in larger format stores, it would be conservative to assume that 10 per cent increase in floor space resulted in only a 5 per cent increase in direct retail employment. The total employment in the retail sector is currently about 1.2 million persons. This increase would equate to 61,000 jobs Australia wide. In NSW, this would equate to over 19,500 jobs and in metropolitan Sydney 6,850 jobs. (…).Another way of identifying this cost is to consider how the planning system’s artificial restriction on the format and layout of supermarkets and retail stores affects consumers directly. By mandating smaller, more compact sizes and restricting large format stores, the planning system removes economies of scope and scale that could be achieved with larger formats, resulting in increased prices experienced by consumers”, http://conceptnews.com.au/artman2/uploads/1/Choice_Free_Zone.pdf; y ACCC Study 2008, Overview, XIX: “The ACCC recognises that zoning and planning policies are designed to preserve public amenity. However, zoning and planning regimes, including existing centres’ policies, also act as an artificial barrier to new supermarkets being established with the likely unintended consequence of potentially impacting on competition between supermarkets. In particular, existing centres’ policies, combined with the strong preference of existing centre owners to lease space to the major supermarket chains rather than independent supermarkets or new entrants, are likely to lead to a greater concentration of supermarket sites in the hands of Coles and Woolworths. Broadly speaking, little regard is had to competition issues in considering zoning or planning proposals. Further, the complexities of planning applications, and in particular the public consultation and objections processes, provide the opportunity for Coles and Woolworths to ‘game’ the planning system to delay or prevent potential competitors entering local areas. Submissions put to the inquiry support planning authorities taking competition issues into account when approving new developments. Given the high barriers to entry in grocery supermarket retailing, including the difficulty in obtaining suitable supermarket sites, the ACCC considers that new ways of incorporating competition analysis into planning decisions should be considered.

274 French Competition Authority Decision 2007, paragraph 116: “Il ne semble pas que de simples aménagements du système actuel de régulation quantitative soient en mesure de remédier aux externalités induites par l’implantation d’équipements commerciaux tout en améliorant les conditions d’exercice de la concurrence dans le secteur de la distribution. Même si les distorsions de concurrence pourraient être partiellement réduites par un aménagement du processus d’autorisation, le maintien d’une procédure d’autorisation au cas par cas reviendrait à maintenir une barrière à l’entrée fortement dissuasive pour les nouveaux entrants.”
The OECD Study 2008 has specifically analysed barriers to entry or expansion in the market derived from legal restrictions on the use of land\textsuperscript{277}.

### 8.2.4.1.2 Economic

Economic barriers may be of two types. First of all, barriers related to financial resources and economies of scale required to set up and run a national network of large commercial establishments. Secondly, barriers related to the economic feasibility of the individual establishments.

#### 8.2.4.1.2.1 Economies of Scale and Scope

In the Carrefour/Promodès Report, the TDC established that large distribution companies enjoy a competitive advantage over small operators:

“One of the main competitive variables on which competition within retail distribution has been founded in recent times is the reduction of overheads and procurement costs. A reduction of overheads may be said to be a result of existing economies of scale in hypermarkets compared to those corresponding to other smaller formats.\(\ldots\). The result of these changes in the retail trade is leading to a greater concentration of retail distribution. This greater concentration may be producing a more efficient way of operating than traditional ways, but at the same time, these searches for efficiency

\textsuperscript{275} Competition Commission Study 2008, sections 7.37-7.38, page 129: “An inevitable consequence of a plan-led system that seeks to meet the broad range of objectives set out in paragraph 7.35 is that grocery retailers may not always be able to open a new larger grocery store in the location of their choice. That is, the planning system will, quite deliberately and appropriately for the purposes of meeting its objectives, act—to some extent—as a barrier to entry and/or expansion. The planning regime acts as a barrier to entry or expansion primarily for larger grocery stores. This is because, in general, it is easier to secure suitable sites for mid-sized grocery stores or convenience stores in those areas where planning consent is already in place or where planning requirements are significantly less onerous, in particular in town centres.”

\textsuperscript{276} Nordic Authorities Study 2005, page 19: “The composition of shops in the retail sector has changed towards more discount shops and hypermarkets. Access to buildings or building sites is essential for new retailers. Therefore, planning authorities should acknowledge the value of competition for consumers and only limit entry of new retailers where there are objective reasons for it. Application procedures should be transparent and applicants should be ensured possibility to appeal.”

\textsuperscript{277} OECD Study 2008, Executive Summary by the Secretariat, page 7: “The social harms that can arise when land use restrictions create “entry barriers” are rarely considered explicitly. More careful integration of policy on land use restrictions with competition policy could benefit consumers and many entrepreneurs and reduce the likelihood that public or private restrictions will lead to supply scarcity. Competition agencies can play a critical advocacy role in this domain that would not typically be fulfilled by any other part of national government.

Land use regulation creates the most severe competition problems when:

- The regulations prevent new firms from entering markets where there is market power;
- The regulations prevent low-cost firms from entering in markets where existing firms are high-cost;
- The regulations reduce total supply of a good; or
- The regulations unduly delay the arrival of a good or service that consumers would value (such as ones resulting from innovation or differentiation).”
require a certain size company and a distribution network, which becomes an important entry barrier to the sector.\textsuperscript{278}

In the Eroski/Caprabo Report, the CNC also stated that “in this search for efficiency, the size of the companies and the need to adapt the network of establishments to the distribution structure may constitute an entry barrier to the sector which discourages market access to new entrants who do not enjoy the degree of implementation of current operators”\textsuperscript{279}. The UK Competition Commission has also referred to this competitive advantage:

“Economies of Scale/Critical Mass: 235. To be a viable and effective operator, the Commission noted that a supermarket chain must achieve a minimum economic size to justify the capital expenditure and other infrastructure costs. Size is also necessary to achieve “buying clout” with suppliers. This meant that effective entry is only likely to be viable on a large scale. Given the maturity of the market, difficulty in gaining sites, and satisfying planning laws, \textit{de novo} entry of a new chain was not considered likely.”

Two categories of competitors appear to have emerged in the Spanish daily consumer goods distribution market: national operators (Carrefour, Mercadona, Eroski, Auchan and El Corte Inglés) and regional or even local operators. The former belong to large business groups with diverse interests and vast financial resources. Therefore, they enjoy the advantages inherent in their size in the running of their establishments (particularly hypermarkets and supermarkets of >1,000 square metres) and in commercial relations with suppliers. On the other hand, there are regional operators, whose regional strength appears to be insufficient to equal the competitive advantages of the large national chains and, therefore, they are gradually being taken over by them\textsuperscript{280}. These operators have benefited from the legal barriers to the implementation of large grocery retail outlets but they do not have the financial resources or the economies of costs and scope to compete on a national scale\textsuperscript{281}.

\textbf{8.2.4.1.2.2 Market Saturation}

The location of a commercial establishment is a determining competitive factor. In a market in which the daily consumer goods are homogenous and the associated services offered in large grocery retail outlets are similar, the establishments exercise a spatial monopoly on the neighbouring geographic area. This monopoly is reduced as the radius of influence overlaps with that of competitors’ establishments. In these competitive

\textsuperscript{278} Carrefour/Promodès Report, page 60.  
\textsuperscript{279} Eroski/Caprab Report, page 54.  
\textsuperscript{280} For example, the regional leader in Aragón, Galerías Primero, has recently been taken over by Auchan, \textit{vid.}, CNC Report, 5\textsuperscript{th} December 2008, Case C-113/08 Supermercados Sabeco/ Galerias Primero.  
\textsuperscript{281} \textit{Vid}, Eroski/Caprab Report, page 53: “Furthermore, on a wider geographic scale, when retail operators plan their expansion strategy and choose the sites to locate their new establishments, they take into account the operator’s procurement and logistics structure so as to save costs. The absence of a logistics network is an obstacle to the penetration of operators in geographic areas in which they are not already established. This partly explains the relatively “regionalised” character of the retail distribution structure in Spain, with the presence of significant operators based in certain areas.”
dynamics, companies strive to “monopolize” the best sites and once established, they enjoy a competitive advantage over their rivals, hence reducing the economic viability of their investment and acting as barriers to entry.

In the Carrefour/Promodès Report, the TDC stated the following:

“In the case of retail distribution, the location of the establishments is a strategic variable when deciding on the opening of a new establishment. New entrants, in general, will find that the best locations are occupied, whereby sites of less commercial interest are left free. This fact, at least partially, explains that the leading distribution chains, present as hypermarkets, have opted en masse for the purchase of supermarket establishments instead of opening their own establishments, when entering to compete in the supermarket and self-service format. It must also be pointed out that these acquisitions are at a high cost, which adds to their barrier to entry characteristic.”

The progressively lower profit of new entrants will lead to a total saturation of the market at some stage (assuming constant demand):

“According to the information available to the Tribunal, the implementation of a new hypermarket is studied based on an analysis of the number of inhabitants within the catchment area. Traditionally, a figure of 80,000 inhabitants has been used in the sector as a reference to invest in a hypermarket. This merely orientate figure has been reduced to 60,000 inhabitants by other agents of the sector, and it must be taken as a single indicator that provides information on the market. When the number of hypermarkets in a certain geographic market is such that, according to these figures, the introduction of a new hypermarket would not be economically viable, the market is said to be saturated and it would be difficult for any competitor to find any appeal in investing in new hypermarkets. We are therefore faced with a closed market from the point of view of rational investments.”

The TDC and the CNC have remembered the importance of location and market saturation as barriers to entry in other cases.

8.2.4.1.3 Strategic behaviour

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283 Carrefour/Promodès Report, page 61.
284 Caprabo/Enaco Report, page 10: “On the other hand, as already mentioned in this report, retail trade not only competes in prices but also in proximity to the consumer. Once the best locations have been taken, entry becomes extremely difficult. The interventionist regulation allows spatial monopoly situations to be consolidated in some market areas”; Pío Coronado/Cemetro Report, page 43; and Eroski/Caprabo Report, page 53: “Como ya ha manifestado el Tribunal (now Commission ), New entrants, in general, will find that the best locations are occupied, whereby sites of less commercial interest are left free, with the incentive, particularly in the supermarket and self-service segments, of opting for a strategy of purchasing establishments instead of new openings, particularly in areas in which the demographic and urban structure is consolidated.”
Although market saturation may be a natural and effective consequence of supply and demand, it may also be due to a deliberate strategy by established companies to ensure monopolistic or oligopolistic income. In a competitive market, a company has no economic incentive to overrun its presence in it (excess capacity or establishments in the same market). This natural dimensioning of the market appears to occur in the small and medium-sized supermarket segment. Companies do not open more stores than necessary or they close those that create an overlap or cannibalization of income. For example, in the Dia/El Árbol concentration, Dia notified the acquisition of 36 El Árbol establishments and reported its intention to close 16 of its own establishments in the markets in which there was excessive proximity to any of the establishments acquired or in which the reduced market dimension did not justify the existence of two establishments. According to the TDC, Dia had acquired 22,946 square metres, which was equivalent to an average of 637 square metres per establishment and the TDC considered that there was sufficient accessibility in the market as none of the establishments acquired was a large grocery retail outlet, in accordance with regional regulations and Dia had notified its intention of closing the establishments that may produce market saturation.

However, in the large grocery retail outlet market, characterised by the shortage of land, companies may adopt unilateral strategies aimed at accumulating land or the spread of establishments in order to create barriers to entry and ensure supracompetitive prices.

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285 The Carrefour/Promodès Report analysed the strategic barriers as a separate category of entry barriers whilst the Eroski/Caprabo Report includes them in the economic barriers category. This Study considers them separately in line with the Carrefour/Promodès Report.

286 TDC Report, 28th May 2003, Case C-79/03 Dia/El Árbol (“Dia/El Árbol Report”), page 5: “The operation consists of the acquisition by DIA of 36 EL ÁRBOL stores, as well as the substitution of DIA in administrative licenses and lease contracts for the outlets in which the stores acquired are located. Of these 36 establishments, DIA intends to directly operate 25, operating the remaining 11 in the form of a franchise. It also plans to close 16 of the 36 establishments acquired [sic] in those towns in which trademarks coincide as they are not compatible for the purchaser due to their excessive proximity or because they are located in municipalities with a small population, whose maximum potential for DIA is a single store.” It must be clarified that the reference to the divestiture of 16 of the acquired establishments is erroneous. The TDC points out in other sections of its Report that Dia planned to close 16 of its own establishments, vid., Dia/El Árbol Report, pages 4, 24 and 25.


288 2,000 square metres or more, in towns with a population in excess of 50,000 inhabitants; 1,500 square metres or more, in towns with a population between 10,000 and 50,000 inhabitants; 750 square metres or more, in towns with a population of less than 10,000 inhabitants.

289 Dia/El Árbol Report, page 24: “In spite of the above, it must be emphasised that in those markets in which the total share is greater, under no circumstances do the acquired establishments exceed the demands set out in current regulation for them to be considered a large store, so it can be confirmed that in these markets there is sufficient accessibility which means that the freedom of supply and demand is not adversely affected as a result of this concentration operation. On the other hand, it must be highlighted that the notifying party has undertaken to close 16 existing DIA establishments as they are not compatible with those acquired due to excessive proximity or because they are located in municipalities whose limited population does not allow for more than one DIA store.”
Spatial saturation as a strategic barrier\textsuperscript{290}, particularly in the retail trade, has been analysed in detail by the industrial economy\textsuperscript{291}.

In the Carrefour/Promodès Report, the TDC verified the existence of a defensive strategy of setting up establishments in certain areas:

“Sometimes, promoters set up a large commercial establishment, not with the aim of attracting new clients, but rather to avoid losing existing clients. Hence, new centres are established in areas in which they are already present, opting for the best locations, discouraging the entry of a competitor, as the competitor must not only accept a worse location, but also the significant presence of the trademark in the area. This is the criteria that will explain why there are 3 PRYCA hypermarkets in the Cádiz area, 2 CONTINENTE in the area of Algeciras, 3 CONTINENTE hypermarkets in Seville capital, 3 PRYCA in the north of Madrid, 2 PRYCA in Valladolid, 2 PRYCA in L’Hospitalet-El Prat, etc\textsuperscript{292}.

The Cruz Roche Study 1999 had already reflected the possibility that leading companies use the saturation of establishments for strategic purposes (market closure):

“As internal growth is used to create barriers to entry, through the anticipation of future demand and market pre-emption, there will be an over dimensioning of the retail offer and as a result, the total cost of the activity will increase, with adverse effects on the efficiency of the distribution system [Footnote: Eaton, B. and Lipsey, R. (1979), “The theory of Market Pre-emption: The persistence of excess capacity and monopoly in growing spatial markets”, Economica, vol. 46, pages 149-158]\textsuperscript{293}.

Although the economic strategy of market saturation through increased capacity or production may be developed in any economic sector, it must be taken into account that land is a scarce input in commercial distribution and is often legally restricted, so it is in this sector that a market saturation strategy is likely to prosper. In particular, if there are legal restrictions on the use of land for commercial purposes, the distribution market functions in a similar way to any other market subject to administrative concession (mobile telephone, passenger transport airline, etc.) without being subject to any regulation that avoids the monopolization of “concessions” and the subsequent abuse of consumers, as shown in the TDC Study 1993. The French Competition Authority Study 2007 also established that urban planning and legal restrictions on the use of land for

\textsuperscript{290} The strategic barriers theory was the subject of analysis for the first time by Joe Bain, Barriers to New Competition, Harvard University Press: Cambridge MA (1956), one of the fathers of the modern industrial economy. In relation to spatial competition, it is worth referring to the pioneering work of Harold Hotelling, “Stability and Competition”, Economic Journal 39(1), 1929, pages 41-57.
\textsuperscript{292} Carrefour/Promodès Report, page 61.
\textsuperscript{293} Cruz Roche Study 1999, page 52.
commercial retail generate business strategies aimed at monopolizing the available land for commercial purposes.\(^{294}\)

The OECD Study 2008 has also tackled business conduct aimed at restricting the use of land for competitive purposes.\(^{295}\)

The TVDC faced a market saturation case in its Eroski-Balmaseda Report.\(^{296}\) In 2006, Eroski applied for a regional trading license to open a 2,000 square metre commercial centre (1,500 square metre sales floor) in March 2010 (an unusually long period), in Balmaseda (7,168 inhabitants), a town of the historical sub-region of Vizcaya (Encartaciones), a County with approximately 31,000 inhabitants, which represents a relevant geographic market due to its relative isolation from other relevant urban centres. Eroski already had a 2,500 square metre hypermarket in the neighbouring town of Zalla (8,150 inhabitants), approximately 10 minutes driving time from the new hypermarket in Balmaseda; as well as an 800 square metre supermarket in the same town of Balmaseda. Both hypermarkets were the largest establishments in the Encartaciones. As set out in the market study which Eroski included in its application for a second license, the authorisation would have led to a shortage of legally available commercial surface area for the setting up of establishments over 1,000 square metres. In other words, the granting of a second license to Eroski would indirectly confer to the company a monopoly in the market of large grocery retail outlets. The TVDC Eroski-Balmaseda Report suggested increasing the legally available metres for large grocery retail outlets or postponing the authorisation for a reasonable period of time in order to allow an interested competitor to apply for authorisation to open a large commercial store in this geographic market. The Basque Government’s Department of Industry,

\(^{294}\) French Competition Authority Decision 2007, paragraph 83, page 21: “Il convient toutefois de souligner que l’identification préalable des zones éligibles à l’implantation d’équipements commerciaux dans les plans d’urbanisme pourrait entraîner des comportements de préemption du foncier commercial de la part des opérateurs dans le but d’empêcher l’entrée de concurrents. Le degré de précision des plans d’urbanisme est par conséquent un point délicat: trop de précision risquerait de créer des barrières à l’entrée, mais un areage trop imprécis ne permettrait pas d’atteindre l’objectif assigné d’aménagement du territoire”.

\(^{295}\) OECD Study 2008, Executive Summary, “Private land use restrictions”, page 11: “Restrictions on entry do not arise solely from government restrictions. Private restrictions on entry may have anti-competitive effects. Private acts that restrict competition can include either covenants or purchases that make no economic sense except to prevent competition. Covenants are widespread and have diverse, often beneficial effects. But covenants that restrict uses of a site often merit review. These covenants are in fact quite common. Examples include: • When selling land, a grocery retailer inserts a covenant that future uses cannot include grocery retailing (…). In general, covenants might not have any real impact when there are many equally attractive alternative retail locations to which the same set of consumers would be indifferent. (…). In contrast, covenants can reduce competitive constraints when they prevent or deter entry that would have improved competitive conditions for consumers. (…) Covenants are not the only form of private restriction. Perhaps the most blatant form of private exclusion occurs when a firm buys blocking property to prevent initial assemblage of a site by a competitor or prevent expansion of a competing facility. For example, a hospital may purchase property surrounding another competing hospital, to make it more difficult for the competing hospital to expand. In most jurisdictions, it is an open question whether competition laws apply to such circumstances. Under a “no economic sense test”, such actions raise serious competition questions and, given an appropriate pattern of facts, merit investigation by public authorities or action by courts.”

\(^{296}\) TVDC Report, 15th November 2006, GS 19/06 Eroski/Balmaseda.
Trade and Tourism, competent authority for granting the second commercial license, followed the recommendation of the TVDC and opted for suspending the granting of the license to Eroski for a year, but no competitor applied for a license, either due to a lack of commercial attraction or due to the impossibility of obtaining municipal authorisation and the necessary land to build an establishment. Even when the quantitative limitations to setting up large grocery retail outlets had disappeared, if a competitor wished to enter this market in the future, it would have to face two Eroski hypermarkets strategically positioned in the two main towns of a geographic enclave with barely 31,000 inhabitants.

In short, without a second trading license and quantitative limits to opening large commercial establishments, legal, economic and strategic barriers will continue to exist (regional and municipal urban planning). Therefore, the competition authorities should prevent and avoid the saturation of some local markets.

### 8.2.4.2 Inelasticity of Demand

Consumers have limited reaction capacity compared to commercial retail and in particular, compared to large-scale distribution. Consumption of foodstuffs and, in general, of consumer goods, is a basic need that must be regularly satisfied. In modern society, time is a limited commodity and consumers need to shop for the main consumer shopping basket in a single act and spaced out in time, a possibility that only large retail grocery retail outlets are able to offer.

In conclusion, although the cross-elasticity between some brands of food products and, even, between similar foodstuffs may be significant, the aggregate demand for food products is relatively inelastic. Statistical data for recent months, characterized by a scenario of economic crisis, shows that demand has not fallen as much as in other sectors and, in any case, it has been offset with price increases. For example, the Retail Trade Index (RTI) published in November 2008 reflects that consumption of food and spirits continues to grow in constant terms (eliminating the price effect) whilst it falls sharply for other goods.

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297 In the Carrefour/Promodès Report, page 61, the TDC estimated the profitability threshold of a hypermarket at 80,000 inhabitants, which some sources of the sector reduced to 60,000 inhabitants.

298 Progressive/Woolworths Decision: “173. If the market demand for a product is price inelastic (that is, demand is not very responsive to changes in price) there is greater scope for profiting through collusion. Inelastic goods are those that the consumer considers as necessary, and will continue to buy, even at prices well above the competitive level. 174. Foodstuffs (Auckland) has advised that [confidential] Foodstuffs (Auckland) believed this is because groceries are a “relatively inelastic good”. This is consistent with demand for a good being price inelastic. 175. So, while the demand on a product by product basis is likely to vary considerably due to varying levels of “necessity” across products, and of cross-elasticity between products, the Commission is of the view that the demand for the retailing of grocery items, taken together, is very likely to be inelastic.”

Índices nacionales: general y de grupos

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<tr>
<th>Índice general</th>
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<th>% variación sobre año anterior</th>
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<td>5,0</td>
<td>-0,9</td>
<td>97,2</td>
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In the following graph, the different evolution of food consumption can be observed in relation to other consumer goods:

Tasas anuales (precios constantes)

8.3 Individual Dominant Position in Local Markets

In some local markets, barriers to entry (legal, economic and strategic) may lead to individual dominant situations similar to true legal monopolies, which transcend in tacit oligopolistic collusion. Indeed, the land on which a store is located is necessary for commercial activity. In the case of large commercial stores, the availability of vast commercial land in an optimum location is the main factor for competition. However, the shortage of land is aggravated by legal restrictions on its use. The Land Law attributes competence for the different uses of land and, in particular, on the commercial use of land to Town Halls. Therefore, retail companies established in a local market may saturate the market through the acquisition of land rights or by imposing restrictions on third parties, as well as through the establishment of commercial areas that reduce the available locations and their expected profitability below the profitability threshold of a new entrant. This economic or strategic saturation may lead indirectly to
a legal monopoly by virtue of the use of restrictions applied by Town Halls, resulting in a legal entry barrier to the market.

The existence of individual dominant positions in local markets of large grocery retail outlets may require more active involvement of the competition authorities in case of abuse, for example, through the imposition of divestiture of rights to land and even stores, in order to allow new competitors to enter the market.\(^{300}\)

### 8.4 Anti-Competitive Effects: Supra-competitive Prices

European courts have recognised that the existence of a collective dominant position may be deduced from the existence of facilitating conditions (theoretical analysis) and, if appropriate, from the examination of competition in the market (empirical or practical analysis).

Theoretically, the Spanish retail distribution market for daily consumer goods fulfils all of the necessary conditions to facilitate the appearance of a price oligopoly: market concentration of large grocery retail outlets on a national, regional and local level; product identity and homogeneity of services offered; price transparency and commercial discounts; ease to adapt prices to those of the competition; enormous barriers to entry; and inelasticity of aggregate demand. The empirical analysis of the Spanish retail distribution market carried out by different institutions confirms and strengthens the results of the theoretical analysis.

The European Commission considered in its Report to the Council on the development of the Lisbon Agenda that the retail distribution market presents a competition deficit.\(^{301}\)

The Task Force of the European Central Banks Study concluded that the legal barriers had increased retail distribution margins and the prices paid by consumers:

“Apart from the impact on employment, the experience of France, Spain and Italy shows that the change in regulation introduced in order to protect small traditional shops from the competition of large stores has increased incumbents’ market power and price margins, pushing retail prices upwards”.\(^{302}\)

The SDC Study 2004 established that the legal barriers had restricted competition in many local markets, pushing prices up in large grocery retail outlets.\(^{303}\)

\(^{300}\) Vid., infra Section 10.1.2.6.


\(^{303}\) SDC Study 2004, page 27: “Apart from the legal barriers to potential competition, the barriers deriving from the location of the stores cannot be ignored. (…). This situation is being made worse in some
Empirical analysis of Spanish retail distribution reveals high price parallelism, not related to business costs but to the prices applied by other competitors. National, regional and local leadership of the oligopoly formed by Carrefour, Mercadona and Eroski in practically the entire state, allows them to determine the reference prices, to which external competitors adapt, with higher or lower variations to take into account other service/quality considerations (for example, El Corte Inglés applies a mark up on its prices in relation to the prices applied by the oligopoly). The mutual dependence on distribution in pricing, added to the market conditions that make collusive behaviour possible (detection of competitive conduct, capacity of competitive retaliation and the absence of external balances) explain the price parallelism in supracompetitive levels.

Vid., Similar conclusions of the Competition Commission Study 2000, “The main parties pricing behaviour”, pages 57-60: “2.232. Although the parties all stressed that the pricing of their competitors was the key determinant of their own pricing, other influences were acknowledged by some companies” (page 57); “2.234. All the main parties undertake regular monitoring of their competitors’ pricing, and this is the principal means they employ both to ensure that they are competitive on individual product lines, and to maintain their overall price position relative to other retailers. When monitoring the prices of other companies, the parties often assemble different representative ‘baskets’ of goods. These usually include a basket comprising high-selling or high-profile product lines. Larger baskets, containing both KVIs and some other products, will also sometimes be compared. Less frequent checks are typically also carried out on a wider range of slower-selling, ‘background’ products. 2.235. It seems clear that for most of the parties there is a core group of products that are particularly important for comparative purposes and on which they tend to concentrate their price monitoring activity. As well as core lines or KVIs, budget own-label products are also intensively monitored by all the parties that stock them. Although representing a small proportion of the total number of products stocked, these categories of product account for a very much higher proportion of the parties’ total revenue. Some parties also identify a group of products on which they will not allow themselves to be undercut. 2.236. Some price monitoring exercises are used to ensure that an overall price target is achieved that maintains a company’s price position relative to other grocery retailers. In such cases, individual product lines might be allowed to deviate from the relative price rule so long as the target is achieved at category level, or for the overall basket. Many of the parties told us that their buyers were expected to know competitor prices for all the product lines under their control” (page 58).

Vid., Similar conclusions of the Progressive/Woolworths Decision, paragraphs 161-162, in line with the Study by the Consultant Charles Rivers Associates (CRA) presented by the retail company Foodstuffs: “161. It would appear to the Commission that there are two components to the product at issue. When looking strictly at the goods being retailed it would appear there is a high degree of homogeneity. This is especially true for those goods that are regularly specialised, such as Coca Cola and baked beans. However, on top of this is the price/service positioning of the supermarket banner. Currently, the market is spread along a price/service continuum, with a price differential of around 5-10%. The market can therefore be considered to have some differentiation. “162. CRA does not believe this would inhibit coordination. This is because there is centralised control of pricing, which controls the relative prices between stores in different segments. Commission staff have observed that an enormous amount of resources are put into monitoring prices of rival supermarkets, and to maintaining price relativities. Firms’ pricing strategies all appear to be on the basis of a rival banner plus (or minus) a margin. The firms have the ability to create a single price index that encapsulates most of the products. It would appear that the differentiation is not so strong that rivals cannot place a value on it”.

Autonomous Communities by their Second License legislation, whereby markets are in fact closed to certain formats due to moratoriums as a result of having become saturated, or due to the restrictions on the expansion of certain formats. This is restricting competition between formats and may be conditioning some of their pricing policies. Therefore, a certain shift is observed in the pricing policy of large stores, becoming less price competitive.”
which allows large-scale distribution to obtain margins above those that would be obtained in a competitive market.

8.4.1 Price Parallelism

Different empirical investigations confirm the existence of enormous price parallelism between the leading retail distribution companies in local markets and, aggregately on a national scale.

The Spanish Consumers and Users Organisation (“OCU”) publishes an annual Price Study (generally, identified with different commercial formats) of retail distribution chains. This survey assigns a rating of 100 to the cheapest company in three different categories: typical basket (fresh and packaged products), fresh products basket and packaged food basket. The rest of the companies receive a rating in relation to their price difference with the cheapest company (for example, a rating of 110 indicates a difference of 10%). The OCU Price Study aggregates the data from the chains so there may be significant price differences between them and, in particular, between regional or local chains. Indeed, price differences may be enormous between a local chain competing in a competitive region with economic conditions that favour low prices (low land prices, low acquisitive power, etc.) and another local chain competing in not a very competitive region with economic conditions that favour higher prices. However, the Price Study enables the historic price evolution of the chains to be compared as well as chains competing in the same geographic areas. This allows the conclusion to be reached that the evolution of prices in recent years reflects an enormous price parallelism between the large grocery retail outlets of the leading companies, with a marked inflationist tendency.

In 2007, for large grocery retail outlets, there were identical prices between the leading companies (Carrefour, Eroski and Mercadona price valuation: 111)\textsuperscript{306}, in relation to the typical shopping basket, whilst their competitors offered slightly lower prices (Alcampo rating: 107 and Leclerc rating: 110) or chose to associate their chain with quality products and higher prices (El Corte Inglés – Hipercor rating: 124).

\textsuperscript{306} \textit{Vid.}, OCU, Compra Maestra 315, May 2007. The Eroski and Carrefour supermarket chains have a price rating close to those of the reference hypermarkets (Eroski City Rating: 108; Carrefour Express Rating: 112).
This price parallelism was also reflected in a fragmented way in fresh and packaged products. In relation to fresh products, although it is not easy to prepare reliable statistics, the Carrefour Express, Eroski and Mercadona chains coincided in prices (rating: 135) and Carrefour was only one point higher (rating: 136). Alcampo and Leclerc offered slightly lower prices (respective ratings: 129 and 133), whilst El Corte Inglés (Hipercor rating: 170) highlighted their price differential. Significantly, the small and medium-sized supermarkets offered better prices than the large grocery retail outlets, which may indicate a lack of competition in this latter segment.
However, there was undoubtedly greater parallelism in relation to packaged products, as a result of their similarity and ease of comparison, as well as their function as a commercial anchor to attract consumers to the commercial establishment. In this segment, not only was a price similarity between the leading chains in the large grocery retail outlet market appreciated (Carrefour, Mercadona and Eroski rating: 103), but also enormous parallelism between these chains and other chains with different commercial formats: 8 chains shared a rating of 102, 11 chains shared a rating of 103 and 11 chains shared a rating of 104. Even El Corte Inglés, a chain traditionally associated with quality products at a higher price, reduced its positive price differential in this segment (Hipercor rating: 108; Supercor and El Corte Inglés ratings: 111).
In November 2008, the OCU published its Price Study for 2008\textsuperscript{307}, highlighting the “spectacular rise in prices” and the “slight homogenisation of prices between establishments”\textsuperscript{308}. In relation to the typical basket, the large grocery retail outlets were once more positioned with identical or similar relative values to those of 2007, with the exception of the El Corte Inglés hypermarkets, which reduced their price index by three points: Alcampo rating: 107 (no changes in relation to 2007); Carrefour rating: 110 (-1); Mercadona rating: 110 (-1); Leclerc rating: 110 (=); Eroski rating: 111 (=); Hipercor rating: 120 (-3).

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<th>TYPICAL BASKET</th>
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Source: OCU Price Study, 2008

In the fresh products basket, the price parallelism between the majority of the large grocery retail outlets is maintained, although Eroski has risen considerably (Rating: 140, +5 in relation to 2007). The Carrefour and Mercadona chains coincide in their rating: 135 (Carrefour +1 in relation to 2007; Mercadona with no changes in relation to 2007);

\textsuperscript{307} OCU, Compra Maestra 315, November 2008.

\textsuperscript{308} OCU, Press Release 22.10.2008: “(1) Spectacular rise in prices in the past year, an average of 11.4\% in the Typical Basket and 12.3\% in the Economic Basket. These figures represent a 60\% rise in the CPI for the past 18 months (7.1\%); (2) There is a slight homogenisation of prices between establishments; (…)”
Alcampo and Leclerc are slightly behind with a rating of: 133 (Alcampo +4 in relation to 2007; Leclerc with no changes in relation to 2007), whilst El Corte Inglés falls from a rating of 170 to 167 (-3 in relation to 2007). Once more, the small and medium-sized supermarkets offer better prices than the large grocery retail outlets.

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<tr>
<th>CHAINS</th>
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<td>INDEPENDIENTES</td>
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Source: OCU Price Study, 2008

In 2008, like in 2007, the greater price parallelism (close to price equality) is shown in packaged products, used as a commercial anchor to attract consumers to the establishments. In the large grocery retail outlet segment, the main companies have almost identical prices with the exception of Alcampo (rating: 100, no changes in relation to 2007). Eroski and Mercadona maintain the rating of 103 (=); Carrefour (+1) and Leclerc (+2) have the same rating: 104 and Hipercor is positioned as a competitive alternative in prices by reducing its rating to 106 (-2). The homogeneity in prices in this segment is extraordinary: 9 chains share a rating of 103; 9 chains share a rating of 104; 11 chains share a rating of 105; 8 chains share a rating of 106 and 8 chains share a rating of 107. In short, of the 65 chains analysed, 45 (69.2%) had ratings of 103-107\(^ {309}\).

\(^{309}\) 13.8% of the chains share the rating of 103, 13.8% share the rating of 104, 16.9% share the rating of 105, 12.3% share the rating of 106 and a further 12.3% share the rating of 107.
### PACKAGED PRODUCTS BASKET

<table>
<thead>
<tr>
<th>CHAIN</th>
<th>Rating</th>
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<tbody>
<tr>
<td>FAMILIA</td>
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<tr>
<td>ALCAMPO</td>
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<td>MAXIDIA</td>
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<td>INTERMARCHÉ</td>
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<td>LUPA</td>
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<td>ALIMERKA</td>
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<td>HIPERUSERA</td>
<td>102</td>
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<td>HALEY</td>
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<td>DIA</td>
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<td>GADIS</td>
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<td>AHORRAMAŚ</td>
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<td>ECOMOR</td>
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<tr>
<td>VIDAL</td>
<td>103</td>
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<tr>
<td>MÁS Y MÁS</td>
<td>103</td>
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<tr>
<td>FROIZ</td>
<td>103</td>
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<tr>
<td>EROSKI</td>
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<td>MERCADONA</td>
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<td>GIGANTE</td>
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<td>MOLDES</td>
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<tr>
<td>SABECO</td>
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<tr>
<td>E. LECLERC</td>
<td>104</td>
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<tr>
<td>SIMPLY MARKET</td>
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<td>S. DANI</td>
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<td>CARREFOUR</td>
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<td>SUPER KEISY</td>
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<td>EROSKI CENTER</td>
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<td>HIPERDINO</td>
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<td>DIALPRIX</td>
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<tr>
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<td>CARREFOUR EXP.</td>
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<td>SPAR</td>
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<tr>
<td>SUPERSOL</td>
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<tr>
<td>EL ÁRBOL</td>
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<tr>
<td>INDEPENDIENTES</td>
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<tr>
<td>LA DESPENSA</td>
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<tr>
<td>ORANGUTÁN</td>
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<td>BON PREU</td>
<td>107</td>
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<tr>
<td>HERBU'S</td>
<td>107</td>
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<tr>
<td>ESCLAT</td>
<td>108</td>
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<tr>
<td>SUMA</td>
<td>108</td>
</tr>
<tr>
<td>EROSKI CITY</td>
<td>109</td>
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<tr>
<td>SUPERCOR</td>
<td>109</td>
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<tr>
<td>PIEDRA</td>
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<td>EL CORTE INGLÉS</td>
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<td>SUPER OLÉ</td>
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<td>SUPER BM</td>
<td>111</td>
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<tr>
<td>GALER. PRIMERO</td>
<td>112</td>
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<tr>
<td>SORLI DISCAU</td>
<td>115</td>
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<tr>
<td>ERCORECA</td>
<td>122</td>
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<tr>
<td>S. Romero</td>
<td>123</td>
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</tbody>
</table>

Source: OCU Prices Study, 2008

This data allows the conclusion to be drawn that, although there may be regional differences due to the competitive environment and economic conditions, in aggregate terms (by chain), the price parallelism acquires a national dimension. This national effect is explained by the existence of two inter-related factors: a large number of regional oligopolistic markets (verified by the SDC in its Decision 2006 in relation to large-scale distribution prices in Valencia) and a national commercial and pricing strategy, at least partially (admitted by the companies and verified by the Aceites 2 Resolution in relation to the prices of Carbonell 0.4º and Koipesol oil in Spain).

### 8.4.2 Supracompetitive Prices

If price parallelism fails to respond to a perfect competition scenario, it must logically be concluded that it responds to a scenario of oligopolistic interdependence that generates supracompetitive prices.

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*Vid., Section 6.2.1 supra.*
The existence of local markets with barriers to entry is a characteristic of the services sector which contributes to greater inflationist tendencies than those supported by the industrial sector. In its 1993 Study, the TDC established that joining the European Community had contained industrial prices whilst it did not have positive effects on the price of services. In the opinion of the TDC, “the introduction of competition in services that the Report advocates should have the same effect on the price of services as the joining the EC has had on the price of industrial products”.

Within the services sector, food distribution is one of the sectors that has contributed most to the rise in the CPI in recent years. In the period 1993-2002, food was the most inflationist segment behind services. The inflationist tendency of food seems to have continued in the most recent period. According to a study by Caixa Catalunya on food inflation in Spain (Caixa Catalunya Study 2008), the HCPI for food presents a positive differential in relation to the 15 Member States which make up the Euro Zone: “In the middle of the five year period 2003-2007, the CPI for food in Spain registered a yearly growth of 3.9% compared to 1.8% in the euro-15 zone, with a differential which has constantly pointed towards greater dynamism of prices in Spain”.

Graph 3.3. Evolution of the HCPI for food in Spain and the Euro-15 Zone
Year on year variation rate as a percentage and the differential in percentage points

311 María de los Llanos Matea and Ana Esteban, “Structural, price and margin transformations in the food retail distribution sector”, Economic Bulletin, Bank of Spain, June 2003, page 52: “In this respect, it must be taken into account that the average for the last nine years [1993-2002] —period for which the previous CPI base was valid – food has been the most inflationist component of this index, behind services.”

The Caixa Catalunya Study 2008 states that the Spanish Harmonised Consumer Price Index (HCPI) for food is downwardly more resistant and upwardly more flexible than the euro zone. On the other hand, the Caixa Catalunya Study has shown that foodstuffs have been extremely important in the inflation differential between Spain and the euro zone in recent years:

“The combination of the two factors observed: on one hand, a more fragmented expenditure structure in Spain towards the consumption of food products than in the euro zone and, on the other hand, greater dynamism of food prices in Spain, justifies the relatively more intense contribution of foodstuffs to the Spanish inflation rate. Therefore, in the 5 year period 2003-2007, average inflation for the UE-15 area was 2.2% annually, of which around 10% (0.2 percentage points) were attributed to foodstuffs. In the case of Spain, average inflation for this period was 3.2% annually, of which 27% (0.8 percentage points) corresponded to the HCPI for food. This implies that throughout this period, food has played a major role in the inflation differential between Spain and the euro zone, so that on a yearly average, this differential was one percentage point, with food accounting for 0.6 points, or in other words, 60%.”

Graph 3.4. Evolution of the food weighting in the HCPI in Spain and the Euro-15 zone
Percentage weighting of the HCPI
A. Spain
In relation to the components of the Spanish HCPI for food, unprepared foods have a greater influence on the differential with the euro zone, although this is mainly due to their relative weight in the Spanish index. However, whilst unprepared foods have grown at an average annual rate of 3.9% (1.9% in the euro zone), prepared foods have increased by average annual rate of 3.7% (1.7% in the euro zone), having experienced a significantly higher increase in 2007 than unpackaged foods.

Graph 3.6. Evolution of the food weighting in the HCPI in Spain and the euro-15 zone
Percentage weighting of the HCPI
A. Spain

Source: Caixa Catalunya Study 2008
Diverse economic studies have established a positive relationship between the degree of concentration of retail distribution local markets and prices\(^\text{316}\). In particular, the following studies stand out: “Relationship between Concentration and Prices in the Retail Trade” (1995)\(^\text{317}\), “Concentration and Competition in the Food Distribution Channels” (2003)\(^\text{318}\), and “Competition Structure and Price Dispersion in the Retail Trade” (2006)\(^\text{319}\).

### 8.4.3 High Margins

The existence of high margins in an economic sector may respond to the economic savings obtained by the companies operating in it, at least in a transitory way (in the absence of barriers to entry, the high margins will attract new competitors that will reduce the margins to competitive levels). However, in an oligopolistic structure in which there is price parallelism, an inflationist tendency and insurmountable barriers to entry, it must be concluded that the high margins essentially reflect the market power of the oligopoly and the lack of sufficient competition in the market.

\(^{316}\) For example, the Department of Marketing and Market Research of the Autonomous University of Madrid has published numerous studies in this field.

\(^{317}\) María Jesús Yagüe, Spanish Trade Information ICE, Number 739, 1995, pages 59-70.

\(^{318}\) Ignacio Cruz Roche, Alfonso Rebollo Arévalo and María Jesús Yagüe, Economy Papers, Number 96, 2003, pages 112-133.

\(^{319}\) Ignacio Cruz Roche and Javier Oubiña Barbolla, Spanish Trade Information ICE, Number 828, 2006, pages 175-186.
The link between high margins and market power in the retail distribution Spanish has been shown in different studies.

In the Spanish sector, the Cruz Roche Study 1999 dedicated a chapter to the study of the structure of the profit and loss accounts in retail distribution companies, classified into four groups in accordance with turnover. The Study identified a minimum turnover threshold in terms of positive gross margins:

“The results obtained for 1997 (last available year) for the different groups of companies reveal the existence of a clear distinction in securing gross margins between large companies, with turnover in excess of 30,000 million [pesetas], and companies with sales below this level. (...) These differences in gross margins seem to point towards the existence of an operation scale, turnover of 30,000 million, which marks the breaking point, above which companies increase their gross margins. Securing a higher gross margin may be a result of increased net sales, increases in other operating income or a reduction in the [cost] of sales.”

Large companies also showed higher operating margins, in spite of there being homogeneity in relative operating costs in all of the groups. All of this makes it plausible to think that these companies obtain higher gross margins as a result of their market power and, as already mentioned, due to the existence in the operation scale, transferring the effect of higher gross margins to their operating margins. However, individual analysis of the accounts of large companies led the Study to conclude that the market power factor outweighed the efficiency factor:

“This gradual rise in gross margins may be due to an improved level of service offered to consumers, which would lead to an increase in operating costs; however, as can be observed in the same table, operating margins continue to follow a growth trend, which leads us to rule out the previous hypothesis and attribute the rise in gross margin to PRYCA’s stronger competitive position over the years, enabling it to secure a higher margin over time. This strengthening of the competitive position, and the subsequent extra gain, may be transferred in two different ways, either by greater power in the final market allowing higher prices to be set, or in a stronger negotiating position with manufacturers, allowing for a reduction in the procurement costs of products.”

An article published in the Bank of Spain’s Economic Bulletin in June 2003 linked the commercial margins of hypermarkets and large supermarkets chains with the concentration and absence of sufficient competition in the sector.

320 Cruz Roche Study 1999, page 294.  
321 Cruz Roche Study 1999, page 295.  
322 Cruz Roche Study 1999, page 301.  
323 Cruz Roche Study 1999, page 302.  
324 Matea and Esteban, “Structural Transformations…”, op. cit., page 61: “With all of the caution that this information should be given and depending on the results that may be obtained from a more thorough study, analysis of this data indicates that, on one hand, traditional shops have tended to set comparatively higher prices in order to offset their higher costs and, on the other hand, hypermarkets may
According to the European Central Bank Study 2006, the growing margins in the retail distribution of daily consumer goods in Spain are a direct consequence of barriers to entry and insufficient competition in the sector, a scenario which also arises in France and Italy:

“Different aspects of the impact of regulation of a key services sector such as retail trade on the sector’s economic performance can be studied using the experiences of France, Spain and Italy. Although their market structure is very different (e.g. retail sales are concentrated in France, but not in Spain), the results of the reversal in the liberalisation trend of the mid-1990s in these countries have been a fall in new entries of large retail stores, which has dampened competition, and an increase in margins. Apart from the impact on employment, the experience of France, Spain and Italy shows that the change in regulation introduced in order to protect small traditional shops from the competition of large stores has increased incumbents’ market power and price margins, pushing retail prices upwards. Moreover, it has failed in its aim: in France, it did not prevent the decrease in the market power of small shops, whereas in Spain and Italy, employment growth in the retail sector has slowed down.”

be significantly increasing their margins reflecting their greater negotiating power and the effect of administrative barriers established by some Autonomous Communities. This information is confirmed with the analysis of the data on hypermarkets and leading supermarkets chains. These commercial establishments have shown significant dynamism since 1984, which has been shown in the growth of the GAV [Gross Added Value] in excess of the total of non-financial societies and in considerable growth in employment, highlighting, in particular, the strong progress of temporary employment and, in recent years, part-time work. These companies have followed different commercial strategies over the period analysed. Until approximately midway through the decade of the nineties, the consolidation process of new establishments in the sector had required a more aggressive pricing policy. Subsequently, in a more moderate expansion context, the commercial and operating margins would have been extended to a master rate than other sectors, according to Central Balance Sheet Data.”

325 European Central Bank Study 2006, page 73
The IMF has also associated the high margins in the services sector and, in particular, in the retail distribution of daily consumer goods, with the lack of sufficient competition.

In addition to the analysis of business margins, the different evolution of retail prices and the price of consumables in recent years may indicate, with the opportune caution, a reduction in competition in distribution. In the period 1993-2002, inflation in food retail distribution was considerably higher than the inflation of their consumables.\textsuperscript{326}

\textsuperscript{326} Matea and Esteban, “Structural Transformations…”, op. cit., page 52: “Furthermore, the growth of the two food components of the CPI — processed food and unprocessed food — has been
Similarly, according to data from the European Statistics Office (Eurostat)\textsuperscript{327}, Spain with a rate of almost -10\%, is one of the five Member States of the EU-27 (in descending order, Slovakia, Bulgaria, Malta, Denmark and Spain) and one of the two Member States of the former EU-15 that has experienced negative growth in the actual agricultural prices in the period 2000-2007.

