

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

As a curiosity we may say that our Competition Act of 1963, no longer in force, stated that a company enjoyed a dominant position when it was the only one offering or demanding a particular type of product or service in the national market, or when, not being the only one, it was not exposed to substantial competition in such a market.

Our current Competition Act (of 1989) does not define a "dominant position". Article 6 just states the following:

"1. Abusive exploitation by one or more undertakings is prohibited, namely the abusive use:

- a) Of a dominant position in all or part of the domestic market.*
- b) Of the situation of economic dependence customer or supplier companies may be in, if they do have an equivalent alternative to carry out their activities. This shall be presumed to be the case when a supplier must grant its customer other additional benefits as well as the usual discounts on a regular basis, which are not granted to similar purchasers.*

2. Such abuse may consist, specifically, of:

- a) Directly or indirectly imposing unfair prices or other unfair trading or services conditions.*
- b) Limiting production, distribution or technical development, to the unjustified prejudice of undertakings or consumers.*
- c) Unjustifiably refusing to meet the demands to purchase products or services.*
- d) Applying dissimilar conditions to equivalent transactions in trading or service relations, thereby placing some competitors at a competitive disadvantage compared to others.*
- e) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
- f) Breaking up, albeit partially, an established commercial relationship without precise prior notice in writing at least six months in advance, except in the case of an intentional failure to comply with the conditions accepted by the supplier or in the case of force majeure.*
- g) Threatening to break up commercial relations in order to obtaining or trying to obtain prices, settlement conditions, modes of sale, the payment of additional charges and other commercial cooperation conditions that are not included in the general sale conditions agreed upon by the parties.*

3. This prohibition shall also be applied to such cases as where the dominant market position of one or several undertakings was established by a legal provision”.

However, some conclusions on the subject can be inferred from our case law.

Before, excessive importance was given to market shares. Resolution *Cervezas* (1974) stated that for a company to have a dominant position it was necessary that it was the only bidder in the market and that it was not subject to substantial competition. The situation changed from 1989 on, when other factors were taken into consideration. Resolutions *Tecnotron* and *Bacardi* among many others confirmed that we may understand that a company enjoys a dominant position in a market when it has enough economic power and independence of behaviour to act regardless possible reactions of rivals and so is able to modify the price and other characteristics of the product to its own interest. Thus, market shares have become just one of many elements to consider when studying a defendant’s possible dominant position.

In short, the key element to consider a company’s dominant position in a market is its capability to behave independently in that market in relation with competitors, providers and clients. Should this element fail to exist, the company is supposed not able to perform regardless market laws, even when its market share is very important.

As regards the question whether the Spanish Competition Authorities categorize different levels of dominance (*e.g.*, “super dominance”), the answer must be no.

The Spanish Competition Act provides for another unilateral conduct, besides abuse of dominant position: Article 7 deals with unfair competition (according to the Spanish Act on Unfair Competition), but it only applies to cases where the defendant does not have a dominant position; otherwise, article 7 is subsumed into article 6.

“Article 7. Distortion of free competition by unfair acts of unfair competition.

1. The Competition Court shall be informed, according to the terms established in the present Act for prohibited conduct, about the acts of unfair competition as long as the following circumstances are present:

a) That this act of unfair competition seriously distorts the competitive conditions in the market.

b) That this serious distortion affects the public interest.

2. When the Competition Service deems that the above circumstances are not present, it shall shelve the proceedings”.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- **If dominance/substantial market power is present – Yes**
- **Acquisition or creation of dominance/substantial market power – No**
- **Attempt to acquire or create dominance/substantial market power – No**

The holding or acquisition of a dominant position is not prohibited. It is the abuse of such a dominant position which is prohibited under our Competition Act.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”?

The Spanish Competition Act does not establish a market share at which to presume dominance. Neither does it establish a market share which works as a “safe harbour” for companies.

It has already been mentioned that, before, excessive attention was paid to market shares when assessing a presumed dominant position (recall Resolution *Cervezas*). From 1989 on, other factors were considered. Resolution *Bacardi* (1999) stated that “a high market share does not necessarily determine dominance. It is just a factor which, considered together with many others may, determine such dominance”. Bacardi was found to hold a share of 70% of the relevant market but no dominant position was declared in that case.

Current doctrine and practice of the Spanish *Tribunal de Defensa de la Competencia* can be exposed as follows: declaring the existence or non-existence of a company’s dominant position in a relevant market on the basis of, respectively, a high or small market share, without taking into consideration the elements which really characterise such a dominance, namely market power and independence of behaviour, is an error. Market shares can stabilise when access to the market is hindered. Thus, a study of barriers to entry or expansion is essential.

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold? If so, please explain why and in which circumstances.

Where no dominant position has been identified, no intervention on the side of Competition Authorities regarding abuse of dominance is possible.

5. Does your jurisdiction’s analysis of dominance/substantial market power first require that a relevant product and geographic market be defined?

Yes. A dominant position has to be defined in relation with a specific market. A company can operate in several relevant markets, and it can be dominant in one or some of them and not in others at the same time. Thus, market definition is of extreme importance in the eyes of the Spanish Competition Authorities.

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?¹ Please specify any other criteria that you use to assess single-firm dominance/substantial market power:

¹ The answer “yes” should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer “no” should be provided if in practice you have not ever used that criterion.

Market share of the firm and its competitors	Yes
Market position and market behavior of competitors	Yes
Durability of market power	Yes
Barriers to entry or expansion	Yes
Economies of scale and scope/network effects	Yes
Buyer power	Yes
Access to upstream markets/vertical integration	Yes
Access to essential facilities	Yes
Market maturity/vitality	Yes
Financial resources of the firm and its competitors	*
Profits of the firm	**
High prices (at absolute or comparative level)	**

The Spanish Competition Authorities understand these following three factors to be very intimately connected with each other: durability of market power, barriers to entry and expansion, and market maturity/vitality.