However, real food and non-alcoholic beverage prices have followed a markedly positive tendency, at least in the period 2002-2008.

**General CPI (2005=100)**

<table>
<thead>
<tr>
<th>Annual Average</th>
<th>Variation of Annual Averages</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>88.0</td>
</tr>
</tbody>
</table>

Source: INE

**CPI Food/Non-Alcoholic Beverages (2005=100)**

<table>
<thead>
<tr>
<th>Annual Average</th>
<th>Variation of Annual Averages</th>
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<tr>
<td>2002</td>
<td>2003</td>
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</table>

systematically higher than that recorded at a lower level of the pricing chain, whereby the differences between the unprocessed food CPI and the price index perceived by farmers for products intended for human consumption is particularly significant. The average annual increase of the CPI for processed food was 2.9\% in the period 1993-2002, whilst the industrial price rate for food consumption was 2.2\%. On the other hand, the progress rate of the CPI for unprocessed food was 3.1\% in the period 1993-2001, and 1.5\% for the price index perceived by the farmer for products intended for human consumption [note omitted]. This data points toward the fact that marketing margins have tended to be extended over the past decade [note omitted], so that the behaviour of the distribution sector appears to have influenced the evolution of food retail prices.”

\textsuperscript{327} “Food: From Farm to Fork”, Eurostat Pocketbooks, 2008
8.4.4 Views of Retailers

The opinion of distribution companies in relation to the Carrefour/Promodès concentration, allow the conclusion to be reached that nowadays, the individual or collective dominant position in local markets of large grocery retail outlets are a reality, largely brought about by barriers to entry. It must be remembered that in the Carrefour/Promodès concentration, the market share of the merged company had not reached the threshold traditionally associated with the individual dominant position (40%) on the national level or in the majority of local markets.

However, in their allegations concerning the Carrefour/Promodès concentration, the leading distribution companies alleged that the merged company would occupy a restrictive dominant position in a large number of local markets.

For example, Alcampo identified 12 provinces in which sales floor participation exceeded 30% of the total distribution and 21 provinces in which participation was between 20% and 30%. Similarly, 18 populations close to hypermarkets of the merged company were identified in which there was a “control or concentration” 328. In relation to barriers to entry, Alcampo stated that “regional regulations of certain Autonomous Communities restrict the entry of new competitors, worsening competition conditions” 329. Lidl stated that “the acquisition by a single company of such an important share of the Spanish distribution market acquires particularly serious prominence if considering that it concerns a market in which there are insurmountable barriers to entry for new competitors wishing to enter the market. It also specified that a dominant position may facilitate the “regulatory capture” phenomenon, increasing legal entry barriers for other competitors 330. Eroski defended the need to define a large grocery retail outlet market (hypermarkets) in a local geographic area and identified 5 cities in which the merged company would hold an “absolute monopoly” position and many others in which it would have high market shares, a situation aggravated by projects to open new establishments. Therefore, Eroski considered the following:

- the simultaneous combination of the requested merger authorisation and the application of current regulations in the regulation of the retail trade market in Spain, penalises the rest of the competitors, prevents them from improving their competitive position and distorts the exercise of free competition.

328 Carrefour/Promodès Report, page 10.
329 Carrefour/Promodès Report, page 11.
330 Carrefour/Promodès Report, page 11: “the privileged position of the new entity makes it powerful pressure group with the capacity to influence the regulation process, influencing situations such as commercial opening hours or freedom of establishment”.
- it is priority to adopt the opportune measures in order to re-establish competition conditions and equal opportunities for operators.

- it is essential to ensure that the market shares of the product categories controlled by the Carrefour Group in Spain do not reduce the choice opportunities available to the consumer and do not adversely affect final pricing processes in the medium and long term.”

The allegations of El Corte Inglés were similar to those of Eroski:

“There are parallel administrative barriers in Spain derived from the Law on the Regulation of the Retail Trade and regional regulations on commercial premises as a result of the stabilising of the degree of competition in the regions, by rejecting or hindering to a large extent any new initiative. As a result of these restrictions, a merger such as the one considered, produces a response reduction or impossibility on the remaining companies of the sector. In other words, as there is a regulatory restriction on the setting up of new commercial establishments of a certain size, and as this is the reality in the whole state, to a lesser or larger extent, the operation is consolidated in some geographic areas in which the merged companies have a clearly predominant position, whereby other groups are unable to set up in order to compete in the reference area”.

Logically, the allegations of retailers continue to be fully justified in relation to local markets in which the leadership of one or several companies, regardless of their origin (merger or organic growth), is benefited from the huge existing barriers to entry.

Although the Carrefour/Promodès Report was adopted in 2000, the oligopolistic market conditions appear to be greater nowadays. In recent years, large-scale distribution has alleged in at least two sanctioning cases (one of them related to national conduct) that retail distribution is an oligopolistic market in which price parallelism is the result of the interdependence of companies and their intelligent adaptation to the behaviour of competitors.

8.5 Retail Market Conclusions

The Spanish large grocery retail outlet market is characterised by the existence of an individual or collective dominant position (collusive oligopoly) in the majority of local markets.

The collusive oligopoly is facilitated by the high degree of concentration, market transparency, the possibility of effectively counteracting the commercial strategies of...
competitors and high barriers to entry. These conditions occur to a greater or lesser degree in all of the Autonomous Communities. For example, the concentration rate of the leading three companies (C3), in terms of retail sales floor in 2 Autonomous Communities is almost 45%, the C3 is between 45-50% in 3 Autonomous Communities, the C3 reaches 50-60% in 1 Autonomous Community, the C3 increases to 60-70% in 9 Autonomous Communities and it exceeds 70% in 2 Communities. This degree of concentration is higher if the market share is estimated in turnover and, even higher if the estimate refers to the large grocery retail outlet market, both in sales floor and turnover.

The three leading companies in retail distribution, Carrefour, Mercadona and Eroski, play a decisive role in this competitive structure. First of all, the three companies are proven leader in the Spanish market and are present in all of the Autonomous Communities. Secondly, the three companies head the regional market in 13 Autonomous Communities (Carrefour and Eroski are each leaders in 5 and Mercadona in 3). Thirdly, the three leading companies nationally occupy the top three positions in 4 Autonomous Communities and two of them were among the top three companies in 14 Autonomous Communities. In terms of turnover, the criteria that best reflects market power, the combined share of the three leading companies in the national retail market may stand at between 55% and 63.6%, depending on the sources. In relation to the market large grocery retail outlets of more than 1,000 m², the combined market share may exceed these percentages.

The national and local leadership of Carrefour, Mercadona and Eroski in an oligopolistic environment produces the following results. In local/regional markets, these three companies have individual or joint capacity to act as oligopolistic leader which serves as a reference to the rest of the competitors. On a national scale, the sum of local oligopolies, the multiplicity of markets in which the three companies operate and may adopt retaliation measures, the growing importance of commercial policies...
and national pricing\textsuperscript{337}, and their participation in the national oligopoly of the procurement market\textsuperscript{338}, are factors that facilitate the spread of oligopolistic collusion on prices and other commercial conditions throughout Spain.

9 Competition in the Supply of Consumer Goods

The retail distribution market and the procurement market are closely related, so much so, that the existence of market power in one of them tends to be transferred naturally to the other\textsuperscript{339}. In the following sections, the Spanish procurement market is studied and it is concluded that members of the distribution oligopoly are exercising their buyer power in the supply market in detriment to free competition and consumers.

9.1 Framework of Analysis

In the 1990’s, the progressive concentration of national retail markets for consumer goods and the subsequent appearance of retail “buyer power” over suppliers, generated enormous interest in diverse institutions related to the defence of competition. The OECD had analysed this then incipient phenomenon at the beginning of the 1980’s, but

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\textsuperscript{337} Vid., A description of the gradual adoption of commercial policies and regional and national pricing by Spanish retailers, supra Section 6.2.1. \textit{Vid.} Similar conclusions of the Competition Commission Study 2008, sections 6.64-7.73, summarised in the Competition Commission Study, “Summary”, page 24: “We also concluded that a grocery retailer with a number of stores in highly-concentrated local markets can weaken that part of its retail offer, such as pricing, that it applies uniformly, or near uniformly, across its stores nationally and thereby earn higher profits across all of its stores. The scale of the impact on national price levels arising from weak local competition, while difficult to measure, is potentially very substantial. For example, for each 0.1 per cent increase in national price levels (ie each 1p increase on a £10 shopping basket), consumer expenditure on groceries at the four largest grocery retailers increases by £80 million a year.”

\textsuperscript{338} \textit{Vid.}, infra Section 9.2. Supplier transfer prices are uniform throughout Spain, so oligopolistic practices that increase commercial payments reduce competition in transfer prices and, as a result of the sale below costs regulation, increase retail sales prices nationally.

\textsuperscript{339} Eroski/Caprabo Report, page 21: “The retail and wholesale commercial distribution market for daily consumer goods is closely interdependent on suppliers. The distributor’s position in the market is directly reflected in his relations with suppliers and particularly in his purchasing conditions from these suppliers”.

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its spread led to a round table being held in 1998, giving rise to the OECD Study 1999, the first to define buyer power in terms of relative dependence:

“….a retailer is defined to have buyer power if, in relation to at least one supplier, it can credibly threaten to impose a long term opportunity cost (i.e. harmful or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long term opportunity cost to itself. By disproportionate, we intend a difference in relative rather than absolute opportunity cost, e.g. Retailer A has buyer power over Supplier B if a decision to delist B’s product could cause A’s profit to decline by 0.1 per cent and B’s to decline by 10 per cent.”

In 1999, the Commission also published the Dobson Study 1999, prepared by an expert in this field, Professor Dobson. The Dobson Study 1999 confirmed that, initially, buyer power is socially beneficial when lower wholesale prices are reflected in lower retail prices, as a result of effective retailer competition. However, there is a possibility that buyer power may ultimately damage economic welfare if suppliers are forced to reduce investment in new products or product improvements, eliminating secondary brands and weakening primary brands, whilst strengthening the position of private-label brands, and in the process increasing wholesale prices to small retailers. The final effect would be the appearance of a market comprised of a small number of vertically integrated large retailers, only selling their own private-label brands, hence reducing choice and possibly increasing prices. In economic terms, the Dobson Study 1999 considered that exercising buyer power and reducing wholesale prices to infracompetitive levels may reduce the total welfare of society as the producer surplus is reduced, but it would not have an adverse effect on consumer welfare. However, if a company enjoyed joint buyer and selling power (“monemporist”), there could be an inefficient allocation of resources in detriment to the economic welfare of the producers and final consumers. On the other hand, in a dynamic analysis of the economic welfare, the reduction of the producer surplus could reduce investment and innovation, and this reduced efficiency may ultimately feed through to higher prices for final consumers.

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340 OECD Study 1999, Draft of “Background Paper”, paragraph 20, prepared by the OECD Secretariat. The final version of the Background Paper included in the OECD Study 1999 includes the spirit of this definition with different terminology, vid., page 281: “In the Background Paper, which was confined to looking at multi-product retailers, a retailer is defined to have buyer power if in relation to at least one supplier it can credibly threaten to impose a long-term opportunity cost (harm or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long-term opportunity cost to itself [editor - the version of the background paper included in this publication has been somewhat revised on this point]. Otherwise put, buyer power is defined as situations where there is a fundamental difference in negotiating power between the parties.”

341 In 1995, the Commission held some workshops on competition dealing with economic dependence, among other questions, and, in particular, the purchasing power of distribution in relation to their suppliers. The papers presented in these workshops were published in the book: Proceedings of the European Competition Forum, ed. Wiley, New York, 1996.


Prior to the Dobson Study 1999, the Commission had considered the existence of a dominant position in the supply market for the first time in its Kesko/Tuko Decision (1996), although the Rewe/Meinl Decision (1999) was the first to establish the legal principles that regulate the analysis of the procurement market for daily consumer goods, inspired by the Interim Report which led to the Dobson Study 1999. This Decision, in line with the conclusions of the Dobson Study 1999, established that the exercise of daily consumer goods buyer power, by one or several companies, does not have to be anti-competitive or detrimental to the economy, if there is effective competition in the retail market of these goods. However, it also pointed out that the close interdependence between the retail market of daily consumer goods and the procurement market, may generate a concentration spiral and reduce competition in both markets (in colloquial terms, “snowball effect”) from the moment at which one or several companies take advantage of market buyer power in any of them. In its Carrefour/Promodès Decision, the Commission expressly confirmed that the principles that govern the competitive analysis of the procurement market are also applicable to oligopolistic markets (collective dominant position).

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345 Rewe/Meinl Decision, paragraph 71: “The exercise of buyer power which leads to the securing of more favourable purchase conditions is not to be considered per se detrimental to the economy as a whole. Especially where the supplier side is itself highly concentrated and powerful buyers are faced with effective competition in their own selling market and hence are compelled to pass on any savings to their own customers, buyer power can prevent monopoly or oligopoly profits from being earned on the supply side. However, if the powerful buyer himself occupies a strong position in his selling market which is no longer kept sufficiently in check by the competition, any savings can no longer be expected to be passed on to customers.”


346 Rewe/Meinl Decision, paragraphs 72-74: “(72) In the retail trade there is a close interdependence between the distribution market and the procurement market. Retailers’ shares of the distribution market determine their procurement volume: the bigger the retailer’s share of the distribution market, the larger the procurement volume. And the larger the procurement volume, the more favourable, as a rule, are the buying conditions which the trader obtains from his suppliers. Favourable buying conditions can in turn be used in various ways to improve one’s position in the distribution market (sometimes through internal or external growth, but also through low-price strategies targeted at competitors). The improved position in the distribution market is itself reflected in a further improvement in buying conditions, and so on. (73) This spiral leads to ever-higher concentration both in distribution markets and in procurement markets. In the short term, final consumers may benefit from the process, as there may be a period of intense (predatory) competition in the distribution market during which the powerful buyer/trader is forced to pass on savings to consumers. But this will last only until such time as a structure (as in this case, an individual dominant position) is reached in the distribution market which leads to a clear reduction in competitive intensity. At this stage, any consideration for the final consumer goes by the board, as he is left with few alternatives. (74) Buyer power also gives a trader considerable influence over the choice of products which come to the market and hence are obtainable by consumers. Products which are not bought by a dominant buyer have practically no chance of reaching the final consumer as the supplier lacks alternative outlets. Hence, the dominant buyer determines the success or otherwise of product innovations.

347 Carrefour/Promodès Decision, paragraphs 45-46: “Toutefois, cette situation ne durera que jusqu’à ce que se mette en place, sur les marchés de la distribution, une structure entraînant une réduction sensible de l’intensité de la concurrence (c’est-à-dire, dans le cas présent, le risque de la domination du marché par une seule ou plusieurs sociétés). À ce moment-là, le consommateur final n’aurait plus que des possibilités de choix très limitées.”
The TDC/CNC and other competition authorities of the Member States have adopted these principles in the control of concentrations 348.

**Individual Dominant Position**

In the Kesko/Tuko Decision, the Commission considered that the concentration would occupy a dominant position in the daily consumer goods retail market and the wholesale cash & carry market, which in turn, would further reinforce its dominant position in the retail and cash & carry markets 349.

The Commission bore in mind the following factors: (a) the share of the merged company would have risen to 55% of the retail distribution market and to 80% of the cash & carry market (paragraph 146); (b) a significant number of suppliers would have depended on Kesko and Tuko for a high percentage of their sales: 50-75% (paragraph 150); (c) the merged company could have switched to alternative suppliers in almost all product categories, whilst suppliers would not be able to switch the merged company for other retailers or cash & carry establishments (paragraph 151); and (d) the merged company could have exercised increased negotiating power in relation to suppliers thanks to private-label brands and information on customer preferences and buying habits (paragraph 152).

In the Rewe/Meinl Decision, the Commission considered that the concentration would lead to the creation or strengthening of a dominant position of the merged company in nine Austrian procurement markets (paragraph 88). To reach this conclusion, the Commission took into account the market structure and the specific advantages for the parties. In the first category, it included the following factors: (a) “In the Austrian

348 Vid., For example, Caprabo/Alcosto Report, page 33: “The daily consumer goods retail distribution market maintains close interdependence on suppliers. The retailer’s position in the distribution market is reflected directly in its relations with suppliers and particularly in the purchasing conditions, whereby situations of economic dependence or buyer power may arise”; Eroski/Caprabo Report, page 22; and Competition Commission Study 2008, pages 156-157: “9.3 The exercise of buyer power by grocery retailers (and wholesalers or buying groups) may have a detrimental effect on suppliers (for example, through diminishing their profitability). 9.4 In general, the exercise of buyer power by grocery retailers is likely to have positive implications for consumers. Where competition between grocery retailers is effective, retailers will pass on to consumers a substantial portion of the lower prices that they obtain from suppliers through the exercise of buyer power. Grocery retailers’ buyer power may also act as a countervailing force to any market power possessed by suppliers. In addition, the exercise of buyer power can spur innovation in the supply chain. 9.5 The exercise of buyer power by grocery retailers may, however, raise concerns in certain limited circumstances if it allows retailers to impose excessive risks and unexpected costs on suppliers, which reduces suppliers’ incentive or ability to invest and innovate. This could lead to reduced capacity, reduced product quality and fewer new product offerings, and ultimately, to a detriment to consumers.”

349 Kesko/Tuko Decision, paragraph 153: “For these reasons, and given that the concentration would lead to dominant positions on the retail and cash & carry markets, the Commission is of the opinion that the increased buying power of Kesko would further reinforce the dominant position of Kesko on the retail and cash & carry markets. In particular Kesko would be able to use its buying power to employ different strategies, the long-term effects of which would be to further weaken the position of its competitors.
procurement markets the supply side is much less concentrated than the demand side, especially as far as demand from the food-retailing market is concerned” (paragraphs 89-93); (b) “The food-retailing trade is by far the most important sales channel for the foodstuffs suppliers” (paragraphs 94-97); and, (c) “Even prior to the merger, Rewe/Billa has the highest market shares in the procurement markets; these shares will increase substantially as a result of the operation” (paragraphs 98-106). In this case, the Commission estimated that the procurement shares of the merged company would be the following:

<table>
<thead>
<tr>
<th>Grupo de productos</th>
<th>Ø Cuota Rewe/Billa</th>
<th>Ø Cuota Meinl</th>
<th>Ø Cuota Rewe + Meinl</th>
</tr>
</thead>
<tbody>
<tr>
<td>Productos lácteos</td>
<td>[15-25]%</td>
<td>[10]%</td>
<td>[25-35]%</td>
</tr>
<tr>
<td>Panadería y pastelería</td>
<td>[20-30]%</td>
<td>[10]%</td>
<td>[30-40]%</td>
</tr>
<tr>
<td>Bebidas alcohólicas</td>
<td>[20-30]%</td>
<td>[10]%</td>
<td>[25-35]%</td>
</tr>
<tr>
<td>Bebidas no alcohólicas</td>
<td>[25-35]%</td>
<td>[10]%</td>
<td>[25-35]%</td>
</tr>
<tr>
<td>Productos Alimentarios de base</td>
<td>[20-30]%</td>
<td>[10]%</td>
<td>[25-35]%</td>
</tr>
<tr>
<td>Alimentos para bebés</td>
<td>[25-35]%</td>
<td>[5]%</td>
<td>[30-40]%</td>
</tr>
<tr>
<td>Alimentos para animales</td>
<td>[25-35]%</td>
<td>[5]%</td>
<td>[25-35]%</td>
</tr>
<tr>
<td>Productos de higiene</td>
<td>[20-30]%</td>
<td>[5]%</td>
<td>[25-35]%</td>
</tr>
<tr>
<td>Aseo y cosméticos</td>
<td>[25-35]%</td>
<td>[5]%</td>
<td>[30-40]%</td>
</tr>
</tbody>
</table>

On the other hand, the suppliers surveyed by the Commission estimated that, on average, replacing a customer that represents 22% or more of its turnover is economically unviable. The notifying companies contended that the suppliers must be able to withstand reductions in turnover of around 20%. In view of this data, the Commission considered that the concentration would have created or strengthened a dominant position in nine procurement markets.

The Commission, citing the OECD Study 1999 and the Dobson Study 1999, considered the notion of relative dependence of suppliers in relation to the merged company and other large retail companies. This relative dependence, facilitated by the consumer habit of one stop shopping and replacing, if necessary, the unavailable brand for another brand, is more important for the purposes of creating market power in the supply

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350 Rewe/Meinl Decision, paragraph 101: “The Commission asked producers what proportion of turnover with a given customer could be switched to other sales channels without difficulty. It transpired that on average 22% of turnover is the figure above which a customer can be replaced only at the cost of very heavy financial losses, if at all. The parties have contended that a producer behaving in an economically realistic manner must be able to withstand turnover reductions of up to about 20%. In view of the magnitudes indicated, the Commission proceeds in this case - having regard to supplier structures in the indicated procurement markets and assuming the existence of a dominant position in the distribution market - on the premise that the position which Rewe/Billa will occupy in the procurement markets after the operation takes place will be such that either a dominant position is created or an existing dominant position is strengthened.”

351 Rewe/Meinl Decision, paragraph 105: “The extent to which a trader is dependent on producers of branded goods depends on what consequences the non-availability of certain brands has for the trader. An important factor here is how the trader’s customers react to the absence of a brand. In the case of food
market, than the absolute producer and retailer shares respectively in the production and retail markets.

The Commission mentioned the following specific advantages of the concentration: (a) centralised management (paragraphs 107-108); (b) “the dominant position of Rewe/Billa/Meinl in the oriental/Vienna region of Austria would strengthen its position in the Austrian demand markets” (paragraphs 109-110) (c) Rewe/Billa is introducing its own brands to further reduce its degree of dependence on suppliers, which is already limited (paragraphs 111-114); and (d) “the dominant position created by the concentration in the distribution market would further strengthen the position of Rewe/Billa/Meinl in the procurement markets” (paragraph 115).

In the Carrefour/Promodès Decision, the Commission declared that the concentration would have considerable shares of the French procurement market:

shopping, the duration of a shopping trip is an essential consideration to customers. One-stop shopping is preferred, or in other words, buying everything needed from one shop. If a branded product which the customer wants is not stocked by such an outlet, the risks have to be weighed up that the customer might: (1) stop shopping or put off making the purchase till later, (2) go to another shop where the desired article may be found, but otherwise remain faithful to "his/her" shop, (3) take his/her business elsewhere in the longer term, or (4) buy another brand.[footnote: See the OECD reference document “Roundtable on buying power”, 1998, page 9 et seq.]. (106) The answer depends, on one hand, on the importance of the product in question to the customer, and secondly on the availability of alternative sources of supply. In the case of foodstuffs, which are purchased frequently and for which the convenience of shopping as a rule outweighs other aspects such as price and quality, the importance of the product is somewhat limited. This is all the more true if the customer exclusively finds in his/her shopping area outlets of the same trader. It can accordingly be assumed that, in the event of a delisting of branded goods, the trader suffers less than the producer, especially since he will usually have more alternative possibilities open to him than the latter.”

Rewe/Meinl Decision: “(102) It must be borne in mind here firstly that, when they lose a major customer, producers do not have many alternatives (…). (103) Rewe/Billa and Meinl, on the other hand, are not dependent on individual suppliers. The leading supplier to the Rewe group, the Nestlé group, covers, according to the notification, only about […]% of the volume of purchases. In the case of Meinl, the leading supplier covers approximately […]% of the volume of purchases. The result is a much heavier dependence of the supplier side on Rewe/Billa/Meinl than the other way round. This is the norm, with large food retailers. [Footnote: See Dobson Consulting Interim Report for the Study “Buyer power and its impact on competition in the food retail distribution sector of the European Union”, page 27].

Range flexibility in the retail trade is far greater than the flexibility of suppliers in production and distribution. Hence it is much easier for the retail trade not to buy something than it is for the producer not to produce it. This puts the market share study well and truly into context.”
The Commission determined that for a supplier, the loss of a customer that represents approximately 20-22% of its sales endangers the continuity of his/her company ("viability threshold")\(^\text{353}\), and proved that the viability of suppliers would depend on the merged company in four procurement markets: drugstore, perfume and hygiene, self-service perishable products and packaged food (paragraph 53). The merged company would enjoy certain competitive advantages: (a) considerable presence in all forms of retail distribution (paragraphs 56-59); (b) leadership in the most profitable format: the hypermarket (paragraphs 60-63); (c) leadership in loyalty cards (paragraphs 64-65); (d) an integrated and centralised structure (paragraphs 66-69); (e) financial capacity (paragraphs 70-75); (f) its closest rivals would have created joint purchasing centres that were pending approval by the competition authorities\(^\text{354}\), so there was an element of uncertainty regarding its competitive capacity to compete with the merged company\(^\text{355}\).

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\(^{353}\) Carrefour/Promodès Decision, paragraph 52: "Lors de son enquête, la Commission a demandé aux fournisseurs d’indiquer à partir de quel pourcentage de leur chiffre d’affaires ils considéraient que la perte d’un client représenterait une menace pour l’existence même de leur entreprise. La moyenne des réponses obtenues fait apparaître un seuil de 22%. Ce seuil de 22% avait été également retenu dans l’affaire Rewe/Meinl(…). D’une manière générale, les taux mentionnés par les fournisseurs se situent aux alentours de 20-22%. Les données obtenues de l’enquête doivent bien évidemment être nuancées (pour certains groupes de produits, le nombre de réponses obtenues est en effet trop faible pour constituer un échantillon représentatif). A priori, on pourrait en déduire que lorsqu’un distributeur dépasse un tel seuil dans le chiffre d’affaire d’un de ses fournisseurs, ce dernier se retrouve de facto en situation de «dépendance économique».” The Commission defines it as a threat threshold (“taux de menace” o “seuil de menace”).

\(^{354}\) Carrefour/Promodès Decision, paragraph 76: “Comme déjà mentionné, la présente opération se situe dans le cadre d’une consolidaion globale du secteur: les concurrents de la nouvelle entité Leclerc et Système U ont créé une centrale commune, Lucie [footnote: Ce rapprochement a fait l’objet le 11 mars dernier d’une notification auprès de la Commission au titre de l’article 81. Cette opération est également

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<table>
<thead>
<tr>
<th>Groupe de produits</th>
<th>1 Estimation de la part des parties (notification)</th>
<th>2 Estimation de la part des parties (par les fournisseurs, résultat de l’enquête)</th>
<th>3 Estimation de la part des parties (par les concurrents)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Liquides</td>
<td>(20-30)%</td>
<td>(15-25)%</td>
<td>(20-30)%</td>
</tr>
<tr>
<td>(4) Epicerie sèche</td>
<td>(20-30)%</td>
<td>(25-35)%</td>
<td>(20-30)%</td>
</tr>
<tr>
<td>(6) Produits périssables en Libre Service</td>
<td>(20-30)%</td>
<td>(25-35)%</td>
<td>(20-30)%</td>
</tr>
<tr>
<td>(7) Charcuterie</td>
<td>(5-15)%</td>
<td>(20-30)%</td>
<td>(15-25)%</td>
</tr>
<tr>
<td>(8) Poissonnerie</td>
<td>(15-25)%</td>
<td>(20-30)%</td>
<td>(25-35)%</td>
</tr>
<tr>
<td>(9) Fruits et Légumes</td>
<td>(10-20)%</td>
<td>(15-25)%</td>
<td>(20-30)%</td>
</tr>
<tr>
<td>(10) Pain et Pâtisserie fraîche</td>
<td>(&lt;10%)</td>
<td>(15-25)%</td>
<td>(*16)</td>
</tr>
<tr>
<td>(11) Boucherie</td>
<td>(10-20)%</td>
<td>(5-15)%</td>
<td>(20-30)%</td>
</tr>
<tr>
<td>(2) Droguerie</td>
<td>(30-40)%</td>
<td>(25-35)%</td>
<td>(20-30)%</td>
</tr>
<tr>
<td>(3) Parfumerie/hygiène</td>
<td>(15-25)%</td>
<td>(25-35)%</td>
<td>(20-30)%</td>
</tr>
<tr>
<td>(5) parapharmacie</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(12) Bricolage</td>
<td>(10-20)%</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(13) Maison</td>
<td>(&lt;5%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(14) Culture</td>
<td>(&lt;10%)</td>
<td>(15-25)%</td>
<td>-</td>
</tr>
<tr>
<td>(15) Joints/loisir/détente</td>
<td>(5-15%)</td>
<td>(15-25)%</td>
<td>-</td>
</tr>
<tr>
<td>(16) Jardin</td>
<td>(5-15%)</td>
<td>(5-15%)</td>
<td>-</td>
</tr>
<tr>
<td>(17) Automobile</td>
<td>(&lt;5%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(18) Gros Électroménager</td>
<td>(&lt;5%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(19) Petit Électroménager</td>
<td>(&lt;10%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(20) Photo/Ciné</td>
<td>(&lt;10%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(21) Hifi/Son</td>
<td>(10-20%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(22) TV/Vidéo</td>
<td>(20-30%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(23) Textile, chaussures</td>
<td>(&lt;10%)</td>
<td>-</td>
<td>(25-35)%</td>
</tr>
</tbody>
</table>

Total général: (10-20)% (20-30)% -
The Commission also superficially analysed the Spanish procurement market for daily consumer goods, in which the merged company would reach a market share of 20-30%. The Commission considered, in general, that the observations made in relation to the French market were applicable to the Spanish market and set the “viability threshold” at 20-22% of the market share, indicating that it was reached in three product markets (drugstore, self-service perishable goods and packaged foods). However, the Commission considered that the concentration would face strong competition, highlighting the IFA and Euromadi purchasing centres, with similar market shares (20-30%) to those of the merged company, as well as the centres belonging to the large retailers (Eroski, Auchan and El Corte Inglés). In short, the Commission considered that the merger would not give rise to a dominant position in view of the “still weak” degree of concentration in the retail market and the existence of strong competitors in the supply market.

However, the TDC concluded that the merged company would reach a dominant position likely to restrict competition in numerous local markets and estimated, in line with the Commission’s analysis principles of the procurement market, that the position of the merged company in the retail market would have the effect of “strengthening the negotiating power of the post-merger group.”

In reality, if the Commission had taken into account the effects of the dominant position of the merged company in regional and local retail markets on its position in the procurement market, it would probably have reached a different conclusion, but it was unable to do so because the regional and local retail markets were being analysed in parallel by the Spanish authorities. This inconsistency has been remedied in subsequent cases, in which the Commission has referred the analysis of the procurement and retail distribution markets to the national competition authority. In this way, a single authority...
can uniformly appreciate the existing interaction between the procurement markets and the retail markets\(^{361}\).

**The Oligopoly as a Collective Dominant Position**

La Commission analysed the possible existence of a collective dominant position for the first time in the Carrefour/Promodès Decision. Following the merger, the French retail procurement market was mainly distributed (> 60-70%) between the merged company and the Lucie and Opera purchasing centres (paragraph 98)\(^{362}\). However, the Commission considered that the necessary conditions for the existence of a collective dominant position were not met because of (a) the different structure and operation of the three leading purchasing centres; (b) the lack of structural ties between the distributors; (c) the different evolution of the market shares in previous years; (d) the growth of the procurement market; (e) the heterogeneity of the affected products; and (f) the lack of transparency of the procurement markets, in spite of the standardising effects of legislation that forbids sales below costs (paragraph 99). In relation to this latter question, the Commission stated that the prohibition on selling at a price lower than the cost price had produced the standardisation of the prices and discounts included in the invoice and the spread of payments for other commercial services, a practice that may indicate the economic dependence of producers on retailers\(^{363}\). Although there was a lot of transparency in relation to prices and discounts, it did not seem to be the same case for commercial services\(^{364}\). Anyway, the Commission did not rule out that, in the future, as the market becomes more concentrated, transparency in negotiation conditions between producers and the main retailers in the future would increase, hence generating a collective dominant position\(^{365}\).

\(^{361}\) Rewe/Plus Discount Referral Decision, paragraph 53: “For efficiency reasons and in order not to split the current transaction, the Commission considers that the case should be referred in its entirety, including all retail and procurement markets. Indeed, an assessment of the procurement markets without the assessment of the retail markets does not appear appropriate.”

\(^{362}\) Lucie and Opera each obtained a share of the procurement market of 15-20%, Carrefour/Promodès Decision, paragraph 76.

\(^{363}\) Carrefour/Promodès Decision, paragraph 102: “Ainsi, en imposant de calculer le seuil de revente à perte à partir du prix unitaire sur facture et en interdisant aux distributeurs de déduire les marges dites «arrières» qui rémunèrent les services, la négociation entre les distributeurs et les fournisseurs s’est, dans une large mesure, déplacée des «marges avants» vers les «marges arrières», c’est-à-dire vers la coopération commerciale qui est le budget payé par l’industriel au distributeur pour la rémunération de services tels que la présence de son produit dans un prospectus publicitaire, la mise en avant de ses produits dans les linéaires ou en tête de gondole etc. [footnote omitted]. En principe, distributeurs et fournisseurs devraient rechercher à coordonner leurs stratégies respectives afin d’optimiser le budget de coopération commerciale. Cependant, le développement des marges arrières peut également masquer des situations de dépendance du fournisseur par rapport au distributeur.”

\(^{364}\) Carrefour/Promodès Decision, paragraph 103: “Il apparaît en définitive qu’en dépit d’une relative uniformisation des marges avants, il n’existe, du moins pour le moment, aucune transparence ou échange d’informations concernant les marges arrières, conditions vers lesquelles le jeu concurrentiel s’est largement déplacé. Bien au contraire, il ne semble y avoir, pour les distributeurs, aucun intérêt à dévoiler à leurs concurrents les marges arrières qu’ils obtiennent auprès des fournisseurs, les marges arrières servant, entre autres, à développer les positions à l’aval.”

\(^{365}\) Carrefour/Promodès Decision, paragraph 104: “Néanmoins, la réalisation de la présente opération pourrait, dans le futur, donner lieu à d’autres rapprochements (alliances ou concentrations) dans le secteur et ce mouvement pourrait, dans certaines conditions et même compte tenu des particularités du
In relation to the possible existence of a collective dominant position in the Spanish procurement market, the Commission established that the three leading companies in the sector would have a market share in excess of 55-65%, however, it was referred to the considerations in relation to the French procurement market\textsuperscript{366}.

### 9.2 Collective Dominant Position in the Spanish Market

This Section analyses the conditions that may lead to oligopsonic behaviour in the procurement market: concentration of the procurement market, transparency, dissuasive capacity and absence of external competitive reactions. Logically, the oligopolistic conditions of the retail distribution market also have special relevance on the analysis of the procurement market (and the other way round).

The three leading companies in retail distribution, Carrefour, Mercadona and Eroski, represent an oligopsony in relation to their suppliers, which is equivalent to a collective dominant position.

#### 9.2.1 Concentration

The Commission has admitted the difficulties involved in measuring the shares in the procurement market of daily consumer goods\textsuperscript{367}. However, in general, it can be said that (1) the increased concentration in the retail distribution market has brought with it an increased concentration of the procurement market; and (2) the existence of horizontal purchasing centres (IFA and Euromadi) further increases the concentration in relation to the retail distribution market.

In the Caprabo/Alcosto Report, the TDC appreciated the following structural characteristics of the Spanish procurement market:

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“a) The retail trade generally represents a share equal to, or in excess of 50% of the procurement market. In Spain, it reaches 70%.
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b) In accordance with the studies on the sector in Spain, the leading food retailers do not form part of horizontal purchasing centres, but they use their own buyer power in relation to the suppliers (vertical purchasing centres). These represent between 10% and 20% of sales of the large manufacturers and more than 25% of the small and medium-sized companies.

c) In the past decade, the importance and number of purchasing centres including small and independent retailers has increased, with the aim of obtaining savings in purchases from suppliers and hence compete more effectively with the large chains. Euromadi and IFA are the main purchasing centres, each with approximately 20% of the market.368

According to the TDC estimates, the two horizontal centres reached a combined share, in terms of turnover, of 38.42%, whilst 61.58% was divided between the vertically integrated purchasing centres369. However, the acquisition of small companies by the large retailers has weakened the IFA and Euromadi purchasing centres. In the Miquel Alimentació/Puntocash concentration, the TDC estimates revealed that the combined share, in terms of turnover, of both purchasing centres had gone 38.42% to 29.59%, a fall of 25% in the short period of time since the Caprabo/Alcosto concentration 370.

In other concentration reports, both the SDC and the TDC have estimated the procurement market shares in terms of sales floor. In its Report on the Consum/Dinosol concentration, the SDC estimated that the IFA and Euromadi centres had a market share, in terms of sales floor, of 20.4% and 17.8% respectively; whilst the large vertically integrated commercial retail distribution groups such as Carrefour, El Corte Inglés, Auchan or Mercadona, had a combined share of 51.7% of the market; and the purchasing centres of the Eroski Group reached 10.1% of the market371. In the Eroski/Caprabo concentration, the SDC Report revealed that Caprabo represented “23.8% of the sales floor of the IFA associates and approximately 19% of their total purchases” and purchases by Eroski would take the share of this company to 14.5% in terms of sales floor372.

In short, nowadays, the vertically integrated purchasing centres appear to have acquired a greater preponderance than the IFA and Euromadi purchasing centres, due to the organic growth of the large distribution companies and their acquisition of companies integrated in both horizontal purchasing centres. It must be taken into account that the large distribution groups with greater relative presence in the large grocery retail outlet format (for example, Carrefour, Mercadona and Eroski) have a larger sales share than their smaller competitors373.

If the turnover shares of Carrefour, Mercadona and Eroski in the retail market are extrapolated to the procurement market, it may be concluded that they each reach or

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368 Caprabo/Alcosto Report, page 56.
369 Caprabo/Alcosto Report, page 57
370 Miquel Alimentació/Puntocash Report, page 49.
371 SDC Report N-07001 Consum / Dinosol (active)
373 Vid., supra Section 8.2.1.1.
come close to the “viability threshold” (20% of sales) which the Commission associates with the economic impossibility of replacing a distributor.\textsuperscript{374} Anyway, although the “viability threshold” (risk for the existence of the producer) identified by the Commission is perfectly integrated in the behaviour independence concept associated with the dominant position, a significant replacement difficulty (substantial economic difficulty), without reaching the impossibility shown, it may indicate a dominant position in the procurement market. In fact, in the Rewe/Meinl Decision, the Commission showed that economic difficulty existed to replace a distributor from the moment it reached 5-10% of a producer’s sales (“difficulty threshold”):

“For these reasons and because of the large role played by the food-retailing trade in the sale of products in the above categories in Austria, it follows that a "lost" food retailing trade customer is as a rule difficult for producers to replace. The producers surveyed stated that they could replace without difficulty only small food-retailing trade customers (accounting on average for less than 5% of turnover). Even food-retailing customers accounting for 5-10% of turnover are, according to the same source, not easy to replace. Switching to other sales channels is normally out of the question owing to the difficulties referred to above. And the larger producers - both international and Austrian - especially have already as a rule attained a very high degree of distribution through all sales channels and in particular through all the major food retailers. This shows clearly that in Austria the opportunities for producers to switch to other buyers are much more limited than the opportunities for buyers to switch to other producers."

If the retail distribution market presents oligopolistic characteristics, the interdependence that leads to parallel conduct in the procurement market may arise from the market shares lower than the “viability threshold” of 20% and closer to the “difficulty threshold” (10% approximately). In the OECD Study 1999, The French Competition Authority hinted at this possibility in concentrated product markets in which the size of the producers makes them more dependent on their distributors\textsuperscript{376} and

\textsuperscript{374} Vid., supra different estimates of market shares in Section 8.2.1.3.1 and general conclusions in Section 8.5. Given that there is no uniformity in the volume of purchases between product categories, it can be expected that these market shares are higher in certain categories.\textsuperscript{375}

\textsuperscript{375} Rewe/Meinl Decision, paragraph 97.

\textsuperscript{376} OECD Study 1999, Document submitted by France, page 166 : “Actuellement, sept réseaux réalisent approximativement 85 pour cent du chiffre d'affaires de la grande distribution en France, le plus gros étant de l'ordre de 15 pour cent. Dans quelques années, ces sept réseaux pourraient n'en constituer plus que cinq, le plus gros étant alors de l'ordre de 20 pour cent. Une telle situation est caractéristique d'un oligopole. Du côté de l'aval, c'est-à-dire des marchés de détail, un oligopole à cinq participants ne pose pas de problème spécifique. Cependant, les marchés pertinents sont de dimension locale, et il se peut donc que certaines zones de chalandise présentent une concentration bien supérieure à la concentration nationale. Il convient donc d'examiner ces zones une par une, en considérant les différentes formes de distribution, afin de s'assurer que les consommateurs gardent toujours un choix suffisant pour être capables de faire jouer la concurrence entre distributeurs. Cette analyse est classique, et elle n'est pas spécifique aux questions de distribution. Nous nous intéresserons donc plutôt à l'amont. Du côté de l'amont, c'est-à-dire des marchés de gros, l'analyse précédente ne peut être transposée telle quelle. En effet, si le problème de l'acheteur est résolu dès qu'il trouve un vendeur de substitution, il n'en est pas de même pour le vendeur. Les fournisseurs ne peuvent en général se contenter d'être présents chez un ou
the Carrefour/Promodès Decision expressly accepted it in theoretic level\textsuperscript{377} and in its analysis of collective dominant position in the French procurement market\textsuperscript{378}. Along the same lines, the Competition Commission Study 2000, following detailed empirical investigations, considered that the large distribution companies that exceeded the 8% share of the procurement market enjoyed a collective dominant position and considered that a large number of their anti-competitive practices in relation to producers were typical of a “complex monopoly” (collusive oligopoly)\textsuperscript{379}.

\subsection*{9.2.2 Transparency}

The transparency of the retail distribution market is loyally reflected in the supply market. All retail distribution companies sell the leading manufacturers’ brands in each product category (first brand, second brand and so on, according to the value that the company attributes to the variety of offer). Therefore, practically all of the branded daily consumer goods (packaged food and beverages, personal hygiene, drugstore and perfumery, etc.) stocked in retail distribution are identical (absolute homogeneity). With regard to private-label brands, there is also significant homogeneity, associated with the product characteristics, quality and prices (budget private-label brand, quality “premium” private-label brand, etc.)\textsuperscript{380}.

The Carrefour/Promodès Decision referred to price transparency in the French and Spanish procurement markets, although it considered that there was insufficient transparency in relation to commercial conditions\textsuperscript{381}.

The Commission did not dwell on the fact that the existence of commercial payments that weakened price competition was better evidence of the oligopolistic structure in both the retail distribution market and the procurement market. If the retail distribution market is characterised by perfect or simply effective competition, companies must
compete intensely in the negotiation of lower prices in the supply market. However, once the retail distribution companies have assumed their mutual dependence and the advantages associated with less price competition, the oligopolistic strategy par excellence is the reduction of competition in the negotiation of prices with suppliers (transferring it to commercial conditions), as the purchase price is legally translated into the common minimum price for all competitors (sales below cost regulation) in the retail distribution market.

In short, oligopolistic conduct aimed at reducing competition in the negotiation of prices with suppliers and the exclusion of the manufacturer’s brand to benefit a private-label brand is feasible, even in the absence of absolute transparency in commercial payments and conditions. Oligopolistic companies only need to control the transfer price (purchase price) to check that none of them are competing excessively in this area, which is simple to do thanks to the transparency of sales prices in the retail distribution market and the transfer prices in the supply market (for example, supplier price lists).

9.2.3 Capacity of Dissuasion within the Oligopoly

European courts have accepted that retaliating against competitive conduct tests the dissuasive capacity of the members of the oligopoly and, implicitly, market transparency (retaliation would not be possible without prior transparency which allows competitive conduct to be identified within the oligopoly). Retaliation must involve intense competition which makes competitors reconsider the advisability of maintaining high procurement prices. These episodes of intense competition may be developed in the retail market, by adjusting the sales price to the purchase price and hence producing purchase price transparency which enables retaliation to be transferred to the procurement market, in a series of price lowering negotiations. A sales price war may influence purchase prices, also affecting the supplier’s income. If a price reduction is negotiated with the company and this reduction is passed on to its retail prices, an automatic alarm will go off in its competitors, who will proceed to equal their prices. If the sales price set by the “free rider” is lower than the purchase price of competitors with buyer power in the supply market, these will automatically force the supplier to offer them the same favourable prices as those offered to the “free rider”. In this case, not only does the competitor suffer from the retaliation (in the form of a zero sum retail price war), but also the supplier who must finance the price war between the distribution companies. Therefore, suppliers are the most interested in standardising the prices offered to large distribution companies at the highest possible level.

Pressure from distributors to standardise their commercial conditions to leading distributors can be implicitly observed in Carrefour’s low price strategy, and expressly

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382 In any case, there is also certain transparency in relation commercial payments and conditions due to the intense degree of interaction between suppliers and distributors. For example, the average payment periods of the leading distribution companies is of public knowledge, vid., “Does anyone pay on time? The food sector reports delays of 40 days”; Cotizalia, 27.11.2008.

383 Vid., supra Section 7.1.

384 Vid., supra Section 8.2.3.
in the retaliations of the leading retail distributors from different countries against suppliers who offer more favourable conditions to other competitors. This pressure perfectly illustrates the oligopolistic dynamics in the supply market, closely linked to the price oligopoly in the retail market.

The use of the “most favoured client” clause by Carrefour, perfects the transparency of the retail market because it turns the consumer into the informant of the competition’s lower prices. Once informed of the existence of lower prices in any of its rivals’ establishments, Carrefour proceeds to equal its prices with those of the competition or even improve them as many times as required, in a game of zero or negative sum until all of the competitors reach the conclusion that it is more beneficial to reduce price competition and, if appropriate, transfer it to other parameters (location, etc.). This strategy enables it to know that its competitor, Eroski, is benefiting from a lower purchase price for a certain product (Pepsi 2 litres) and, given its procurement market share and subsequent buyer power, it may address the supplier to demand the same conditions as those offered to Eroski.

In the case of Eroski, the discovery, once it had acquired Caprabo, that common suppliers offered the latter better conditions than Eroski, led this company to demand common suppliers to adapt purchase prices to those offered to Caprabo and retrospective financial compensation.

Similarly, the leading Australian retailer, Safeways, was sanctioned by the ACCC for ceasing its commercial relations (“delisting”) with bakeries that offered better prices to its competitors. The Competition Commission Study 2008 detected that the manager of a Tesco store had threatened to delist a supplier if it offered better prices to a local competitor.

In short, the dissuasive capacity of the large companies in the retail market is even greater given their buyer power over suppliers. Whenever a company with buyer power detects that the retail price of the competition is lower than its purchase price, it can force the supplier to (1) offer a reduction in the purchase price, enabling it to equal or even improve on the retail price of the competition or (2) cancel the competitive advantage offered to its competitor.

9.2.4 Absence of External Competitive Reaction

385 Vid., supra Section 8.2.3.
386 Vid., infra Section 9.3.2, in particular, “Eroski ajusta cuentas a los proveedores”, El País, 23rd March 2008: “Although each case is different, according to data from one hundred companies, more than 90% of those surveyed indicated that they had been required to pay penalties for differences in purchasing conditions between Eroski and Caprabo. In 58% of the cases, the companies indicate that the penalties are retrospective from 2006”.
387 Idem.
388 Id.
Analysis of the Spanish procurement market clearly shows that other competitors do not exercise sufficient competitive pressure on the oligopoly and suppliers and consumers do not have the capacity to counteract the collusive conduct within the oligopoly.

The aim of the other competitors is to copy the collusive conduct of the oligopoly to obtain economic benefits (commercial payments, moratorium in payments, etc.) without the need to compete intensely in the retail market. If they try to secure lower transfer prices to improve their competitive position in the retail distribution market, they will face intense price competition from the oligopoly in this market as a result of market transparency.

Suppliers, at least initially, benefit from the collusive conduct of the oligopoly, obtaining a higher transfer price which may act as a reference for the rest of the distribution sector and consequently, keep sales prices supracompetitive. Later, when private-label brands become the main competitor of many brands, the supplier does not have sufficient market power to reject the commercial conditions demanded by the retailer and demand more competitive transfer prices.

Consumers, faced with a higher sales price for a product or even with its absence from the shelves, prefer to adapt their shopping basket (for example, replacing the more expensive or delisted product with the retailer’s private-label brand) without switching stores\textsuperscript{389}.

Faced with evidence of consumer loyalty to a store, even in the absence of a specific product, some distribution companies have argued that there are brands with an image and attraction for consumers that make them essential for distribution (“must stock”). However, these products represent a reduced number of all daily consumer goods that may be acquired in another convenience or complementary shop in a different establishment. In any case, retailing practices do not contribute to reduce the price of these products, at most, dual monopolization occurs as a result of the market power of the manufacturer and distribution. Therefore, the remedies proposed in this Study are also effective in reducing the risk of dual monopolization.

\textsuperscript{389} “How we buy? – the other side of the consumer” Study, Information Resources Inc. (IRI), 2003, concludes that, faced with the shelf absence of the chosen brand, 70% of consumers change the product brand instead of not purchasing the product. \textit{Vid.}, similar conclusions of the ACCC Study 2008, pages 355-356: “There are a number of characteristics of consumer shopping behaviour and habits that are likely to limit the extent to which consumers will switch stores in response to the unavailability of their preferred brand. In particular, consumers who are time-poor and have a strong preference for one-stop convenience shopping are less likely to shop around if their preferred brand is unavailable. The supplier will be worse off in all cases of consumer switching in response to the non-availability of its product except where the consumer switches stores to buy the product elsewhere. If the consumer does not buy any product at all then the supermarket will lose the value of the lost sale but retain the remainder of the value of the consumer’s shopping basket, so its loss will be relatively small. The impact on the retailers will be ambiguous if the consumer switches to another brand, which may have higher or lower margins than the unavailable product. On the other hand, if the consumer switches stores, the supermarket will potentially lose the consumer’s entire shopping basket. The ACCC considers that consumer behaviour will provide at best a weak constraint on the abuse of any buyer power.”
9.3 Tacit Collusion in Prices and Exclusion of other Suppliers/Distributors

Logically, the existence of a collective dominant position does not imply any breach of the competition regulations. Only conducts that restrict competition and damage the welfare of consumers represent punishable abuse.

However, once the retail distribution companies have assumed their mutual dependence and the advantages associated with less price competition, the oligopolistic strategy par excellence in the supply market appears to be the reduction of competition in the negotiation of prices with suppliers, the generation of quasi-monopolist income through the imposition of commercial payments and conditions and the gradual monopolization of their shelves by their private-label brand. This collusive strategy is doubly harmful to consumer welfare. The first anti-competitive effect will be derived from the reduction of competition in purchase prices, facilitated by the increase in commercial payments (“collusive effect”). The second anti-competitive effect will arise from the exclusion of competitors in the manufacturers’ market and in distribution (“exclusionary effect”).

The FTC Studies 2001 and 2003 tackled these anti-competitive effects from the point of view of a supplier with market power interested in setting the re-sale price of its products at high levels and excluding other rival suppliers. From this perspective, suppliers may recur to commercial payments to reduce competition in transfer prices, hence facilitating a homogenous increase in retail prices to the detriment of consumers. Commercial payments increase economic barriers to entry and the consequent exclusion of financially weaker suppliers. The capacity of the supplier with market power to increase entry costs may facilitate less competition in its market and lead to higher prices for consumers. The Dobson Study 1999 and the Competition Commission Study 2000 and 2008 have shown that retailers with individual or collective market power (oligopoly), have the same incentives to carry out these collusionary conducts with suppliers with one peculiarity: they may gradually squeeze out suppliers and replace them with private-label brands.

Conducts that produce anti-competitive effects follow a gradual sequence of competition reduction in the supply and distribution market which is virtuously fed. The reduction in price competition through the increase of commercial payments allows oligopolistic distribution to increase its market power (“snowball effect”). The increase in commercial payments produces a reduction of competition in the product market by increasing economic barriers to entry. Although this effect may initially benefit

390 This presentation of the theory of the anti-competitive effects of commercial payments is based on the Study “Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories”, an FTC Staff Study, November 2003 (“FTC Study 2003”), pages 3-4.
financially stronger suppliers, the predominant role of the private-label brand turns the possibility of final exclusion of all independent suppliers into a real threat, which is why the “snowball effect” entails an excluding effect of smaller suppliers and finally all suppliers (except those that enjoy special protection in the form of industrial property, etc.). The exclusionary effect is equivalent, in economic terms, to a death by drowning: the supplier must increase commercial payments to be competitive to distribution but the need to finance these commercial payments with higher transfer prices makes him lose competitiveness against the retailers’ private-label brand until he finally disappears. In short, it is a slower but by no means less painful economic death for the independent supplier, because he has contributed to financing the retailers’ private-label brand.

SNOWBALL EFFECT

Sequence X: Oligopsony of retail distribution

(1) Demand for commercial payments and conditions
(2) Increase in transfer prices as a result of (1)
(3) Increase in retail prices as a result of (2)
(4) Reduction in retail competition as a result of (3)
(5) Increase in retail concentration as a result of (1) and (4)

Sequence X+1: Tacit collusion of the oligopsony

(6) Increase in commercial payments and conditions as a result of (5)
(7) Increase in transfer prices as a result of (6)
(8) Increase in retail prices as a result of (7)
(9) Reduction in retail competition as a result of (8)
(10) Increase in the retail concentration as a result of (5) and (9)

Sequence X+2: Weakening of competition in the manufacturer’s market

(11) Increase in commercial payments and conditions as a result of (10)
(12) Exclusion of economically weaker suppliers as a result of (11)
(13) Increase in transfer prices as a result of (11) and (12)
(14) Increase in retail prices as a result of (13)
(15) Reduction in retail competition as a result of (14)
(16) Increase in the retail concentration as a result of (11) and (15)

Sequence X+3: Monopolization of the manufacturer’s market by the oligopsony

(17) Increase in commercial payments and conditions as a result of (16)
(18) Exclusion of economically weaker suppliers as a result of (17)
(19) Increase in transfer prices as a result of (17) and (18)
(20) Increase in retail prices as a result of (19)
(21) Private-label Brand (vertical integration) excludes suppliers as a result of (17) and (20)

It must be clarified that from a competition law perspective, a market monopolized by private-label brands competing among each other is a perfectly legitimate scenario in the absence of market power that facilitates anti-competitive practices aimed at
imposing this result. For example, hard discount retailers (“hard discount”) have opted for a competitive retail price model sustained by a majority of private-label brand products, which leads to intense competition to secure low transfer prices and the absence of commercial payments. However, it is not admissible that distribution market power is used to impose commercial payments that are not required from private-label brand suppliers or to set a not very competitive commercial and pricing strategy in relation to the manufacturer’s brand products (including delisting) to favour its private-label brand.

9.3.1 Supra-Competitive Prices

The Commission determined in its Carrefour/Promodès Decision that competition in the Spanish supply market, with reference to the French market, was shifting from purchase prices to commercial conditions, which could mask a situation of economic dependence of suppliers compared to distribution394.

This conclusion is totally in keeping with empirical findings of the Cruz Roche Study 1999, as a result of a survey between retail suppliers. This survey identified 16 aspects of commercial negotiation between suppliers and retailers and the degree of buyer power between them: (1) discount on rate price, (2) listing charges, (3) atypical payments, (4) slotting fees, (5) use and payment of gondola ends, (6) payment for use of distribution platforms, (7) shelf position, (8) product adaptation to retailer’s specifications, (9) contributions towards advertising costs, (10) assume costs related to refund process, (11) deferred payment days, (12) pre-established payment dates, (13) point of sale promotions, (14) coding and labelling of products and packaging, (15) restocking of shelves, (16) product selection and definition of stocks within the category395.

In their negotiations with the main retailer, suppliers perceived that 10 aspects, almost all related with monetarium payments or financial costs (listing charges, atypical payments, slotting fees, payment of gondola ends, contributions towards advertising costs, deferred payment days, pre-established payment dates, promotions in outlets, restocking of shelves and product selection and definition of stocks), were more

394 Carrefour/Promodès Decision, page 26: “102. Ainsi, en imposant de calculer le seuil de revente à perte à partir du prix unitaire sur facture et en interdisant aux distributeurs de déduire les marges dites «arrières» qui rémunèrent les services, la négociation entre les distributeurs et les fournisseurs s’est, dans une large mesure, déplacée des «marges avants» vers les «marges arrières», c’est-à-dire vers la coopération commerciale qui est le budget payé par l’industriel au distributeur pour la rémunération de services tels que la présence de son produit dans un prospectus publicitaire, la mise en avant de ses produits dans les linéaires ou en tête de gondole etc. En principe, distributeurs et fournisseurs devraient rechercher à coordonner leurs stratégies respectives afin d’optimiser le budget de coopération commerciale. Cependant, le développement des marges arrières peut également masquer des situations de dépendance du fournisseur par rapport au distributeur. 103. Il apparaît en définitive qu’en dépit d’une relative uniformisation des marges avants, il n’existe, du moins pour le moment, aucune transparence ou échange d’informations concernant les marges arrières, conditions vers lesquelles le jeu concurrentiel s’est largement déplacé.” (TVDC underlining)

395 Vid., Cruz Roche Study 1999, Table 3.19, pages 138-140, Annex 12.5 “Analysis of the strategies of the main retailer on negotiations with suppliers (Cruz Roche Study, 1999)".
important than the negotiation of discounts on rates. The perception of the suppliers indicated that the main retailer exercised more pressure on 8 aspects of the negotiation (listing charges, atypical payments, payment of gondola ends, payments for the use of distribution platforms, contributions towards advertising costs, deferred payment days, pre-established payment dates, promotions in outlets) than on the rate price; and exercises slightly less pressure in relation to another 3 aspects (assuming costs related to refunds, restocking of shelves and product selection and definition of stocks within the category). In short, the power exercised by the main retailer (result of multiplying the importance of an aspect by the pressure exercised) was greater than the power exercised on the rate price in relation to 8 aspects (listing charges, atypical payments, payment of gondola ends, payment of logistics platform, advertising costs, deferred payment days, pre-established payment dates and promotions in outlets) and the power exercised in relation to another 2 aspects (restocking of shelves and product selection and definition of stocks) was only slightly less than that exercised on the rate price396.

In relation to their negotiations with average retailers, suppliers perceived that retailers gave slightly more importance to the discount on rate price and however, received slightly less pressure in comparison with the main retailer. On the other hand, in total contradiction to the purchasing policy of the main retailer, the power exercised by the average retailer on the rate price (less than that exercised by the main retailer) was only exceeded by the pressure exercised on point of sale promotions (aspect linked to purchase price397).

The Cruz Roche Study 1999 also measured the degree of conflict (importance of an aspect multiplied by the degree of disagreement) between suppliers and the main or average retailer in relation to the 16 negotiation aspects398. In relation to the main retailer, the degree of disagreement on the discount of the rate price was low and was exceeded in another 14 aspects of the negotiation (listing charges, atypical payments, slotting fees, payment of gondola ends, payments for the use of logistics platforms, shelf positioning, contributions to advertising costs, cost of refunds, deferred payment days, pre-established payment dates, promotions in outlets, restocking of shelves and

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396 Vid., asimismo, Cruz Roche Study 1999, page 141: “…the negotiation aspects in which manufacturers perceive greater pressure by the main retailer are atypical payments, contributions towards advertising costs, payment of gondola ends, slotting fees, pre-established payment dates and payment for the use of distribution platforms. They all form part of the group of negotiation aspects which are considered to be of major importance by the manufacturer and represent payment items. In the remaining factors, the pressure perceived is medium or low …”

397 Vid., Cruz Roche Study, page 137: “…in the negotiation process with average retailers, only the aspect related to point of sale promotions is considered to be important, from which it is deduced that the negotiation processes vary widely in terms of the conditions discussed in accordance with the size and power of the retailer. This difference reaches highly significant values in all of the aspects except in the discount on rate price, in which the average values are similar.”; and page 141: “…manufacturers do not perceive high pressure from the average retailer in any of the aspects, whilst they perceive low pressure in a large number of aspects, which clearly indicates that the exercise of power is directly related to dependence based on the proportion of sales represented by the retailer. The differences are once more significant in all of the aspects except in the discount on rate price, in which the pressure evaluation reaches a similar average level.”

398 Cruz Roche Study, Table 3.21, pages 146-147, Annex 12.6 “Measurement of the Degree of Conflict (Cruz Roche Study 1999)”. 
product selection and definition). On the other hand, only in two minor aspects of the negotiation (product adaptation to retailer specifications and product coding and labelling) was there a greater level of agreement than in relation to discount on the rate price. Although the relative importance of the disagreement on the discount of the rate price increased in the measurement of the degree of conflict with the main retailer, the degree of conflict in this aspect of the negotiation continued to be less than in another 10 aspects. The huge relative difference between the degree of conflict in the discount of the rate price and other determining factors, such as the listing charges (+34.5%), atypical payments (+62.2%), payments for gondolas (39.7%) and advertising costs (+36.5) must also be taken into account.

In relation to the average retailer, the degree of conflict in relation to the discount on rate price (19.65) was practically the same as the degree of conflict with the main retailer (20.43) and, in relation to other negotiation aspects with the average retailer, it was exceeded by atypical payments, payments for gondolas, advertising costs, deferred payment days and point of sale promotions, which appears to indicate that the average retailer copies the main retailer. The greatest degree of conflict was in atypical payments (23.08), advertising costs (21.60), payments for gondolas (20.67) and point of sale promotions (22.22). In any case, in these four aspects, the degree of conflict with the main retailer was 43.5%, 29.1%, 38.1% and 16.7% greater respectively than the average retailer. In other aspects in which the conflict with the main retailer was less, the comparison with the main retailer revealed huge differences in favour of the latter: listing charges (52.4%), payment for the use of distribution platforms (157.3%), cost of refunds (36.7%), restocking of shelves (126.3%).

In short, empirical data compiled by the Cruz Roche Study 1999 showed that the buyer power of the large retailers is considerably greater than that of average retailers and significantly, the large retailers do not use their buyer power to reduce the purchase price of the product, but to obtain commercial payments from their suppliers. On the other hand, average retailers, in spite of a relatively low buyer power, had started to shift their financial demands to different concepts other than the purchase price. This may be due to the same reasons that explain the oligopolistic conduct of the large purchasing centres: (1) the absence of price competition in the retail market also benefits medium-sized retailers, who do not consider it necessary to obtain lower transfer prices; and (2) the price transparency of the retail market would immediately give away an average retailer applying low prices and the large retailer would immediately demand the supplier to raise the transfer price applied to this competitor or reduce the transfer price applied to large retailers at least to the same level and probably to a lower price, a scenario which does not benefit either the average retailer or the supplier.

In the years since the publication of the Cruz Roche Study 1999, concentration in the retail distribution and procurement market has increased, so it must be concluded that the buyer power scenario, reduced competition in transfer prices and the imposition of commercial payments, described in the Cruz Roche Study 1999, continues or has been accentuated, given the greater concentration of the market. This scenario favours (1) supracompetitive transfer prices, because retailers do not have sufficient incentives to
negotiate discounts on rate price but on the other hand, they are able to secure all types
of payments for other “artificially” created concepts; and (2) the possibility of the
distribution oligopoly collectively dominating the manufacturer’s market through their
private-label brands.

Initially, as predicted in the theoretical FTC Studies 2001 and 2003, this scenario of
supracompetitive prices may represent mutual benefits for suppliers and retailers and,
therefore, enjoy the complicity of the former. On one hand, atypical payments or listing
charges represent a guaranteed income for the retailer and therefore, a barrier to entry
for new suppliers. On the other hand, higher transfer prices are automatically passed on
to the consumer due to the absence of price competition in the retail market, which
enables the product to be associated with a higher quality and avoid a reduction in the
intangible value of the brand.

The Cruz Roche Study 1999 and the Dobson Study 1999 show that in Spain, suppliers
and retailers may reach supracompetitive prices through tacit collusion, without
detriment to the use of facilitating practices such as those sanctioned in the French
Competition Authority’s Toy Retailing Resolution and the TDC Aceites 2 Resolution.

In the first case, the French Competition Authority condemned a large part of the toy
industry and retail sector (both specialised and daily consumer goods) for a joint
strategy aimed at increasing procurement and retail sale prices. The Resolution stated
that the large grocery retail outlets (Leclerc, Carrefour, Auchan, Cora and Casino,
identified as “GSA”) had standard commercial cooperation contracts applicable to all
suppliers, food and otherwise. These commercial cooperation contracts set out a series
of commercial services which varied frequently from year to year and also included new
incorporations\(^{399}\). According to some suppliers, the commercial cooperation contracts
were in reality adhesion contracts, to which new concepts were added and the suppliers
were obliged to accept\(^{400}\). In relation to the fixing of the purchase price and, indirectly,
the retail price, suppliers and retailers were mutually accused of its imposition\(^{401}\).
However, the French Competition Authority concluded that the case revealed numerous
indications of the existence of an agreement between suppliers and retailers in relation
to the retail prices of the toys sold in the Christmas period. These indications showed
that the GSA purchase price was used as a reference to fix the sales price, to which
Value Added Tax (VAT) was added. Large specialised retail outlets (identified as
“GSS”), independently of their purchase conditions, aligned their retail prices with

\(^{399}\) French Competition Authority Toy Retailing Resolution, section 62.
\(^{400}\) French Competition Authority Toy Retailing Resolution, sections 72-73, page 16.
\(^{401}\) French Competition Authority Toy Retailing Resolution, sections 524-525: “524. La plupart des
distributeurs mis en cause allèguent qu’à les supposer établies, les pratiques incriminées résulteraient d’un
comportement unilatéral des fournisseurs, ce qui serait insuffisant pour les qualifier d’entente. Ils
affirment que le mécanisme mis en place ne résulte pas d’une entente mais d’actions conjointes et
unilatérales des fournisseurs, les fournisseurs décidant seuls de leur tarif qui n’est aucunement négociable.
525. A l’inverse, les fournisseurs font valoir qu’à les supposer établies, les pratiques incriminées résultent
d’un comportement unilatéral des distributeurs. La plupart ajoutent qu’ils n’ont pas donné leur libre
consentement, les distributeurs disposant d’une puissance d’achat telle qu’ils imposent ce qu’ils veulent
en matière de coopération commerciale. Pour certains d’entre eux, la contrainte interdit la qualification
d’entente, en raison de l’absence d’autonomie de volonté des petits fournisseurs.”
those applied by the GSA, thanks to the intervention of the suppliers\(^{402}\). The French Competition Authority knew from the minutes of a meeting between Carrefour and the toy company, Lego, in which it realised that Lego was the only company to have adopted a payment reduction policy for commercial cooperation, which obliged retailers to “be paid” in accordance with the deductions on the rate price and bulk discounts. This implied an absence of control over sales prices, which led both companies to study the possibility of returning to a commercial cooperation policy\(^ {403}\). Therefore, the French Competition Authority reached the conclusion that there was an agreement fixing minimum sales prices between suppliers and retailers facilitated by means of three practices:

(1) The additional commercial payments to the retailer guaranteed the supplier that the purchase price became the minimum retail sales price (after adding VAT), due to the intervention of the regulation on below-cost retail price floor; (2) supplier communication to the retailer reminding that the invoice discount should not be used to offer lower prices than those of the competition; and (3) the publication of the recommended sales price\(^ {404}\). To guarantee the effectiveness of this concerted practice, both suppliers and retailers, often together, carried out systematic monitoring of retail prices to detect any deviations and adopt the opportune retaliation in both markets\(^ {405}\).

The French Competition Authority’s Toy Retailing Resolution was adopted a few months later in the TDC Aceites 2 Resolution and, although they concerned different products, there were many similarities in terms of the nature of the anti-competitive practices and the underlying economic incentives.

In the second Resolution, the TDC sanctioned SOS Cuétara and each of the retail distribution chains Carrefour, Caprabo, Alcampo, Eroski, Mercadona, Día, El Arbol and El Corte Ingles, the former for having established and the remaining for having accepted a minimum price for the sale of the Carbonell 0.4º and Koipesol brands to the public. The Resolution was based on a press article that picked up on some declarations by SOS Cuétara related to the fixing of a sales price of 2.7 euros throughout Spain for Carbonell 0.4º oil and likewise observed the sales price in practically all of the stores of the sanctioned retailers (starting at 2.69 euros and increasing in subsequent periods). The

\(^{402}\) French Competition Authority Toy Retailing Resolution, section 534.

\(^{403}\) French Competition Authority Toy Retailing Resolution, section 535: “A notamment été saisi dans les locaux de la société Carrefour, le compte rendu d’une réunion entre Lego et Carrefour tenue en 2002 commentant le choix fait par Lego en 2001 d’accorder moins de marges arrière, et donc d’amener les distributeurs à se rémunérer en partie par des marges avant, en soulignant que Lego est le seul fournisseur en France avec cette politique commerciale et que ce choix a eu pour résultat que les prix de vente sont « non maîtrisés ». Les solutions envisagées dans le document sont une garantie des marges avant, dont il est précisé qu’elle ne résout pas le problème de la « non maîtrise des prix de vente », d’une part, et le « retour d’une politique de marge arrière », d’autre part (cf. ci-dessus au paragraphe 216).”

\(^{404}\) French Competition Authority Toy Retailing Resolution, section 540.

\(^{405}\) French Competition Authority Toy Retailing Resolution, section 557 and, in particular, 558: “Les éléments du dossier font apparaître des actions de surveillance mises en œuvre par certains fabricants, soit directement à leur initiative, soit à la suite de plaintes leur ayant été adressées par des distributeurs ayant constaté que des concurrents pratiquaient des prix plus bas que les leurs. Des mesures de police ont également été mises en place par des distributeurs, soit directement à leur initiative, soit à la suite de l’intervention de fabricants leur demandant de relever leur prix de vente au détail.”
Resolution did not reveal how this agreement or concerted practice had been carried out, but the operation of the retail market brings us to the conclusion that the application of a minimum and uniform sales price may be achieved through oligopolistic interaction of the suppliers and retailers, or in other words, without the need for an express agreement but equally detrimental to consumers. This collusion occurs in the fixing of the purchase price and the sales price, which in the latter case is strengthened by the effect of the regulation that forbids below-cost sales.

In relation to the purchase price, the supplier may negotiate a high transfer price with the leading retailers (close to the desired sales price) in exchange for other commercial payments. This price will act as a reference for the remaining retailers, who do not have the power to demand discounts. In the case of Carbonell 0.4º oil, from the data provided in the Resolution, it may be estimated that prior to the implementation of retaliations against Carrefour, the transfer price applied to Carrefour, which probably enjoyed the most favourable conditions due to its size, by SOS Cuetara, was 2.78 euros/litre, which was automatically turned into a minimum sales price in accordance with Article 14 LORCOMIN. Therefore, Carrefour did not legally have a margin to reduce the price below the minimum sales price of 2.70 euros desired by SOS Cuetara.

In relation to the uniform sales price, although it may appear difficult for a supplier to be able to unilaterally control sales prices and retailers’ promotions, it may be achieved with the help of the competitors of the establishment which decides to lower their prices (“free rider”), who have refined systematic price control mechanisms. Therefore, it is no surprise that the Carrefour advertising leaflet which gave rise to the SOS Cuetara retaliation would have been detected and passed on to SOS Cuetara by one or several competitors, for the adoption of the opportune commercial retaliations, hence avoiding the cost of a retail price war.

In short, although the TDC ruled that there was a minimum price fixing agreement, SOS Cuetara could achieve the same objective by fixing a transfer price close to the desired sales price (2.7 euros), even at the expense of increasing commercial payments to its retailers. In fact, in its defence, the company alleged that the declarations included in the press article in reality referred to the purchase price and not the retail sales price.

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406 Aceites 2 Resolution, page 6: “In May 2003, Carrefour published an advertising leaflet to announce commercial offers at its hypermarkets for 10th to 18th June, among which was an offer of discounts of 0.18 euros in the purchase of three bottles of the Carbonell 0.4º brand, or in other words, 0.06 euros per litre over the fixed unit price of 2.69 euros. As a result of the announcement of this offer, Koipe sent Carrefour a fax on 9th June 2003 notifying an increase in its transfer prices of Carbonell 0.4 and Koipesol oils of 25% on what it had been offering up to that time, requesting 3.475 euros per litre for Carbonell 0.4º and 1.480 euros per litre for the Koipesol brand, which prevented Carrefour from fulfilling its published offer.” The TVDC has worked out the former transfer price for Carbonell 0.4º oil using a rule of three, which attributes a value of 125% to 3.475 euros (100%= 2.78 euros). If in reality the TDC referred to a discount of 25% over 3.475 euros (75%= 2.60625 euros), Carrefour only had a legal reduction margin of approximately 10 cents (3.7% of the retail price desired by SOS Cuetara of 2.7 euros) and its reduction of 6 cents per litre was equivalent to a reduction of 2.6% on the retail price desired by SOS Cuetara.

407 Aceites 2 Resolution, page 8. “[Representatives of SOS Cuetara] alleged at the Oral Hearing that the journalist had misinterpreted the declarations of Mr. S. and in reality what he had said did not refer to the sales price to the public, but to the transfer prices.”
Although it was not considered relevant in relation to the conduct object of analysis, the Aceites 2 Resolution established that SOS Cuetara was the leading supplier of brand oils with 20-30% market share in virgin oil and 30-40% market share in sunflower oil, whilst the retailers’ private-label brands held a 50-60% share in both markets. In this case, if the SOS Cuetara strategy of high prices could benefit it or not in accordance with the degree of loyalty (elasticity of demand) of its consumers, the retail benefit was assured in the form of less competition in sales prices, potential offsetting commercial payments by SOS Cuetara and a better positioning of their private-label brand oils in relation to those of SOS Cuetara.

From the above, it may be concluded that commercial payments reduce competition on transfer prices and, therefore, they may only be generated in a scenario of market power of the large retail companies in the retail distribution and procurement markets, aggravated, if appropriate, by the market power of some suppliers of leading brands. This situation is enough to consider commercial payments as anti-competitive agreements or abuse of dominant position that restrict competition and represent a reduction in the well-being of consumers in the form of supracompetitive purchase prices that are immediately translated into supracompetitive retail prices. On the other hand, economic discrimination of the suppliers’ brands compared to retailers’ private-label brands worsens anti-competitive effects in prices leading to reduced variety/quality of products available to consumers.

9.3.2 Anti-competitive Commercial Payments and Conditions

The Carrefour/Promodès Decision and the Cruz Roche Study 1999 proved that the competitive dynamics between suppliers and retailers has been turned into commercial cooperation, a term to describe payments to retailers unrelated to discounts on rate price and volume of sales.

Similarly, the Dobson Study 1999 analysed the Spanish procurement market and pointed out that commercial relations were made up of two phases. In the first phase, retail distribution pre-selects the candidates in accordance with generic criteria such as reference prices, brand leadership, guarantee of supply, etc. The second “more interesting” phase consists of preparing “templates” in which the retailer standardises the conditions of the commercial relationship with its suppliers. Typical conditions include: (a) listing charge; (b) payment for shelf presence; (c) payment for a preferential position on the shelf (gondola payment); (d) extensive payment periods, the duration of which is positively related to the size of the retailer; (e) return of unsold products; (f) promotional payments (for example, 3x2 campaigns); (g) payment for repositioning supplier’s products.

The configuration of the procurement contracts (equivalent to adhesion contracts) and the conditions included in them, led the Dobson Study 1999 to conclude that the

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408 Aceites 2 Resolution, Proven Fact 1.
409 Vid., supra, introduction to Section 9.3.
410 The Dobson Study 1999, page 118.
economic benefits obtained by retailers were not related to efficiency (volume of purchases, costs savings) but to buyer power. In particular, the Dobson Study 1999 identified practices specifically associated with the exercise of buyer power:

1. Payments for opening, refurbishing or extending stores:
   - The staff of a large retail company indicates that supplier XXX must pay a certain amount for each store opened in 1996.
   - In February 1996, Simago (Promodès) demanded 1% of its suppliers’ sales for 1995 due to economic problems and to finance the refurbishment of stores (El País, 18/02/1996).
   - A retail group demanded a contribution of between 10,000 and 50,000 pesetas for each refurbished store.
   - Alcosto (member of the IFA purchasing centre) demanded from its suppliers a retrospective discount on its sales for 1993 to finance its expansion policy (Cinco Días, 25/2/1997).

2. Retrospective discounts on sales for the previous year in the event of mergers, acquisitions (“wedding presents”) or anniversaries:
   - On purchasing Jumbo and Sabeco in March 1996, Alcampo claimed a retrospective discount from its suppliers of 1% of its sales for the previous year (Cinco Días, 4/11/1998).
   - In accordance with Unide and Mercat, Eroski demanded 3 million pesetas or a retrospective discount of 2% on its sales for 1997 from its suppliers, under the threat of delisting (Expansión, 3-2-98, Cinco Días, 4/11/1998)
   - On purchasing Simago at the end of 1998, Continente (Promodès) demanded from its suppliers a discount of between 1% and 2% of its total sales in 1998 (Cinco Días, 4/11/1998).
   - The IFA purchasing centre and another purchasing group demanded an anniversary payment in 1997 (Cinco Días, 5/2/1997).

3. Retrospective increase in discounts without compensation to suppliers.

4. Application of regressive discounts at the end of the year to suppliers that failed to reach the planned volume of sales.

5. Exclusive purchase agreements particularly in relation to retail brands.

6. Payment periods of up to 120 days when they were reduced to 9 and 12 days in other European countries and product rotation is between 7 and 20 days.

The Dobson Study 1999 concluded that this type of practices appeared to exceed the limits of equitable commercial relations and mentioned that the Monitoring Commission of the Commercial Retail Observatory had considered the retrospective discount demands by Alcampo (Auchan), Eroski and Continente (Carrefour) as unilateral
contract modifications without legal and constitutive effectiveness in addition to an abuse of a dominant position.\footnote{The Dobson Study 1999, pages 117-119.}

The recent episode of retrospective financial demands and “wedding gifts” on suppliers, involving Eroski following the purchase of Caprabo, confirms the persistence of these practices and their widespread character between the large retail companies:

“Tolls to be a supplier of the new group. Percentages over past sales volume and potential future turnover. Special payments, known as wedding gifts. These are some of the conditions that the Eroski Group management have demanded from suppliers in recent months, following the purchase of Caprabo… Although each case is different, according to data from one hundred companies, more than 90% of those surveyed indicate that they have been required to pay penalties for differences in purchasing conditions between Eroski and Caprabo. In 58% of the cases, the companies indicate that the penalties are retrospective from 2006. (...) Those surveyed also coincide in pointing out that all of the demands considered represent between 3% and 10% of the turnover. Industrialists indicate that acceptance of these conditions is essential to continue as a group supplier and their rejection is grounds for expulsion. (...) Indiscriminate payment demands on suppliers by retailers to be present in stores of the group in accordance with sales floor have represented a common practice in the past, particularly when there have been merger or integration processes. Nowadays, this mechanism to obtain additional resources to revenue for sales is maintained in the majority of cases, although there are variations to the general rule. (...) For Eroski’s management, what the group is doing is nothing new and it is common practice in retail in this type of situations. At Eroski it is considered that the acquisition of Caprabo has involved significant investment effort by the group which must lead to profit for all. The purchase is going to mean more activity for suppliers by increasing their sales capacity. For this reason, from Eroski it is understood that companies must offer more favourable transfer conditions to the group.” \cite{TVDC}\footnote{“Eroski ajusta cuentas a los proveedores”, El País, 23rd March 2008.}

The increase of commercial payments does not represent a mere transfer of income from suppliers to retailers without any effect on competition and consumers. The financing of these commercial payments must be applied to transfer prices, with the approval of the retail industry, which may pass these higher transfer prices on to consumers and at the same time indirectly favour the competitive position of its private-label brands. The increase in commercial payments and the subsequent increase in transfer prices and retail sale prices, fostered by incumbent retailers or suppliers or by both,\footnote{\textit{Vid.}, as an example of analysed concerted practices of suppliers and retailers: the Aceites 2 Resolution, the TDC Resolution and the French Competition Authority Toy Retailing Resolution, \textit{supra}, Section 9.3.1.} restrict competition in both markets and reduce the well-being of consumers.

In relation to the producers’ market, the anti-competitive effects of commercial payments may be varied. The exercise of buyer power to transfer excessive risks or unexpected costs on producers (for example, retrospective demands for discounts or...
other commercial payments), may reduce competition and efficiency of the production sector without generating any benefit for consumers.\textsuperscript{414} Finally, commercial payments may distort competition between producers, creating economic barriers to entry that favour established suppliers (incumbent) with leading brands.

In relation to the retail market, commercial payments guarantee the retailer fixed revenue that is not linked to its business management or sales strategy for the product. On the contrary, in some cases, the exercise of buyer power to transfer economic responsibility on risks or costs that only the retailer can control (for example, costs for refunded products by consumers, compensation for lower than expected sales, etc.) to the supplier may eliminate the “moral risk” of its conduct and generate inefficiencies.\textsuperscript{415} Finally, as detailed in the previous section, the increase in commercial payments implies an increase in transfer prices to offset them, which serves to fix a minimum retail sales price and reduce price competition in the retail market.

Commercial payments and conditions have been the object of criticism in the Competition Commission Studies 2000 and 2008 and in the Nordic Authorities Study 2005.\textsuperscript{416} The French Competition Authority Decision 2004 analysed their impact on trade, justification and anti-competitive effects.\textsuperscript{417} In relation to their growing importance in trade traffic, the Competition Authority established that discounts not included in the invoice and commercial cooperation payments have become more widespread. In particular, the Competition Authority referred to the data compiled by the Institut de Liaisons et d’Études des Industries de Consommation (ILEC) related to the percentage of the net price represented by commercial payments:

\textsuperscript{414} Competition Commission Study 2008, section 9.41: “However, when, in the hope of gaining a competitive advantage, grocery retailers transfer excessive risks or unexpected costs to their suppliers through practices involving retrospective adjustments to supply agreements or giving rise to moral hazard on the part of the grocery retailer, this is likely to lessen suppliers’ incentives to invest in new capacity, products and production processes. If unchecked, these practices, which are essentially a side-effect of competition between grocery retailers with buyer power, will be detrimental to the interests of consumers.” Vid., Competition Commission Study 2008, sections 9.44-9.46, in relation to retrospective agreement adjustments.

\textsuperscript{415} Vid., Competition Commission Study 2008, sections 9.47-9.49, In relation to excessive risk transfers and the implicit “moral risk”.

\textsuperscript{416} Nordic Authorities Study 2005, page 19: “Producers’ access to the shelves: Agreements between suppliers and retail chains have become more complex. Certain arrangements in such agreements may have foreclosing and other anticompetitive effects. The agreements may include discounts, loyalty bonuses, slotting payments, marketing support, gifts and similar favours, and the competition authorities will include all these factors in their assessments. Market participants should be aware that agreements or practices which can be shown to limit competition can constitute a breach of competition rules. Central to the assessment are the effects of the practise, not the label or form it takes.”

\textsuperscript{417} French Competition Authority Decision 2004, paragraph 3 : “Sur la base de ces constatations, l’UFC-Que Choisir saisit le Conseil de la concurrence des deux questions suivantes :

« 1° - Dans le cadre précédemment décrit, le développement des accords de coopération commerciale dans le secteur de la grande distribution non spécialisée générant des marges arrière peut-il avoir pour effet de limiter le libre jeu de la concurrence par les prix et ce au détriment des consommateurs ?

2° - Est-il possible, au moyen d’accord conclu sous l’égide des pouvoirs publics entre des producteurs, certaines de leurs fédérations professionnelles, des distributeurs et leurs fédérations, ainsi que des associations de consommateurs de fixer le niveau de ces marges arrière sans porter atteinte au libre jeu de la concurrence ?”

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The French Competition Authority admitted that the percentage varies considerably (10-50%) according to product categories and in relation to particular suppliers. On the other hand, “hard discount” companies do not demand commercial payments from suppliers nor do the remaining retail companies demand commercial payments in relation to private-label brands. In relation to its justification, the French Competition Authority considered that these practices did not correspond to services effectively provided to suppliers, but to retail buyer power and the lack of formal complaints is justified by the fear of being delisted. Retail buyer power is explained by the oligopolistic structure of the procurement market and retail distribution, strengthened by legal barriers which prevent the opening of rival large grocery retail outlets. The French Competition Authority confirmed that the role of the competition authorities is not to intervene in the distribution of economic income between producers and retailers, but to prevent anti-competitive conduct. In this respect, it established that the commercial payments and discounts may help suppliers and retailers reduce competition in terms of the purchase price and, indirectly, the sales price. In particular, suppliers may avoid the prohibition of minimum resale prices through negotiations with retailers for a high transfer price (minimum retail price threshold), in exchange for compensatory commercial payments. Vertical anti-competitive effects (minimum resale prices) may also generate collusive effects between rival producers, as well as exclusionary effects as a result of shelf saturation. These anti-competitive effects favour inflationist prices for consumers. Therefore, the French Competition Authority confirmed that the percentage varies considerably (10-50%) according to product categories and in relation to particular suppliers. On the other hand, “hard discount” companies do not demand commercial payments from suppliers nor do the remaining retail companies demand commercial payments in relation to private-label brands. In relation to its justification, the French Competition Authority considered that these practices did not correspond to services effectively provided to suppliers, but to retail buyer power and the lack of formal complaints is justified by the fear of being delisted. Retail buyer power is explained by the oligopolistic structure of the procurement market and retail distribution, strengthened by legal barriers which prevent the opening of rival large grocery retail outlets. The French Competition Authority confirmed that the role of the competition authorities is not to intervene in the distribution of economic income between producers and retailers, but to prevent anti-competitive conduct. In this respect, it established that the commercial payments and discounts may help suppliers and retailers reduce competition in terms of the purchase price and, indirectly, the sales price. In particular, suppliers may avoid the prohibition of minimum resale prices through negotiations with retailers for a high transfer price (minimum retail price threshold), in exchange for compensatory commercial payments. Vertical anti-competitive effects (minimum resale prices) may also generate collusive effects between rival producers, as well as exclusionary effects as a result of shelf saturation. These anti-competitive effects favour inflationist prices for consumers. Therefore, the French Competition Authority confirmed that the percentage varies considerably (10-50%) according to product categories and in relation to particular suppliers.

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<tr>
<th>Marge arrière en % du prix net facturé</th>
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<td>29%</td>
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Source: enquête Ille

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418 French Competition Authority Decision 2004, paragraphs 16-17.
419 French Competition Authority Decision 2004, paragraph 18.
422 French Competition Authority Decision 2004, paragraphs 33-34.
424 French Competition Authority Decision 2004, Section B.2. (La pratique de prix de revente imposé), paragraphs 41-44.
425 French Competition Authority Decision 2004, Section B.3. (La lisibilité des prix favorise la collusion entre marques concurrentes), paragraphs 45-50. The French Competition Authority mentioned its Decision 03-D-45 of 25th September 2003, confirmed by the Judgment of 21st September 2004 of the Court of Appeal of Paris, versus Texas Instruments and Noblet (Casio importer), as an example of collusion of solar calculator suppliers facilitated by the imposition of minimum sales prices.
426 French Competition Authority Decision 2004, Section B.4. (L’éviction des concurrents par la saturation du linéaire), paragraphs 51-55. The French Competition Authority mentioned its Decision 04-D-13, of 8th April 2004, sanctioning SOCIETE for an abuse of a dominant position consistent with having negotiated listing charges with retailers and discounts, which excluded other producers of Roquefort cheese from the shelves.
Authority concluded that an agreement aimed at reducing commercial payments will have favourable effects on competition and prices.\textsuperscript{428}

Slotting fees are a clear example of conduct with anti-competitive effects.\textsuperscript{429} The power of large-scale distribution in the retail market has turned their shelves into an “essential facility” for suppliers and access to them determines the success or failure of the suppliers. In other words, product competition in the retail market to satisfy the needs of consumers has become competition to access retail shelves. This scenario distorts the economic incentives of suppliers and large retailers to work for the good of consumers. On one hand, suppliers must concentrate their financial expenditure on ensuring product listing, rather than improving it or making it more attractive to consumers in terms of price. On the other hand, large retailers turn their shelves into a market to be monopolised through slotting fees, which may offset lower quality or higher prices for captive consumers. The ACCC Study 2008 includes graphic testimonies by retailers in this respect. The leading Australian retailer (Coles) considers access to its shelves as a service whose economic value is represented by slotting fees.\textsuperscript{430} However, the leading chain of franchised retailers (FoodWorks) rejects their use because it would favour financially stronger suppliers over the rest, regardless of the appeal of their products for

\begin{itemize}
\item \textsuperscript{428} French Competition Authority Decision 2004, page 18: “89. À l'inverse, un accord conduisant à une baisse du niveau des marges arrière devrait plutôt favoriser la concurrence, à la fois sur le marché amont et sur le marché aval, pour des raisons symétriques. Le transfert des marges de la distribution de l’arrière vers l'avant, qui devrait résulter d’un tel accord, serait un frein sérieux aux pratiques anticoncurrentielles décrites plus haut (cf. supra, §42 et suivants). En effet, la pratique de prix de revente imposé devrait devenir plus difficile, dans la mesure où les distributeurs auraient plus de mal à soutenir une marge avant nulle et un prix de vente aligné sur le seuil de revente à perte. Ainsi, ce transfert des marges vers l’avant devrait réintroduire un espace pour une concurrence par les prix entre distributeurs. Dans ce contexte où les fournisseurs ne maîtriseraient plus le prix de revente de leurs produits, la collusion entre marques concurrentes deviendrait bien plus difficile.”
\item \textsuperscript{429} Professor Dobson associates three anti-competitive effects with slotting fees, Dobson, “Exploiting buyer power…”, op. cit., page 557: “Possible distortions to competition may work at three levels. First, there may be a discriminatory effect between own-label goods and branded goods if one category has to pay the fee while the other does not. Second, a possible foreclosure effect may arise if certain brands are able to bid in such a way as to squeeze out rivals, which might be deliberately facilitated by retailers eager to maximize the size of these payments. Third, a competition-dampening effect regarding retail prices may arise when producers are able to raise the prices they obtain to compensate for the one-off payments, which retailers then pass on to consumers through higher retail prices.”
\item \textsuperscript{430} ACCC Study 2008, page 339: “Coles wants products sold in its stores to be successful. Given that every product stocked by Coles occupies space that could be used to stock a different product, the choice of one product over another represents an opportunity cost to Coles. Consequently Coles needs a compelling reason to stock that product generally in the form of a reasonable degree of certainty that sufficient volumes of the product will be sold.”
\end{itemize}
consumers. Another retailer that has recently entered the market with a low price strategy (Aldi) describes the anti-competitive effects of slotting fees:

“In dealing with suppliers, we do not charge them slotting, or any other fees, in order for them to obtain product exposure. We consider such arrangements to be inconsistent with our low cost approach and incompatible with supplying our own exclusive brand products. Ultimately the customer will carry the cost of slotting fees in the form of higher prices and they may also miss the opportunity to obtain the best value product. With slotting fees and other supplier funded promotional activity, customers are not offered the best product, but the product that is able to pay for placement.”

In short, commercial payments to retailers, as well as unfair or discriminatory commercial conditions imposed on suppliers are likely to constitute anti-competitive agreements or abuse of dominant position. In relation to the identification of these payments and conditions, it must be highlighted that although they may commercially be given a wide array of names and descriptions, what is important from the competition law perspective is their nature and anti-competitive effects. 52 practices were provisionally identified in the Competition Commission Study 2000 which could give rise to competition problems. Later, the Competition Commission proceeded to a more detailed analysis of 42 practices, classifying them into 8 types: (A) payments or concessions to access shelves; (B) imposition on supplier of conditions related to other retailers; (C) application of differentiated standards on suppliers; (D) imposition of excessive/unjustified risks; (E) imposition of retrospective conditions; (F) restriction of supplier access to the market; (G) imposition of charges and transfer costs on the supplier; (H) imposition on suppliers of goods and service providers chosen by the retailer.

The following practices were identified in Category (A):

1. Charges for listing
2. Charges for slotting.
3. Charges for extending the product range or extension to new stores.
4. Charges for in-store product promotion for one year.
5. Discrimination between suppliers, regardless of size, to secure discounts.
6. Formal or informal notification to the supplier of delisting, withdrawn after securing a discount for the product in question or others.
7. Require the supplier to contribute to specific promotions (gondola, advertising, etc.) in excess of the cost incurred by the retailer.

431 ACCC Study 2008, page 339: “It is generally understood that unless a supplier pays the slotting fee (by whatever name that might be given) to the MSC, the products do not get on the shelf. FoodWorks does not have ranging fees. This [payment of slotting fees to MSCs] generally means the larger suppliers get ‘ranged’ as they have the better ability to pay. This leads to less competition at supplier level as smaller players disappear.”

432 ACCC Study 2008, page 339

433 Vid., Annex 12.7 “Retailers’ practices in their dealings with suppliers (United Kingdom)”.

434 Competition Commission Study 2000, page 98.
The following practices were identified in Category (B):

1. Supplier exclusivity requirement (in manufacturer’s brand products).
2. Pressurise a supplier not to supply or to increase prices applied to another retailer with lower prices.

The following practices were identified in Category (C):

1. Sale by a retailer of a product on which the labelling indicated, or might be taken to indicate, that the product was of British origin when the consumable originated from another country.

The following practices were identified in Category (D):

1. Require global or in-anticipation discounts.
2. Require retrospective discounts that were not set out in the contract.
3. Require compensation for failure to meet expected sales or profit.
4. Require payments to match prices of another retailer.
5. Require payments for product waste management.
6. Require suppliers to make payments or buy back unsold products or fail to pay for them once acquired.
7. Failure to compensate supplier for costs incurred through errors or order changes.
8. Levy charges for consumer complaints in excess of the costs incurred by the retailer, or that were not related to a product fault or for which written information was not provided to the supplier.
9. Delisting a supplier who fails to deliver agreed product quantities owing to weather conditions.
10. Seek information from a supplier on the supply and pricing applied to other retailers.
11. Require the supplier to offset lower than expected sales in a promotion initiative.
12. Require the supplier to bear the costs of surplus special packaging or labelling for a promotion when sales do not meet expectations.

The following practices were identified in Category (E):

1. Debit supplier invoices without their agreement.
2. Delayed payments outside agreed contractual periods, or by more than 30 days from the date of invoice.
3. Require the modification of product quantities or specifications previously agreed with a supplier with less than 3 days notice without financially compensating the supplier for any losses it incurred.
4. Require the supplier to respect the price negotiated for a certain volume despite purchasing less volume than agreed.
5. Purchasing bulk volumes at a promotional price to resell at a higher price without compensating the supplier.
6. Debit invoices or claim for payment for expenditure on promotions in access of the amount agreed, or which have not yet taken place or which have not been documented or justified by the retailer
7. Instigation by the retailer of a promotion campaign without the knowledge of the supplier and retrospective requirement for its funding.
8. Require the supplier to reduce purchase price in relation to retail and marketing initiatives already contemplated or included in the supply contract.

The following practices were identified in Category (F):

1. Delisting of a supplier in favour of the nearest private-label brand equivalent.

The following practices were identified in Category (G):

1. Require payments from existing or potential suppliers for buyer visits, presentation of products and packaging, consumer panels, market research, or to provide hospitality to the retailer’s employees.
2. Levy deductions or penalties for discrepancies that have not been identified in the supply contract or where written information has not been provided.
3. Require wedding gifts, anniversary or refurbishment payments.
4. Introduction of a change to any aspect of the supply chain procedures which could be expected to increase a supplier’s costs without compensating the supplier or sharing any savings achieved.
5. Impose charges on suppliers for not meeting product specifications even though the problem might have originated at the store (mishandling, incorrect or excessive storage).
6. Require suppliers to predominantly fund the cost of retailer promotion campaigns (for example, 2x1).
7. Require suppliers to incur costs of bar-code changes or reduced price labels.
8. Invite suppliers to make contributions to charitable organizations or events.

The following practices were identified in Category (H):

1. Require supplier to purchase goods or services (transport, pallets, packaging, etc.) from designated companies particularly when the retailer has received a commission from the third party and the supplier has not been informed.
2. Invite third parties not to offer their services to a supplier that has ceased to work with the retailer.

However, the Competition Commission Study 2000 did not consider it necessary to comment definitively on practices A.6 and A.7; B.1 and B.2; D.9 and D.10; E.1 and E.6; F.1; G.2 and G.5; and H.2, because their occurrence, widespread application or in some cases, their anti-competitive effect had not been proven\(^ {435} \). In its final analysis, the

\(^ {435} \) Vid., Annex 12.8 “Retailers’ practices against the public interest (United Kingdom)”. Practices considered to adversely affect public interest should inspire the “Office of Fair Trading” to adopt a Code of Practice, vid., Section 10.2 and Annex 12.9 “Code of Practice (United Kingdom).
Competition Commission did not consider it necessary to impose conditions in relation to practices A.4, A.5 and G.8. The following practices were among those that were initially identified for subsequent analysis, but finally were not analysed:

1. Require payment from a supplier in return for it being appointed to manage a category.
2. Allow a supplier responsible for category management to charge other suppliers for shelf space.
3. Refusal to provide sales data to some suppliers whilst providing such data to the category manager.
4. Require a supplier to reduce discounts offered to another retailer.
5. Charge for quality audits carried out by the retailer above the actual costs.
6. Apply the most favoured client clause to suppliers.

With the exception of the legitimate delisting of a product, which are analysed herein, all practices that were objected to final evaluation and the six aforementioned practices which were excluded from final evaluation may imply abuse of a dominant position, an anti-competitive agreement and even unfair competition in breach of the Competition Act.

For example, in relation to practice B.2 (pressurising a supplier to increase prices applied to another retailer), the Competition Commission became aware of an incident between a retailer (Tesco) and a bakery regarding lower prices observed in a rival store supplied by said bakery, but it was considered to be an isolated case as a result of a misunderstanding and its widespread occurrence could not be proven. However, there appears to be no doubt of the anti-competitive nature and appropriateness of a sanction if it is proven to exist. For example, in 2001 the ACCC considered that one of the leading Australian retailers (Safeways) had breached the competition regulations by applying a delisting policy on bakeries whose products were sold at a lower price than those applied in its stores, by any other retailer that was not one of the other two large retailers (Coles and Franklins). The delisting of the bakery ended when the rival retailer ceased to offer its products at a lower price to that of Safeways, supposedly due to pressure from the bakery. Safeways alleged that the delisting only occurred when the bakery failed to offer a transfer price equivalent to that received by the rival retailer, although during the appeal it was proven that Safeways had only requested lower transfer prices in some cases and not in others. In a similar case, the Israel Competition Authority has initiated a criminal inquiry against one of the leading

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437 Competition Commission Study 2000, page 109: “Tesco told us that it appeared that following customer complaints, its local store manager, who was no longer with the company, had spoken directly to the bakery about the price difference between Tesco and a nearby store. The bakery subsequently contacted Tesco’s Buying Manager to clarify the situation. The Buying Manager, who had been unaware of the situation at Trdegar, assured the bakery that Tesco would continue to carry its products, and would in no way attempt to dictate its trading terms with other retailers.”

distribution companies in Israel (Shufersal), in relation to the delisting of some products that had been offered at a lower price in rival establishments.\(^{439}\)

The ACCC Study 2008 has also included informal reports from suppliers in relation to many of the practices considered to be anti-competitive by the Competition Commission Study 2008 and has concluded that despite the efficiencies that may be attributed to them, they may generate anti-competitive effects: unilateral and retrospective modifications to the contract\(^{440}\), listing charges\(^{441}\) and slotting fees\(^{442}\), long payment periods\(^{443}\), commercial conditions (including discounts) aggregated for various products in the case of large suppliers\(^{444}\), most favoured client clause\(^{445}\), transference of

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\(^{439}\) “Israel investigates leading supermarket”, Global Competition Review, 27\(^{th}\) January 2009.

\(^{440}\) ACCC Study 2008, page 338: “The inquiry heard evidence that, on occasion, the MSCs [major supermarket chains] attempt to recover some of the costs of product deletion, including the cost of marking down the product to clear stock from the supplier even though the ownership of the product has already passed to the MSC under previously agreed supply terms. The MSCs leverage the need for a supplier to maintain a distribution channel into a request for payments, which amounts to a unilateral variation of the supply terms. The ACCC considers that such practices are consistent with buyer power and lead to an inappropriate risk allocation in some circumstances.”

\(^{441}\) ACCC Study 2008, page 341: “The evidence presented to this inquiry is consistent with both efficiency and anti-competitive rationales for shelf space fees. The supply agreements provided to this inquiry on a confidential basis show that not all suppliers pay fees for new product introduction. This evidence is inconsistent with assertions that such fees seek to recover the costs of new product introduction and are thus efficient. Instead, it may be that such fees are mechanisms for buyers to extract additional payments from suppliers who do not have significant countervailing power.”

\(^{442}\) ACCC Study 2008, page 341: “Furthermore, the evidence indicates that some suppliers are able to negotiate more favourable shelf space locations. Such arrangements may have an efficiency basis and make it easier for consumers to find the leading products they wish to purchase. However, the arrangements may also reinforce existing brand strength by making it harder for weaker brands to attract consumers’ attention and thus compete with leading, or more profitable, brands.”

\(^{443}\) ACCC Study, page 348: “The MSCs clearly use their bargaining power in this sense when they are able to do so. The ACCC received confidential information that indicates that the MSCs have approached suppliers to advise that they intend to extend the periods for payment so as to standardise their terms. The ACCC understands that to reduce the settlement periods, suppliers will be required to provide an additional settlement rebate. The ACCC understands smaller suppliers have been told that if they do not either provide longer payment terms or additional rebates, they may lose their supply contract. Given the volumes of product that flow through the MSCs, and the distinct lack of alternative routes of sale particularly for dry grocery products, de-listing could quite possibly result in the overall failure of the product (and potentially the supplier company).”

\(^{444}\) ACCC Study 2008, pages 348-349: “In recent years, the MSCs in particular have moved from an approach of having a number of individual terms and rebates, to bundling or combining rebates... The trading term document often does not clearly explain exactly what factors have been taken into account in determining the bundled rebate... It appears from the documents provided to the ACCC that the vast majority of suppliers who currently operate on a bundled term basis with the retailers are large manufacturers.” The ACCC has shown that the large suppliers do not have any problems with this practice so its in-depth analysis has been considered unnecessary. However, this practice is equivalent to a tie-in or bundling and, depending on the circumstances, it may produce excluding effects for other suppliers.

\(^{445}\) ACCC Study 2008, page 349: “The vast majority of trading terms provided to the ACCC contain a provision which requires suppliers to acknowledge they are providing the product to the retailer at the best possible price in the marketplace”
risks and costs to suppliers, and favourable handling of private-label brands in relation to suppliers’ brands.

9.3.3 Category Management

In commercial distribution, a “category” is a group of products or services that consumers perceive to be inter-related and/or substitutive in the satisfaction of a need. Category management perceives the categories as strategic business units, establishing a selection, presentation, price and promotion strategy for each category, in order to get the most out of each one aggregately. Traditionally, retailers have entrusted the management (or co-management) of some categories to the main supplier, known as the “category captain”. The captain receives information from the distributors’ outlets on consumer habits and the effects of promotions, shelf positioning, discounts, etc. within the category. Information from the distributors’ sales and other sources (specialised consultant’s studies, etc.) enables the captain to recommend the brands that will make up the category and their position on the shelves (planogram), as well as their promotions and prices.

Participation of the supplier in category management has awakened the interest of competition authorities, particularly in the United States. This practice has been considered equivalent to the “fox guarding the henhouse”, due to the inherent conflict of interest between the distributor, wishing to satisfy the demand of its consumers, and the supplier, wishing to maximize its own profit (not that of the category as a whole).

The FTC Study 2001 on slotting fees and other forms of commercial cooperation also tackled category management. The expert group created by the FTC recognised the potential efficiencies of category management but considered that the participation of a supplier as a category captain may also generate some exclusive or collusive effects: (1) The captain may access confidential information on competitors in the category; (2) The captain may give incorrect advice to the retailer in order to exclude its competitors in

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446 ACCC Study 2008, page 350: “Evidence has also been received from suppliers that costs associated with the supply of the products are being pushed back along the supply chain and ultimately incurred by suppliers. One example of such conduct, raised on numerous occasions during the course of this inquiry, is the introduction of reusable plastic crates for fresh fruit and vegetable products supplied to the MSCs. Many suppliers have indicated that the introduction of the crates has resulted in increased costs. Growers have noted that each of the MSCs use different reusable crates.”

447 Vid., ACCC Study 2008, Section 16 (The role of private label products), analysed infra Section 9.3.3.

448 Leo S. Carameli, “The anti-competitive effects and antitrust implications of category management and category captains of consumer products”, Chicago-Kent Law Review, Volume 79-3, 2004, pages 1316-1317: “Intuitively the Category Captain relationship is like the “fox guarding the henhouse”. Choosing which products to sell and how to price, shelf, and promote them is a job that most logically and traditionally belongs to the retailer itself, and not a manufacturer. After all, the manufacturer is concerned primarily with its own brands and has a vested interest in seeing competing products fail. The retailer, on the other hand, has a vested interest in maximizing overall profit in its stores, regardless of brand. It seems, then, that there is a fundamental difference between a Category Captain’s business goals and those of the retailer it serves. One logical conclusion, therefore, is that the retailer is the more appropriate party to perform category management tasks.”
the category from the market; (3) The category captain facilitates concerted practices among suppliers in the category; and (4) The category captain facilitates concerted practices among retailers. The expert group agreed that the risks to competition could be minimized if the retailer made its own category management decisions or the supplier acting as captain created “firewalls” to stop the flow of confidential information between suppliers and retailers. Soon afterwards, an American Federal Court ordered a category captain (“US Tobacco”) to pay the highest compensation ever awarded at that time (1,050,000,000 $) to a competitor (“Conwood”) for having carried out the anti-competitive practices described in number (2) above. In 2004, an Article by the FTC Commissioner, Thomas Leary, reflected a more critical view of the participation of captains in category management, highlighting their potential horizontal anti-competitive effects. In particular, he considered that a captain could avoid exclusionary practices by opting for oligopolistic practices that benefited all suppliers and retailers at the detriment of consumers:

“The fundamental premise of our antitrust laws is that consumers are ultimately best served by inter-brand competition that is uncoordinated, unstable and unpredictable. If rival producers were to combine and rationalize their sales and promotion efforts, they would get indicted for it. I question whether it is any less harmful when a designated “captain” acts as a czar for the group - even, or particularly, if the captain makes some effort to accommodate the interests of its competitors. The market will simply be less dynamic in the long run, something that is difficult to measure but reasonable to predict. (…). I personally continue to have grave concerns about certain aspects of category management. “Foreclosure” of competitors may not be the most important issue, but rather rationalization of inter-brand competition to achieve market stability.”

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449 FTC Study 2001, page 54: “The consensus of workshop participants was that category management can produce significant efficiencies that will benefit retailers, manufacturers and consumers. In some cases, category management, in particular the use of category captains, can also provide an opportunity for anticompetitive conduct. While these concerns are not so inherently serious as to call into question the entire practice of using category captains, the panel agreed that care should be exercised: (1) that the captain does not improperly receive confidential information about its rivals’ plans; (2) that the category captain does not bias its advice to the retailer in such a way that it effectively excludes or significantly disadvantages its competitors; (3) that the category captain does not orchestrate horizontal collusion among retailers; and (4) that the category captain does not orchestrate horizontal collusion among manufacturers. The potential for anticompetitive conduct is minimized when retailers make their own category management decisions, require category captains to establish firewalls, and limit the competitive information that goes to the category captain.”


451 Thomas Leary, “A Second Look at Category Management”, Conference, 17th May, 2004, [http://www.ftc.gov/speeches/leary/040519categorymgmt.pdf](http://www.ftc.gov/speeches/leary/040519categorymgmt.pdf), pages 2-3: “Some insist that category management should be analyzed as a vertical restraint, presumably because category managers are primarily suppliers to, not competitors of, the retail customers they advise. I believe the matter is more complex. In my view, the nature and context of the communication should control, not the formal relationship between the parties. In short, advice on the resale of the manufacturer’s own product should be viewed as vertical; advice on the resale of a competitor’s product should be viewed as horizontal.”

452 Thomas Leary, “A Second Look at Category Management”, op.cit., page 6. Vid., also on page 6: “A category captain is likely to have an interest in a regime that not only preserves its leading position but also avoids competition that will be “disruptive.” The captain would likely prefer to have its special
In 2005, following an investigation into commercial relations between suppliers and large retailers carried out in 2000-2002, the Israeli competition authority adopted its “Israeli Final Decision 2005” regarding ten anti-competitive practices in its Preliminary Report 2003453. In this way, a leading supplier (+50% of the market share) could not exercise any influence over the leading retailers in relation to their commercial relations with a rival supplier or their private-label brand strategy. In particular, leading suppliers may not negotiate agreements with exclusive effects (shelf capacity, group discounts, etc.), or influence the prices at which their products or those of their competitors are sold. There should not be any exchange of information between the supplier and a distributor in relation to prices and the volume of the supplier’s product sold by rival retailers. On the other hand, the leading distributors should manage their categories independently and they are obliged to pre-notify their category management agreements to control their lawfulness.

On the other hand, in spite of the fact that suppliers called for the intervention of the Israeli Competition Authority to control the potential abuse of buyer power by leading distributors and, in particular, the favourable treatment of private-label brands compared to those of suppliers, the competition authority did not consider it appropriate. In relation to buyer power, the authority considered it difficult and costly to control commercial disputes between suppliers and retailers although it declared that it would not hesitate to apply the competition regulations if the supplier and retailer practices restricted competition in terms of price454. In relation to private-label brands, at that time, the authority did not consider that they represented a risk to competition455. Effectively, the competition authority has recently initiated a criminal investigation

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454 Israeli Final Decision 2005, page 42: “I am not unmindful of the potential anticompetitive effect of the retail chains’ buying power. In the past, I sent the retail chains an explicit warning not to exploit their power to stifle price competition in the retail-chain segment of the industry. Furthermore, the chains’ buying power was, and remains, an important consideration in the review of mergers in the chain-store industry, since merger law does not distinguish between a merger that creates monopoly power and one that creates monopsony power.”

455 Israeli Final Decision 2005, page 44: “By the same token, there is no gainsaying that a competitor’s control of the arena of competition with its rivals may create a fertile environment for competitive concerns. I do not believe, however, that the private-label phenomenon reflects significant concern about competition, at least for the time being. Antitrust law is geared to preventing the creation or reinforcement of market power. A competitive scenario in which retail chains attain market power in private-label products by taking over the shelves is improbable.”
against a large Israeli distributor in relation to a possible delisting of suppliers whose products had been offered at a better price by competitors\textsuperscript{456}.

In the European sphere, category management has not been analysed in-depth. The European Commission limited itself to pointing out the potential risks to competition as a result of cooperation between suppliers and retailers in the supply chain in its Green Paper on Vertical Restraints\textsuperscript{457}. The Competition Commission Study 2000 mentioned the inherent conflict of interests in the participation of the leading supplier in category management\textsuperscript{458} and realised the exclusionary effects reported by other suppliers\textsuperscript{459}. In its provisional conclusions, the Competition Commission had considered that three practices related to category management could generate anti-competitive effects, although they were not included in the final evaluation: (1) Assigning category management to a supplier in return for an economic payment; (2) authorising a supplier responsible for category management to demand payments from other suppliers in order for their products to be included on the shelves; and (3) refusing to give suppliers sales data whilst it is given to the category manager. However, in its recommendations for the adoption of a Code of Practice, the Competition Commission recommended including a prohibition on the discrimination of sales data given to the captain compared to the rest of the suppliers and prohibited the captain from deciding on the shelf space assigned to a product\textsuperscript{460}. The Competition Commission Study 2008 paid more attention to the

\textsuperscript{456} \textit{Vid., supra} Section 9.3.2.

\textsuperscript{457} Commission, Green Paper on Vertical Restraints, COM (96) 721 final, 1997, paragraph 51: “From a competition perspective it is important to note that the shift from traditional arms' length relationships towards relationships based on cooperation may weaken positive competitive forces within the supply chain, such as intra-brand competition. In addition, there is a greater potential for the domination of such a supply chain by one of its members than a traditional distribution channel, resulting in the imposition of functions and costs on the other operators in the chain (as opposed to the situation where all independent operators freely assign and integrate their functions on the basis of arms’ length negotiation). This is an important factor for EC Competition policy, particularly where the party responsible for the management of the supply chain is a large undertaking and the other parties are small and medium sized enterprises who are economically dependent on that supply chain, given that it may result in a substantial weakening of intra-brand competition and/or foreclosure of the supply chain to other producers in the same or related markets”.

\textsuperscript{458} Competition Commission Study 2000, section 11.70: “This has problems, though, since determining the optimal profitability of the category for a retailer involves assessing the profitability of each line stocked and might result in removal of some of the category captain’s own brands or products. This could generate conflicts of interest and requires, therefore, a considerable degree of honesty and objectivity from the category captain.

\textsuperscript{459} Competition Commission Study 2000, section 11.73: “Some suppliers raised concerns about category management. First, participation in category management may give privileged access to sales data to one supplier, compared with its competitors. Second, only the very largest suppliers would have sufficient resources to participate in projects simultaneously with all their major customers, giving them a potentially significant advantage. Some smaller suppliers were concerned that category management, and consequent consolidation practices by the main parties, were reasons for losing business, and could also act as a barrier to entry, especially for secondary and tertiary brands.”

\textsuperscript{460} Competition Commission Study 2000, Conclusions, section 2.593. The Code of Practice, included in Annex 12.9, does not include any of these recommendations. The Nordic Authorities Study 2005 also tackled category management from a theoretical point of view, including the conclusions of the FTC Study 2001.
participation of captains in category management and referred to the four types of anti-competitive effects described in the FTC Study. In the empirical sphere, category management was analysed in two product categories (fruit and yoghurts) and a multi-product supplier, confirming the existence of (1) contacts, even bulletins, between category suppliers, with the agreement of the distributor and, in some cases, its participation in these contacts and meetings; (2) price recommendations from suppliers to retailers in both categories, and by the multi-product supplier; (3) concentration of the role of the tree fruit category captain in the same supplier by all of the large retailers with the exception of one; (4) information from a supplier to all its suppliers regarding its prices in relation to the prices of the distribution leader (Tesco) over a period of time; (5) provision of “extremely detailed” information from the multi-product supplier to its retailers on the strategies of other retailers; (6) so-called objective quantitative analyses which appear to respond to an attempt at promoting its own products, even by the captain; (7) listing and delisting recommendations by the captain. According to the Competition Commission, these practices may facilitate a restriction on competition and may only be substantiated in the absence of effective competition in the retail distribution market, although it has not been proven.

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461 Competition Commission Study 2008, Section 8, sections 8.13-8.18 (section 8.19 also includes commercial communication between suppliers and retailers) and Annex 8.1.
463 Competition Commission Study 2008, sections 8.16-8.17.
464 Competition Commission Study 2008, Appendix 8.1, paragraph 22. In the category of yoghurts, a supplier promotes its products in relation to the margins that the retailers will obtain if they follow its pricing recommendations (Annex 3, paragraph 4).
466 Competition Commission Study 2008, Appendix 8.1, Annex 1, paragraph 14.
470 Competition Study 2008, Appendix 8.1, Annex 3, paragraphs 15-17. The Competition Commission considers that incorrect recommendations may be made subtly, by manipulating the planogram without the need to expressly suggest delisting. However, it considers that the distributor may react if its relative position is weakened. The Competition Commission omits the possibility that the captain for several retailers may use the same strategy with all of its retailers and achieve its objective if none of the relative positions are weakened, as proven by the Federal Court in the Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002) case.

471 Competition Commission Study 2008, section 8.18: “The degree of interaction among suppliers arising from category management is a cause for concern. Given the level of interaction among suppliers, and the large amount of information that is passed between retailers and suppliers, there is an opportunity for competitive harm. Absent collusion downstream, a retailer would have the incentive to prevent collusion between suppliers. Category management might be a means by which collusion of this type is facilitated, but in the three product categories that we reviewed, we did not find evidence of this taking place.” This conclusion seems difficult to justify in light of the evidence of the exchange of all types of commercial information in Appendix 8.1 and the flow of information from suppliers to retailers on prices and promotion campaigns of competitors, described in section 8.19: “Our review of emails between buyers at Tesco and Asda and their suppliers for the five-week period between 18 June 2007 and 22 July 2007 provided some instances of suppliers providing information to retailers in relation to rival retailers (see Appendix 9.1). The review consistently showed suppliers providing information to retailers on the current retail price at which competitors were selling goods, as well as details of current product promotions at competitors. There were also some examples where suppliers offered information to grocery retailers regarding the future plans of competitors. Our review did not, however, involve a search...
The possible use of category management to facilitate collusive practices in the procurement market and retail distribution has also been under discussion at the OECD meeting on facilitating practices in oligopolies\(^{472}\). In particular, the Danish Competition Authority has been informed of a category management agreement with a distributor whose market share is around 20% of the Danish retail market and has expressed serious concerns about its compatibility with competition legislation, in view of the high concentration of retail distribution\(^{473}\). Similarly, the South African Competition Authority has indicated that it is investigating a possible abuse by a category captain and the Norwegian Competition Authority has ordered Nielsen to provide its data on historic prices in a more aggregated manner and more frequently\(^{474}\).

### 9.3.4 Private-label brands

Over recent years, leading retailers (Carrefour, Mercadona, Eroski, Auchan and el Corte Inglés) have adopted an aggressive policy to promote products under their own brand (“private-label brand”). Leading retailers have thus become one of the main competitors of the manufacturers in the retail distribution market. In Spain, private-label brands have grown significantly to the point that they are now at the top of the ranking of European countries.

According to the estimate of Professor Dobson, in 2001, the market share in value of private-label products was 17% in Spain, a moderate penetration compared to other countries\(^{475}\).

<table>
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<th>Country</th>
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<th>Value (2) %</th>
<th>(1) / (2) %</th>
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\(^{473}\) Annex 12.11.1 “Facilitating practices in Oligopolies (OECD): Note by the Danish Competition Authority”.

\(^{474}\) Annex 12.11.2. “Facilitating practices in Oligopolies (OECD): Discussion on category management”.

\(^{475}\) Dobson, “Exploiting Buyer Power…”, p. 551.
However, according to the ACCC Study 2008, the penetration of private-label brand in Spain had increased to 26% of the market share in terms of values by 2005.

**Chart 16.1 Value shares of private labels in retail sales, various countries, 2005**

The 2008 Nielsen Yearbook data show a general upward trend of the private-label brands and leadership in various product categories, where it has reached a position of dominance within each establishment. Likewise, according to the most recent data from the specialist consultant “Information Resources Inc. (IRI)”, between September 2007 and the same month of 2008, the brands backed by the major retailers grew by over 8% up to 32% of total sales of the sector, compared to 29.6% a year ago. Therefore, Spain is the country with the highest penetration of private-label brands ahead of countries such as Germany (31%), the Netherlands and the United Kingdom (27%), France (26%); and Italy (13%). If the Eroski private-label brand represented approximately 30-35% of its sales in 2007, the presence of the Mercadona private-label accounted of 35% of its sales in 2008 and it has just announced a large-scale delisting of...

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476 Vid., Annex 12.12, “Market share of the private brands (Nielsen, 2008)”. The market shares are much higher in some product categories and only have a marginal presence in the drink sector, probably due to the presence of industrial property rights and secret know-how.

477 “Las marcas blancas se imponen en el supermercado español”, El Mundo, 25.01.2009. The press article stresses that unlike countries such as Germany, the “hard discount”, traditionally associated to a private-label brand, it is not highly developed in Spain, and attributes the leadership of the private-label brand in Spain is due to the high retail concentration: “El gran liderazgo de la marca blanca en España está directamente ligado a la fuerte concentración de la distribución minorista. Tres grandes grupos: Carrefour, Eroski y Mercadona controlan ya el 59% de toda la alimentación envasada que se vende en el país, según datos de la consultora Nielsen”. A subsequent IRI estimate (updated on 28 December 2008) estimate calculated the penetration of private label brand to be 34.8% of the market.

478 “Eroski, una cesta familiar”, El País, 20.05.2007: “En la actualidad, las marcas propias suponen el 29% de la facturación del grupo, pero se elevan hasta casi el 35% si se tienen en cuenta otros productos correspondientes a líneas especiales de productos, también bajo la marca Eroski.”
manufacturer’s brands, which will result in a consolidation of its own private-label brand\textsuperscript{479}.

From a perspective of competition law, the authorities have noted that the introduction of private-label brands can have ambiguous effects on competition\textsuperscript{480}. On the other hand, the vertical integration of the distributor can generate greater efficiency (transaction cost saving) and competition on the manufacturers' and retail distribution market (product differentiation). On the other hand, vertical integration places the retailer in a privileged position (both judge and jury) compared to the other manufacturers, and thus becomes a double agent that may be to the detriment of the products of the manufacturer and beneficial to their own\textsuperscript{481}. Retail distribution has the last word in relation to the presence of a manufacturer’s brand product on its shelves and, in particular, its packaging and price. This power may tempt retailers to implement a gradual and subtle strategy to replace the brand products of the manufacturer. For example, the ACCC Study 2008 detected that some retailers have rejected promotional payments offered by the suppliers in order to protect the sales of their private-label products\textsuperscript{482}. The ACCC considers that these types of practices by companies with market power are an abuse of a dominant position\textsuperscript{483}.

\textsuperscript{479} “Mercadona expulsa a las grandes marcas de sus supermercados”, Cotizalia, 26.01.2009: “Según explican desde la propia compañía, se han establecido tres criterios -rotación, necesidad y duplicidad- para discriminar la llegada de productos a sus puntos de venta”. The duplicity seems to refer to the existence of private-label products replacing branded products.

\textsuperscript{480} ACCC Study 2008, p. 371: “As noted previously, the competitive effects of buyer power are ambiguous. However, a number of potential competition concerns associated with buyer power arising from private label products have been raised at this inquiry, including: retailers may allocate premium shelf space to their own brands in preference to competing suppliers, which could affect competition at the retail level; branded products may be de-listed to make way for private labels, which could affect competition at the supply level; private labels may weaken incentives for product innovation; the impact of ‘copycat packaging’ of private labels.”

\textsuperscript{481} Dobson, “Exploiting Buyer Power…”, op. cit., p. 537: “Brand producers face an additional problem when retailers act as potential "double-agents" and seek to develop own-label products in direct competition with producer brands while still serving as the brand producer’s customer. The leading point here is that retailers have unilateral control over stocking, shelf allocation, and retail pricing. Thus, they are able to promote own-label products at the expense of manufacturers’ brands (e.g., by better shelf placement and judicious use of prices) and there is little direct response that brand producers can make (in view of their inability to control in-store activity or boycott a major retailer. The threat to a branded goods supplier is twofold: the retailer can, if it so chooses, undermine the supplier’s branded products, e.g., by placing them in less well-located shelf positions, raising their retail prices, or even substituting them for its own-label products (which can be given the appearance of offering better value to consumers). This can afford the retailer a large and credible bargaining lever over the branded goods supplier while allowing it to promote its own franchise with consumers, using own-branded goods to reinforce the retailer’s brand image in consumers’ minds as the “consumers’ champion.”

\textsuperscript{482} ACCC Study 2008, p. 372: “Confidential evidence presented to this inquiry suggests that a desire to protect sales of private labels does sometimes lead a retailer to maintain branded prices despite the suppliers’ wish to price more competitively through the provision of additional promotional payments. However, this evidence is not necessarily inconsistent with the MSCs’ position that not every promotional proposition that is put to them is accepted.”

\textsuperscript{483} ACCC Study 2008, p. 377: “The inquiry has heard evidence indicting that MSCs generally accept increased promotional funding and pass through the funding to retail prices, although in limited circumstances this funding had been declined. The ACCC notes that there are risks of breaching s. 46 of the Act if promotional funding from a rival supplier of a proprietary brand is rejected in order to protect a private label product. Section 46 of the Act is directed at preventing firms with substantial market power
In a competitive market, any retail company that so wishes is free to integrate vertically and compete against the manufacturers under the same conditions to provide the consumers with what they are looking for, even if this involves delisting products of a supplier to make room for their branded products. Given the lack of an individual or collective dominant position in the retail and supply markets, the efficiencies arising from an upstream vertical integration of the distribution can offset the disappearance of some suppliers from their shelves and result in greater competition on the manufacturer’s market and, indirectly, on the retail market. However, in the case of a collective or individual dominant position, vertical integration may lead to abusive conducts and agreements that restrict competition and are to the detriment of consumers. In particular, the assessment of effects on the competition of the private-label brands cannot be dissociated from the distribution practices relating to the transfer price and commercial payments. The increase of the commercial payments makes the transfer prices (that have to finance the commercial payments) less competitive and, automatically, affects the retailer’s retail prices. In turn, this price increase provides a wide margin to position private-label brands at a lower price. These private-label brands imply the disappearance of secondary branded products or their transformation into private-label brands and consolidating the leverage enjoyed by retailers over branded goods suppliers. The greater leverage may be used to seek better commercial payments, which must be offset by better transfer prices, which finally facilitates the growth in volume and/or in value of the private-label brands.

Even though the mutual consolidation of a dominant position on the retail market and on the supply market had so far been associated with the exclusion of other distributors, the appearance of private-label brands and the risk of excluding suppliers that the consumer prefers over the private label brands may significantly aggravate the antitrust effects linked to the commercial payments and terms. Indeed, even though they may distort competition, by generating entry barriers that protect the leading brands, there is from taking advantage of that market power for the purpose of eliminating or substantially damaging a competitor, preventing market entry or deterring or preventing competitive conduct in a market.”

484 The Article 82 CE Working Document, Section 5.3, pp. 21-23, also differentiates between horizontal and vertical abuses. Equally, the Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (“Vertical Merger Guidelines”, Official Journal C 265 of 18/10/2008, lay down in paragraph 59: “In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines, first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals, second, whether it would have the incentive to reduce its purchases upstream, and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market.”

485 Kesko/Tuko Decision, paragraph 152: “Moreover, recent developments in retailing will enhance the buying power of the merged entity. In particular, private label development is a leading element in the power wielded by retailers vis-à-vis branded everyday consumer goods producers. It enables retailers, who are inevitably privy to commercially sensitive details regarding the branded goods producers’ product launches and promotional strategies, to act as competitors as well as leading customers of the producers. This privileged position increases the leverage enjoyed by retailers over branded goods producers.”
a risk with private-label brands that all competition is eliminated from the supply market\textsuperscript{486}.

In short, the companies that enjoy a collective dominant position on the retail distribution and supply markets may subcontract the production of a product under their private label (partial integration) but must guarantee equal opportunities for the branded products as its own brands, so that it is the decision of the consumer that determines the success and performance of a product. This is the only way to ensure the wellbeing of the consumers, thus preventing the major retailers from unilaterally deciding the products that must be purchased.

The measures adopted to avoid oligopolistic conduct in the form of unjustified commercial payments and terms and the ensuing increase of the transfer prices must likewise generate equal opportunities between the branded products and the products of the retailer in relation to their retail distribution\textsuperscript{487}.

First of all, the disappearance of unjustified commercial payments and terms must ensure that the manufacturers of branded products are in a position where they can fiercely compete in the transfer prices against the manufacturers of private labels\textsuperscript{488}.

Secondly, equal opportunities must be ensured with regard to category management (range, shelving, etc.). In the past, the antitrust authorities prioritised possible exclusionary abuses by the captains and the collusive effects of the participation of suppliers in category management. The presence of private-label brands on the shelves was non-existent or symbolic, and the retailer was therefore not considered as a competitor of the supplier. At best, the odd author highlighted the risk of the category captain abusing its position to exclude the private label of the manufacturer itself from

\textsuperscript{486} Extreme hypothesis already put forward in the 1999 Dobson Study, p. 4: “The contrary view to this benign picture is that buyer power may ultimately damage economic welfare. Although it may lead to lower prices in the short run, there may be longer term detrimental effects resulting from buyer power. In the context of retail grocery markets the effects may be to force manufacturers to reduce investment in new products or product improvements, advertising and brand building, and eliminate secondary brands and weaken primary brands while strengthening the position of private-label (store) brands, and in the process cause wholesale prices to small retailer to rise, further weakening them as competitors. In other words, buyer power may have the effect of considerably distorting both retail and producer competition. The fear is that ultimately competition in food retailing would be between a small number of fully integrated retailers supplying private-label only. This would mean reduced choice and, depending on the nature of competition between these exclusively dealing integrated retailers, possibly higher prices.”(underlined by the TVDC)

\textsuperscript{487} Vertical Merger Guidelines, paragraph 60: “A vertical merger may affect upstream competitors by increasing their cost to access downstream customers or by restricting access to a significant customer base. Customer foreclosure may take various forms. For instance, the merged entity may decide to source all of its required goods or services from its upstream division and, as a result, may stop purchasing from its upstream competitors. It may also reduce its purchases from upstream rivals, or purchase from those rivals on less favourable terms than it would have done absent the merger [footnote: For instance, in cases involving distribution, the merged entity may be less likely to grant access to its outlets under the same conditions as absent the merger.]”

\textsuperscript{488} Vid., Dobson, “Exploiting buyer power…”, p. 557. One of the three antitrust effects of requiring listing payments and other commercial payments is its discriminatory effect, given that the private label brands do not have to face those payment required by the retailer to its suppliers.
the market. However, private-label brands currently hold significant market shares in numerous categories and intensely compete with the branded products for space on the shelves and to become a preferred product with consumers. Therefore, another risk that is potentially more dangerous to competition is the risk of the category captain developing collusive or excluding strategies: there is now the risk of retailers abusing their market power to exclude the branded product to the benefit of their own label and to reduce the competition between the brands of the category, without generating any benefit for the consumers. In a highly competitive retail environment, management of the category by the retailers themselves is a guarantee that the range, presentation and prices would meet the preferences of the consumers. However, in an imperfect competitive environment characterised by the leverage of the major retailers (collective dominant position) and the presence of private-label brands, category management by the retailers has the same or greater risks of conflict of interest and sub-optimum competitive results than category management by a supplier with leverage.

In short, category management must be aimed at fulfilling its original purpose, i.e. to increase the performance of the category and not to increase the profitability of the branded product (or of a specific supplier). Increasing the category’s profitability reflects increased well-being for the consumer while the increased performance of the private-label brands reflects a reduction of the well-being of the consumer and, as it also implies a transfer of revenue from more efficient brands to the private-label brand, i.e. a reduction of the total well-being (sum of the well-being of the consumers and the well-being of the producers). Therefore, in the same way as the category captain, retailers with leverage must carry out objective and non-discriminatory category management in order to abide by competition law.

This objectivity can be presumed if the category management is carried out by a department different to the one that manages the own-label brand or an independent expert, whose “expert” report could likewise act as a benchmark to assess whether the principles of objectivity, non-discrimination and competence are respected by the retailer.

Likewise, other conducts that may be considered abusive and contrary to competition legislation are the following:

1. Unjustified requirements of strategic plans or R&D plans and the requirement to notify plans excessively beforehand, along with confidential information about new

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489 Robert A. Skitol, “Consolidation and the Private Label Sector: Antitrust Enforcement Policy Developments”, American Antitrust Institute, 2002, p. 20: “To the extent that a brand manufacturer in its role as category captain persuade its retail partners to abandon their plans to price or promote private label goods aggressively against the branded products, or there is any coordination of the plans in these areas, the parties could easily be found to be engaged in illegal collusion”.

490 Thomas Leary, “A Second Look at Category Management”, op. cit., p. 4: “Experienced counselors also point to complicating factors, which present potential horizontal issues even more clearly and which may therefore be particularly dangerous for retailers. These include situations where a manufacturer and dealer discuss sales strategy for both the manufacturer’s brand and the retailer’s private label brand, which compete head-to-head.”
products, which could give a competitive edge to the private-label brand of the retailer.\textsuperscript{491}

2. Using the image of the supplier to benefit the competitor’s private-label brand (for example, “copycat packaging”).\textsuperscript{492}

3. Linking the commercial relations of the branded product to the production of private-label brands.\textsuperscript{493}

4. Rejecting a price reduction financing proposal by the supplier aimed at promoting a product, in order not to harm the price competitive position of the private-label brand.

\section*{9.4 Conclusions of the supply market}

The analysis of the Spanish supply market of everyday consumer goods reveals the existence of a collective dominant position of the three leading companies on the retail distribution market: Carrefour, Mercadona and Eroski. Each of them reach or are near to the "viability threshold" (20\% of the suppliers’ sales) above which the Commission considers that it is economically impossible to replace a retailer, and clearly surpasses the "difficulty threshold" (5-10\% of the suppliers’ sales) that provides negotiating power over the suppliers and has been used by the Competition Commission to verify the existence of a collective dominant position.\textsuperscript{494} In addition to a high concentration, the supply market meets the conditions that make oligopsonic conduct possible: transfer price transparency, powers of persuasion regarding competitive conducts and the inability of other companies and the suppliers to counteract collusive conduct.\textsuperscript{495}

Even though the acquisition of a collective or individual dominant position cannot be penalized, any abusive display of it is can result in administrative proceedings being taken. In this case, Carrefour, Mercadona and Eroski have resorted to different strategies to reduce the competition between them on the supply market and benefit their private-label brands to the detriment of the suppliers’ brands. If the retail distribution market is characterised by perfect or merely effective competition, the companies should compete intensely when negotiating the lowest prices on the supply market to be able to pass them on to their customers. However, once the retail retailers have assumed their mutual dependence and the advantages associated to a less

\textsuperscript{491} ACCC Study 2008, p. 376: “The inquiry has been told that suppliers typically share their new product plans with MSCs at annual reviews. This may give MSCs a head start in being able to copy those products compared with other rivals. However, suppliers have not raised concerns about the competitive effect of the requirement to share new product plans in advance with MSCs, nor has the inquiry heard evidence that suppliers have reduced their product innovation as a consequence.”

\textsuperscript{492} ACCC Study 2008, p. 371.

\textsuperscript{493} ACCC Study 2008, p. 371: “An additional competition concern considered by this inquiry is whether MSCs tie the allocation of shelf space for proprietary brands to the winning of a private label contract. The ACCC considers that if this were the case, retailers may be able to extract excessive discounts for private label contracts from suppliers, leading to higher barriers to entry at the supply level.”

\textsuperscript{494} \textit{Vid.}, the EC origin of the different “thresholds” in Section 9.1. \textit{supra} and a discussion of the treatment of the “thresholds” in different jurisdictions and its relevance for the Spanish market in Section 9.2.1. In particular, the Competition Commission Study 2000 set the collective dominant position threshold in 8\% of the supply market.

\textsuperscript{495} \textit{Vid.}, Section 9.2.
competition when it comes to prices the oligopolistic strategy par excellence on the supply market is to substitute competition when negotiating prices with suppliers by a quasi-monopolistic generating of income by means of equivalent commercial conditions and payment. This reduction of competition in the purchase price does not have a negative impact on the oligopolistic price structure of the retail market and allows them to generate quasi-monopolist revenue in the form of commercial payments from suppliers and greater penetration of their own brand that is not necessarily justified by greater quality/price. This collusive strategy has a double negative impact on the well-being of consumers. First of all, less competition in the retail purchase prices is reflected (automatically, due to the effect of the predatory pricing regulations) in less competition in the retail prices. Second of all, abusive commercial conditions and payments imposed on the suppliers and the favourable treatment of their private-label brands generates a restriction of competition on the manufacturers’ market and less variety/quality of products.

On the other hand, the reduced market shares of the Auchan and El Corte Inglés vertical distribution do not seem to justify the scope of the collective dominance of these companies at the moment. Likewise, even though the IFA and Euromadi central purchasing agencies have significant market shares, their non-integrated structure (horizontal) and the freedom of their members to out-contract seems to limit its competitive advantages to negotiating advantageous purchasing prices (discount for volume), without being extended to the commercial conditions and payment or to the favourable treatment of the own-label brand.

Therefore, and in line with the principle of minimum intervention, the TVDC considers that implementing the remedies suggested in this Report and, in particular, the changes to the Carrefour, Eroski and Carrefour conduct towards its suppliers, will be sufficient to generate competitive dynamics in the supply market that avoid any abuse not only by the three leading companies, but also by their competitors (Auchan, El Corte Inglés, IFA, Euromadi, etc.). However, if subsequent penalising procedures or studies reveal that some of these competitors have market leverage and carry out any of the conducts forbidden to Carrefour, Mercadona and Eroski, it could be included in the group of companies that enjoy a collective dominant position.
10 Remedies

The necessary remedies to solve the competitive failings identified in the retail distribution and supply market must guarantee free competition without questioning the size of the companies or their efficiencies. In the past, the difficulty to arbitrate efficient solutions against the legal barriers, tacit collusion and leverage was wielded to justify the passivity of the antitrust authorities in this field. However, Competition Law must be seen as a comprehensive organisation system of free competition on the market that may and must tackle oligopolies and the retail distribution market, as various specialists in this field have argued496.

The intervention of the antitrust authorities must be guided by the principle of minimum intervention, which demands a proportionality of the chosen remedies. Therefore, the suppression of legal restrictions, controlling abusive conduct or those facilitating tacit collusion must be prioritized and only exceptionally should the cases of unilateral monopolisation of local market be tackled. Therefore, the words of the former TDC must be recalled relating to the legal barriers aimed at promoting competition that cause conflicting effects:

“Incorrect regulation may lead to problems equal or greater than those it seeks to solve. The possible market failures do not justify discrimination and protection of one type of retail distribution compared to another if it prejudices competition. In fact, the correction of external diseconomies and of the possible geographical monopolies should be performed with a thorough but simple legislation, which is quick and not costly, that reduces the discretionary approach as far as possible, which will allow the positive external effects of the grocery retail outlets to be used, will minimise the negative effects and will reduce, instead of consolidating, the power of geographical monopolies, by regulating in favour of competition and, when all said and done, of the consumers”.497

On the other hand, given the interrelation between the distribution and supply market, it is necessary on act on both markets to avoid the antitrust dynamics of the “snowball effect”.

496 Dobson, “Retailer Buyer Power in European Markets”, op. cit., pp. 27-28: “Existing policy measures and law have thus far had little effect in restricting retail buyer power. Economic dependency laws have generally been ineffective in protecting suppliers subjected to opportunistic behaviour by powerful retailers. Competition authorities have only in a few cases sought to prohibit retailer-induced vertical restraints. Moreover, authorities have generally shown little appetite for blocking retailer mergers thereby allowing for further retail consolidation. The present EC competition framework, represented by EC Treaty Articles 81 and 82, remains the most effective way of tackling abusive buyer power. Yet in regard to interpretation, dominant and jointly dominant retailer positions should be seen as emerging not simply from overall market shares but relative to the extent of supplier dependency. Similarly, in regard of buyer-induced vertical restraints account needs to be taken of not just the individual share of each retailer employing these restraints but their collective share (given that cumulative effects are likely to exacerbate anti-competitive outcomes).”

497 Caprabo/Alcosto Report, p. 68.
10.1 Remedies on the retail market

This Study proposes the following remedies: (A) suppress legal restrictions (entry barriers, predatory pricing legislation and shop opening hours legislation), (B) forbid antitrust conducts of the companies and the authorities in terms of land use, (C) forbid the most privileged customer clauses, (D) forbid conducts that prevent new independent business forms online, and (E) carry out a more demanding analysis of the retail distribution mergers.

10.1.1 Suppression of legal restrictions

Legal barriers, due to their perceptive nature, are the main factor restricting competition on a market. In the Spanish sphere of commercial distribution, both national and international entities have repeatedly complained that legal entry barriers and rise in the number of commercial establishments, in particular large grocery retail outlets, are the main inflationary and distortionary competition factors. Likewise, commercial legislation that forbids predatory pricing restricts price competition and facilitates tacit collusion.

10.1.1.1 Commercial legislation contrary to the Service Directive

Regional and national commercial legislation have been one of the most restrictive competition legal systems in Europe for many years. The coming into force of the Service Directive shall suppress the legal restrictions founded on protectionist and economic criteria. Therefore, legal restriction to the entry and expansion of commercial establishments and, in particular, leading grocery retail outlets shall only be acceptable if they meet pressing reasons of general interest and are applied in a proportionate and non-discriminatory manner.

Antitrust authorities may control the justification of the adopted legal restrictions and their proportionality, by preparing, where applicable, reports with recommendations. In this field, the authorities shall act in coordination with the Commission, by adopting insofar as possible a uniform interpretation of the Service Directive.

The TVDC has proposed the setting up of a work group with the CNC and the other authorities with competence in the autonomous communities to monitor and control national and regional legislation that has an impact on the setting up of grocery retail outlets. In particular, the TVDC proposes to denounce administrative measures, including Sectorial Territorial Plans (PTS), which establish quantitative limits, even for urban development reasons. Likewise, the TVDC proposes to gather the opinion of the Commission in relation to the justification and proportionality of the primacy principle of urban over periurban stores.
10.1.1.2 Antitrust urban planning

Currently, obtaining a second commercial licence in an autonomous community does not guarantee that a major establishment will be set up or expanded. Local urban planning may prevent or delay the execution of the project for many years and thus acts as a legal barrier that is as harmful as the second commercial licence.

The TVDC propose that the work group of the antitrust authorities, automatically or in response to complaints from the companies in questions, controls urban planning that may restrict competition in the sphere of unjustified or out-of-proportion retail distribution. The work group should offer its cooperation and advice to local councils to facilitate the compliance of the provisions of the Service Directive and LDC. As a last resort, the CNC throughout Spain and the autonomous antitrust entities in their geographical sphere of action may lodge appeals with the administrative litigation courts against the commercial and urban planning that fail to respect the Services Directive and free competition.

10.1.1.3 Below-Cost Pricing Legislation

Article 17 of the Spanish Unfair Competition Act 3/1991 (Ley de Competencia Desleal – LCD), of 10 January, establishes that any sale made under cost, or under the acquisition price, shall be deemed to be unfair in the following cases:

“a) When it is likely to cause consumers to make errors about the price level of other products or services of the same establishment.
b) When it discredits the image of a third-party product or establishment.
c) When it is part of a strategy aimed at eliminating a competitor or group of competitors from the market.”

The wording of Article 17 of the LCD requires rigorous conditions to forbid predatory pricing, which is fully justified because the freedom of prices and, in particular, the freedom to offer attractive prices to consumers is a fundamental aspect of the free market. However, Article 14 of the Spanish Retail Trade Act (Ley de de Ordenación del Comercio Minorista – LORCOMIN) has relaxed these conditions so that (1) the acquisition price according to the invoice or (2) the replacement price if is lower than the former or (3) the production cost of the private-label brand indirectly establish the minimum resale price to reach the price of a significant competitor or "meeting competition defence":

“1. Notwithstanding what is envisaged in the previous article (referring to the freedom of prices), articles cannot be offered or sold to the public at a loss, outside the situations regulated in Chapters IV and V of Heading II of this Act, unless the retailer that does so aims to reach the prices of one or more competitors with the capacity to significantly affect sales or when they are perishable articles which will shortly become unusable. In any event, the provisions of the Unfair Competition Act should be respected.

498 Vid., Section 10.1.1.1
2. For the purposes set out in the previous section, it shall be considered that there is predatory pricing: when the price applied to a product is lower than the acquisition price on the invoice, after having deducted the proportional part of the discounts that appear on the invoice, or the replacement price if lower than the former, or the effective production cost if the article had been manufactured by the retailer itself, increased, by the relevant indirect tax rates applicable to the operation…”

The introduction of Article 14 of the LORCOMIN seeks to: (1) Eliminate the estimate drawbacks of Article 17 LCD, (2) Establish an objective ban on predatory pricing, (3) Include such antitrust conduct within the disciplinary power of the Authorities, (4) Have special administrative penalties for recidivism and (5) Ensure the companies cannot bypass the legal obligation by using purchasing middlemen (Additional Provision 6 of the LORCOMIN)”.

Likewise, the ban on deducting all those discounts that do not appear on the purchase invoice gets rid of all the discounts or consideration paid by the supplier to the retailer with regard to commercial cooperation. Therefore, the price according to the invoice is always necessarily greater and therefore increases the minimum resale price.

In short, the predatory pricing regulation envisaged in the LORCOMIN does not protect the consumers or the competitors (the LCD and the LDC are sufficient for that) and, to the contrary, facilitates collusion between suppliers and retailers about the resale price to the detriment of the consumers. This outcome may be implicitly observed in the Judgment of the Castilla-La Mancha High Court of Justice of 28 February 2001 (TSJ Castilla-La Mancha). This Judgment was on an appeal lodged by Eroski with regard to an administrative sanction for a predatory pricing in one of its hypermarkets in Ciudad Real.

Eroski alleged that it had negotiated different discounts with the supplier prior to the issuing of the invoices and that, in any event, its non-inclusion on the invoice was the responsibility of the supplier. The Castilla-La Mancha TSJ categorically rejected this argument, exhibiting an in-depth knowledge of supplier-distributor relations and the purchasing power associated with commercial payments:

“On the other hand, the Retail Trade Act 7/1996, of 15 January, can be seen to seek to narrow the notion, by marking it out very precisely, by ensuring that it cannot be diluted by standard commercial practices in the retail and sale sectors performed on a large-scale or by major companies that can benefit from their position on the market to eliminate other competitors as they can negotiate more beneficial conditions - when they do not impose on – with suppliers from the point of view of corporate profits. Thus, the second section clearly establishes for the purposes pointed out in the above section, predatory pricing shall be considered to exist, when the price applied to a

product is less than the acquisition price according to the invoice, after having deducted the proportional part of the discounts that appear on the invoice, or the replacement price if lower than the former, or the effective production cost if the article had been manufactured by the retailer itself, increased, by the relevant indirect tax rates applicable to the operation. Negative and positive delimitation that in turn prevents discounts not included in the invoice from being taken into consideration, as the appellant intends and which is the basis of its claim.

Strictly speaking, there are not discounts but rather conditions or benefits arising from a long-standing commercial relations that implies complex services between the parties that exceed what is normally classified as a sale of goods to enter into different contractual legal concepts arising from the wealth of experience of modern business trade, which contemplate the so-called rebates or discounts at the end of a period and which are applied to a specific volume of sales, taking into account other aspects such as promoting or advertising products or services. It is believed that this type of commercial practice between suppliers and retailers and dealers must not be to the detriment of protecting the consumer to the point that the very precept in its point 3 orders that "Retributions or discounts of any type that mean compensation for services rendered shall be not be included for the purpose of the price deductions referred to in the above paragraph".

The latter is a compelling provision that adds to the rejection of the demand thesis insofar that strictly speaking discounts are not being invoked that to a greater or less extent have an impact on the price of the products from the point of view of the interests of the consumer, but rather the profits arising from complex business relations, which must not harm the correct formation of the contractual consent to the detriment of the consumers and users regarding the correct level of the prices of a specific proprietor or establishment, in such a way that this type of practices must be solely computed for the purposes of the overall profit of the business activity taken in its modern and widest sense." (underlining of the TVDC)

Finally, the Castilla-La Mancha TSJ also refers to the impossibility of amending the invoices accepted by the recipient after a certain period of time:

“In any case, the Law - after it was amended by the Social, Administrative and Fiscal Measures Act 55/1999, of 29 December, not applicable to the alleged case on trial due to the commission date of the facts – very precisely regulates the amendment of invoices to avoid fraud and the hiding of these collusive practices, pointing out that “The invoices shall be understood to be accepted in all their terms and acknowledged by their recipients, when they have not been amended within twenty-five days of their issue. Should they not be accepted, there is an additional period of ten days to correct them and issue the relevant rectified invoice. For the purposes of what is envisaged herein, any amendments contained in rectified invoices issued after the above time periods shall not be taken into account.”

Even though the legal assessment of the Castilla-La Mancha TST is irreproachable, the oligopolistic competitive structure of commercial distribution is conducive to this legislation having a lethal effect on competition. In fact, the lack of competition in commercial distribution and the leverage of the main companies facilitate less
competition (tacit collusion) with respect to the transfer prices reflected on the invoices, which in turn serves as a mechanism to set supracompetitive resale prices for all competitors.

In other countries, the anticompetitive effects of the predatory price legislation have also been stressed and measures have been introduced aimed at suppressing them:

In Ireland, a report by the Irish Government (2005) concluded that the predatory price legislation increased the prices of consumer goods, which led to its derogation in 2006. In its subsequent assessment report, the Irish Competition Authority concluded that the abolition of predatory pricing legislation had had positive effects on the prices of consumer goods 501.

In France, the Attali Report 2008 stressed that predatory pricing legislation had allowed retailers and suppliers to negotiate commercial payments not linked to the transfer price, thus reducing the price competition and proposed that it be derogated 502.

Therefore, the TVDC will put forward that Article 14 of the LORCOMIN be suppressed during the parliamentary hearing of the Bill which amends the unfair competition legal system to improve the protection of consumers and users, in the interests of transposing the Unfair Commercial Practices Directive 2005/29. It should therefore be stressed that the mandatory Report by the General Council of the Judiciary (CGPJ) for the bill to amend the unfair competition legal system to improve the protection of consumers contains the same recommendation 503.

10.1.1.4 Shop opening hours restrictions

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502 2008 Attali Report, p. 145 : “Dans le but d’assurer une concurrence plus loyale dans la vente au détail, notamment à l’égard du commerce de détail, la loi du 1er juillet 1996 sur la loyauté et l’équilibre des relations commerciales, dite «loi Galland», a défini avec précision le seuil de revente à perte. Si les pratiques de vente à perte ont bien été dissuadées de façon plus efficace qu’auparavant, la définition du seuil de revente à perte a également permis aux distributeurs de négocier leurs rabais, remises et autres prestations de «coopération commerciale» sur un tarif «horsfacture». Ces différentes réductions de prix constituent la «marge arrière» des distributeurs. Ne pouvant bénéficier aux consommateurs (puisqu’elles ne sont pas retranscrites sur le prix de facturation du fournisseur et que leur intégration dans le prix de vente au consommateur constituerait une pratique de vente à perte), elles ont contribué à une diminution de la concurrence entre distributeurs et entre fournisseurs, et donc à une hausse significative des prix.”
503 CGPJ, Report for the Bill to amend the unfair competition legal system to improve consumer protection, pp. 23-24: “El espíritu y fundamento de la prohibición del art. 14 [LORCOMIN] se encuentra en la protección de los consumidores, proscibiendo prácticas que pudieran resultar engañosas para sus intereses. Toda vez, que el Anteproyecto presentado introduce en la redacción de la Ley de Competencia Desleal la definición general de los actos de engaño y de las conductas que por engañosas con los consumidores han de reputarse desleales, parece adecuado reconsiderar la posible duplicidad que pudiera crearse, con el consiguiente riesgo de confusión en la determinación de la legislación aplicable, así como la inseguridad que introduce en los operadores jurídicos, sin olvidar la ocasión que ofrece para la incoherencia normativa.”
The legal restrictions related to opening hours and days restrict competition and are to the detriment of consumers. The TVDC recommends the suppression of the legislative restrictions in this field, in line with the recommendations of the Commission and of the TDC/CNC. Likewise, the TVDC considers that the agreements between companies aimed at limiting their business autonomy in relation to those competition parameters are likewise restrictive on competition and must be forbidden if the companies do not justify their beneficial effects for competition and the consumers. In the same way, the articulation of these agreements by means of collective wage agreements with trade unions in no way implies the legalisation of these restrictive agreements and, to the contrary, they may extend the defaulting liability also to the trade union signatories of those agreements.

10.1.2 Antitrust conducts with regard to land market

Beyond its being referred to as a strategic or economic barrier when analysing mergers, the possible saturation of the retail distribution market at a local level has not been analysed by the antitrust authorities. However, the special characteristics of the land market are likely to facilitate oligopolistic and monopolist practices on the retail distribution market. Economists, such as Mason Gaffney, have stressed that controlling optimum locations leads to market power. The land market is also not very transparent and its transferability is rigid which leads to an excessive amount of land being amassed for future activities, leading to a distortion of the market and economically inefficient aggregate results. In the sphere of retail distribution, Mason Gaffney stresses that the excessive amassing of land destroys the economies of cost

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504 Vid., likewise, appearances of the Chairman of the TVDC on 10 April and 30 June 2008 before the Commission of Industry, Trade and Tourism of the Basque Parliament.
505 Vid., Carrefour/Promodès Report, p. 61.
506 Adam Smith was the first to identify the monopolist nature of land ownership, when he pointed out that the owner of the land receives monopolist income as it is not related with the cost of its generation, but rather with the capacity of the lessee to pay them, Adam Smith, The Wealth of Nations, Edinburgh, 1776, Book 1, Chapter XI. Likewise, various economists working in the field of “land economics”, have stressed the special nature of land in relation to other economic assets (capital and work, including Henry George, founder of the Georgista school. A defender of the free market and against commercial protectionism and legal monopolies, however, they considered that land ownership (natural resources) and monopolist income extracted from it was economically inefficient, generated poverty and, therefore, of being socialized by means of fiscal measures: Henry George, Progress and Poverty, Doubleday, Page & Co., New York, 1879. There are also industrial economy specialists who have studied the strategic advantages of the “location” of the sites on imperfect competition markets, referred to in Section 8.2.4.1.3 supra.
508 Mason Gaffney, “Land…”, op. cit., p. 77: “A common precaution against sticky markets is buying excess land for possible future expansion. This behaviour makes markets that much more sticky. It is one of those things that necessitates and justifies itself, considered in the aggregate: it is self-aggravating and self-authenticating. When anyone buys and holds for his own future expansion, everyone has to: it is a positive feedback loop of possessiveness run wild.”
associated with the storage of everyday consumer goods\textsuperscript{509}. Likewise, the economic costs of this amassing are increased when plots of individual land need to be purchased to make up a large enough plot for an economic activity\textsuperscript{510}. Finally, the different legal restrictions that condition ownership and the use of the land must be taken into account\textsuperscript{511}, some of which are contractually imposed by the companies themselves in order to restrict competition\textsuperscript{512}. The 2008 OECD Report highlighted the need for greater vigilance by the competitive authorities with respect to purchasing land and the contractual relations related to the land\textsuperscript{513}. This preventive monitoring would avoid "ex post" actions in response to unilateral market saturations by companies with leverage.

In short, the specific characteristics of the land mean that owning it is a natural source of leverage. In particular, amassing land is a zero-sum economic activity\textsuperscript{514} (the gains of a company, in terms of land, imply a loss of economic opportunities for another). The limited resource nature of land may lead to strategies aimed at monopolising the available land to exclude competitors from the market\textsuperscript{515}. Likewise, unlike the "capital" monopoly, the land monopoly may endure for an indefinite period of time\textsuperscript{516}.

\textsuperscript{509} Mason Gaffney, "Land…", op. cit., p. 78: “The composite result of individuals buying for future contingent need is that the market in raw land is turned to glue. It ceases to serve the median person in time of need. The effect is a species of vertical integration and, like all vertical integration, it destroys the free market in raw materials and vastly inflates the aggregate need for holding raw materials. This is because the pooling effect that is otherwise provided by the market is neutralized. For example, the grocer obtains, stores and keeps a wide variety of food and sundries on tap for thousands of customers. Lacking a grocer, each customer would have to maintain her own stores, and the aggregate required would far exceed that in the common grocery store. A good land market would likewise keep land on tap for the contingent needs of all, greatly lowering aggregate needs.”

\textsuperscript{510} Mason Gaffney, “Land…”, op. cit., p. 78: “In certain ecotones (zones of change of land use) the technical need is to assemble small parcels into larger ones, as where commerce, industry and high rise are moving into a district of single homes on small lots. This condition maximizes market failure. It normally takes years to assemble an optimal parcel: one holdout can spoil years of negotiating and financing. Straw buyers and front men are used to keep principals and their intentions secret. Speculators are everywhere, trying to assemble large plots or hold up other buyers.”

\textsuperscript{511} Mason Gaffney, “Land…”, op. cit., p. 79: “Land is traditionally subject to a host of legal and customary limits on use and ownership”.

\textsuperscript{512} Mason Gaffney, “Land…”, op. cit., p. 82: “Some lands are sold or leased with covenants against competition, as Gimbel’s Department Store holds a covenant on a lot adjoining its parent store on 3rd Street and Wisconsin Avenue, Milwaukee. Such anticompetitive arrangements, however blatant, are intra-state, and apparently immune from sanctions under US Federal anti-trust laws. Scholars of industrial organization, many of them doing outstanding work otherwise, pay these grass-roots matters little heed. Researchers and activists concentrate on commodity markets at national and world levels – the ones subject to Federal sanctions, such as they are. They could probably find more severe and blatant market failure in local land markets.”

\textsuperscript{513} Vid., supra note 294.

\textsuperscript{514} Mason Gaffney, “Land…”, op. cit., p. 79: “Expansion is zero-sum: Amassing land is always done, can only be done, by shrinking the holdings of others. To expand is to pre-empt. If A is to have more then B, C, D et al. must have less, there is no other way.”

\textsuperscript{515} Mason Gaffney, “Land…”, op. cit., pp. 80-81: “Massed control of land is the most natural base for monopolizing markets because land is limited. Buying land always does double duty: when A expands he ipso facto pre-empts opportunities from B. For example, a chain of service stations with most of the best corners in a town has market power, the more so if it also holds a large share of oil sources, of refinery sites, of "offset rights" to pollute air, transmission rights of way, harbour sites, and other such limited lands. Pre-emption is not always just a by-product of expansion; it may be the main point of a business strategy. For example, in 1993 Builders' Emporium, a large chain of California hardware stores
The characteristics of the land (rather scarce) and the essential nature of the “location” parameter for the retailer require the antitrust authorities to take a new approach in this field. The evolution of the retail distribution market in Spain and other countries have irrefutably shown that controlling mergers is not sufficient to prevent the emergence of highly concentrated local markets\(^{517}\). Therefore, measures must be introduced to deal with the amassing of land or proliferation of establishments for antitrust purposes. Along the same lines, the Competition Commission has decided to forbid the amassing of unused land, the sale or leasing of land with use restrictions and exclusivity agreements on highly concentrated local market (3 or less competitors in the grocery retail market)\(^{518}\) in the United Kingdom-. It has also proposed introducing a Competition Test to prevent ex ante the proliferation of establishments of a single

with large parking lots in good locations, closed down and sold out. The sites were bought up by a grocery chain. According to news reports, the stores remain empty today; the land idle. The purpose is to keep the sites from Ralph’s, a competing grocery chain. The social purpose and rationale for private property and land markets is to get land into its best use. When pre-emption overrides use, market failure is total; private property is discredited.”

\(^{516}\) Mason Gaffney, “Land…”, op. cit., p. 81: “If monopoly were based simply on owning a particular form of capital, all the other capital in the world could be converted into the monopolized form each time it is liquidated and the proceeds are reinvested. The same is not true of land, whose specialized qualities are permanent (see A-3 and B-10). Land with differentiated special qualities is fixed…This quality makes land a natural basis for oligopoly control of markets, or attempts at control… The fixity of land also lends itself to stability of association among oligopolists. People come and go; capital turns over, flows in and out; corporations, partnerships and syndicates are collapsed, merged, refinanced, bankrupted and reorganized. Land remains: it is always in the same place, unmistakeably identifiable and findable.”

\(^{517}\) Vid., Competition Commission Study 2008, section 11.28: “We do not consider it sufficient to rely on the existing merger control regime to prevent the emergence or strengthening of highly-concentrated local markets since the merger control regime can apply only when a grocery retailer acquires a trading store from a competitor. However, it does not apply in situations where a grocery retailer acquires a store that has been closed for some time, or moves into a newly developed store. We note that the merger control regime has not been sufficient to prevent the emergence of highly-concentrated local markets to date”; and French Competition Authority Opinion 2007, paragraph 91, p. 22: “Une entrée plus facile pourrait toutefois également bénéficier aux grands groupes de distribution déjà présents sur le marché et les aider à renforcer les positions qu’ils détiennent au niveau local. Il ressort du bilan effectué ci-dessus (cf. particularly paragraph 49), que la loi Royer et la loi Raffarin ont plutôt encouragé qu’empêché la constitution de ces groupes et renforcé les positions dominantes locales. Parallèlement, le contrôle des mergers, dont le rôle est justement d’éviter notamment la création ou le renforcement de positions dominantes, s’est révélé en partie inadapté compte tenu des spécificités du secteur de la distribution, en dépit des réformes mises en place avec la loi sur les nouvelles régulations économiques du 15 mai 2001”.

\(^{518}\) Vid., Competition Commission Study 2008, section 7.83: “In addition to the undeveloped land (or land bank sites) that we discuss in paragraphs 7.72 to 7.74, we also take into account in our analysis three other means by which grocery retailers can control land. These are: land owned or leased by a grocery retailer and leased or sub-leased to a third party; restrictive covenants; and exclusivity arrangements. When a grocery retailer with a strong position in a highly-concentrated local market exercises control over a landsite, it makes entry more difficult for a competing retailer allowing the incumbent retailer to continue to benefit from its position.” The remedies in relation to each land restriction are described in detail: restrictive covenants (sections 11.137 to 11.182); exclusivity arrangements (sections 11.183 to 11.230); land bank sites (sections 11.232 to 11.243); and leases to third parties (sections 11.244 to 11.249).
company in the same local market for antitrust purposes. The Competition Test would be applied to the establishment or expansion projects of large grocery retail outlets (more than 1,000 square metres). According to this Competition Test, establishing or expanding a grocery retail outlet would be authorised, if within a 10 minute radius by car:

- It is the first establishment of the company (new entry on the market), or
- There are three or more competitor grocery retail outlets, or
- There are two or less competitor grocery retail outlets but the aggregate share of the company will be under 60%.

The introduction of the Competition Test was challenged by the leading retailer, Tesco. On 4 March 2009, the Competition Appeal Tribunal (CAT) found for Tesco, as it considered that the Competition Commission had not sufficiently justified how the Competition Test would offset the cost for the consumers (in terms of well-being) of the lack of growth of incumbent companies with the establishment of new competitors. In short, the CAT considered that the Competition Commission had not sufficiently justified that the Competition Test would reduce the concentration of the local market in a reasonably short time. In any event, the CAT left the door open for the Competition Test, once the relevant grounds had been given or amendments made.

In a similar way, even though it did not specify its scope, the ACCC recommended that the effects on competition would be taken into account when assessing planning permission for grocery retail outlets. On the other hand, the Conseil de la Concurrence prioritised the application of structural measures as part of the legislation.

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519 Vid., Competition Commission Study 2008, section 11.27: “We see the competition test remedy as an important complement to our remedies in relation to controlled land and multiple stores (see paragraphs 11.136 to 11.268). While those remedies address barriers to entry in existing highly-concentrated local markets, the competition test will prevent the emergence of areas of highly-concentrated local markets or the strengthening of strong local market positions in the future.”


521 Competition Test Judgment, paragraphs 169-173, in particular, paragraph 170: “We have not concluded that a competition test, whether in the form proposed or in any other form, would be ineffective as a remedy for the AEC which the Commission has identified, nor that such a test would be unreasonable, disproportionate or otherwise inappropriate or unlawful. Our conclusions do not preclude the possibility that the test would ultimately be lawfully recommended by the Commission and implemented. Vid., the positive construction of the Competition Test Judgment made by the Competition Commission in its press release 09/09 of 4th March 2009, “Statement following Competition Appeal Tribunal’s Judgment”.

522 ACCC Study 2008, Overview, XIX: “Recommendation: The ACCC recommends that all appropriate levels of government consider ways in which zoning and planning laws, and decisions in respect of individual planning applications where additional retail space for the purpose of operating a supermarket is contemplated, should have specific regard to the likely impact of the proposal on competition between supermarkets in the area. Particular regard should be had to whether the proposal will facilitate the entry of a supermarket operator not currently trading in the area.”
that forbids the abuse of a dominant position regarding \textit{ex ante} controls of internal growth\textsuperscript{523}.

Therefore, the following remedies are proposed for the land market.

\textbf{10.1.2.1 Acquisition of land rights for antitrust purposes}

The purchase or leasing of land or the acquisition of rights over it associated to the setting up or expansion of a grocery retail outlet may restrict competition if it leads to indirect market legal monopolisation or economic saturation.

From the perspective of competition law, the legal framework applicable to the acquisition of land for commercial purposes must be assessed. During the Consum/Caprabo operation, the notified operation included the acquisition by Consum of 2 retail establishment projects, together with the assets linked to running 61 retail outlets and 2 logistic platforms belonging to Caprabo\textsuperscript{524}. In principal, a store project only includes tangible assets (the land) and the relevant administrative licences, and the mere acquisition of land (for commercial purposes) could therefore be considered to constitute a merger for the purposes of controlling mergers\textsuperscript{525}. In terms of the business turnover attached to said land, the prior rental revenue obtained by the vendor or lessor, or the purchase price of said land or the business plan itself of the purchaser could be taken into account\textsuperscript{526}. The Australian Competition Authority has also adopted this expansive interpretation of the merger concept in terms of merger control\textsuperscript{527}.

\textsuperscript{523} French Competition Authority Opinion 2007, paragraph 96, p. 23: “En revanche, un caractère plus fortement dissuasif pourrait être donné au contrôle ex post effectué par le Conseil de la concurrence en cas d’abus de position dominante en précisant de façon claire que le pouvoir d’injonction dont dispose actuellement le Conseil s’étend à la possibilité de remettre en cause les positions dominantes acquises par des injonctions de cessions d’activités. Le pouvoir d’injonction du Conseil est en effet décrit à l’article L. 464-2 du code de commerce comme la possibilité d’« ordonner aux intéressés de mettre fin aux pratiques anticoncurrentielles dans un délai déterminé ou d’imposer des conditions particulières ». Il pourrait être précisé que ces termes « conditions particulières » s’appliquent aux remèdes structurels pouvant être mis en place par l’autorité de concurrence lorsque les remèdes comportementaux ne peuvent permettre de mettre fin de façon satisfaisante aux pratiques abusives.” The Conseil de la Concurrence did not consider the lack of land input, in particular given the existence of legal restriction regarding its commercial use.

\textsuperscript{524} SDC, N-07025 Consum/Caprabo (Activos), pp. 1-2, 20 April 2007.

\textsuperscript{525} The Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (“Jurisdictional Notice”), OJ C 95, 16.04.2008, paragraph 24, considers that “the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, \textit{i.e.} a business with a market presence, to which a market turnover can be clearly attributed”, an activity that can be even associated with intangible assets or a customer base.

\textsuperscript{526} By analogy with the approach to the sale of business units without external income laid down in paragraph 163 of the Jurisdictional Notice.

\textsuperscript{527} ACCC Study 2008, p. 429: “The inquiry has also revealed a misconception held by some industry players that the ACCC can only analyse transactions where there is an acquisition of an existing supermarket business. This is incorrect. The ACCC considers that leases of sites, acquisitions of leases currently held by other parties and acquisitions of sites that are currently empty or used for other purposes can all be considered acquisitions of assets under s. 50 or other provisions in Part IV of the Act. The ACCC has reviewed acquisitions of development sites in the past, but has not found any acquisition in breach of s. 50. For instance, the ACCC conducted an analysis of the effect of Woolworths acquiring
The use of the market share threshold for controlling merger established in the LDC would allow the examination of the acquisition of land rights resulting in a market share (in terms of sale surface) over 30% of the local market. The TVDC will ask the CNC to express its position with regard to the acquisition of land rights being considered as a merger for the purposes of the possible application of the Chapter II of the LCD (merger control).

Even if Chapter II of the LDC were not applicable, the competitive analysis pursuant to Articles 1 (antitrust agreements) or 2 (abuse of dominant position) of the LDC, should produce equivalent results. In particular, the acquisition of land rights by a company with a high share in the local market where there are substantial entry barriers (in particular, urban developing ones) could be an abuse of dominant position or a restrictive competition agreement.

As far as the retrospective scope of the LDC application is concerned, Article 68 establishes that serious infringements, which include failing to notify a merger or the abuse of domination position, prescribes 2 years from the infringement being committed. Likewise, Article 68 establishes that “the term of the prescription shall be calculated from the day on which the infraction had been committed or, in the case of continuous infractions, on which they had ceased”. If the failing to notify an acquisition of land rights or its antitrust/abusive effects are considered to be a continuous infringement in time, the application of the LDC will be extended to all the land acquisitions in the past.

In order to guarantee the legal security of the companies, the TVDC considers it necessary to establish a “safe harbour” with regard to acquisition of land rights. Therefore, the TVDC considers, pursuant to Articles 1 and 2 of the LDC, the acquisition of land rights in order to set up or expand a grocery retail outlet of more than 1,000 square metres if, within a 15 minute radius by car;

- It is the only establishment of the company, or
- three or more competitors are established, or
- its resulting market share is under 30%.

In a local market with three or less competitors, the increase of the market share of one of them over 30% does not necessarily imply a negative assessment if there are no legal barrier or entry strategies. In order to assess the existence of said entry barriers, the TVDC will take into account:

- The availability of commercial land for grocery retail outlets within the relevant radius, taking into account current urban planning regulations and information provided by the local councils in question.

several development sites as part of its consideration of the Foodland Associated Limited transaction in 2005 [note: 27 ACCC, public competition assessment, Woolworths’ proposed acquisition of 22 Action stores and development sites (19 October 2005)].
Market saturation, taking into account the information provided by the company itself, its competitors and consumer associations.

Finally, a negative assessment regarding the setting up or expansion of a grocery retail outlet does not necessarily mean a ban on undertaking the project or, should that have occurred, its sale to a viable competitor. The company can opt to transfer another establishment of similar characteristics to a viable competitor so that the new project has a positive or, at least, neutral impact on the competition. The TVDC put forward this solution in its GS 10/2008 Bis Report, where it proposed to condition the establishment of an Eroski hypermarket in a new residential area of Vitoria on the enforced sale of another grocery retail outlet in the centre of Vitoria, a city where Eroski has a clear leadership position in the grocery retail market.528

10.1.2.2 Defensive acquisition (antitrust) of land rights

In exceptional cases, a defensive acquisition of rights may take place on land that is not viable as a site for its own large grocery retail outlet, but are necessary to set up or expand a competitor’s grocery retail outlet. This strategic conduct is an objective or per se infringement of the LDC.

Even if the acquired land is to be used as the site of a small retail outlet, the acquisition may be in breach of the LDC, if said land is suitable, in conjunction with other adjacent land, as the site of a grocery retail outlet and there is not sufficient competition on the grocery retail market, in accordance with the criteria set out in Section 3.1.2.1.

Therefore, the companies that seek to acquire land rights successively until they have a large enough plot for a grocery retail outlet should justify right from the start that (1) the land is necessary and viable to establish it and (2) the introduction of said grocery retail outlet will not restrict competition on the grocery retail market, in accordance with the criteria set out in Section 3.1.2.1. Likewise, companies that wish to acquire to open a smaller retail outlet must check whether the land is suitable, together with any adjacent land, as the site of a grocery retail outlet, in which case, they will have to assess whether the acquisition of said land restricts the competition on the grocery retail market, in accordance with the criteria set out in Section 3.1.2.1.

10.1.2.3 Transfer of land rights with restricted use

The transfer of ownership of land rights or regarding its use by retail companies must not contain contractual restrictions that prevent its commercial use for grocery retail

528 TVDC Report of 9th of March 2009, GS 10/2008 Bis Eroski S.Coop. Bremen Vitoria-Gasteiz. This solution allows the leading companies to set up in new urban developments in exchange for reducing their dominance in other saturated zones and allow the entry of new competitors. The result is an immediate increase in competition and the well-being of consumers, the result that the Competition Test proposed by the Competition Commission Study 2008, does not guarantee, according to the Competition Test Judgment of the British CAT.
distribution. In this case, the setting of those restrictions by the vendor has an economic cost (lower value for the purchaser) and only fulfils a desire to protect nearby establishments of the vendor. Therefore, the setting of said restrictions (equivalent to non-competition agreements) is presumed to be antitrust.

With regard to contracts in force, the TVDC considers that use restrictions contained therein are illegal and the vendor may not insist that the purchaser complies with them. In any event, the TVDC recommends to retailers that have included these restrictions in their contracts regarding the sale or use of land that they remove those restrictions or notify irrefutably the vendor that they are not valid.

### 10.1.2.4 Exclusivity agreements regarding lands belonging to third parties

This category includes the agreements with third parties that include restrictions relating to the use of their land or installations.\(^{529}\) Competition restrictions may be in different forms. For example, a company may sign an exclusivity or pre-emptive right with a third party should the latter decide to sell or rent the land. A grocery retailer set up in a shopping centre may negotiate an exclusivity agreement (express or implicit, for example, by means of a veto right or clearly favourable economic conditions) with a shopping centre developer.\(^{530}\) One option is the possibility that a retailer may be the shopping centre developer and does not allow (expressly or indirectly, by means of setting out-of-proportion conditions) competitors to set up in that shopping centre.\(^{531}\) All these conducts may increase entry barriers and restrict the competition on highly concentrated locally markets where the beneficiary of the exclusive rights have individual or collective leverage. Special attention has not been paid to these practices in Europe while they were actively prosecuted in the United States by the FTC in the

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\(^{529}\) The land must be suitable to set up a large grocery retail outlet. The acquisition of land for smaller surface areas (for example, to be used for smaller retailer outlets) does not threaten competition provided that it cannot be catalogued as defensive acquisition in accordance with Section 10.1.2.2 supra.

\(^{530}\) Vid., ACCC Study 2008, Overview, XVIII: “The inquiry heard evidence that Coles and Woolworths engage in deliberate strategies designed to ensure they maintain exclusive access to prime sites. In particular, both supermarket chains include terms in their leases which effectively prevent centre managers leasing space in centres to competing supermarkets. These restrictive provisions usually take the form of an outright prohibition on the centre owner introducing a second, or third, supermarket into the centre for a specified period (commonly around 10 years) or make provision for a sufficient financial penalty, in the form of reduced rent payable, that renders it commercially unviable for the centre owner to introduce a competing supermarket. A number of supermarket operators provided the inquiry with specific and credible evidence of leases between the major supermarket chains and shopping centres which, they contended, have prevented or delayed their entry into a centre. The ACCC also used its information-gathering powers to obtain leases from Coles, Woolworths and shopping centre owners which confirmed that such restrictive provisions are often included in leases.”

\(^{531}\) This case would be covered by the legal principles that govern the acquisition of land rights, supra Section 10.1.2.1
The TVDC considers that exclusivity agreements are equivalent to the acquisition of rights to own or use the land. Therefore, the exclusivity agreement will enjoy a presumption of legality if, within a 15-minute radius by car with respect to the land in question:

- It is the first establishment of the company, or
- three or more competitors are established, or
- the market share of the retail beneficiary of the exclusivity agreements is less than 30%.

### 10.1.2.5 Anticompetitive agreements with Local Councils

The Land Act attributes urban planning competences to local councils and, in particular, regarding land use. Therefore, once the period for transposing the Service Directive has ended, the restrictions on establishing and expanding grocery retail outlets may come under the urban planning policy of the local councils and their agreements with companies. Even though the urban planning policy and the ensuing licences granted can only be controlled by means of the relevant administrative litigation appeals, urban planning and other agreements between local councils and companies are agreements between economic operators subject to the LDC. Therefore, urban planning agreements between retailers and local councils that restrict competition to the benefit of the former are an infringement of the LDC attribute to both parties. This competition restriction may be envisaged in the agreement, for example, by guaranteeing the company that the council will not facilitate the setting up of competitors close by.

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533 **American Law Institute-American Bar Association, June 3-4, 2004: “The factors that are considered in determining whether a restrictive covenant is an unreasonable restraint of trade include (among others): (a) The relevant market area – (…) the anticompetitive effects of exclusives in larger shopping centers are greater than those in smaller centers. (b) Whether the protected party has “market power” or dominance in the market. (c) The impact on competition in the relevant market – i.e. what is the impact on consumer choices in the ability to purchase the merchandise in question. (d) Whether the clause has economic justification. The courts have recognized that shopping centers require a balanced and diversified tenant mix for its success. Exclusives are one of the ways that goal is accomplished and therefore a valid business justification has been acknowledged.”**

534 **Vid., also, Competition Commission Study 2008, sections 11.139 and 11.183.**

535 **Vid., TDC Resolution of 20 March 1998, Case 419/97, Cruz Roja de Fuengirola; and Resolution of the CNC of 7 March 2008, Case 632/07, Feriantes Ayuntamiento de Peralta (“Resolution Feriantes Ayuntamiento de Peralta”), page 8: “the agreement between the Municipality of Peralta and AIFNA, as far as its content goes beyond the award of a public land occupation licence to a company, is not covered by Publica Law but for private Law.”**

536 **Vid., similarly, Resolution Feriantes Ayuntamiento Peralta, page 7: “Likewise, the Municipality of Peralta, through the award of this exclusive concession (without a tender) to the said Association for the exploitation of the fair-related activities in Peralta, has conducted itself as an economic operador,**
Likewise, the restriction of competition may indirectly come from the joint evaluation of the agreement and the municipal urban planning policy. For example, if the urban planning policy allows in practice a commercial surface area of up to 3,000 square metres and the local council signs an agreement with a company that enables the latter to monopolise all of them, the local council will be implicitly granting a legal monopoly to said company, which is a more restrictive result than the possible division of the legally available commercial surface area between two major retailers (1,500 square metres each).

Therefore, the TVDC will assess on its own motion or, in any event, at the request of affected third parties, the compliance with the LDC of the agreements entered into between local councils and retailers to set up leading grocery retail outlets with more than 1,000 square metres of sales area and smaller commercial areas located on sites that are suitable for said outlets.

10.1.2.6 Divestitures of establishments

The measures to avoid monopolization of land rights must help to avoid abuse situations in highly concentrated local markets. However, in some exceptional cases, it may be necessary to order the enforced sale of establishments when there is a strategic saturation of the market by a company, minimum competition by other companies and legal barriers that prevent the entry of new competitors.

Logically, the maximum respect of the procedural safeguards of the companies requires that the administrative proceedings to order enforced selling-off irrefutably show the existence of a dominance position and the abuse of said dominant position by means of the monopolisation of the supplies (land) needed for other competitors to be able to grow or enter in the market.

In order to guarantee the legal security of the companies, the TVDC considers it necessary to establish a “safe harbour” with regard to the actions aimed at ordering enforced selling-off. Therefore, the existence of a strategic saturation of the market will only be presumed if strict conditions are met:

\[537\] \textit{Vid.}, French Competition Authority Opinion 2007, paragraph 96. The “Attali Report 2008” also concluded the disappearance or reduction of the legal barrier is an insufficient remedy on some local markets where impregnable dominant positions already exist: “Enfin, la commission est consciente que la levée des barrières réglementaires peut se révéler insuffisante pour empêcher la constitution de positions dominantes locales, compte tenu des stratégies de merger et des positions dominantes actuellement occupées par certaines enseignes dans certaines zones de chalandise” (page 148); and clarified the powers of Conseil de la Concurrence to order enforced sales of land or stores: “Le Conseil de la concurrence devrait pouvoir prononcer lui-même, en cas d’abus constaté, des modifications de la structure d’entreprises en position dominante. Il pourra ainsi imposer la scission ou la vente forcée de certaines activités, magasins ou surfaces” (página 154).
- High market share of a company (+50%)
- multi-establishment presence of a company (+1)
- reduced number of competitors (3 or less) and
- legal barriers that prevent or make it hugely difficult for new competitors to enter (no available and viable commercial land available).

Even though it is to be expected that all these conditions only appear in very specific cases, the inefficient controlling of mergers and the very evolution of the retail market provides examples that could meet these conditions.

For example, in its Carrefour/Promodès Report, the TDC proposed the enforced sale of a Carrefour hypermarket in Palma de Mallorca. However, the Council of Ministers did not second the recommendation of the TDC: In its Eroski/Caprabo Report, the CNC noted that many years later, the three large Carrefour hypermarkets continue to hold a privileged position in the city of Palma de Mallorca, only challenged by a small Caprabo hypermarket. In short, if the competitive structure of the Palma de Mallorca market required the enforced sale of a Carrefour hypermarket in 2000, the competitive structure has barely improved in 2009 (presence of a small Caprabo hypermarket purchased by Eroski) and the LDC may need to be applied to force Carrefour to sell off at least one of its three hypermarkets.

Likewise, in the Uribe-Kosta region of Vizcaya and, in particular, in the Getxo and neighbouring areas (the most important population nucleus), Eroski has increased its presence by means of increasingly more attractive hypermarkets, due partly to external factors (better road communications and promotion of a Shopping Centre). The first hypermarket, located in the small town of Berango (next to Getxo), was followed by a larger hypermarket with greater services (larger car parks, petrol stations, etc.) in Leioa, another town adjoining Getxo but at the opposite site to Berango. Finally, the construction of the “Artea” Shopping Centre, also based in Leioa but the one that is geographically closest to the town of Getxo, provided Eroski with the opportunity to open a hypermarket with the best range of services, using the common services of the Shopping Centre (surface and underground car parks, Eroski petrol station, possibility to shop in other towns, etc.). The location advantage of the Eroski hypermarket in the “Artea” Shopping Centre was increased by an exogenous factor: the construction of the Uribe-Kosta dual-carriageway with a direct slip-road to the “Artea” Shopping Centre. This improvement to the road structures has placed the Berango and Leioa Eroski hypermarket just 10 minutes by car away from each other, while the Eroski hypermarket of the “Artea” Shopping Centre is halfway between both (5 minutes in car). Apart from the three Eroski hypermarkets, the population of the Uribe-Kosta region and, in particular, of Getxo and the neighbouring areas only have one alternative: a Carrefour hypermarket, which is further from the main population centre and without direct access to the Uribe-Kosta dual-carriageway. Eroski is also completing another major retail outlet in Gorliz, a town that some way away from the main population.

centre (Getxo and surrounding areas), but where there may be some overlap with the Berango hypermarket, the closest town to Gorliz.

If the mergers control or the articles that regulate the restrictive antitrust conducts regarding the acquisition of rights on the land needed for the hypermarkets had been applied, the enforced sale of the Berango hypermarket and/or Leioa hypermarket could have been required as a condition to authorise the hypermarket at the “Artea” Shopping Centre. If the current situation of that local market confirms that the strategic and legal barriers (3 hypermarkets of a single company in a 15-minute radius) prevent the entry of new competitors, the enforced sale of one or two Eroski hypermarket could be necessary.539

On the other hand, in the Margen Izquierda region (Vizcaya), Eroski has an outstanding position in the retail outlet market, as it has establishments in all the existing commercial centres: Centro Comercial Max Center (Barakaldo), Centro Comercial Megapak (Barakaldo) and Centro Comercial Bailonti (Portugalete). Its only competitor is a Carrefour hypermarket (Ctra. Barakaldo-Trapagaran, Sestao), which does not benefit from the traction of a shopping centre of an optimum location in terms of the road network. Eroski also has another hypermarket at the Centro Comercial Bilbondo shopping centre (Basauri), a town close to the Margen Izquierda that could be include in the same geographical market.

In short, the requirement for the enforced sale of a major retail outlet if they meet the strict conditions listed herein only reflects a previous regulatory failure: not to have avoided the monopolisation of the market by means of the depletion of the commercial surface available in the relevant market. Therefore, even though it is late, the enforced sale is proportionate and necessary.

Likewise, this intervention is implicitly supported by the arguments used by the major retailers about the Carrefour/Promodès merger. Alcampo, Lidl, Eroski and El Corte Inglés alleged that the high market shares of the merged company on the national retail market (30%) and, in particular, on local grocery retail markets, together with the legal entry restrictions would generate antitrust effects that could only be remedied by asset enforced sales, in addition to greater liberalisation:

Alcampo allegations

“According to this competitor ‘the CARREFOUR/Promodès merger project hinders the maintenance of effective competition on the market in Spain’. It was concluded from the provincial analysis performed that, first of all, the participation in auction rooms exceed

539 The enforced sale of a large grocery retail outlet where there may be activities outside the main activity of retailing consumer goods (for example, petrol stations) raises the question to what extent these activities can be separated. In principle, if the company that must sell off can find a viable purchaser of the retail distribution activity without needing to including the other outside activities, such as petrol distribution, in the sale, the exclusive sale of the retail distribution activity would be acceptable, together with the exploitation of synergies (crossed sales, etc.) between vendor and purchaser in relation to the different activities carried out on the same land.
30% out of the total retail distribution which includes hypermarkets, supermarkets and convenience stores, and the participation is between 20% and 30% in 21 provinces. It also lists 18 agglomerations, defined as populations close to CARREFOUR hypermarkets, where it is estimated that there is domination of merger of the CARREFOUR Group. (...) As far as the legal barriers are concerned, the following is stated: "the autonomous legislation in certain autonomous regions restricts access to new competitors and worsens the competition condition". 540

Lidl allegations

"And with regard to the conclusion, it is stated “that the authorisation of the merger operation, if it occurs, should be accompanied by measures that foster the entry of new competitors such as the suppression of the indicated entry barriers, the adoption of liberalisation legislative measures for opening new commercial establishments and the transfer to competitors by the company resulting from the merger’”. 541

Eroski allegations

“This competitor believes that the relevant market must refer to Hypermarkets. (...). It also claims that ‘that there is a certain risk that the current position of the Carrefour Group in Spain is perpetuated due to the simultaneous concurrence of its creation and of the limitation of new authorisations by the competent authorities.

And they conclude by saying that:

“definite market” is considered as the consumer goods market for a defined local sphere, which is the urban centre of a town and its catchment area.

don dominant positions of the company resulting from the announced merger are presented on different regional and local markets.

if the criteria are maintained in the granting of licences that the Autonomous Communities currently hold, the current position of Carrefour and Promodès in Spain is definitively consolidated, by granting it insuperable competitive advantages and the benefit of the situation value.

the simultaneous concurrence of the authorisation of the requested merger and the application of current regulations in the regulation of the retail trade market in Spain penalises the other competitors, prevents them from improving their competitive position and disrupts the exercising of free competition.

adopting the relevant measures is a priority, in order to re-establish conditions of competition and equal opportunities for the operators.

it is essential to oversee that the market shares of the product categories controlled by the Carrefour Group in Spain do not reduce the possibilities of choice for the consumer and do not have a negative impact, in the medium- and long-term, on how the final prices are established’.” 542

El Corte Inglés allegations

540 Carrefour/Promodès Report, section 1.6.5., pp. 10-11.
541 Carrefour/Promodès Report, section 1.6.6., pp. 11-12.
“With respect to the regulatory barriers, the group states that:

'There are parallel administrative barriers in Spain arising from the Retail Trade Act and the Autonomous retail goods regulations aimed at stabilizing the degree of competition in the territories, as they negate or hinder any new initiative to a great extent. “As a result of these restrictions, a merger, such as the proposed one, causes a reduction or impossibility to react by the other companies of the sector. Said in those terms, as there is a regulatory limitation for the setting up of new commercial establishments of a certain size, and as this is, to a greater or lesser extent, the reality throughout the State, the operations occurs in certain geographical zones where the merged entities have a clear dominant position, in order to consolidate it, without it being possible for other groups to set up in order to compete in the area in question’.”

On the other hand, with regard to the enforced sale process within the framework of Article 2 of the LDC, the extensive decisional practice regarding controlling mergers could be used. However, nothing hindered the major retailers, in conjunction with the antitrust authorities, should they deem it to be necessary, from acting preventively and proceeding to sell off in local markets where they hold a dominant position that restricts competition. The coordinated action of the CNC and autonomous antitrust authorities can likewise facilitate the exchange of assets between companies, a practice that is not unknown in the retail market, to simultaneously solve competition problems on various local markets.

10.1.3 Most favoured customer clauses

Given the oligopolistic characteristics of this market, the use of most favoured customer clauses by the leading companies signals to the markets the readiness of the members of the oligopoly to equalise the lowest prices of the competition and, therefore, they are a powerful weapon to discourage the drops in prices and reinforce their collusive links. Therefore, the use of these clauses by the members of the oligopoly is an abuse of the collective dominant position and/or an antitrust agreement.

10.1.4 Overcoming spatial monopoly: virtual competition

545 Vid., similarly, the asset divestitures carried out by EON and RWE in order to bring to an end the infringement proceedings opened by the Commission, supra Section 7.1.
546 On 8 September 2008, Eroski and Alcampo announced the exchange of two hypermarkets in Torrelodones (Madrid) and Cullera (Valencia).
547 Vid., for example, Annex 12.4, “Terms and Conditions of the Carrefour lowest price guarantee”.
548 Vid., practical and theoretical analysis of the antitrust effects of the most favoured customer clauses in TVDC Resolution of 20 February 2008, Exp. 01/2007, Igualatorio Médico Quirúrgico (“Resolución TVDC Igualatorio Médico Quirúrgico”), Sections 3.4 (“Case law and administrative precedents”), 3.5 (“Economic Theory”) and 3.6 (Compatibility of the conduct with the LDC”).
In its Caprabo/Alcosto Report, the TDC pointed out that, in the future, e-commerce can have a fundamental importance in retail distribution, by increasing "the disputability of the existing geographical monopolies and exploited by the already installed leading grocery retail outlets."  

The retailers and, in particular, the five main ones (Carrefour, Mercadona, Eroski, Alcampo and El Corte Inglés) are extending their leadership in physical retailing to online sales (virtual supermarkets). The presence of retailers online may be an important competition factor, but it currently seems to play a marginal function in relation to physical retailing: the range of products is more limited, their prices are higher (to which the transport cost has to be added) and their online coverage is linked to the physical presence of the company in one area.

The TVDC has used the opportunity to recall the huge advantages that Internet may offer to overcome the geographical monopolies and information asymmetry that harm consumers, mainly in the service sector. In the TVDC Resolution on Igualatorio Médico Quirúrgico, it pointed out that private or public initiative could contribute to increase competition among service providers, by fostering comparison, information and, even, procurement services online. For example, new business models have appeared in the United Kingdom that foster competition on the online retailing market.

Mysupermarket, a company set up in 2006, offers an electronic price comparison tool with added services. The Mysupermarket user selects one of the four supermarkets available online (Tesco, Asda, Sainsbury and Ocado) and chooses the products on his shopping list while the Mysupermarket software calculates the price of that list in the other online supermarkets and suggest cheaper or healthier alternatives (lower fat, etc.). Once the shopping list is completed and the online supermarket chosen to be used, the user is transferred to the ecommerce of the online supermarket where he only has to pay for the purchase and specify the delivery details.

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549 Caprabo/Alcosto Report, pg. 24: “Igualmente, la utilización de esta variable no permite incluir en el análisis el comercio electrónico. La importancia de este canal es todavía incipiente, pero en el futuro podría ser fundamental, tanto en lo que respecta al volumen de ventas como a la determinación de la competencia efectiva en el sector [Nota: En la actualidad, el volumen de ventas por Internet representa apenas un […] de la facturación de CAPRABO. Sin embargo, el previsible incremento de la facturación a través de este canal podría llegar a tener desde el punto de vista de la defensa de la competencia una doble importancia. Por un lado, podría ser una de las posibles vías de incremento del número de operadores en el mercado geográfico relevante y, por lo tanto, de contestabilidad de los monopolios geográficos existentes y explotados por las GS físicas ya instaladas. Por otro lado, en el futuro, con un número de clientes suficientemente elevado en una determinada zona geográfica, podría ser económicamente rentable atender esa demanda directamente desde un centro de almacenaje, sin apertura física de GS y, en consecuencia, no estando la empresa sujeta a las restricciones de licencias de Comunidades Autónomas y ayuntamientos, coadyuvando de esta forma a sortear las barreras administrativas que imponen las administraciones regionales y locales a la apertura de GS físicas. En el presente, esta posibilidad es únicamente competencia potencial, y el estudio de la competencia en el mercado puede y debe hacerse en función de las superficies de ventas de los operadores.]”

550 Igualatorio Médico Quirúrgico TVDC Judgment, Section 4.3 (Consumers’ lack of information).

551 Mysupermarket website: www.mysupermarket.co.uk
In short, the business model of Mysupermarket does not directly compete against online supermarkets, it is a tool that fosters competition among them.

On the other hand, the Ocado business model is in direct competition with online supermarkets. Ocado has a partnership agreement with a retail conglomerate (John Lewis Partnership, owner of the Waitrose, John Lewis and Greenbee retail chains), which is also a minority shareholder of Ocado, for its supplies. Ocado has its own distribution and storage platform. Therefore, it allows an independent online supermarket model to be developed and in direct competition with the other online supermarkets and physical establishments, which helps to reduce both sales channels. However, its supply contract is for renewable annuities, which may be affecting its sustainable brand image and its growth.

The Spanish competition authorities must guarantee that the emergence of new online business models is not delayed or hindered by the oligopolistic brand of the retail companies. Mention should therefore be made of the CJEC Judgment on the Magill case, where three conditions were established that required a dominant company to contract with third parties: (1) essential product or service for carrying out a specific activity in a related market; (2) unjustified refusal to supply exclusive any effective competition in that related market; and (3) hindering of the appearance of a new product where there is a potential demand from the consumers. In this area, the CJEC considered the refusal of three Irish television channels, based on intellectual property rights, to allow third parties to use their weekly programme guides to offer multi-channel weekly programme guides. This issue, even though it was settled as an abuse of the individual dominant position of each television channel in relation to its own programme guide, was in legal and economic terms parallel conduct of various companies that held a collective dominant position on the TV guide market and in fact, the CJEC decision identified a secondary market of TV programme guides, where none of the TV channels held a dominant position when considered individually.

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552 Ocado website, “By fulfilling orders from a dedicated warehouse, we can show virtually live inventory on our webshop, enabling customers to choose from a range of groceries that are actually in stock. By using unique logistics software and satellite navigation systems in our vans, we strive to deliver the right goods at the right time.” http://corporate.ocado.com/background.html

553 “Ocado taps shareholders for up to £40m in rights issue”, The Independent, 28 October 2008: “The online grocer has invested heavily in prices this year and has expanded the range of non-food products it offers. In March, Ocado launched a price war against the grocery giant Tesco and vowed to match its prices on 3,500 branded products, including Pampers nappies and Coca-Cola. Tesco responded fiercely with its own price cuts.” http://www.independent.co.uk/news/business/news/ocado-taps-shareholders-for-up-to-16340m-in-rights-issue-975523.html

554 Idem: “Ocado has had a one-year rolling contract with Waitrose since 2000, but is thought to still be in negotiation with the grocer about nailing down a five-year contract. The City has viewed the lack of a long-term branding and sourcing contract as a barrier to a stock market flotation.”

555 CJEC Judgment of 6 April 1995, Accumulated Cases C-241-242/91, Radio Telefís Eireann e ITP c. Comisión (Magill), Rec. 1-743, 1995 (English). The third requirement has only been applied in relation to the access to industrial or intellectual property rights.

556 Idem, paragraph 73: “Conduct of that type – characterised by preventing the production and marketing of a new product, for which there is a potential consumer demand, on the ancillary market of
If the requirements to apply European jurisprudence relating to “essential facility” are present, any conduct of the companies that hold a collective dominant position on the retail distribution market that prevents the appearance of new or differentiate services on the online retail market and, indirectly, the competition on the “physical” distribution market, could be considered an abuse of the dominant position. The abuse may consist of a supply or access refusal, but also of a conduct that produces the same effect (for example, demand an out-of-proportion consideration).

Price comparison services are obviously a new service that helps to reduce the information asymmetry of the consumers. Likewise, an independent online supermarket of the retail companies may offer an innovative and differentiated service with regard to the online supermarkets of the retailers, by avoiding the extension of its "physical" collective dominant position to e-commerce557.

10.1.5 Merger control: collusive and unilateral effects

As far as merger control is concerned, the analysis of the national retail mergers by the TDC and the CNC has focused on the possible creation of an individual dominant position. However, the competitive structure of the distribution market means that an analysis focused on the unilateral (competition between the merged establishments) as well as oligopolistic (creation or reinforcing of a dominant position) effects of the merger is required.

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557 Vid., TPI Judgment of 17 September 2007, Case T-201/04, Microsoft c. Commission, where there is a wide interpretation of the concept of product novelty requirement (paragraphs 643-665): “Debe observarse que la Comisión cuidó de subrayar en ese contexto que existían «amplias posibilidades de diferenciación y de innovación más allá del diseño de las especificaciones de interfaz» (considerando 698 de la Decisión impugnada). Con otras palabras, una misma especificación puede ser objeto de numerosas aplicaciones diferentes e innovadoras por parte de los diseñadores de soportes lógicos (paragraph 655). De esta forma, la Decisión impugnada descansa en la idea de que, una vez se haya levantado el obstáculo para los competidores de Microsoft que representa el carácter insuficiente del grado de interoperabilidad existente con la arquitectura de dominio Windows, esos competidores podrán ofrecer sistemas operativos para servidores de grupos de trabajo que, lejos de constituir una mera reproducción de los sistemas Windows ya presentes en el mercado, se diferenciarán de éstos en parámetros que los consumidores consideran importantes (paragraph 656)...Por último, se ha de recordar que según reiterada jurisprudencia el artículo 82 CE se refiere no sólo a las prácticas que pueden causar un perjuicio directo a los consumidores, sino también a las que les perjudican indirectamente al atentar contra una estructura de competencia efectiva (sentencia del Tribunal de Justicia de 13 de febrero de 1979, Hoffmann-La Roche/Comisión, 85/76, Rec. p. 461, apartado 125, y sentencia Irish Sugar/Comisión, citada en el apartado 229 supra, apartado 232). Pues bien, en el presente caso, Microsoft atentó contra la estructura de competencia efectiva en el mercado de los sistemas operativos para servidores de grupos de trabajo al adquirir en éste una importante cuota de mercado. (paragraph 664)”
10.1.5.1 Unilateral effects

As the TDC argued in its Carrefour/Promodés Report, the traditional analysis based on the market definition and individual dominant position is insufficient on markets characterised by differentiated products/services and the location of an establishment and its catchment area is an important differentiating element. The FTC introduced the analysis of the unilateral effects (non collusive) of mergers in oligopolistic sectors of differentiated goods/services in its 1992 “Horizontal Merger Guidelines”. Following the replacement of the “dominance test” by the “significant impediment of effective competition test” in the Merger Regulation 139/2004, the European Commission Horizontal Merger Guidelines also contemplates the unilateral effects that are not necessarily associated to a dominant position.

In the words of one of the artifices of the assessment of unilateral effects on different services/products markets, the economic calculation of the unilateral effects consists of:

1. calculating the diversion rate: the fraction of the sales of establishment A that are diverted to establishment B if the former increases its prices in a specific proportion (5-10%);
2. separately estimating the post-merger price increase, calculated according to the pre-merger gross margins and the estimated diversion rate (without taking possible synergies or competitive reactions from other companies into account);
3. quantifying the product/established or price changes of the competitors, including new entries; and
4. apply a reduction to the post-merger prices, if there are proven efficiencies and inherent to the merger that decrease the marginal costs. The Commission has also published studies related to categorising and estimating the unilateral effects, with special attention to the mergers in oligopolistic sectors with differentiated products.

10.1.5.2 Coordinated effects

The outcome of the high concentration, price transparency, the dissuasion mechanism regarding price reductions and the lack of response by small competitors or new entries results in tacit price collusion by the retail distribution market in leading grocery retail outlets. Given this situation the US competition authorities have adopted a structuralist approach to ensure there is sufficient variety of supply and services. When controlling retail mergers, the FTC gives much importance to the presence of a sufficient number of competitors to hinder, insofar as possible, tacit price collusion and, in any event, to

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increase competition in location/services. Curiously, even though the Commission and the national authorities of the Member States have traditionally been more rigorous than the FTC when controlling the mergers, retail distribution in leading grocery retail outlets seems to be one of the few sectors, if not the only one, where the FTC has been more rigorous and "structuralist": The FTC has focused much more than the European competition authorities on assessing the unilateral and co-ordinated effects of mergers in food retail markets. The FTC focus seems to be fully justified: retail distribution, due to its oligopolistic structure with high entry barriers is possibly one of the sectors where coordinated and unilateral effects are most likely to emerge. The doctrine has referred to the following statistical table of the FTC to stress its structural focus on analysing local retail markets:\footnote{Darren S. Tucker, “U.S. Merger Review in the Grocery Store Business”, ABA Section of International Law Committee on International Antitrust Law, 21 de mayo de 2008; y Fishkin, “Historical Review of FTC Supermarket Merger Enforcement 1997-2001”, FTC Conference on Grocery Store Antitrust, 24 May, 2004.}

<table>
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<th>“Significant Competitors”</th>
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<td>7 to 6</td>
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<td>8 to 7</td>
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Source: FTC Horizontal Merger Investigation Data, Fiscal Years 1996-2003, Table 4.2

The FTC has ordered divestitures in 100% of the mergers that led to a local monopoly; 89% of the mergers ending in a local duopoly; 85% of the mergers that reduced the local market to three companies; and 80% of the mergers that resulted in a local company of four companies. The enforce enforced sale has reduced by up to 60% of the mergers that resulted in markets of five companies and even up to half of the mergers in markets where six companies continued to compete. In short, 85% of local markets were enforced sales were enforced had 3 or fewer competitors.

Logically, the situation of the US market cannot be directly translated into the Spanish food retail market: it is smaller and a fewer number of companies are present. However, given the conclusions of this Study on the oligopolistic structure, the tacit price collusion and the entry barriers in practically all the local markets, it seems there is no doubt that a merger that reduces the number of competitors on local grocery retail market to less than four operators raises serious doubts as to their competitive effects.

On the other hand, the merger control should take into account the special leadership position of Carrefour, Mercadona and Eroski on the national retail distribution and
supply market (particularly, on the major retail outlet sub-market). These three companies form an oligopoly and are aware of their own interdependence, which enables them to adopt parallel conducts on the market, which also includes the other competitors, to maximise their profits. Therefore, the acquisition by one of these companies of the minority establishments and, in particular, leading grocery retail outlets belonging to third parties should be conditional on the enforced sale of leading grocery retail outlets on the local markets saturated by their own establishments\textsuperscript{564}. The existence of market saturation generated by a company will only be presumed if strict conditions are met:

- High market share of a company (+50%)
- multi-establishment presence of said company (+1)
- reduced number of competitors (3 or less) and
- legal barriers that prevent or make it hugely difficult for new competitors to enter (no available and viable commercial land available).

10.1.5.3 A new focus to reduce tacit collusion and the saturation of local markets

Merger control in Spain is within the realm of the CNC and only it can determine whether the acquisition of commercial land amounts to a concentration, as well as assess the coordinated and unilateral effects of a merger in this field\textsuperscript{565}.

In the spirit of loyal cooperation that characterises the relations of the regional antitrust authorities with the CNC, the TVDC will raise with the CNC the following proposals for its consideration:

1. The analysis of a retail distribution merger shall include an assessment of its coordinated and unilateral effects on competition if (1) one of the three companies that enjoy a collective dominant position (Carrefour, Mercadona and Eroski) is a party to the merger; or (2) if there is an overlap of large grocery outlets in a geographical market.

2. The analysis of the unilateral effects of the mergers on retail distribution shall take into account the degree of substitutability of the merged establishments. Logically, in an oligopolistic setting, the greater the similarity of the geographical and strategic positioning between the establishments of the two merged companies, the greater the probability of a unilateral price increase effect.

3. The analysis of the coordinated effects shall take into account the oligopolistic structure of the market, the entry barriers in the local markets and the need to maintain a variety of supply that decreases the collusive incentives and fosters greater competition. Therefore, any acquisition that reduces the number of competitors on the major retail outlet market or a local market to under four shall be analysed thoroughly and shall

\textsuperscript{564} Vid., supra Section 10.1.2.6.
\textsuperscript{565} However, pursuant to Article 58 of the LDC, the autonomous competition authorities have consultation competence with regard to autonomous mergers analysed in second phase.
conclusively justify its benefits (efficiencies) for the consumers and the absence of entry barriers (legal and economic).

4. If Carrefour, Mercadona or Eroski are part of the merger, it will be taken into account that these three companies form an oligopoly and are aware of their own interdependence, which enables them to adopt parallel conducts on the market, which also includes the other competitors, to maximise their profits. Therefore, even in the case that the acquisition by one of these companies of the minority establishments and, in particular, leading grocery retail outlets belonging to third parties, does not result in unilateral or coordinate antitrust effects on the local market, the authorisation of the purchase will likewise be conditional on the enforced sale of leading grocery retail outlets on the local markets saturated by their own establishments. For example, the existence of market saturation generated by a company will only be presumed if strict conditions are met:

- High market share of a company (+50%)
- Multi-establishment presence of said company (+1)
- Reduced number of competitors (3 or less) and
- Legal barriers that prevent or make it hugely difficult for new competitors to enter (no available and viable commercial land available).

10.2 Remedies on the procurement market

The supply market is closely related to the retail distribution market. The leverage on the retail distribution market naturally extends to the supply market and creates a “snowball” effect.

In a competitive scenario, the market generates the maximum well-being for consumers: manufacturers try to offer the most sought-after products by the consumers at the most competitive prices and retailers try to acquire said products at the most competitive prices. However, in an oligopolistic retail distribution and supply market, the suppliers with leverage and the distribution may obtain supracompetitive income, excluding other competitors and to the detriment to the well-being of consumers.

In order to deal with these market failures, some countries have opted to introduce Conduct Codes that regulate the commercial relations between suppliers and retailers. In Australia, the Retail Grocery Industry Code of Conduct (RGICC) was adopted in 2000 at the request of the Australian Government. This voluntary code included an Ombudsman figure entrusted with solving disputes between parties in relation in application of the RGICC: In 2003, an independent review of the RGICC concluded that it was not functioning satisfactorily and in 2005, the RGICC was replaced by a new voluntary Code of Conduct, the Produce and Grocery Industry Code of Conduct (PGICC). In 2007, the Australian Government also adopted the Horticulture Code of Conduct, a Code of Conduct legally binding for all the members of the production, dealing and distribution chain for horticulture products. The Horticulture Code of Conduct was adopted in accordance with the provisions of the relevant legislation, and
therefore the Australian Competence Authority, the ACCC; is responsible for its compliance and, failing that, for the applicant of economic sanctions.

In the United Kingdom, the Competition Commission Study 2000 established that distributors with a market share of 8% or more of retail distribution enjoyed leverage compared to its suppliers and identified various restrictive competition conducts. According to the Competition Commission Study 2000 recommendation, the Office of Fair Trading (“OFT”) adopted the Code of Practice on Supermarkets’ dealings with Suppliers (“Supermarkets Code of Practice”) in 2003, a Code of Conduct binding for the distributors with leverage. In 2005, the OFT performed an assessment of the application of the Supermarkets Code of Practice and noted that the great majority of suppliers (80-85%) considered that it had not modified the retail conducts. In particular, the suppliers alleged that the failure to ban many conducts if they were “reasonable” make it impossible to control the conducts of the suppliers. However, no supplier had resorted to the conflict resolution system envisaged in the Supermarkets Code of Practice or had report abuse to the OFT, and it therefore decided to audit its application by retailers\textsuperscript{566}. In 2006, the OFT decided to ask the Competition Commission to investigate the supply and retail distribution market in depth.

The Competition Commission Study 2008 noted that at least 20 of the 52 antitrust conducts identified in the Competition Commission Study 2000 continued to be applied by the retailers\textsuperscript{567}. The Competition Commission, in addition to introducing specific remedies for the first time for retail distribution market failures, decided to replace the Supermarkets Code of Practice for a new reinforced Code of Conduct, the Groceries Supply Code of Practice (GSCP), which shall be adopted by the OFT. The new GSCP shall be applied to all the major retailers and will contains stricter clauses including a general fair dealing obligation, a ban on retrospective contractual modification, a ban on enforcing inventory costs on the suppliers, the obligation to provide beforehand the supplier to the contractual conditions of a retailer and a mechanism to avoid unjustified or abusive delisting. In order to guarantee the application of the GSCP, the major retailers shall appoint a person in charge of overseeing compliance of the GSCP within each company. Likewise, an Ombudsman, with the widest powers of investigation, will oversee the application of the GSCP and the settlement of disputes. The defaulting companies shall cease their practices and will also pay pre-established compensation to the supplier if the ruling of the Ombudsman is contrary to their interests\textsuperscript{568}.

In Spain, the Federación de Industrias de Alimentación y Bebidas (the Federation of Food and Drink Industries – FIAB) and the Asociación Española de Distribuidores, Autoservicios y Supermercados (Spanish Association of Retailers, Self-Service and Supermarkets - ASEDAS) signed in 2007 an “Agreement on Recommendation of Good Commercial Practices to Improve Management in the Value Chain and Fostering

\textsuperscript{567} Competition Commission Study 2008, section 9.63.
Business Cooperation” (“ASEDAS-FIAB Agreement”), a voluntary Code of Conduct establishes the main lines of commercial negotiations between suppliers and retailers, and greater legal security for the suppliers with regard to various aspects of the commercial relationship, such as commercial promotions, logistics (delivery, acceptance and, where applicable, returns), the services and charges of the retailers and the payment terms. The ASEDAS-FIAB Agreement envisaged the establishment of a Watchdog Committee, which in turn will appoint a Conflict Settlement Committee.

The ASEDAS-FIAB Agreement is a “milestone in the Spanish food sector as it is first agreement of similar characteristics which was voluntarily and pro-actively promoted by two of the leading links of the food chain”\(^{569}\). However, the British and Australian experience seems to indicate that retailers generally fail to comply with Codes of Conduct, whether or not they are obligatory, and suppliers are generally reluctant to report it. In short, the Codes of Conduct are a step in the correct direction, but in themselves they do not prevent the tacit collusion of the major retailers, in conjunction of the suppliers with leverage, aimed at extracting high commercial payments from the suppliers at the cost of higher transfer prices. This collusive conduct restricts the competition on the manufacturers’ market and on the retail distribution market.

Likewise, the Codes of Conduct have a vertical focus (producer-distributor) and do not tackle the horizontal role of retail distribution as a competitor of the suppliers (private-label brand).

In short, even though the Codes of Conduct, such as the ASEDAS-FIAB Agreement, devoid of anticompetitive clauses\(^{570}\), are a laudable attempt to foster commercial relations between suppliers and retailers, the role of the competition authorities is to ensure competition and the well-being of the consumers. The existence of a collective dominant position of Carrefour, Mercadona and Eroski on the supply and parallel practices market aimed at restricting the competition on the retailers and manufacturers' market, means the competition authorities need to establish the LDC application criteria in this field. A non-executive list of conducts that may be collective or individual position of abuse and/or an antitrust agreement of the retailers in their commercial relations with the suppliers of branded products, the suppliers of private-label brands and the suppliers of fish and agricultural products is set out below.

Form of the contracts


\(^{570}\) Clause 11 of the ASEDAS-FIAB Agreement envisages that suppliers shall pass on to retailers the costs of tax fluctuations and the contributions to integrated management systems. This clause may be an antitrust price-setting agreement: the supplier agree to pass on to the retailers, with their consent, fluctuations in tax costs and the contributions to integrated management systems (\textit{vid.}, similarly, TVDC Resolution of 18 June 2007, Exp. 1/2006, ASETRAVI). Irrespective of the fact that retailers may interpret this clause to mean that they are then require to pass on these external variable to consumers and thus guarantee a neutral effect on their economic position, the application of the predatory pricing legislation guarantee that automatic transfer of the increase of the invoice price to the retail prices without a need for prior agreement. This justifies the determination of suppliers and retailers to ensure the strict application of this legislation as is reflected in Clause 36 of the Agreement.
(1) Failure to establish in writing and beforehand of the contractual conditions with the suppliers is an abuse of a dominant position.
(2) The retroactive amendment of the commercial conditions is an abuse of dominant position.

Commercial payments

(3) Listing fees are an abuse of dominant position and/or antitrust agreement.
(4) Non-standard payments (wedding gifts, anniversary gifts, contribution for new establishments or remodelling existing ones, etc.) are an abuse of dominant position and/or antitrust agreement.
(5) Payments for use or space preference on shelving are an abuse of dominant position and/or antitrust agreement.
(6) Payments for extending the range of products or its extension to new establishments are an abuse of dominant position and/or antitrust agreement.
(7) Payments for use or gondola end unit preference are an abuse of dominant position and/or antitrust agreement.
(8) Payments for replacing products on shelving are an abuse of dominant position and/or antitrust agreement.
(9) Payments for retailer visits, product presentation and packaging, consumer panels, market research, employee hospitality are an abuse of dominant position and/or antitrust agreement.
(10) Overall discounts or payments in advance not related to sales are an abuse of dominant position and/or antitrust agreement.
(11) Payments for promoting a product in the establishment during the year are an abuse of dominant position and/or antitrust agreement.
(12) Payments for specific promotions (gondola, advertising, etc.) are an abuse of dominant position and/or antitrust agreement.
(13) Payments for failure to meet sales or profit expectations are an abuse of dominant position and/or antitrust agreement.
(14) Payments for the surplus promotional labelling or packaging when sales forecasts have not been met an abuse of dominant position and/or antitrust agreement.
(15) Payments to equal the prices of another distributor are an abuse of dominant position.
(16) Payments for managing product waste are an abuse of dominant position and/or antitrust agreement.
(17) Payments for unsold products or buying them back are an abuse of dominant position and/or antitrust agreement.
(18) Failure to compensate the supplier for the costs incurred for errors or changes in the order are an abuse of dominant position.
(19) Payments for breaches of contract (delivery time, product specifications, etc.), which have not been notified to the supplier in writing in time and form or, in any case, after a reasonable period from the delivery of the product, are an abuse of dominant position.
(20) Payments for changes to the bar codes or labelling of reduced prices are an abuse of dominant position and/or antitrust agreement.

(21) Payments for audits and controls carried out by the distributor are an abuse of dominant position and/or antitrust agreement.

(22) Payment delays exceeding 30 days or the product turnover (if it exceeds 30 days) are an abuse of dominant position and/or antitrust agreement^571.

Conducts that affect third-party competition

(23) The transfer to the distributor of information relating to the supplies and prices applied to/by other distributors is an abuse of dominant position and/or antitrust agreement.

(24) The influence on a supplier so that it does not supply or increase the prices applied to another distributor with lower prices is an abuse of dominant position and/or antitrust agreement.

(25) Enforcing on a supplier the purchase of goods or services offered by a third party (transport, pallets, packaging, etc.), in particular, when the retailer has received economic compensation from the third party, is an abuse of dominant position and/or antitrust agreement.

(26) Establishing a “more privileged customer” clause is an abuse of dominant position and/or antitrust agreement.

End of commercial relations

(27) The (treatment or) delisting a supplier in an untimely or unexpected manner (beyond the logical process of negotiating with different suppliers and selecting the best offer) is an abuse of dominant position if it is not justified for pressing reasons.

(28) The replacement of a supplier by another that is not economically justified and, in particular, in terms of the economic profit of each product category (units sold and purchase price) is an abuse of dominant position.

Category management by the supplier

[^571]: The retailer uses its leverage to sell a product and delay payment to the supplier of its transfer price, thus generating financial liquidity at the cost of the supplier, *vid.*, Dobson Study, pp. 117-119 Cruz Roche Study, pg. 26 (“la exigencia de periodos de pago que superan en varias veces el periodo de rotación del distribuidor supone unas condiciones desproporcionadas y que evidencian un mayor poder de mercado del distribuidor”). However, the retailer that has a collective or individual dominant position must act with special diligence so as not to distort the competition on the market and this must imply not abusing the payment terms to consolidate its competitive position (as retailer and as “private-label supplier”) over the private-label suppliers and other retailers. In short, in principle, delaying payment over the rotation of the product implies abuse of a collective or individual dominant position that cannot be justified by an alleged “agreement” with the supplier. However, when the sales turnover is very short and, in any case, under 30 days, reasons of economic efficiency advise a monthly settlement between the supplier and retailer. These considerations from the perspective of competition legislation are independent from the legislation applicable to payment terms: European Council and Parliament Directive 2000/35/EC, of 29 June 2000, which establishes measures to fight against defaulting in commercial operations, Article 17 of the Retail Trade Act 7/1996, of 15 January, and Act 3/2004, of 29 December, establishing measures to fight against defaulting in commercial operations.
The suppliers that reach a management agreement of the same category ("category captain") with more than one retailer will have committed abuse of dominant position and/or antitrust agreement.

Third parties (for example, consultancies) that reach a management agreement of the same category ("category captain") with more than one retailer will have committed abuse of dominant position and/or antitrust agreement, unless they can prove that internal mechanisms are in place that fully guarantee independent management of the customer categories.

Payments to the retailer for category management are an abuse of dominant position and/or antitrust agreement.

Payments to the category captain related to its functions by other suppliers an abuse of dominant position and/or antitrust agreement.

The decisions or recommendations of the “category captain” aimed at promoting its products, without taking into account the demand of the consumers, are an abuse of dominant position and/or antitrust agreement.

Private-label brands

The distributor must manage its products, whether private-label or branded, according to objective and non-discriminatory pre-determined criteria so as not to commit an abuse of dominant position. The economic criteria must directly or indirectly refer to the well-being of consumers (for example, transfer price and units sold).

A refusal to list or delisting a supplier, together with its replacement by a private-label must be justified by objective and non-discriminatory pre-determined criteria.

Category management by the distributor (prices, advertising, positioning, etc.) must follow objective and non-discriminatory criteria. In particular, setting higher margins for branded products than for replacement private-label brands are an abuse of dominant position.

The use of commercially sensitive information of the supplier (R&D, launch plans, promotion campaigns) to the benefit of the private-label brand is an abuse of dominant position.

Linking the supply of branded product to the supply of private-label products is an abuse of dominant position.

Retailers may avoid committing abuse by establishing an internal separation ("firewall") between the department that manages the private-label brand and the department that manage the category and the commercial strategy of the company. An independent auditor or expert may be allocated to the category management, whose “expert” report should assess whether the retailer respects the competition, non-discrimination and objectivity principles.

Commercial information supplied to third parties
The transfer by the suppliers or retailers to third parties (Nielsen, Alimarket, etc) of updated sensitive commercial information (sales volume, prices, etc.) for its publication is an antitrust agreement of which the third party also forms part.

Even though the clarification of the application of the LDC to the aforementioned conducts is an initial step that will provide legal security for the suppliers and the retailers, the next question is to check whether the companies are respecting the LDC. In this area, the leverage of the major retailers and the possibility to delist their suppliers is a factor to be taken into account. When the OFT prepared its Report on the application of the Supermarkets’ Code of Practice and the Competition Commission prepared the Competition Commission Study 2008, they discovered that the suppliers are reluctant to use the dispute settlement instruments and, to a greater extent, the complaints filed with the competition authorities, due to fear, whether justified or not, of the possible reprisals that they may suffer in their commercial relations with their distributors. This situation may generate a certain feeling of impunity among the retailers and suppliers with leverage and discourages compliance of the Codes of Conduct and competition legislation. In short, legislation that is not applied is bad legislation. In order to remedy this situation in Spain, given the lack of the figure of the Ombudsman with investigation and disciplinary powers, a figure existing in the United Kingdom, the suppliers associations that so wish may contract the services of a third parties (for example, a forensic auditor) and empower it to inspect and monitor the commercial relations of its members with retailers. Its exclusive function would be to note possible breaches of the LDC, in accordance with the guidelines arising from this Report, and report them to the CNC or relevant autonomous competition authority. Logically, neither its functions nor its actions should serve to exchange commercial information or agree on the behaviour of the suppliers or, to the contrary, it may lead to administrative proceedings.

11 Final conclusions

1. Major retailers have significantly contributed to economic development. Their size and efficiency has made it possible to constantly innovate the logistic processes, distribution formats and the services offered to consumers.

2. However, the high concentration of the market in the hands of a limited number of companies (oligopoly) may facilitate the understanding of their interdependence and the adoption of parallel conducts that reduce competition on the market (tacit collusion).

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572 Competition Commission Study 2008, footnote 1, pg. 168: “One of the difficulties that we faced when examining competition issues in the groceries supply chain was the reluctance of suppliers to provide us with details of specific instances of conduct by grocery retailers that illustrated the general concerns that were being raised. Following the publication of Emerging Thinking in January 2007, in which we drew attention to the apparent reluctance of suppliers to give evidence to us, we took steps to reassure suppliers that we would be able to receive their evidence regarding grocery retailers’ conduct without damaging their commercial relationships with those retailers.”
3. Tacit collusion does not mean a deliberate intention of infringe competition legislation; it only reflects the rational behaviour of the companies, aimed at maximising their profit on an oligopolistic market. However, neither the oligopolistic structure of the market or the lack of antitrust intentionality of the companies justifies a passive approach by the competition authorities towards parallel behaviours that may cause the same detrimental effects for consumers than the antitrust agreements (for example, price cartels). Oligopolistic companies enjoy a collective dominant positions and their collusive conduct may constitute an abuse of dominant position forbidden by Article 2 of the LDC and/or antitrust agreements contrary to Article 1 of the LDC. Therefore, once the existence of tacit collusion that restrict competition on the market has been proven, proportionate remedies must be established that facilitate better competition without reducing the economic incentives of the companies to be more efficient.

4. With regard to the Spanish grocery retail distribution and supply market, the Cruz Roche Study noted, in 1999, the existence of (i) incipient local oligopolies that fixed supracompetitive prices, (ii) protected by legal barriers, and (iii) used their leverage to, (iv) enforce payments without offsetting entry on their suppliers and (v) promoted their private-label brand to the detriment of the branded product.

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573 1999 Cruz Roche Report, pp. 17-18: “la propia naturaleza competitiva del mercado minorista, donde los costes de búsqueda de los productos son elevados y en consecuencia los clientes se desplazan en una distancia limitada, lleva a que el número de tiendas minoristas que compiten efectivamente en un área local sea muy reducido, formando “oligopolios locales” en los que los minoristas fijan los precios por encima de los costes dirigiéndose a unos consumidores con diferentes preferencias respecto a las enseñas comerciales que les ofrecen distintos niveles de servicio”.

574 1999 Cruz Roche Report, pg. 23: “En primer lugar, la creciente regulación del comercio minorista establece obstáculos a la libre apertura de establecimientos…Por otra parte, los nuevos entrantes se pueden encontrar con que las localizaciones de mayor atractivo han sido ya adquiridas, y quedan libres emplazamientos de menor interés…Finalmente, la utilización de precios predatorios mediante la práctica prohibida tras la Ley de Ordenación del Comercio Minorista de 1996 de las ventas a pérdida puede dificultar la implantación de un nuevo establecimiento minorista”.

575 1999 Cruz Roche Report, pg. 25-26: “La concentración supone un mayor poder de compra sobre los proveedores…Desde la perspectiva del consumidor, si el menor precio de compra obtenido se traslada hacia el consumidor final en forma de precios más bajos, el efecto final sería positivo, dándose únicamente una reestructuración interna del reparto de márgenes en la cadena de valor…Si por el contrario, las economías obtenidas van en todo o en parte a incrementar el margen de los distribuidores, el ejercicido del poder de compra no beneficia a los consumidores y sí a los distribuidores. Los distribuidores pueden con una relativa facilidad sustituir un fabricante por otro, ya que salvo que se trate de un producto con una muy elevada notoriedad e imagen de marca, existen en el mercado numerosos oferentes de productos sustitutivos. Por el contrario, para los fabricantes la pérdida de un distribuidor supone la renuncia a una cuota importante del mercado final…Este diferente grado de sustituibilidad, especialmente en los fabricantes de marcas no líderes, afecta de forma fundamental al establecimiento de condiciones asimétricas de compra mediante la utilización de descuentos y cobros por determinados servicios”.

576 1999 Cruz Roche Report, pg. 27: “Los casos antes citados [descuentos no vinculados a ventas, exigencia de periodos de pago que superan en varias veces el periodo de rotación del distribuidor, pagos por referencia, regalos de boda, apertura o aniversario] constituyen buenos ejemplos de descuentos que no corresponden a ningún servicio prestado al distribuidor o situaciones de las que el productor pudiera obtener un rendimiento adicional. Obviamente, suponen una imposición derivada del poder de mercado, e incluso cabría preguntarse, para el caso de los productores de las marcas más prestigiosas y
5. In a similar way, the TVDC “DISTRIBUTION OF EVERYDAY CONSUMER GOODS: COMPETENCE, OLIGOPOLY AND TACIT COLLUSION” Report concluded that Carrefour, Mercadona and Eroski currently are a “narrow” oligopoly on the Spanish grocery retail market and in the retail distribution to large grocery retail outlets (>1,000 m2), which adapts parallel (collusive) behaviour that restricts competition and is to the detriment of the well-being of the consumer.

6. In the sphere of antitrust legislation, the oligopoly of Carrefour, Mercadona and Eroski is equivalent to a collective dominant position and its collusive conducts are an abuse of said collective dominant position forbidden by Article 2 of the LDC.

7. The main parallel conducts (tacit collusion) that restrict competition and are to the detriment of the well-being of the consumers are as follows:

A) Price parallelism in retail distribution that restricts competition and generates an inflationist trend in everyday consumer goods. Likewise, the lack of price competition is accompanied by a lack of competition in products and services on the markets with high entry barriers where a company has a high market share equivalent to an individual dominant position, which is a double detriment to consumers.

B) Parallelism in negotiations with suppliers aimed at obtaining advantageous commercial conditions that (1) indirectly rise the transfer prices and, due to current legislation, the minimum sales prices, and (2) restrict competition and innovation on the manufacturers’ market and thus favour the manufacturers that have financial resources to meet the payments demanded by the retailers, irrespective of how attractive their products are for the consumers.

c) Parallelism in sub-contracting branded products for their resale as own label (private label) and a discriminatory treatment of the branded products in terms of listing, positioning and price, thus restricting competition and innovation on the manufacturers' market.

8. The “snowball effect”\textsuperscript{578} or “virtuous circle”\textsuperscript{579} regarding which the Commission has theorised in its decisions regarding mergers and economic doctrine, is a reality on the

\textsuperscript{577} 1999 Cruz Roche Report, pg. 28: “El distribuidor organiza las condiciones en las que dentro de su establecimiento compiten las diferentes marcas. Lógicamente, la asignación de los espacios y demás condiciones competitivas entre las marcas concurrentes se produce de acuerdo con la lógica de la contribución de las marcas al beneficio del distribuidor. Sin embargo, ocurre que con las denominadas “marcas del distribuidor”, los intereses del distribuidor tienden a favorecer la posición de su propia marca en los lineales, y se definen los términos de la competencia en las condiciones más favorables para su propia marca. De alguna manera, el distribuidor que antes era el juez de las condiciones en las que los productos se exponían a los consumidores, pasa a ser juez y parte, con lo que se altera el principio de igualdad de oportunidades de las marcas”.

\textsuperscript{578} Carrefour/Promodès Report, p. 69.
Spanish grocery retail and supply market. The antitrust dynamics on both markets has a feedback effect, which increases the concentration, entry barriers, abusive commercial terms and payments and the presence of private-label brands.

Dobson, “Retailer Buyer Power in European Markets”…, pp. 27-28: “Powerful positions in retail markets allow the leading retail groups to take control of supply chains, dictating terms and conditions on suppliers enabling them to gain further competitive advantage over smaller rivals, which in turn leads to further consolidation at the retail level. The process is one of a virtuous circle for the very largest retailers. Through aggressive bargaining tactics and the increasing use of auctions for awarding contracts, retailers have been able to drive down the prices and margins that producers receive to levels that potentially endanger the latter’s long-term viability and incentives to invest. Anti-competitive concerns also arise in regard to the increasing use of vertical restraints by retailers; e.g. practices imposed on producers aimed at further profit extraction or limiting producers’ freedom or incentives to supply elsewhere.”
SNOWBALL EFFECT

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<tr>
<th>Sequence X (INFLECTION POINT): Collective dominant position on the supply and/or retail market\textsuperscript{580}</th>
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<tbody>
<tr>
<td>(1) Payment terms and commercial requirements</td>
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<td>(2) Increase of transfer prices by effect (1)</td>
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<td>(3) Increase of retail prices by effect (2)</td>
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<td>(4) Less retail competition by effect (3)</td>
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<td>(5) Increase of retail concentration by effects (1) and (4)</td>
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<th>Sequence X +1: Abuse of collective dominant position on the retail market</th>
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<td>(6) Increase of payments and commercial conditions by effect (5)</td>
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<td>(7) Increase of transfer prices by effect (6)</td>
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<td>(8) Increase of retail prices by effect (7)</td>
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<td>(9) Less retail competition by effect (8)</td>
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<td>(10) Increase of retail concentration by effects (6) and (9)</td>
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<th>Sequence X +2: Abuse of collective dominant position weakens competition of the manufacturer’s market</th>
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<td>(11) Increase of payments and commercial conditions by effect (10)</td>
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<td>(12) Exclusion of economically weaker suppliers by effect (11)</td>
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<td>(14) Increase of retail prices by effect (13)</td>
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<td>(15) Less retail competition by effect (14)</td>
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<td>(16) Increase of retail concentration by effects (11) and (15)</td>
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<th>Sequence X +3: Abuse of collective dominant position monopolises the manufacturer’s market</th>
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<td>(17) Increase of payments and commercial conditions by effect (16)</td>
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<td>(18) Exclusion of economically weaker suppliers by effect (17)</td>
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<td>(19) Increase of transfer prices by effects (17) and (18)</td>
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<tr>
<td>(20) Increase of retail prices by effect (19)</td>
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<tr>
<td>(21) Private-label brand (vertical integration) excludes suppliers by effect (20)</td>
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9. In order to facilitate greater competition on the supply and retail distribution market, action needs to be taken on both markets. On the retail distribution market, the following remedies must be put into practice: (A) suppress legal restrictions (entry barriers, predatory pricing legislation and shop opening hours legislation), (B) forbid antitrust conducts of the companies and the authorities in terms of land use, (C) forbid

\textsuperscript{580} The existence of a collective dominant position of Carrefour, Mercadona and Eroski both on the supply market and on the grocery retail distribution market, allows the order of the factors to be altered with the same result, for example, the “snowball effect” can begin with a less competitive retail prices, which reduces the competition regarding transfer prices and increases the payment requirements and other commercial conditions, with the effects described in this table.
the most privileged customer clauses, (D) forbid conducts that prevent new independent business forms online, and (E) carry out a more demanding analysis of the retail distribution concentrations. On the supply market, it is necessary to (F) ban all abusive or collusive conduct between retailers and suppliers that restrict competition.

**A. Legal Barriers**

A.1. The TVDC has put forward the setting up of a work group with the CNC and the other authorities with competence in the autonomous communities to monitor and control national and regional legislation that has an impact on the setting up of leading grocery retail outlets. In particular, the TVDC proposes to denounce administrative measures, including Sectorial Territorial Plans (PTS), which establish quantitative limits, even for urban development reasons. Likewise, the TVDC proposes to gather the opinion of the Commission in relation to the justification and proportionality of the primacy principle of urban over periurban stores.

A.2. The TVDC propose that the work group of the antitrust authorities, automatically or in response to complaints by the companies in questions, controls urban planning that may restrict competition in the sphere of unjustified or out-of-proportion retail distribution. The work group should offer its cooperation and advice to local councils to facilitate the compliance of the provisions of the Service Directive and LDC. As a last resort, the CNC throughout Spain and the autonomous antitrust entities in their geographical sphere of action may lodge appeals with the administrative litigation courts against the commercial and urban planning that do not respect the Services Directive and free competition.

A.3. The TVDC will put forward that Article 14 of the LORCOMIN be repealed during the parliamentary hearing of the Bill which amends the unfair competition legal system to improve the protection of consumers and users, in the interests of transposing the Unfair Commercial Practices Directive.

A.4. The TVDC recommends the suppression of legal restrictions relating to shop opening hours (opening days and times) The TVDC will foster infringement proceedings into agreements between companies and Collective Agreements aimed at limiting their business autonomy with regard to these competition parameters.

**B. Restrictive conducts on land-related matters**

B.1. The TVDC considers that there may be incompatibility with Articles 1 and 2 of the LDC in relation to the acquisition of land right in order to set up or expand a grocery retail outlet of more than 1,000 square metres if, within a 15 minute radius by car,

- the company has one or more establishments
- three or less competitors are present, and
- the company’s resulting market share is over 30%.
The fact that these conditions exist does not necessarily imply a negative assessment of the operation in the absence of legal barriers or entry strategies. In order to assess the existence of said entry barriers, the TVDC will take into account:

- The availability of commercial land for grocery retail outlets within the relevant radius, taking into account current urban planning regulations and information gathered from the local councils in question; and
- Market saturation, taking into account the information provided by the company itself, its competitors and consumer associations.

B.2. The TVDC considers that the defensive acquisition of rights may take place on land that is not viable as a site for its own grocery retail outlet, but are necessary to set up or expand a competitor’s grocery retail outlet is an objective or per se breach of the LDC. Even if the acquired land is to be used as the site of a small retail outlet, the acquisition may be in breach of the LDC, if said land is suitable, in conjunction with other adjacent land, as the site of a grocery retail outlet and there is not sufficient competition on the grocery retail market, in accordance with the criteria established in (B.1.)

B.3. The TVDC considers that the transfer by retailers of rights regarding the property or use of land with contractual restrictions that prevent their commercial use for grocery retail distribution is likely to infringe the LDC:

B.4. The TVDC considers that an agreement with a third party (for example, commercial developers) that includes restrictions relating to the use of its land or installations for grocery retail distribution is a possible incompatibility with the LCD if the criteria listed in (B.1) occur.

B.5. The TVDC considers that urban planning agreements between retailers and local councils that restrict competition to the benefit of the former are an infringement of the LDC attributable to both parties. This restriction of competition may indirectly come from the joint evaluation of the agreement and the municipal urban planning policy. Therefore, the TVDC will assess on its own motion or, in any event, at the request of affected third parties, the compliance with the LDC of the agreements entered into between local councils and retailers to set up leading grocery retail outlets with more than 1,000 square metres of sales area and smaller commercial areas located on sites that are suitable for said outlets.

B.6. The TVDC considers that the enforced sale of grocery retailers is a necessary remedy in the case of the local market becoming saturated or closed, a situation that can be said to occur in the following conditions:

- High market share of a company (+50%)
- multi-establishment presence of said company (+1)
- reduced number of competitors (3 or less) and
- legal barriers that prevent or make it hugely difficult for new competitors to enter (no available and viable commercial land available).
C. Merger control

C.1. The TVDC suggests to the CNC that, in the framework of the merger control, a thorough economic analysis be carried out of the unilateral and coordinated effects on competition of all mergers on the grocery retail markets if:

(1) at least one of the three companies in a collective dominant position (Carrefour, Mercadona and Eroski) take part in the merger, or

(2) there is an overlap of large retail outlets in any local grocery retail market.

C.3. The TVDC suggests to the CNC that the competitive analysis of the mergers (C.1.) takes into account the oligopolistic structure of the market, the entry barriers in the local markets and the need to maintain a variety of supply that decreases the collusive incentives and fosters greater competition. Therefore, the TVDC considers that any acquisition that reduces the number of competitors on the major retail outlet market or a local market to less than four shall be analysed thoroughly and shall conclusively justify its benefits (efficiencies) for the consumers and the absence of entry barriers (legal and economic).

C.3. The TVDC suggests to the CNC that the competitive analysis of the mergers (C.1.1.) takes into account that Carrefour, Mercadona and Eroski form a national oligopoly and are aware of their own interdependence, which allows them to adopt parallel conducts on the distribution and supply market to maximise their profits. Therefore, even in the case that the acquisition by one of these companies of the minority establishments and, in particular, leading grocery retail outlets belonging to third parties, does not result in unilateral or coordinated antitrust effects on the local market, the TVDC proposes that the authorisation of the purchase will likewise be conditional on the enforced sale of leading grocery retail outlets, which represent a market share equivalent to the one acquired, on the local markets saturated by their own establishments. The TVDC likewise proposes that market saturation shall be presumed to exist in the following conditions:

- High market share of a company (+50%)
- multi-establishment presence of said company (+1)
- reduced number of competitors (3 or less) and
- legal barriers that prevent or make it hugely difficult for new competitors to enter (no available and viable commercial land available).

D. Most favoured customer clauses

D.1. The TVDC considers that the use of these clauses by the members of the retail oligopoly is an abuse of collective dominant position and/or antitrust agreement.

E. Anticompetitive conducts in new commercial channels (Internet)
E.1. The TVDC considers that any conduct of the companies that hold a collective dominant position on the retail distribution market that prevents the appearance of new or differentiate services on the online retail market and, indirectly, the competition on the “physical” distribution market, could be considered an abuse of the dominant position.

F. Anticompetitive conducts in the suppliers-retailers relations

A non-executive list of conducts that may be collective or individual position of abuse and/or an antitrust agreement of the retailers in their commercial relations with the suppliers of branded products, the suppliers of private-label brands and the suppliers of fish and agricultural products is set out below.

F.1. Form of the contracts

(1) Failure to establish in writing and beforehand of the contractual conditions with the suppliers is an abuse of a dominant position.
(2) The retroactive amendment of the commercial conditions is an abuse of dominant position.

F.2. Commercial payments

(3) Listing fees are an abuse of dominant position and/or antitrust agreement.
(4) Non-standard payments (wedding gifts, anniversary gifts, contribution for new establishments or remodelling existing ones, etc.) are an abuse of dominant position and/or antitrust agreement.
(5) Payments for use or space preference on shelving are an abuse of dominant position and/or antitrust agreement.
(6) Payments for extending the range of products or its extension to new establishments are an abuse of dominant position and/or antitrust agreement.
(7) Payments for use or gondola end unit preference are an abuse of dominant position and/or antitrust agreement.
(8) Payments for replacing products on shelving are an abuse of dominant position and/or antitrust agreement.
(9) Payments for retailer visits, product presentation and packaging, consumer panels, market research, employee hospitality are an abuse of dominant position and/or antitrust agreement.
(10) Overall discounts or payments in advance not related to sales are an abuse of dominant position and/or antitrust agreement.
(11) Payments for promoting a product in the establishment during the year are an abuse of dominant position and/or antitrust agreement.
(12) Payments for specific promotions (gondola, advertising, etc.) are an abuse of dominant position and/or antitrust agreement.
(13) Payments for failure to meet sales or profit expectations are an abuse of dominant position and/or antitrust agreement.
(14) Payments for the surplus promotional labelling or packaging when sales forecasts have not been met an abuse of dominant position and/or antitrust agreement.
(15) Payments to equal the prices of another distributor are an abuse of dominant position.
(16) Payments for managing product waste are an abuse of dominant position and/or antitrust agreement.
(17) Payments for unsold products or buying them back are an abuse of dominant position and/or antitrust agreement.
(18) Failure to compensate the supplier for the costs incurred for errors or changes in the order are an abuse of dominant position.
(19) Payments for breaches of contract (delivery time, product specifications, etc.), which have not been notified to the supplier in writing in time and form or, in any case, after a reasonable period from the delivery of the product, are an abuse of dominant position.
(20) Payments for changes to the bar codes or labelling of reduced prices are an abuse of dominant position and/or antitrust agreement.
(21) Payments for audits and controls carried out by the distributor are an abuse of dominant position and/or antitrust agreement.
(22) Payment delays exceeding 30 days or the product turnover (if it exceeds 30 days) are an abuse of dominant position and/or antitrust agreement.

F.3. Conducts that affect third-party competition

(23) The transfer to the distributor of information relating to the supplies and prices applied to/by other distributors is an abuse of dominant position and/or antitrust agreement.
(24) The influence on a supplier so that it does not supply or increase the prices applied to another distributor with lower prices is an abuse of dominant position and/or antitrust agreement.
(25) Enforcing on a supplier the purchase of goods or services offered by a third party (transport, pallets, packaging, etc.), in particular, when the retailer has received economic compensation from the third party, is an abuse of dominant position and/or antitrust agreement.
(26) Establishing a “more privileged customer” clause is an abuse of dominant position and/or antitrust agreement.

F.4 End of commercial relations

(27) The (treatment or) delisting a supplier in an untimely or unexpected manner (beyond the logical process of negotiating with different suppliers and selecting the best offer) is an abuse of dominant position if it is not justified for pressing reasons.
(28) The replacement of a supplier by another that is not economically justified and, in particular, in terms of the economic profit of each product category (units sold and purchase price) is an abuse of dominant position.
F.5 Category management by the supplier

(29) The suppliers that reach a management agreement of the same category ("category captain") with more than one retailer will have committed abuse of dominant position and/or antitrust agreement.

(30) Third parties (for example, consultancies) that reach a management agreement of the same category ("category captain") with more than one retailer will have committed abuse of dominant position and/or antitrust agreement, unless they can prove that internal mechanisms are in place that fully guarantee independent management of the customer categories.

(31) Payments to the distributor for category management are an abuse of dominant position and/or antitrust agreement.

(32) Payments to the category captain related to its functions by other suppliers an abuse of dominant position and/or antitrust agreement.

(33) The decisions or recommendations of the “category captain” aimed at promoting its products, without taking into account the demand of the consumers, are an abuse of dominant position and/or antitrust agreement.

F.6. Private-label brand

(34) The distributor must manage its products, whether private-label or branded, according to objective and non-discriminatory pre-determined criteria so as not to commit an abuse of dominant position. In particular, the economic criteria must directly or indirectly refer to the well-being of consumers (for example, transfer price and units sold).

(35) A refusal to list or delisting a supplier, together with its replacement by a private-label must be justified by objective and non-discriminatory pre-determined criteria.

(36) Category management by the distributor (prices, advertising, positioning, etc.) must follow objective and non-discriminatory criteria. In particular, setting higher margins for branded products than for replacement private-label brands are an abuse of dominant position.

(37) The use of commercially sensitive information of the supplier (R&D, launch plans, promotion campaigns) to the benefit of the private-label brand is an abuse of dominant position.

(38) Linking the supply of branded product to the supply of private-label products is an abuse of dominant position.

Retailers may avoid committing abuse by establishing an internal separation ("firewall") between the department that manages the private-label brand and the department that manage the category and the commercial strategy of the company. An independent auditor or expert may be allocated to the category management, whose “expert” report should assess whether the retailer respects the competition, non-discrimination and objectivity principles.

F.7 Commercial information supplied to third parties
(39) The transfer by the suppliers or retailers to third parties (Nielsen, Alimarket, etc) of updated sensitive commercial information (sales volume, prices, etc.) for its publication is an antitrust agreement of which the third party also forms part.

G. Private control of the possible abuses by the retailers

The TVDC recommends, pursuant to the LDC that suppliers’ associations contract the services of a third party (for example, an auditor) with powers to inspect and monitor the commercial relations of its members with retailers, along with the reporting of any breaches of the LDC to the association or relevant competition authority. In any event, neither its functions nor its actions should serve to exchange commercial information or agree on the behaviour of the suppliers or, to the contrary, it may lead to administrative proceedings.

H. Codes of Conduct

G.1. The TVDC will respect the minimum intervention principle in relation to the Codes of Conduct signed by suppliers-retailers that (1) ban the antitrust conduct identified herein and (2) establish efficient legal instruments to monitor, control, remodelling and compensation.

G.2 The TVDC considers that Clauses 11 and 36 of the "Agreement on Recommended Good Commercial Practices to Improve the Management of the Value Chain and Foster Business Cooperation" signed by the FIAB and ASEDAS may infringe the LDC and therefore recommends it is removed.
12 Annexes

12.1 Carrefour/Promodès Report, Area 3

<table>
<thead>
<tr>
<th>ZONA</th>
<th>Enseña Presentes del Grupo CARREFOUR</th>
<th>Cuota mercado Libreservicio Grupo C/P</th>
<th>Cuota Mercado Libreservicio/Competid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mgeochas</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>35,4%</td>
<td>11,7% CONSUM</td>
</tr>
<tr>
<td>Cádiz</td>
<td>PRYCA, DIA, CHAMPION</td>
<td>24,2%</td>
<td>34,5% SUPERSOL (753 m²)</td>
</tr>
<tr>
<td>Puerto Sta María</td>
<td>PRYCA, DIA</td>
<td>30,1%</td>
<td>33,4% SUPERSOL (880 m²)</td>
</tr>
<tr>
<td>Jerez</td>
<td>PRYCA, CONTINENTE, CHAMPION</td>
<td>27,9%</td>
<td>16,6% SUPERSOL (1122 m²)</td>
</tr>
<tr>
<td>Málaga</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>30,8%</td>
<td>16,6% SUPERSOL (665 m²)</td>
</tr>
<tr>
<td>Sevilla</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>18,4%</td>
<td>23,8% SUPERMAS (726 m²)</td>
</tr>
<tr>
<td>Palma Mallorca</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>24,2%</td>
<td>33,5% SYP (478 m²)</td>
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<tr>
<td>Murcia</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>35,1%</td>
<td>23,7% MERCADONA (165 m²)</td>
</tr>
<tr>
<td>Cartagena</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>33,2%</td>
<td>28,1% SUPERQUÉ (1000 m²)</td>
</tr>
<tr>
<td>Avilés</td>
<td>PRYCA, CONTINENTE, DIA</td>
<td>25,1% (39,2%)</td>
<td>32,6% ALIMERKA (586 m)</td>
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<tr>
<td>Madrid Norte</td>
<td>PRYCA, CONTINENTE, CHAMPION, DIA</td>
<td>34,7%</td>
<td>10,6% ALCAMPO</td>
</tr>
<tr>
<td>Madrid Norte</td>
<td>PRYCA, CONTINENTE, CHAMPION, DIA</td>
<td>45,6%</td>
<td>13,8% CONDIS</td>
</tr>
<tr>
<td>Vallés Occidental</td>
<td>PRYCA, CONTINENTE, SUPECO, MAXOR, DIA</td>
<td>31,4%</td>
<td>8,5% CAPRABO (689 m²)</td>
</tr>
<tr>
<td>Barberà</td>
<td>PRYCA, CONTINENTE, SUPECO, DIA</td>
<td>37,4%</td>
<td>11,1% DISTOP (363 m²)</td>
</tr>
<tr>
<td>Gages</td>
<td>PRYCA, SUPECO, DIA</td>
<td>42,0%</td>
<td>14,9% LLOBET (225 m²)</td>
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<tr>
<td>Lérida (30)</td>
<td>PRYCA, CHAMPION, DIA</td>
<td>33,2%</td>
<td>31,7% PLUSFREC (m²)</td>
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<tr>
<td>Gerona</td>
<td>MAXIM, MAXOR, SUPERSTOP, DIA</td>
<td>25,3%</td>
<td>26,3% CAPRABO</td>
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48/71
### Economic Performance of the Commercial Formats (Nielsen, 2008)

#### Hypermarket Performances, 2006-2007 (in euros)

<table>
<thead>
<tr>
<th>Year</th>
<th>Sales/m²</th>
<th>Sales/Check out</th>
<th>Sales/Employee</th>
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</thead>
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<tr>
<td>2006</td>
<td>5.867</td>
<td>1.200.756</td>
<td>217.336</td>
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<tr>
<td>2007</td>
<td>4.714</td>
<td>1.191.425</td>
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#### Supermarket (1,000 to 2,499 m²) Performance, 2006-2007 (in euros)

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<th>Sales/Check out</th>
<th>Sales/Employee</th>
</tr>
</thead>
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<td>2006</td>
<td>4.906</td>
<td>863.833</td>
<td>237.168</td>
</tr>
<tr>
<td>2007</td>
<td>5.087</td>
<td>903.960</td>
<td>248.271</td>
</tr>
</tbody>
</table>

#### Supermarket (400 to 999 m²) Performance, 2006-2007 (in euros)

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<th>Sales/Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>3.353</td>
<td>556.495</td>
<td>175.386</td>
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<tr>
<td>2007</td>
<td>3.434</td>
<td>567.754</td>
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Supermarket (100 to 399 m²) Performance, 2006-2007 (in euros)

<table>
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<th>Sales/Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>3.839</td>
<td>447.888</td>
<td>191.952</td>
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<tr>
<td>2007</td>
<td>3.847</td>
<td>444.271</td>
<td>194.368</td>
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12.3 Market shares in the Spanish Regions (Alimarket, 2008)

<table>
<thead>
<tr>
<th>ANDALUSIA</th>
<th>SURFACE AREA (M²)</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>CARREFOUR</td>
<td>438.706</td>
<td>20.3%</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>376.849</td>
<td>17.4%</td>
</tr>
<tr>
<td>COVIRAN</td>
<td>204.852</td>
<td>9.5%</td>
</tr>
<tr>
<td>DINOSOL</td>
<td>145.111</td>
<td>6.7%</td>
</tr>
<tr>
<td>EL CORTE INGLES</td>
<td>134.400</td>
<td>6.2%</td>
</tr>
<tr>
<td>GRUPO HERMANOS</td>
<td>133.959</td>
<td>6.1%</td>
</tr>
<tr>
<td>MARTIN</td>
<td>113.993</td>
<td>5.3%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>107.051</td>
<td>5.0%</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>27.000</td>
<td>1.2%</td>
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<tr>
<td>CONSUM,COOP</td>
<td>7.957</td>
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<td>TOTAL AUTONOMOUS COMMUNITY</td>
<td>2.162.328</td>
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<tr>
<td>C3</td>
<td>47.2%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>60.1%</td>
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<table>
<thead>
<tr>
<th>ARAGON</th>
<th>SURFACE AREA (M²)</th>
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<tbody>
<tr>
<td>GALERIAS PRIMERO</td>
<td>78.796</td>
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<tr>
<td>AUCHAN</td>
<td>61.473</td>
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<tr>
<td>CARREFOUR</td>
<td>51.331</td>
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<td>EROSKI</td>
<td>49.807</td>
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<tr>
<td>MERCADONA</td>
<td>36.632</td>
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<tr>
<td>COVALCO</td>
<td>16.632</td>
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<tr>
<td>EL CORTE INGLES</td>
<td>12.400</td>
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<tr>
<td>TOTAL AUTONOMOUS COMMUNITY</td>
<td>357.503</td>
<td></td>
</tr>
<tr>
<td>C3</td>
<td>53.6%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>77.8%</td>
<td></td>
</tr>
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## ASTURIAS

<table>
<thead>
<tr>
<th>SURFACE AREA (M²)</th>
<th>SHARE</th>
</tr>
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<tbody>
<tr>
<td>ALIMERKA</td>
<td>107.034</td>
</tr>
<tr>
<td>GRUPO EL ARBOL</td>
<td>60.128</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>54.767</td>
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<tr>
<td>HIJOS DE LUIS</td>
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<td>RODRIGUEZ</td>
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</tr>
<tr>
<td>EL CORTE INGLES</td>
<td>22.426</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>21.969</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>9.595</td>
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<tr>
<td><strong>TOTAL AUTONOMOUS COMMUNITY</strong></td>
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C3: 61.4%  
C5: 76.2%

## BALEARIC ISLANDS

<table>
<thead>
<tr>
<th>SURFACE AREA (M²)</th>
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<tbody>
<tr>
<td>EROSKI</td>
<td>115.939</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>35.553</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>17.822</td>
</tr>
<tr>
<td>DOMINGO MARQUES</td>
<td>13.667</td>
</tr>
<tr>
<td>MIQUEL ALIMENTACION</td>
<td>9.358</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>6.000</td>
</tr>
<tr>
<td><strong>TOTAL AUTONOMOUS COMMUNITY</strong></td>
<td><strong>271466</strong></td>
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</table>

C3: 62.4%  
C5: 70.9%

## CANARY ISLANDS

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<thead>
<tr>
<th>SURFACE AREA (M²)</th>
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</tr>
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<td>DINOSOL</td>
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<td>AGRUCAN</td>
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<tr>
<td>MERCADONA</td>
<td>78.758</td>
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<tr>
<td>COMERCIAL JESUMAN</td>
<td>58.134</td>
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<td>UNIDE, S.COOP</td>
<td>30.670</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>25.700</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>15.750</td>
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</tr>
<tr>
<td>C3</td>
<td>60.3%</td>
</tr>
<tr>
<td>C5</td>
<td>77.5%</td>
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<table>
<thead>
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<th>CANTABRIA</th>
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<tr>
<td>SEMARK AC GROUP, S.A</td>
<td>58.597</td>
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<tr>
<td>CARREFOUR</td>
<td>35.514</td>
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<tr>
<td>COVIRAN</td>
<td>21.001</td>
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<tr>
<td>EROSKI</td>
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<tr>
<td>UVESCO</td>
<td>15.831</td>
<td>9.0%</td>
</tr>
<tr>
<td>GRUPO EL ARBOL</td>
<td>8.961</td>
<td>5.1%</td>
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<tr>
<td><strong>TOTAL AUTONOMOUS COMMUNITY</strong></td>
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</tr>
<tr>
<td>C3</td>
<td>65.4%</td>
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<td>C5</td>
<td>84.9%</td>
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<table>
<thead>
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<td>MERCADONDA</td>
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<td>80.243</td>
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<tr>
<td>EROSKI</td>
<td>50.654</td>
<td>11.5%</td>
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<tr>
<td>ECO MORA</td>
<td>35.865</td>
<td>8.2%</td>
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<td>AHORRANMAS</td>
<td>23.223</td>
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<tr>
<td>H.D.COVALCO</td>
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<td>3.6%</td>
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<td>C5</td>
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<tr>
<td>CASTILLA Y LEÓN</td>
<td>SURFACE AREA (M2)</td>
<td>SHARE</td>
</tr>
<tr>
<td>----------------</td>
<td>-------------------</td>
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<tr>
<td>CARREFOUR</td>
<td>135.104</td>
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<tr>
<td>GRUPO EL ARBOL</td>
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</tr>
<tr>
<td>MERCADONA</td>
<td>62.215</td>
<td>10.3%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>61.479</td>
<td>10.1%</td>
</tr>
<tr>
<td>SEMARK AC GROUP</td>
<td>28.425</td>
<td>4.7%</td>
</tr>
<tr>
<td>ALIMERKA</td>
<td>26.904</td>
<td>4.4%</td>
</tr>
<tr>
<td>TOTAL AUTONOMOUS COMMUNITY</td>
<td>606.941</td>
<td></td>
</tr>
<tr>
<td>C3</td>
<td>44.2%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>59.1%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CATALONIA</th>
<th>SURFACE AREA (M2)</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>CARREFOUR</td>
<td>298.484</td>
<td>18.8%</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>159.092</td>
<td>10.0%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>245.387</td>
<td>15.5%</td>
</tr>
<tr>
<td>CONDIS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SUPERMERCADOS</td>
<td>145.895</td>
<td>9.2%</td>
</tr>
<tr>
<td>BON PREU</td>
<td>95.776</td>
<td>6.0%</td>
</tr>
<tr>
<td>CONSUM, COOP</td>
<td>81.504</td>
<td>5.1%</td>
</tr>
<tr>
<td>TOTAL AUTONOMOUS COMMUNITY</td>
<td>1,585,822</td>
<td></td>
</tr>
<tr>
<td>C3</td>
<td>44.3%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>59.6%</td>
<td></td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>EXTREMADURA</th>
<th>SURFACE AREA (M2)</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>CARREFOUR</td>
<td>70.290</td>
<td>25.3%</td>
</tr>
<tr>
<td>LIDER ALIMENT</td>
<td>63.112</td>
<td>22.7%</td>
</tr>
<tr>
<td>MERCADONA</td>
<td>32.405</td>
<td>11.6%</td>
</tr>
<tr>
<td>GRUPO EL ARBOL</td>
<td>24.870</td>
<td>8.9%</td>
</tr>
<tr>
<td>COOP. SAN RAFAEL</td>
<td>18.330</td>
<td>6.6%</td>
</tr>
<tr>
<td>COVIRAN</td>
<td>14.346</td>
<td>5.2%</td>
</tr>
<tr>
<td><strong>TOTAL AUTONOMOUS COMMUNITY</strong></td>
<td><strong>278.270</strong></td>
<td></td>
</tr>
<tr>
<td>C3</td>
<td>59.6%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>75.1%</td>
<td></td>
</tr>
</tbody>
</table>

| GALICIA | SURFACE AREA (M2) | SHARE |
| EROSKI | 168.178 | 22.4% |
| GADISA | 163.833 | 21.8% |
| CARREFOUR | 140.563 | 18.7% |
| GRUPO FROIZ | 104.292 | 13.9% |
| MERCADONA | 43.901 | 5.8% |
| Auchan | 19.420 | 2.6% |
| **TOTAL AUTONOMOUS COMMUNITY** | **751.313** | |
| C3 | 62.9% |
| C5 | 82.6% |

| LA RIOJA | SURFACE AREA (M2) | SHARE |
| EROSKI | 23.539 | 27.6% |
| Auchan | 18.267 | 21.5% |
| CARREFOUR | 14.887 | 17.5% |
| MERCADONA | 9.380 | 11.0% |
| LIDL | 5.326 | 6.3% |
| SUPERMERCADOS | 3.670 | 4.3% |
| MIQUEL ALIMENTACION | 3.670 | 4.3% |
| **TOTAL AUTONOMOUS COMMUNITY** | **85.135** | |
| C3 | 66.6% |
| C5 | 83.9% |
### MADRID

<table>
<thead>
<tr>
<th>Store</th>
<th>Surface Area (M2)</th>
<th>Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>CARREFOUR</td>
<td>269.776</td>
<td>24.4%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>138.955</td>
<td>12.5%</td>
</tr>
<tr>
<td>EL CORTE INGLES</td>
<td>120.650</td>
<td>10.9%</td>
</tr>
<tr>
<td>AHORRAMAS</td>
<td>102.273</td>
<td>9.2%</td>
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<tr>
<td>MERCADONA</td>
<td>97.168</td>
<td>8.8%</td>
</tr>
<tr>
<td>Auchan</td>
<td>80.321</td>
<td>7.3%</td>
</tr>
<tr>
<td><strong>Total Autonomous Community</strong></td>
<td><strong>1,107,801</strong></td>
<td></td>
</tr>
<tr>
<td><strong>C3</strong></td>
<td></td>
<td>47.8%</td>
</tr>
<tr>
<td><strong>C5</strong></td>
<td></td>
<td>65.8%</td>
</tr>
</tbody>
</table>

### MURCIA

<table>
<thead>
<tr>
<th>Store</th>
<th>Surface Area (M2)</th>
<th>Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>MERCADONA</td>
<td>81.219</td>
<td>26.0%</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>61.279</td>
<td>19.6%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>26.055</td>
<td>8.3%</td>
</tr>
<tr>
<td>GRUPO UPPER S.COOP</td>
<td>20.836</td>
<td>6.7%</td>
</tr>
<tr>
<td>CONSUM, COOP</td>
<td>15.536</td>
<td>5.0%</td>
</tr>
<tr>
<td>GRUPO EL ARBOL</td>
<td>13.842</td>
<td>4.4%</td>
</tr>
<tr>
<td><strong>Total Autonomous Community</strong></td>
<td><strong>312,139</strong></td>
<td></td>
</tr>
<tr>
<td><strong>C3</strong></td>
<td></td>
<td>54.0%</td>
</tr>
<tr>
<td><strong>C5</strong></td>
<td></td>
<td>65.7%</td>
</tr>
</tbody>
</table>

### NAVARRA

<table>
<thead>
<tr>
<th>Store</th>
<th>Surface Area (M2)</th>
<th>Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>EROSKI</td>
<td>59.093</td>
<td>39.7%</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>31.042</td>
<td>20.9%</td>
</tr>
<tr>
<td>UVESCO</td>
<td>13.568</td>
<td>9.1%</td>
</tr>
<tr>
<td>COVIRAN</td>
<td>9.576</td>
<td>6.4%</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>6.080</td>
<td>4.1%</td>
</tr>
<tr>
<td>LECLERC</td>
<td>5.150</td>
<td>3.5%</td>
</tr>
<tr>
<td><strong>Total Autonomous</strong></td>
<td><strong>148,803</strong></td>
<td></td>
</tr>
<tr>
<td>COMMUNITY</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>C3</td>
<td>69.7%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>80.2%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>BASQUE COUNTRY</th>
<th>SURFACE AREA (M2)</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>EROSKI</td>
<td>189.174</td>
<td>39.1%</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>80.200</td>
<td>16.6%</td>
</tr>
<tr>
<td>UVESCO</td>
<td>71.374</td>
<td>14.7%</td>
</tr>
<tr>
<td>AUCHAN</td>
<td>45.733</td>
<td>9.4%</td>
</tr>
<tr>
<td>ERCORECA</td>
<td>24.488</td>
<td>5.1%</td>
</tr>
<tr>
<td>NORALCO</td>
<td>16.270</td>
<td>3.4%</td>
</tr>
<tr>
<td>TOTAL AUTONOMOUS COMMUNITY</td>
<td>484.213</td>
<td></td>
</tr>
<tr>
<td>C3</td>
<td>70.4%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>84.9%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VALENCIA</th>
<th>SURFACE AREA (M2)</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>MERCADONA</td>
<td>349.929</td>
<td>26.3%</td>
</tr>
<tr>
<td>CONSUM, COOP</td>
<td>274.534</td>
<td>20.6%</td>
</tr>
<tr>
<td>CARREFOUR</td>
<td>200.919</td>
<td>15.1%</td>
</tr>
<tr>
<td>JUAN FORNES FORNES</td>
<td>67.510</td>
<td>5.1%</td>
</tr>
<tr>
<td>EL CORTE INGLES</td>
<td>55.200</td>
<td>4.2%</td>
</tr>
<tr>
<td>EROSKI</td>
<td>44.042</td>
<td>3.3%</td>
</tr>
<tr>
<td>TOTAL AUTONOMOUS COMMUNITY</td>
<td>1,329.633</td>
<td></td>
</tr>
<tr>
<td>C3</td>
<td>62.1%</td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>71.3%</td>
<td></td>
</tr>
</tbody>
</table>
12.4 Terms and Conditions of Carrefour Lowest Price Guarantee

1. "LOWEST PRICE GUARANTEE FOR ANY ARTICLE. If you find any article available at a Carrefour hypermarket cheaper in another establishment in the same province, we will equal the price of our competitor after checking the information."

2. This guarantee will be valid for all the articles on sale at Carrefour hypermarkets, whether or not they are on offer or are part of any promotion.

3. The customer shall request this LOWEST PRICE GUARANTEE by calling 900.410.410

4. The customer can request the guarantee whether or not he bought the article in Carrefour. If he bought the article in Carrefour, he will have to show the relevant receipt. Only one request per customer for the same article will be accepted.

5. The comparison with the competition will be with the retail prices (PVP) in force on the same day that the client requests the guarantee. If the client has acquired the article in Carrefour, he will have 7 days to request the guarantee. The comparison will only be valid with establishments that are in the same province and always based on retail sales including tax.

6. For the purposes of comparison with the Carrefour retail prices, the prices for the end consumers and displayed at the point of sale are valid. Therefore, prices of company stores, shopping clubs, wholesale establishments, special liquidations or with quantity limitations, street markets, online shopping, catalogue shopping, telephone sales or any other form of distance selling are excluded. Comparisons with retail prices of the competition that have been communicated and published as errors, either at the sale outlet or in the media, will be accepted. Likewise, comparisons will not be accepted between the different Carrefour centres or comparisons of retail prices that are predatory pricing or any breach of current legislation.

7. The price comparison will be between articles of the same brand, format, characteristics and similar promotion conditions (discounts, gift of another article, etc.). In the case of articles on sale in Carrefour, for purchases or two or more units (in promotions such as 3x2, 2nd Unit at Half Price, etc.), the comparison of the article will always be on the cheapest price after applying the promotion.

8. The customer will need to provide proof of the retail price at the other establishment where he has seen the cheaper price in the form of advertising material, receipt or invoice.

9. Carrefour has 24 hours to change the price from when the customer requests the LOWEST PRICE GUARANTEE and to put the change into practice (48 hours for articles on offer or in Carrefour brochures, except for volume promotions where the price will not be able to be modified). Requests received on Fridays, will be transmitted on the following Mondays.
10. For non-perishable products, the changed price will be maintained, at least, during the following 30 days once it is changed and it will be maintained for 7 days in the case of fresh products.

11. If the client purchases the article in Carrefour, apart from being to do so at the requested retail price, Carrefour shall pay the price difference in the form of a Carrefour Gift Voucher, which it shall send to the customer within 8 days of the request in question for the LOWEST PRICE GUARANTEE. This payment shall be applied up to a maximum of 6 units per article of food purchased and included on the purchase ticket and 1 unit of non-food articles. If the article has already been bought in Carrefour (during the 7 days prior to the request), the difference shall likewise be paid in the form of a Carrefour Gift Voucher. Should the article be returned, the amount paid to the customer for this LOWEST PRICE GUARANTEE shall be discounted. Any other discount associated to the article applied at the time of its purchase may likewise by discounted.

12. The terms and conditions of this LOWEST PRICE GUARANTEE are available for customers from the Customer Service Department at the Carrefour hypermarkets.
### Analysis of the strategies of the main distributor on negotiations with suppliers (Cruz Roche Report, 1999)

<table>
<thead>
<tr>
<th>Aspectos de la negociación</th>
<th>Negociación con el principal distribuidor</th>
<th>Negociación con el distribuidor medio</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Importancia (A)</td>
<td>Presión a aceptar condiciones (B)</td>
</tr>
<tr>
<td>Descuento sobre precio tarifa</td>
<td>4,76</td>
<td>4,42</td>
</tr>
<tr>
<td>Cánones de referencia (alta de nuevos productos)</td>
<td>5,12 (a)</td>
<td>4,97 (a)</td>
</tr>
<tr>
<td>Pagos atípicos (nuevas aperturas, ventas aniversario, regalos de boda, remodelación de tiendas …)</td>
<td>5,64 (a)</td>
<td>5,73 (a)</td>
</tr>
<tr>
<td>Espacio asignado en lineales</td>
<td>3,55 (c)</td>
<td>3,36 (b)</td>
</tr>
<tr>
<td>Utilización y pago de cabeceras de góndola</td>
<td>5,67 (a)</td>
<td>5,10 (a)</td>
</tr>
<tr>
<td>Pago por utilización de plataformas de distribución</td>
<td>4,52 (a)</td>
<td>4,95 (a)</td>
</tr>
<tr>
<td>Respeto a la posición en el lineal</td>
<td>3,54 (b)</td>
<td>3,37 (b)</td>
</tr>
<tr>
<td>Adaptación del producto a las especificaciones del distribuidor</td>
<td>3,00 (a)</td>
<td>2,73 (a)</td>
</tr>
<tr>
<td>Aportaciones para gastos de publicidad</td>
<td>5,25 (a)</td>
<td>5,47 (a)</td>
</tr>
<tr>
<td>Aspectos de la negociación</td>
<td>Negociación con el principal distribuidor</td>
<td>Negociación con el distribuidor medio</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Importancia (A)</td>
<td>Presión a aceptar condiciones (B)</td>
</tr>
<tr>
<td>Asunción de gastos relacionados con el proceso de devoluciones</td>
<td>4,00 (a)</td>
<td>4,15 (a)</td>
</tr>
<tr>
<td>Días de aplazamiento de pago</td>
<td>5,01 (a)</td>
<td>4,79 (a)</td>
</tr>
<tr>
<td>Días prefijados para los pagos</td>
<td>5,27 (a)</td>
<td>5,05 (a)</td>
</tr>
<tr>
<td>Promociones en punto de venta</td>
<td>5,64 (c)</td>
<td>4,74 (c)</td>
</tr>
<tr>
<td>Codificación y etiquetado de los productos y embalajes</td>
<td>3,42 (a)</td>
<td>2,62 (a)</td>
</tr>
<tr>
<td>Reposición de los productos en los lineales</td>
<td>5,16 (a)</td>
<td>4,39 (a)</td>
</tr>
<tr>
<td>Selección del producto y definición de surtidos dentro de la categoría</td>
<td>5,15 (a)</td>
<td>4,23 (a)</td>
</tr>
<tr>
<td>NEGOCIACIÓN GLOBAL</td>
<td>391,27 (a)</td>
<td></td>
</tr>
</tbody>
</table>

(a) Diferencia estadísticamente significativa al 99 por 100 respecto a la negociación con el distribuidor medio.
(b) Diferencia estadísticamente significativa al 95 por 100 respecto a la negociación con el distribuidor medio.
(c) Diferencia estadísticamente significativa al 90 por 100 respecto a la negociación con el distribuidor medio.
### 12.6 Measurement of the degree of conflict (Cruz Roche Report, 1999)

<table>
<thead>
<tr>
<th>Aspectos de la negociación</th>
<th>Negociación con el principal distribuidor</th>
<th>Negociación con el distribuidor medio</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Importancia</td>
<td>Desacuerdo</td>
</tr>
<tr>
<td>Descuento sobre precio tarifa</td>
<td>4,76</td>
<td>3,37</td>
</tr>
<tr>
<td>Cánones de referenciación (alta de nuevos productos)</td>
<td>5,12 (a)</td>
<td>4,88 (a)</td>
</tr>
<tr>
<td>Pagos atípicos (nuevas aperturas, ventas aniversario …)</td>
<td>5,64 (a)</td>
<td>5,60 (a)</td>
</tr>
<tr>
<td>Espacio asignado en lineales</td>
<td>3,55 (c)</td>
<td>3,90 (c)</td>
</tr>
<tr>
<td>Utilización y pago de cabeceras de góndola</td>
<td>5,67 (a)</td>
<td>4,70 (a)</td>
</tr>
<tr>
<td>Pago por utilización de plataformas de distribución</td>
<td>4,52 (a)</td>
<td>4,06 (a)</td>
</tr>
<tr>
<td>Respeto a la posición en el lineal</td>
<td>3,54 (b)</td>
<td>3,70</td>
</tr>
<tr>
<td>Adaptación del producto a las especificaciones del distribuidor</td>
<td>3,00 (a)</td>
<td>2,26</td>
</tr>
<tr>
<td>Aportaciones para gastos de publicidad</td>
<td>5,25 (a)</td>
<td>4,89</td>
</tr>
<tr>
<td>Asunción de gastos relacionados con el proceso de devoluciones</td>
<td>4,00 (a)</td>
<td>3,76 (b)</td>
</tr>
<tr>
<td>Aspectos de la negociación</td>
<td>Negociación con el principal distribuidor</td>
<td>Negociación con el distribuidor medio</td>
</tr>
<tr>
<td>----------------------------------------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Importancia</td>
<td>Desacuerdo</td>
</tr>
<tr>
<td>Días de aplazamiento de pago</td>
<td>5,01 (a)</td>
<td>4,35 (c)</td>
</tr>
<tr>
<td>Días prefijados para los pagos</td>
<td>5,27 (a)</td>
<td>3,89 (b)</td>
</tr>
<tr>
<td>Promociones en punto de venta</td>
<td>5,64 (c)</td>
<td>4,26</td>
</tr>
<tr>
<td>Codificación y etiquetado de los productos y embalajes</td>
<td>3,42 (a)</td>
<td>1,79 (a)</td>
</tr>
<tr>
<td>Reposición de los productos en los lineales</td>
<td>5,16 (a)</td>
<td>3,67 (a)</td>
</tr>
<tr>
<td>Selección del producto y definición de surtidos dentro de la categoría</td>
<td>5,15 (a)</td>
<td>4,05 (b)</td>
</tr>
<tr>
<td>NEGOCIACIÓN GLOBAL</td>
<td>348,24 (a)</td>
<td>244,56</td>
</tr>
</tbody>
</table>

(a) Diferencia estadísticamente significativa al 99 por 100 respecto a la negociación con el distribuidor medio.
(b) Diferencia estadísticamente significativa al 95 por 100 respecto a la negociación con el distribuidor medio.
(c) Diferencia estadísticamente significativa al 90 por 100 respecto a la negociación con el distribuidor medio.
### 12.7 Retailers’ practices in their dealings with suppliers (UK)


<table>
<thead>
<tr>
<th>Practice</th>
<th>Add</th>
<th>Anti</th>
<th>Block</th>
<th>Buffer</th>
<th>Cease</th>
<th>Cease</th>
<th>Close</th>
<th>Face</th>
<th>Mall</th>
<th>Market</th>
<th>Rate</th>
<th>Rate</th>
<th>Send</th>
<th>Send</th>
<th>Stream</th>
<th>Stream</th>
<th>Stream</th>
<th>Stream</th>
<th>Text</th>
<th>Online</th>
</tr>
</thead>
<tbody>
<tr>
<td>TN</td>
<td>Had a formal or informal list of suppliers from which the majority of goods you stocked are purchased and such listing is normally a condition of supply to you.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
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</tr>
<tr>
<td>D2</td>
<td>Required or requested payments from suppliers as a condition of storing and displaying their products, or as a pre-condition for being on your list of suppliers (see Practice 1). If you answered Yes, please say whether you give any compensating undertakings (eg in terms of guaranteed minimum order) and give details.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<td>✓</td>
</tr>
<tr>
<td>D3</td>
<td>Required or requested suppliers to make a payment to better position their products within your store.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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</tr>
<tr>
<td>D4</td>
<td>Required or requested suppliers to give you as an improvement in breath in return for reducing the range or depth of distribution of their products within your stores.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D5</td>
<td>Required to provide a supplier in return for being approved by you to manage a category of products.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D6</td>
<td>Required to change suppliers designated as category managers to change other suppliers for strictly economic reasons within your store.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D7</td>
<td>Required to provide sales data to some suppliers concerning their products whilst providing such data to suppliers designated as category managers.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D8</td>
<td>Required other suppliers of a product other than retailer’s own-label.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D9</td>
<td>Required or requested a financial contribution from a supplier in return for its products being promoted within the store during the year identified by some suppliers as peak or ‘top’ time.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D10</td>
<td>Required suppliers to give over-order or ‘non-allocation’ discounts.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D11</td>
<td>Provided discounts from suppliers retrospectively which reduced the price or the amount charged for the product after the time of the sale.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D12</td>
<td>Required suppliers to give over-order or ‘non-allocation’ discounts.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D13</td>
<td>Required or requested compensation from a supplier when your quality of a product were less than you expected (including promotional activity which is covered by Activity 8).</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>D14</td>
<td>Required support from a supplier to match a lower retail price of a product by a competing retailer.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

*Note: The multiple said that it did not supply the product to any other retailer or multiple.*

- The Multiple said that it had carried out the practice.
- Indicates that a supplier indicated that the multiple concerned had carried out the practice, but the multiple did not acknowledge it. We were not always able to resolve these differences.
- Indicates that the multiple said that the practice was not company policy, or did not respond, or that we interpreted and provisionally found that it had carried out the practice. We did not receive a response from the Multiple.

<table>
<thead>
<tr>
<th>Practice</th>
<th>Add</th>
<th>Anti</th>
<th>Block</th>
<th>Buffer</th>
<th>Cease</th>
<th>Cease</th>
<th>Close</th>
<th>Face</th>
<th>Mall</th>
<th>Market</th>
<th>Rate</th>
<th>Rate</th>
<th>Send</th>
<th>Send</th>
<th>Stream</th>
<th>Stream</th>
<th>Stream</th>
<th>Stream</th>
<th>Text</th>
<th>Online</th>
</tr>
</thead>
<tbody>
<tr>
<td>C15</td>
<td>Required a supplier to reduce the discounts it had offered to other retailers.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C16</td>
<td>Required or requested suppliers to make payments to cover product shortages.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C17</td>
<td>Required or requested suppliers to buy stock ‘under trials’, or failed to pay for them outside a written agreement that ‘sale or return’ was in the terms of the sale.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C18</td>
<td>Charged suppliers for retailer scale of food safety above the actual costs of the goods to your company.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C19</td>
<td>Required or requested suppliers to provide you with costs of buyer deals to new or prospective suppliers, artwork and packaging design, consumer panels, market research, or to provide hospitality to your company or its employees.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C20</td>
<td>Levied charges on suppliers for discrepancies in supply where the source of the discrepancy had not been agreed with the supplier, or where written information on the circumstances was not provided to the supplier.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C21</td>
<td>Failed to compensate suppliers for costs caused through your company’s forecasting errors or order changes.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C22</td>
<td>Levied an additional charge on consumers for consumer complaints which exceeded your actual costs, or new not for a product fault, or for which written information was not provided to the supplier.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C23</td>
<td>Levied an additional charge on consumers for consumer complaints which exceeded the costs specifically to the costs of store refurbishment or the opening of a new store.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C24</td>
<td>Required or requested a supplier to give you an improvement in volume or breadth of supply which reasonably could be expected to increase a supplier’s costs without compensating the supplier of any cost deferral.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>C25</td>
<td>Charged retailers or supermarkets for the production of a product previously agreed with a supplier with less than 30 days notice without financially compensating the supplier for any costs it incurred.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

Notes:
- The multiple said that it had carried out the practice.
- Indicates that a supplier indicated that the multiple concerned had carried out the practice, but the multiple did not acknowledge it. We were not always able to resolve these differences.
- Indicates that the multiple said that the practice was not company policy, or did not respond, or that we interpreted and provisionally found that it had carried out the practice. We did not receive a response from the Multiple.
<table>
<thead>
<tr>
<th>Activity</th>
<th>Fall</th>
<th>Spring</th>
<th>Summer</th>
<th>Autumn</th>
<th>Winter</th>
<th>Easter</th>
<th>Christmas</th>
<th>New Year</th>
<th>Summer holidays</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ordered</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Received</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Delivered</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

Notes:
- “✓” indicates that the activity was carried out.
- “○” indicates that the activity was not carried out.
- “-” indicates that the activity was not applicable.

### Raw Text

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**Legal Notice:**

This text is provided as a natural language representation of the document. It is intended for informational purposes and may not be suitable for legal or formal contexts. Always consult professional legal advice before relying on any text. 245
12.8  Retailers’ practices against the public interest (UK)
Estudio Competition Commission 2000, Conclusiones, pp. 140-143.

<p>| TABLE 2.14  | Practices engaged in by any of the major buyers showing findings on the complex monopoly situation and the public interest |</p>
<table>
<thead>
<tr>
<th>ID (see Appendix 11.3)</th>
<th>Major buyer engaging in the practice</th>
<th>Description</th>
<th>Category</th>
<th>Category reference</th>
<th>Paragraph reference of finding</th>
<th>Practices adversely affecting the public interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Safeway/Safeway</td>
<td>Required or requested payments from suppliers as a condition of stocking and displaying their products, or as a pre-condition for being on your list of suppliers</td>
<td>A ✓ ✓</td>
<td>2.476</td>
<td>✓*</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Asda/Safeway</td>
<td>Required or requested suppliers to make a payment for better positioning of their products within your stores</td>
<td>A ✓ ✓</td>
<td>2.477</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Safeway/Safeway/Sainsbury/Safeway</td>
<td>Required or requested suppliers to give an improvement in terms in return for increasing the range or depth of distribution of their products within your stores</td>
<td>A ✓ ✓</td>
<td>2.478</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Asda/Safeway/Sainsbury/Tesco</td>
<td>Required or requested a financial contribution from a supplier in return for the products being promoted within the store during the year (described by some suppliers as &quot;pay to play&quot; or &quot;TAA&quot;)</td>
<td>A ✓ ✓</td>
<td>2.479</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Safeway/Safeway/Sainsbury/Safeway</td>
<td>Required suppliers to give overriding or &quot;in anticipation&quot; discounts</td>
<td>D ✓ ✓ ✓</td>
<td>2.494</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Asda/Safeway/Sainsbury/Safeway</td>
<td>Sought discounts from suppliers retrospectively which reduced the price of the product agreed at the time of sale</td>
<td>D ✓ ✓ ✓</td>
<td>2.495</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Asda/Safeway/Sainsbury/Safeway</td>
<td>Required or requested compensation from a supplier when your profits from a product were less than you expected (excluding promotional activity which is covered by activity 48)</td>
<td>D ✓ ✓ ✓</td>
<td>2.496</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Asda/Safeway/Sainsbury/Safeway</td>
<td>Sought support from a supplier to match a lower retail price of a product by a competing retailer</td>
<td>D ✓ ✓ ✓</td>
<td>2.497</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Asda/Safeway/Sainsbury/Safeway</td>
<td>Required or requested suppliers to make payments to cover product wastage</td>
<td>D ✓ ✓ ✓</td>
<td>2.498</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Asda/Safeway/Sainsbury/Tesco</td>
<td>Required or requested suppliers to buy back unsold items, or failed to pay for them outside a written agreement that sale or return was in the terms of the sale</td>
<td>D ✓ ✓ ✓</td>
<td>2.499</td>
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<td>Asda/Safeway/Sainsbury/Safeway</td>
<td>Required or requested suppliers to contribute to your costs of buyer visits to new or prospective suppliers, artwork and packaging design, consumer panels, market research, or to provide hospitality to your company or its employees</td>
<td>G ✓ ✓</td>
<td>2.523</td>
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*ید فاکس سئیل p. 111.
12.9 Code of Practice (UK)
Code of practice on supermarkets' dealings with suppliers

HAVING REGARD TO the Fair Trading Act 1973;

HAVING REGARD TO the Supermarkets Report of the Competition Commission;

RECOGNISING that:

(a) a competitive market is the most effective way of protecting the interests of UK consumers;

(b) in a free and fair market place, the supermarkets compete with each other in the level of service, quality of product and value for money that they offer to UK consumers; and

(c) it is in the interests of UK consumers that supermarkets should constantly seek to improve their operating efficiency.

WHEREAS:

(a) The Competition Commission has recommended that a code of practice should be introduced to put relations between supermarkets and their Suppliers on a clearer and more predictable basis.

(b) The Competition Commission found that the undue exercise of buyer power by supermarkets in the circumstances identified in the supermarkets Report has effects which are against the public interest.

(c) The Director, following consultation with the supermarkets, has devised this code of practice to meet the concerns of the Competition Commission without wishing to inhibit mutually beneficial arrangements genuinely entered into by supermarkets and their Suppliers.

(d) The effective operation of this code depends upon both the supermarkets and their Suppliers being reasonable in their dealings with each other.

(e) The Director expects that the dispute resolution procedure provided for in this code will be effective and that mediation is the most appropriate way of resolving disputes arising under the code.

(f) The supermarkets are fully committed to the objectives of this code and undertake to operate under this code in good faith.

NOW THEREFORE this code has effect:
PART 1 - STANDARD TERMS OF BUSINESS

Terms of business to be available in writing

1. The terms of business offered by a Supermarket for its dealings with a Supplier shall be available in writing at the request of that Supplier such that:

   a. the standard terms of business offered to all Suppliers, or to all Suppliers in a particular category, shall be available at the request of any Supplier in that category; and

   b. the particular terms of business offered to any one Supplier shall be available at the request of that Supplier.

2. Reasonable Notice of variation of a Supermarket's terms of business shall be given to the affected Supplier(s).

No undue delay in Payments

3. A Supermarket shall pay a Supplier for products delivered to that Supermarket's specification within a reasonable time after the date of that Supplier's invoice.

PART 2 – PRICES & PAYMENTS

No retrospective reduction in price without Reasonable Notice

4. A Supermarket shall not directly or indirectly require a Supplier to reduce the agreed price of or increase the agreed discount for any product unless Reasonable Notice of such requirement is given to that Supplier in writing before the relevant supplies of that product are made.

No obligation to contribute to marketing costs

5. A Supermarket shall not, directly or indirectly, Unreasonably Require a Supplier to make any Payment towards that Supermarket's costs of:

   a. buyer visits to new or prospective Suppliers;

   b. artwork or packaging design;

   c. consumer or market research;

   d. the opening or refurbishing of a store; or

   e. hospitality for that Supermarket's staff.

No Payments for lower profits unless the basis of Payment is agreed in advance

6. A Supermarket shall not directly or indirectly require a Supplier to make any Payment to compensate that Supermarket when profits from the sale of that Supplier's products are lower than expected by that Supermarket unless the basis of any such Payment is
agreed in writing between that Supermarket and that Supplier before the relevant supplies of that product are made.

No Payments for wastage without prior agreement, negligence or default

7. A Supermarket shall not directly or indirectly require a Supplier to make any Payment to cover any wastage of that Supplier’s products incurred at that Supermarket’s stores unless

(a) such wastage is due to the negligence or default of that Supplier; or

(b) the basis of such Payment is agreed in writing between that Supermarket and that Supplier before the relevant supplies of that product are made.

8. A Supermarket shall use its best endeavours to agree in writing with a Supplier what principal factors in their dealings would be likely to amount to negligence or default on the part of that Supplier.

Limited circumstances for lump sum payments as a condition of being a Supplier

9. A Supermarket shall not directly or indirectly require a Supplier to make any lump sum payment as a condition of stocking or listing that Supplier’s products unless either:

(a) such payment is made in relation to a Promotion; or

(b) such payment:

(i) is made in respect of new products which have not been stocked, displayed or listed by that Supermarket during the preceding 365 days in 25 per cent or more of its stores; and

(ii) reflects a reasonable estimate by that Supermarket of the risk run by that Supermarket in stocking, displaying or listing such new products

No lump sum payments for better positioning of goods unless in relation to Promotions

10. A Supermarket shall not directly or indirectly require a Supplier to make any lump sum payment in order to secure better positioning or an increase in the allocation of shelf space for any products of that Supplier within a store unless such payment is made in relation to a Promotion.

PART 3 – PROMOTIONS

No Promotions without Reasonable Notice

11. Where a Supermarket directly or indirectly requires any Payment from a Supplier in support of a Promotion of one of that Supplier’s products, a Supermarket shall only hold that Promotion after Reasonable Notice has been given to that Supplier in writing.
Due care to be taken when ordering for Promotions

12. A Supermarket shall take due care when ordering products from a Supplier at a promotional wholesale price not to over-order, and, if that Supermarket fails to take such care, it shall compensate that Supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price.

13. A Supermarket shall ensure that the basis on which any order for a Promotion is calculated is transparent.

Suppliers not predominantly to fund Promotions

14. A Supermarket shall not, directly or indirectly, Unreasonably Require a Supplier predominantly to fund the costs of a Promotion.

PART 4 - COMPENSATION

No change to supply chain procedures without Reasonable Notice or compensation

15. A Supermarket shall not directly or indirectly require a Supplier to change significantly any aspect of the normal supply chain procedures unless that Supermarket either:

   (a) gives Reasonable Notice of such change to that Supplier in writing; or

   (b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice.

No change to specifications without Reasonable Notice or compensation

16. A Supermarket shall not directly or indirectly require a Supplier to change the specification (including the quantity of products required) of any agreed order unless that Supermarket either:

   (a) gives Reasonable Notice of such change to that Supplier in writing; or

   (b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice.

Limited circumstances for compensation for erroneous forecasts

17. Notwithstanding clauses 15 and 16 above, a Supermarket shall fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error attributable to that Supermarket unless:

   (a) that Supermarket has prepared those forecasts in good faith and with due care; or

   (b) there is an agreement in writing between that Supermarket and that Supplier before the relevant supplies of the product are made that such compensation is not appropriate.

18. A Supermarket shall ensure that the basis on which it prepares any forecast is transparent.
PART 5 – CONSUMER COMPLAINTS

No unjustified payment for consumer complaints

19. Subject to clause 21 below, where any consumer complaint can be resolved in store by a Supermarket refunding the retail price or replacing the relevant product, that Supermarket shall not directly or indirectly require a Supplier to make any Payment for resolving such a complaint unless:

(a) the Payment does not exceed the retail price of the product charged by that Supermarket;

(b) that Supermarket is satisfied on reasonable grounds that the consumer complaint is justifiable and attributable to a failing on the part of that Supplier; and

(c) that Supermarket gives notice to that Supplier of such complaint.

20. Subject to clause 21 below, where any consumer complaint cannot be resolved in store by a Supermarket refunding the retail price or replacing the relevant product, that Supermarket shall not directly or indirectly require a Supplier to make any Payment for resolving such a complaint unless:

(a) the Payment is reasonably related to that Supermarket’s costs arising from that complaint;

(b) that Supermarket has verified that the consumer complaint is justifiable and attributable to a failing on the part of that supplier; and

(c) a full report about the complaint (including the basis of the attribution) has been made by that Supermarket to that Supplier.

21. A Supermarket may agree with a Supplier an average figure for Payments for resolving such complaints as an alternative to accounting for complaints individually.

PART 6 – THIRD PARTY DEALINGS

No tying third party goods and services for payment

22. A Supermarket shall not directly or indirectly require a Supplier to obtain any goods, services or property from any third party where that Supermarket obtains any Payment for this arrangement from any third party, unless the Supplier’s alternative source for those goods, services or property:

(a) fails to meet the objective quality standards laid down for that Supplier by that Supermarket for the supply of such goods, services or property; or

(b) charges more than any other third party recommended by that Supermarket for the supply of such goods, services or property.

PART 7 – STAFF TRAINING

Obligatory training for buyers
23. A Supermarket shall supply a copy of this code to all Grocery buying staff.

24. A Supermarket shall provide training on the requirements of this code to all Grocery buying staff.

25. A Supermarket shall furnish to the Director an annual return detailing staff training and guidance issued in relation to this code in such form and on such days as the Director may specify from time to time.

PART 8 - GENERAL

Compliance and dispute resolution

26. A Supermarket shall negotiate in good faith with a Supplier to resolve any dispute arising under the terms of this code.

27. If bi-lateral negotiations under clause 26 above cannot resolve a dispute within 90 days of that dispute arising, a Supermarket shall at its own expense offer the services of the Mediator to assist.

28. If the Mediator under clause 27 above has failed to resolve a dispute, the Supermarket shall give notice to the Director.

29. A Supermarket shall notify the contact details of any Mediator to the Director.

30. A Supermarket shall procure the Mediator to supply to the Director:

   (a) an annual return of its work under this code in such form and on such days as the Director may specify from time to time; and

   (b) such other information as the Director may specify from time to time in relation to individual cases on which the Director is considering taking action.

Interpretation

31. For the avoidance of doubt, compliance with this code does not affect the duty on any person to comply with or restrict the application of the Competition Act 1998.

32. In this code:

   'the Director' means the Director General of Fair Trading;

   'Groceries' are products sold from any retail store in the United Kingdom and include food, pet food, alcoholic and non-alcoholic drinks, cleaning products, toiletries (dental care products, soap, hair care, sanitary protection, nappies and similar products) and household goods (tissues, kitchen rolls, food wraps, bin liners, light bulbs and similar products) but exclude food and alcoholic and non-alcoholic drinks sold for consumption in the store where it is purchased, petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, compact discs, video and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products and Grocery means any one of them;
"Group of Interconnected Bodies Corporate" has the meaning given in section 137(5) of the Fair Trading Act 1973; ‘the Mediator’ means such independent person or persons as shall be appointed by a Supermarket under clause 27 above from time to time to provide mediation services;

‘Payment’ or ‘Payments’ includes an inducement in any form (monetary or otherwise) and includes better contractual terms;

‘Person’ includes a body of persons corporate or unincorporate;

‘Promotion’ means any offer for sale at an introductory or a reduced retail price, or with some additional benefit to consumers that is intended to be only for a specified period; the meaning of ‘Reasonable Notice’ in clauses 2, 4, 11, 15 or 16 depends on the circumstances of each case including, for example:

(a) whether the notice period given is objectively justifiable and this depends on the circumstances of each case including, for example:

(i) the duration of any relevant contract or the frequency with which orders are placed by the Supermarket for relevant Groceries;

(ii) the characteristics of the relevant Groceries and their production including durability and dependency on external factors such as the weather;

(iii) the value of any relevant order relative to the turnover of the Supplier in question; and

(iv) the overall impact on the business of the Supplier of the information given in the notice;

(b) whether the reasons for the notice period given are transparent; and

(c) whether similar cases are treated alike;

‘Reference Stores’ means multiple stores in the United Kingdom being supermarkets with 600 square metres or more of grocery sales area, where the space devoted to the retail sale of food and non-alcoholic drinks exceeds 300 square metres and which are controlled by a person who controls ten or more such stores;

‘the supermarkets Report’ means the report of the Competition Commission on the supply of Groceries from multiple stores in the United Kingdom presented to Parliament in October 2000 (Cm 4842);

‘supermarkets’ means all retailers of Groceries which operate Reference Stores with 8% or more of the market for the purchase of Groceries for resale from their stores in the United Kingdom and ‘Supermarket’ means any one of them;

‘Supplier’ means any Person actually or potentially carrying on a business in the supply of Groceries to any Supermarket, such Person being established anywhere in the world but, in relation to any Supermarket, excludes any Person which is a member of the same Group of Interconnected Bodies Corporate as that Supermarket;
12.10 Decision of the Israel Antitrust Authority

The Israel Antitrust Authority’s Ten Instructions for binding Major Retailer/ Dominant Supplier commercial relationships and communications
May 29, 2003 (original Israel Antitrust Authority document is 26 pages in Hebrew. It was translated and summarized into 4 pages for workshop)

1. A chain shall not accept, and a supplier shall not offer, a benefit aimed at changing the identity of the supplier’s rivals on the chain’s shelves, reducing their number or diminishing the size or attractiveness of the display area. A chain and supplier shall not negotiate the identity, number, terms of agreement, or scope of sales of the supplier’s rivals on the shelves.
2. A chain shall not accept, and a supplier shall not offer, a benefit aimed at affecting chains decisions for whether to introduce, discontinue, or decrease sales of private labels or parallel imports.
3. A chain and dominant supplier shall not agree on making available to the supplier:
   a) Display areas exceeding 50% of display areas for the entire category; or b) Exclusivity in non-shelf display areas for more than 3 months a year, 30 consecutive days, or the entire high holidays. Any agreements for allocation of display areas shall be no more than one year in duration.
4. A chain shall manage all its categories independently and without any supplier involvement, including, but not limited to, in determining the product and supplier variety and the display areas size and place.
5. A chain shall not accept, and a supplier shall not offer, a benefit in return for the dominant supplier’s achieving of a preset sales target, unless the target is limited to a specific product and the benefit is given only for units sold after the target has been achieved. Products sold in discount shall not be sold under their production cost.
6. A chain shall not accept, and a supplier shall not offer, a benefit in return for setting the supplier’s minimum market share or a rival’s maximum market share in the chain’s sales.
7. A chain and supplier shall not negotiate an agreement constraining directly or indirectly the inability of a rival supplier to hold a special sale together with the chain or the ability of a rival chain to hold a special sale together with the supplier.
8. A supplier shall not affect directly or indirectly a chain’s decision regarding the consumer price of the supplier’s or its rival’s products. Notwithstanding the foregoing, a supplier may agree with a chain, for promotional purposes, on a maximum resale price, or recommendation to the chain, for a period not exceeding nine months, an introduction price for a new product.
9. A chain shall not contact a supplier with any inquiries in regards to the consumer price of the supplier’s products at another chain. Notwithstanding the generality of the
foregoing, a chain shall not ask the supplier retroactively or unilaterally, for compensation for any form of discounts that the supplier has offered the chain’s rivals.

10. A supplier shall not submit and a chain shall not accept, information relating to the sold quantity or the terms of the sales of the supplier’s products at a competing chain. A chain shall not submit and a supplier shall not accept information relating to the sold quantity or the terms of the sales of other suppliers products on the chain’s shelves.

12.11 Facilitating practices in Oligopolies (OECD)

12.11.1 Note by the Danish Competition Authority

Page 27:

“Another example within the second category is a system of co-operation on exchange of information between supermarket chains and their suppliers on a category basis. The system is called Category Management and operates within the Danish market for fast moving consumer goods. A category constitutes for instance of dairy products within which a supermarket chain wishes to enter into a binding agreement with suppliers on development of sales in the supermarkets within the specific category. A supplier must then undertake the role of category captain that is to undertake the responsibility of running the development of sales in the supermarkets within the category and in that relation present plans for which products supermarkets should make their priorities, plans on space management, promotion etc. As part of the co-operation the supermarket chains have to supply the category captain with detailed information on supermarket sales, profits, quantity etc. as well as information on the competitors of the category captain. Category Management in Denmark may entail some extra risks of restricting competition on both the retail level as well as the supply level because the market is very concentrated. There are only three major retail chains and within a number of categories the market is dominated by one large supplier. Hence, Retailers as well as suppliers may get competition sensitive information about their competitors. This may unify their market behaviour at the retail level for instance if the retailers use the same category captain and imply foreclosure of competition to the category captain. The Danish Competition Authority was asked whether such a system of category management would pose a problem in relation to competition law if it was implemented in one of Denmark’s larger supermarket chains with approximately 20 % share of the retail market. The Danish Competition Authority expressed serious concern that the system could restrict competition. However, investigations are still pending and the case is not definitively determined. Consequently, The Danish Competition Authority would like to know whether any other national competition authorities have dealt with similar cases and if so how the national authorities have handled the cases and what decisions they have reached in that relation.”

12.11.2 Discussion on Category Management

Pages 143-144:

“The Chair turned to the representative of Denmark. He explained that the Danish contribution discussed a type of facilitating practice which was not covered in any other contribution, namely the use of "category captains" in the retail sector.
The representative of Denmark explained that the question of category management had been raised in the retail food sector where retailers – mainly supermarket chains – appointed one of the main suppliers as category manager for each category of food products (tea, coffee, washing powder, etc.). The category manager would then have access to sales figures as well as information on the supermarket chain promotion plans. With this information and on the basis of his general industry knowledge, the category manager could suggest changes and recommendations to the stock arrangements and marketing plans in order to increase the category turnover. The recommendations may range from issues such as marketing approaches and space managements to recommendations on the pricing of the products in the category and listing or delisting specific products. After that the retailer must make final decisions on what products and which suppliers to choose for the category in question and also at what level to set the price. In the Danish Competition Authority’s view, category management entailed both advantages and concerns. For example, the retailer will benefit from the supplier’s detailed knowledge of the industry and experience from other retailers. On the other hand, concerns exist because the category manager gets prior and in some cases confidential information on competitive prices as well as on the supermarket chains marketing plans. The primary risk is that he may use this position to foreclose competing brands. In addition, the category manager will obtain a number of additional advantages through his increased market knowledge compared to his rivals. The representative of Denmark explained that these concerns had been identified, but there was uncertainty about how to assess this situation. The Chair then opened the floor for comments from delegates to find out whether they had cases like the Danish one and whether they had reactions to the Danish presentation. The representative of the United States pointed out that the FTC held hearings in 2001-2002 which included the subject of category management. Extensive testimony was provided at the hearings regarding the potential pro-competitive effects as well as the anticompetitive effects. The ultimate conclusion of the report, which was completed after the hearings, was that category management programmes hold the potential for a number of pro-competitive benefits for manufacturers and retailers. But abuses can occur and one must be careful to make sure that they do not. The representative of South Africa explained that South Africa was also investigating a category captaincy case. The case had come up in the cigarette market in which one firm was clearly dominant and paid for the privilege of being the category captain. In the cigarette market, where advertising was not permitted, points of sales arrangements were critical for selling cigarettes. It had been alleged that the practice of category captaincy was an instrument of abuse. The representative of South Africa was not sure about the outcome of the case, but it has become clear from this case that the practice of category captaincy and the practice of firms paying to be category captain was very widespread. Where markets were oligopolistic it seemed very difficult to believe that category captaincy was not a very effective instrument to facilitate collusion, largely because of the information exchanges that accompany the practice. (…) The representative of Norway followed up on the topic of category captaincy. Last year the competition authority had initiated a somewhat similar case against AC Nielsen and supermarket chains. It appeared that the supermarket chains through Nielsen exchanged historic price information. The competition authority reached an agreement with the
chains and AC Nielsen to modify their practices in order to make the information more aggregate and less recent.”

12.12 Market share of the private brands (Nielsen, 2008)

Categories (% value)

Volume. Manufactured Food

THE GROCERIES (SUPPLY CHAIN PRACTICES) MARKET INVESTIGATION ORDER 2009

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Background

On 9 May 2006, the Office of Fair Trading (OFT), in the exercise of its powers under section 131 of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC), for investigation and report, the supply of groceries by retailers in the United Kingdom.

On 30 April 2008 the CC published a report on the investigation and it contained the decision that there were adverse effects on competition.

On 26 February 2009 the CC gave notice of its intention to make this order in accordance with paragraph 2 of Schedule 10 to the Act as applied by section 165 of the Act.

The CC, in accordance with section 138 of the Act and in exercise of the powers conferred by sections 161 and 164 and Schedule 8, and for the purpose of remedying, mitigating or preventing the adverse effects on competition concerned and for the purpose of remedying, mitigating or preventing detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effects on competition, makes the following Order.

PART 1

Citation, commencement and interpretation

1. Citation and commencement

   (1) This Order may be cited as ‘The Groceries Market Investigation (Supply Chain Practices) Order 2009’.

   (2) The obligations in this Order will come into force on the [date six months from date on which Order is made].

2. General Interpretation, index of defined expressions etc

   (1) In this Order (including the Schedule):

      Act means the Enterprise Act 2002;

      Buying Team means those employees of a Retailer:

      (a) who are directly involved in buying Groceries for resale; and/or

      (b) whose role (excluding the role of the Code Compliance Officer) requires the interpretation and application of the provisions of the Code or this Order; and

      (c) who have immediate management responsibility for any of those employees described in (a) and (b) above;

      CC means the Competition Commission;

      Code means the Groceries Supply Code of Practice set out in Schedule 1;

      Code Compliance Officer means the person appointed in accordance with Article 10(1) of this Order;

      De-list means to cease to purchase Groceries for resale from a Supplier, or significantly to reduce the volume of purchases made from that Supplier. Whether a reduction in volumes purchased is 'significant' will be determined by reference to the amount of Groceries supplied by that Supplier to the Retailer, rather than the total volume of Groceries purchased by the Retailer from all of its Suppliers;

      Designated Retailer means a retailer listed in Article 4(a) of this Order or who is designated as a Designated Retailer in accordance with Article 4(b) of this Order;

      Dispute means a dispute arising under Articles 11(2) or 11(3) of this Order;

      Groceries means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products;

      OFT means the Office of Fair Trading;
Ombudsman means a person appointed as the Grocery Supply Code of Practice Ombudsman, at any time when such office is in existence;

Primary Buyer means, in relation to any individual Supplier, the employee or employees of a Retaller who are responsible for the day-to-day buying functions of the Retaller in respect of that individual Supplier;

Retaller means any person carrying on a business in the United Kingdom for the retail supply of Groceries;

Senior Buyer means, in relation to any individual Supplier, an employee or employees within a Retaller’s Buying Team who manage that Supplier’s Primary Buyer or Primary Buyers (or is otherwise at a higher level than the Primary Buyer(s) within the management structure of the Retaller);

Supplier means any person carrying on (or actively seeking to carry on) a business in the direct supply to any Retaller of Groceries for resale in the UK, and includes any such person established anywhere in the world, but excludes any person who is part of the same group of interconnected bodies corporate (as defined in section 129(2) of the Act);

as the Retaller to which it supplies; and

Supply Agreement means any agreement which must be recorded in writing pursuant to Article 6(1) of this Order.

(2) Compliance with the Code and this Order should not be interpreted so as to exclude any person from, or restrict the application of, the Competition Act 1998.

3. Powers of direction

(1) The CC may give directions falling within Article 3(2) to:

(a) a person specified in the directions; or

(b) a holder for the time being of an office so specified in any body of persons corporate or unincorporate.

(2) Directions fall within this Article 3(2) if they are directions:

(a) to take such actions as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order; or

(b) to do, or refrain from doing, anything so specified or described which the person might be required by this Order to do or refrain from doing.

(3) In Article 3(2) above ‘actions’ includes steps to introduce and maintain arrangements to ensure any director, employee or agent of a Designated Retailer carries out, or secures compliance with, this Order.

(4) The CC may vary or revoke any directions so given.
PART 2

Code of Practice

4. **Designated Retailer**

   (1) The following will be Designated Retailers for the purposes of this Order:

   (a) any of those persons specified in Schedule 2.

   (b) any Retailer with a turnover exceeding £1 billion with respect to the retail
       supply of Groceries in the United Kingdom, and which is designated in writing
       as a Designated Retailer by the OFT.

   (c) any person who carries on the whole, or a substantial part, of the business of
       any of the persons specified in Articles 4(1)(a) or 4(1)(b) above.

5. **Duty to Incorporate Code in Supply Agreements**

   (1) A Designated Retailer must not enter into or perform any Supply Agreement
       unless that Supply Agreement incorporates the Code and does not contain any
       provisions that are inconsistent with the Code.

   (2) The prohibition in Article 5(1) above will not apply to any obligation of the
       Designated Retailer to accept and pay for goods ordered prior to the [date on
       which the Order comes into force] or to the rights of the Designated Retailer to
       make any claim in respect of such goods.

6. **Duty to provide information to Suppliers**

   (1) A Designated Retailer must record in writing all terms of any agreement with a
       Supplier for the supply of Groceries for the purpose of resale in the United
       Kingdom, as well as any subsequent contractual agreements or contractual
       arrangements made under or pursuant to that agreement.

   (2) A Designated Retailer must not enter into a Supply Agreement with a Supplier
       unless the Supplier has a written copy of the Supply Agreement, including any
       proposed terms and conditions which are intended to form part of, but are not
       fully documented in, the Supply Agreement.

   (3) Written terms of a Supply Agreement must be held by the Designated Retailer for
       a period of 12 months after the relevant Supply Agreement has expired or
       otherwise concluded.

   (4) Written terms of any agreements or arrangements made under or pursuant to a
       Supply Agreement must be held by the Designated Retailer for a period of
       12 months after the relevant contractual agreement or arrangement is made.

   (5) All such records held by the Designated Retailer in accordance with Articles 6(3)
       and 6(4) must be made available on request to the Supplier to which they relate.

   (6) A Designated Retailer must not enter into a Supply Agreement with a Supplier
       unless it has first provided the Supplier with a letter which sets out:

       (a) the obligation on the Designated Retailer not directly or indirectly to require
actions by the Supplier in relation to marketing costs, wastage, payments, promotions, changes to supply chain procedures, and tying, as more specifically set out in the Code;

(b) the identity and contact details of the Senior Buyer for that Supplier;

(c) the Designated Retailer’s obligation under the Code to allow a Supplier to escalate a decision of a Primary Buyer (including a decision to De-list) to the Senior Buyer for review;

(d) the identity and contact details of the Designated Retailer’s Code Compliance Officer;

(e) the feedback procedure established by the Code Compliance Officer in accordance with Article 9(2)(d) of this Order;

(f) the procedures relating to De-listing, as set out in paragraph 16 of the Code; and

(g) the dispute resolution procedure set out in Article 11 of this Order.

(7) Where any subsequent agreements or arrangements made under or pursuant to a Supply Agreement are agreed orally between the Supplier and a Designated Retailer, the Designated Retailer must confirm the terms of such arrangements in writing with the relevant Supplier within three working days of such arrangements being agreed.

PART 3

Supply of information to the OFT

7. Supply of information to the OFT

(1) A Designated Retailer must provide to the OFT any information and documents reasonably required for the purposes of enabling the OFT to monitor and review the operation of this Order or any provisions of this Order.

(2) A Designated Retailer must keep, maintain and produce those records specified in writing by the OFT that relate to the operation of any provisions of this Order.

(3) Any Designated Retailer whom the OFT reasonably believes to have information which may be relevant to the monitoring or review of the operation of any provisions of this Order may be required by the OFT to attend and provide such information in person.

PART 4

Compliance obligations

8. Duty to train staff with respect to the Code

(1) Prior to the [date on which the Order comes into force] a Designated Retailer must provide to its Buying Team:
actions by the Supplier in relation to marketing costs, wastage, payments, promotions, changes to supply chain procedures, and tying, as more specifically set out in the Code;

(b) the identity and contact details of the Senior Buyer for that Supplier;

(c) the Designated Retailer’s obligation under the Code to allow a Supplier to escalate a decision of a Primary Buyer (including a decision to De-list) to the Senior Buyer for review;

(d) the identity and contact details of the Designated Retailer’s Code Compliance Officer;

(e) the feedback procedure established by the Code Compliance Officer in accordance with Article 9(2)(d) of this Order;

(f) the procedures relating to De-listing, as set out in paragraph 16 of the Code; and

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(3) Any Designated Retailer whom the OFT reasonably believes to have information which may be relevant to the monitoring or review of the operation of any provisions of this Order may be required by the OFT to attend and provide such information in person.

PART 4

Compliance obligations

8. Duty to train staff with respect to the Code

(1) Prior to the [date on which the Order comes into force] a Designated Retailer must provide to its Buying Team:
(a) a copy of the Code; and

(b) training on the requirements of this Order and the Code.

(2) Any person who becomes part of a Designated Retailer’s Buying Team after [date on which the Order comes into force] must be provided with:

(a) a copy of the Code within one week of becoming part of the Designated Retailer’s Buying Team; and

(b) training on the requirements of this Order and the Code within one calendar month of becoming part of the Designated Retailer’s Buying Team.

(3) With the exception of the year in which this Order commences, a Designated Retailer must provide retraining on the requirements of this Order and the Code to all staff in its Buying Team at least once each calendar year.

9. Duty to appoint in-house compliance officer and the role of the compliance officer

(1) A Designated Retailer must appoint a suitably qualified employee as the Code Compliance Officer.

(2) A Designated Retailer must ensure that the Code Compliance Officer:

(a) will be provided with all resources necessary for the fulfilment of its role, including access to all documentation relating to, and availability of the Designated Retailer’s Buying Team to discuss issues with, the Designated Retailer’s obligations under the Code and/or this Order;

(b) will be available as a point of contact for Suppliers and any authority or other body making enquiries in relation to the Code or this Order;

(c) will be independent of, and must not be managed by, any member of the Buying Team of the Designated Retailer;

(d) will develop a procedure by which the Designated Retailer’s Suppliers can provide anonymous feedback to the Code Compliance Officer on, amongst other things, the Supplier’s relationship with the Designated Retailer’s Buying Team and the Designated Retailer’s compliance with the Code and this Order; and

(e) will be available to discuss with the Supplier the reason for any decisions made by the Designated Retailer in relation to the Code or this Order.

10. Compliance

(1) A Designated Retailer must ensure that, for each financial year, the Code Compliance Officer delivers an annual compliance report to the OFT, copied to the Ombudsman if there is an Ombudsman established at the relevant date, within four months of the financial year to which the annual compliance report relates. The annual compliance report must have been submitted to, and approved by, the chair of the Designated Retailer’s audit committee and must include a detailed and accurate account, for the financial year to which the annual compliance report relates, of:
(a) the Designated Retailer’s compliance with the Code and this Order in the preceding year, including instances where a breach or potential breach of the Code or this Order has been identified, and the steps taken to rectify it;

(b) steps taken during the preceding year to ensure compliance with the Code and this Order, including details of staff training undertaken and guidance issued in relation to the Code;

(c) Disputes between the Designated Retailer and its Suppliers regarding the terms of any Supply Agreement, or the application of the Code, and the outcome of any such Dispute; and

(d) any feedback provided to the Code Compliance Officer by Suppliers on the commercial terms of Suppliers’ Supply Agreements or any other aspect of the Designated Retailer’s relationship with its Suppliers.

(2) A Designated Retailer must ensure that:

(a) the Code Compliance Officer provides such other reports as are necessary to ensure that the Designated Retailer’s audit committee retains effective oversight over the Designated Retailer’s compliance with the Code and this Order.

(b) if the Designated Retailer does not have an audit committee, the Code Compliance Officer reports directly to the non-executive director of the Designated Retailer who carries out the functions typically associated with an audit committee, or in the absence of such non-executive director, to the Designated Retailer’s CEO or Managing Director.

(3) A summary of the annual compliance report described in Article 10(1) must be included in the Designated Retailer’s annual company report, and will contain an overview of each of the matters set out in Article 10(1) above. If the Designated Retailer does not produce an annual company report, the summary of the annual compliance report will be published clearly and prominently on the Designated Retailer’s website.

PART 5

Dispute Resolution

11. Duty to negotiate in good faith to resolve disputes

(1) A Designated Retailer must negotiate in good faith with a Supplier to resolve any dispute arising under the Code.

(2) A Dispute will arise under the Code when a Supplier informs the Code Compliance Officer that it believes that the Designated Retailer has not fulfilled its obligations under the Code, and that the Supplier wishes to initiate the dispute resolution procedure set out in this Article.

(3) Whenever a Supplier contacts the Code Compliance Officer regarding a potential breach of the Code by the Designated Retailer, the Code Compliance Officer will inform the Supplier of its right to initiate a Dispute under Article 11(2) above, and confirm whether the Supplier wishes to initiate a Dispute. In the absence of the
Code Compliance Officer requesting confirmation, a Dispute will be deemed to arise.

(4) If any Dispute is not resolved to the satisfaction of the Supplier within 21 days from the date the Dispute arises, then at any time during a period expiring four calendar months after the Dispute arises the Designated Retailer will submit to an arbitration request by the Supplier in accordance with Articles 11(5) to 11(8).

(5) The arbitration will be administered by a dispute resolution body approved and designated by the OFT and nominated by the Supplier in the event that more than one such body is designated by the OFT.

(6) To the extent that they do not conflict with the this Article 11, the arbitration will be conducted in accordance with the Rules of the Chartered Institute of Arbitrators in force for the time being, or such other dispute resolution body as is nominated by the arbitrator. In any arbitration commenced pursuant to this Order, the number of arbitrators will be one and the seat or legal place of arbitration will be London, England or such other city within the United Kingdom as the Supplier nominates.

(7) All costs of the arbitration, including the fees and expenses of the arbitrator, will be borne by the Designated Retailer, unless the arbitrator decides that the Supplier’s claim was vexatious or wholly without merit, in which case costs will be assigned at the arbitration’s discretion.

(8) The decision of the arbitrator will be binding and final on both the Designated Retailer and the Supplier, with the exception that either party may appeal on the grounds set out in sections 67 to 69 inclusive of the Arbitration Act 1996.

(9) Nothing in this Article will prevent a Designated Retailer including in a Supply Agreement a right for the Designated Retailer also to refer a Dispute to arbitration if the Dispute is not resolved to the satisfaction of the Retailer within 21 days from the date the Dispute arises, provided that such arbitration is on the same terms as that set out in this Article.

Signed by authority of the CC

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Peter Freeman  
Chairman  
Competition Commission  
[ ] 2009
Schedule 1
The Groceries Supply Code of Practice

PART 1—INTERPRETATION

1. Interpretation

(1) In this Code:

**Code Compliance Officer** means the person appointed in accordance with Article 10(1) of the Order;

**Groceries** means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products;

**Order** means The Groceries (Supply Chain Practices) Market Investigation Order 2009;

**Payment** or **Payments** means any compensation or inducement in any form (monetary or otherwise) and includes more favourable contractual terms;

**Promotion** means any offer for sale at an introductory or a reduced retail price, or with some other benefit to consumers that is intended to subsist only for a specified period;

**Reasonable Notice** means a period of notice, the reasonableness of which will depend on the circumstances of the individual case, including:

(a) the duration of the Supply Agreement to which the notice relates, or the frequency with which orders are placed by the Retailer for relevant Groceries;

(b) the characteristics of the relevant Groceries including durability and external factors affecting their production;

(c) the value of any relevant order relative to the turnover of the Supplier in question; and

(d) the overall impact of the information given in the notice on the business of the Supplier;

**Retailer** means any person carrying on a business in the United Kingdom for the retail supply of Groceries;

a Retailer will ‘Require’ particular actions on the part of a Supplier if the relevant Supplier does not genuinely volunteer, whether or not in response to a suggestion from the Retailer, to undertake an action in response to ordinary commercial pressures. Where those ordinary commercial pressures are partly or wholly attributable to the Retailer, they will only be deemed to be ordinary commercial pressures where they are objectively justifiable, transparent and
result in similar cases being treated alike. The burden of proof will fall on the Retailer to demonstrate that, on the balance of probabilities, an action was not Required by the Retailer;

**Senior Buyer** means, in relation to any individual Supplier, an employee (or employees) within a Retailer’s Buying Team, who manages that Supplier’s Primary Buyer (or Primary Buyers) (or is otherwise at a higher level than the Primary Buyer within the management structure of the Retailer);

**Shrinkage** means losses that occur after goods are delivered to a Retailer’s premises and arise where due to theft, the goods being lost or accounting error;

**Supplier** means any person carrying on (or actively seeking to carry on) a business in the direct supply to any Retailer of Groceries for resale in the UK, and includes any such person established anywhere in the world, but excludes any person who is part of the same group of interconnected bodies corporate (as defined in section 129(2) of the Act) as the Retailer to which it supplies; and

**Supply Agreement** means any agreement which must be recorded in writing pursuant to Article 6(1) of this Order.

**Wastage** means Groceries which become unfit for sale subsequent to them being delivered to Retailers.

(2) Compliance with the Code does not exclude any person from, or restrict the application of, the Competition Act 1998.

(3) The Interpretation Act 1978 applies to this Order as it does to Acts of Parliament.

**PART 2—FAIR DEALING**

2. **Principle of fair dealing**

A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers’ need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

**PART 3—VARIATION**

3. **Variation of Supply Agreements and terms of supply**

(1) Subject to paragraph 3(2), a Retailer must not vary any Supply Agreement retrospectively, and must not request or require that a Supplier consent to retrospective variations of any Supply Agreement.

(2) A Retailer may make an adjustment to terms of supply which has retroactive effect where the relevant Supply Agreement sets out clearly and unambiguously:

(a) any specific change of circumstances (such circumstances being outside the Retailer’s control) that will allow for such adjustments to be made; and
(b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply.

(3) If a Retailer has the right to vary a Supply Agreement unilaterally, it must give Reasonable Notice of any such variation to the Supplier.

4. Changes to supply chain procedures

A Retailer must not directly or indirectly Require a Supplier to change significantly any aspect of its supply chain procedures during the period of a Supply Agreement unless that Retailer either:

(a) gives Reasonable Notice of such change to that Supplier in writing; or

(b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice.

PART 4—PRICES AND PAYMENTS

5. No delay in Payments

A Retailer must pay a Supplier for products delivered to that Retailer’s specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier’s invoice.

6. No obligation to contribute to marketing costs

Unless provided for in the relevant Supply Agreement between the Retailer and the Supplier, a Retailer must not, directly or indirectly, Require a Supplier to make any Payment towards that Retailer’s costs of:

(a) buyer visits to new or prospective Suppliers;

(b) artwork or packaging design;

(c) consumer or market research;

(d) the opening or refurbishing of a store; or

(e) hospitality for that Retailer’s staff.

7. No Payments for shrinkage

A Supply Agreement must not include provisions under which a Supplier makes Payments to a Retailer as compensation for shrinkage.

8. Payments for wastage

A Retailer must not directly or indirectly Require a Supplier to make any Payment to cover any wastage of that Supplier’s products incurred at that Retailer’s stores unless:
(a) such wastage is due to the negligence or default of that Supplier, and the relevant Supply Agreement sets out expressly and unambiguously what will constitute negligence or default on the part of the Supplier; or

(b) the basis of such Payment is set out in the Supply Agreement.

9. **Limited circumstances for Payments as a condition of being a Supplier**

A Retailer must not directly or indirectly Require a Supplier to make any Payment as a condition of stocking or listing that Supplier’s products unless either:

(a) such Payment is made in relation to a Promotion; or

(b) such Payment:

(i) is made in respect of products which have not been stocked, displayed or listed by that Retailer during the preceding 365 days in 25 per cent or more of its stores; and

(ii) reflects a reasonable estimate by that Retailer of the risk run by that Retailer in stocking, displaying or listing such new products.

10. **Compensation for forecasting errors**

(1) A Retailer must fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error attributable to that Retailer unless:

(a) that Retailer has prepared those forecasts in good faith and with due care, and following consultation with the Supplier; and

(b) the Supply Agreement includes an express and unambiguous provision that full compensation is not appropriate.

(2) A Retailer must ensure that the basis on which it prepares any forecast has been communicated to the Supplier.

11. **No tying of third party goods and services for Payment**

(1) A Retailer must not directly or indirectly Require a Supplier to obtain any goods, services or property from any third party where that Retailer obtains any Payment for this arrangement from any third party, unless the Supplier’s alternative source for those goods, services or property:

(a) fails to meet the objective quality standards laid down for that Supplier by that Retailer for the supply of such goods, services or property; or

(b) charges more than any other third party recommended by that Retailer for the supply of such goods, services or property.
PART 5—PROMOTIONS

12. No Payments for better positioning of goods unless in relation to Promotions

A Retailer must not directly or indirectly Require a Supplier to make any Payment in order to secure better positioning or an increase in the allocation of shelf space for any products of that Supplier within a store unless such Payment is made in relation to a Promotion.

13. Promotions

   (1) A Retailer must not, directly or indirectly, Require a Supplier predominantly to fund the costs of a Promotion.

   (2) Where a Retailer directly or indirectly Requires any Payment from a Supplier in support of a Promotion of one of that Supplier’s products, a Retailer must only hold that Promotion after Reasonable Notice has been given to that Supplier in writing. For the avoidance of doubt, a Retailer must not require or request a Supplier to participate in a Promotion where this would entail a retrospective variation to the Supply Agreement.

14. Due care to be taken when ordering for Promotions

   (1) A Retailer must take all reasonable steps to ensure that when ordering products from a Supplier at a promotional wholesale price, not to over-order, and if that Retailer fails to take such steps it must compensate the Supplier for any product over-ordered and which it subsequently sells at a higher non-promotional retail price.

   (2) A Retailer must ensure that the basis on which the quantity of any order for a Promotion is calculated is transparent.

PART 6—OTHER DUTIES

15. No unjustified payment for consumer complaints

   (1) Subject to paragraph 15(3) below, where any consumer complaint can be resolved in store by a Retailer refunding the retail price or replacing the relevant product, that Retailer must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless:

       (a) the Payment does not exceed the retail price of the product charged by that Retailer; and

       (b) that Retailer is satisfied on reasonable grounds that the consumer complaint is justifiable and attributable to a failing on the part of that Supplier.

   (2) Subject to paragraph 15(3) below, where any consumer complaint cannot be resolved in store by a Retailer refunding the retail price or replacing the relevant product, that Retailer must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless:
(a) the Payment is reasonably related to that Retailer’s costs arising from that complaint;

(b) that Retailer has verified that the consumer complaint is justifiable and attributable to a negligence or default on the part of that Supplier;

(c) a full report about the complaint (including the basis of the attribution) has been made by that Retailer to that Supplier; and

(d) the Retailer has provided the Supplier with adequate evidence of the fact that the consumer complaint is justifiable and attributable to negligence or default on the part of the Supplier.

(3) A Retailer may agree with a Supplier an average figure for Payments for resolving customer complaints as an alternative to accounting for complaints in accordance with paragraphs 15(1) and 15(2) above. This average figure must not exceed the expected costs to the retailer of resolving such complaints.

16. Duties in relation to De-listing

(1) A Retailer may only De-list a Supplier for genuine commercial reasons. For the avoidance of doubt, the exercise by the Supplier of its rights under any Supply Agreement or the failure by a Retailer to fulfil its obligations under the Code or this Order will not be a genuine commercial reason to De-list a Supplier.

(2) Prior to De-listing a Supplier, a Retailer must:

(a) provide Reasonable Notice to the Supplier of the Retailer’s decision to De-list, including written reasons for the Retailer’s decision. In addition to the elements identified in paragraph 1(1) of this Code, for the purposes of this paragraph ‘Reasonable Notice’ will include providing the Supplier with sufficient time to have the decision to De-list reviewed using the measures set out in paragraphs 16(2)(b) and 16(2)(c) below;

(b) inform the Supplier of its right to have the decision reviewed by a Senior Buyer, as described in paragraph 17 of this Code; and

(c) allow the Supplier to attend an interview with the Retailer’s Code Compliance Officer to discuss the decision to De-list the Supplier.

17. Senior Buyer

(1) A Retailer’s Senior Buyer will, on receipt of a request from a Supplier, review any decisions made by the Retailer in relation to the Code or this Order.

(2) A Retailer must ensure that a Supplier is given Reasonable Notice of any change to the identity and/or contact details of the Senior Buyer for that Supplier.
Schedule 2

Designated Retailers

Asda Stores Limited, a subsidiary of Wal-Mart Stores Inc
Co-operative Group (CWS) Limited
Marks & Spencer plc
Wm Morrison Supermarkets plc
J Sainsbury plc
Somerfield plc
Tesco plc
Waitrose Limited, a subsidiary of John Lewis plc
[Aldi Stores Limited]
Iceland Foods Limited, a subsidiary of the Big Food Group
Lidl UK GmbH