* Financial resources of the firm and that of its competitors may be studied to determine whether they mean an obstacle to entry or expansion, thus, in connection with barriers to entry or expansion.

** Exaggerated profits or prices can be interpreted as the result of an abuse of a dominant position so that such a dominant position could be inferred from them. However, the *Tribunal de Defensa de la Competencia* has shown its preference not to inverse the order of the analysis. It rather prefers to define the relevant market and establish dominance by a firm in that market in the first place, and to assess the alleged abuse in the second place.

Following the European Community's doctrine and case law, three tests can be carried out in order to establish the existence of such a dominant position:

Structural tests deal with the position of the incumbent in relation to that of its competitors. We have already stated that market shares of the incumbent and its competitors in the relevant market are considered in a limited way since a high market share does not necessarily mean dominance; it is just an element which needs to be completed by others in order to reach to the conclusion that a particular firm holds a dominant position in a particular market. The existence of entry or expansion barriers is also examined because they tend to stabilise high market shares. Besides, market shares must be looked at in a dynamic context.

Behaviourist tests are complementary to structural tests and are used to confirm the conclusions of the latter.

Dependence tests can also be made. In Resolution *McLane-Tabacalera*, the *Tribunal de Defensa de la Competencia* indicated that such an analysis was not necessary when the existence of a dominant position had been proved by other means. A reform of article 6 of the Competition Act was made in 1999 to include the abuse of economic dependence, though.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

Market share in the relevant market and connected markets of the allegedly dominant firm and competitors, evolution of those market shares, barriers to entry and expansion and dynamics of the markets. In short, the elements pertaining to the above-mentioned “structural test”.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

The most important thing to say here is, probably, that a high share in the relevant market may lead to the suspicion (not to the presumption) that the company holds a dominant position in that market, even more when the share of its competitors is rather small in comparison. That circumstance may encourage the competition authorities to make a serious research on the structure of the market (studying barriers of entry and expansion, dynamics of the market, stability of shares, etc...) to confirm such a suspicion. Certain importance is given to recent precedents (“recent” because markets develop and change from one time to another). Other analyses are used additionally where necessary: behaviourist and dependence tests, as explained before.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power? Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? Yes/no

The possession of a patent on a non-replicable technology may grant a dominant position in a relevant market to the holder.

10. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? No

Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. Yes, to the extent that dominant positions are defined on the basis of a relevant market and such agreements may alter the definition of that relevant market.

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

The current Spanish Competition Act does not say much about the objectives it pursues. In its preliminary chapter it states the following:

“EXPLANATORY STATEMENT

Competition, as the guiding principle of any market economy, is an inseparable element in our society’s model of economic organisation. In the sphere of the individual liberties, it is the first and foremost way in which corporate liberty is exercised and manifested. Therefore, in accordance with the requirements of the general economy and if needs be, of planning, defence of competition must be conceived as a mandate for the public authorities, directly related to article 38 of the Constitution.

The present Act was drawn up to meet this specific objective: to ensure the existence of sufficient competition and protect it against any attack that is contrary to the public interest. It is compatible with the other laws that regulate the market according to other legal or economic requirements, be they public or private.

The Act is built upon the solid pillars of experience. On the one hand, it is inspired by the community regulations on competition policy, which have played a transcendental role in creating and operating the common market. On the other hand, this Act is born with the purpose of rectifying the faults that thwarted the full implementation of Act 110/1963, of 20th July, on the Suppression of Restrictive Practices in Competition, which is hereby repealed.

Under the first title, "Free competition", the first chapter, "Restrictive or abusive agreements and practices" lays down a system for flexible control of the agreements that limit competition on the domestic market, prohibiting the abuse of economic power and unilateral conduct that may distort competition by disloyal means. The second chapter, "Economic concentrations", establishes a system to control the concentrations that might alter the structure of the national market to the detriment of the public interest, due to the importance and effects of such an event. The third chapter, "State aids", establishes a system for analysing them according to the criteria of competition and if necessary, for preventing their undesirable effects from the perspective of the general interest.

The application of the Act, which aims to vouch for the constitutional economic order in the market economy with a view to defending the public interests, is entrusted in the second title to the following administrative bodies: The Competition Court (Tribunal de Defensa de la Competencia), with the functions of legal ruling and in some cases, proposals, and the Competition Service (Servicio de Defensa de la Competencia), in charge of instructing the proceedings. The latter shall be given special proceedings status, both due to the essential complexity of the issue and due to the need to provide the system with the necessary independence from the active Administration, without prejudice to legal control over its activities.

The applicable procedure, described in the third title, abides by the principles of economy, promptness and efficiency and guarantees the rights of defence of the interested parties. It includes the special proceedings required by its very nature, envisaging in some cases the intervention of the Autonomous Communities and the Council of Consumer Associations.

Finally, a sanctionary regime is laid down to ensure compliance with the formal and substantive aspects of the Act”.

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms, energy, water, and railways* sectors.

I. State-created Monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned², state-controlled³, state-enabled or facilitated⁴, recently privatized and/or liberalized, regional monopolies,⁵ etc.

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.⁶

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- **Legal restrictions/scope of application:** Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?
- **Practical restrictions/difficulties:** Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

² Those undertakings that are 100% owned by the State.

³ The control belongs to the State, without taking into consideration the amount of the % of the State share.

⁴ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

⁵ Includes public/private undertakings that are granted exclusive rights within a certain region.

⁶ The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

Besides those where network economies exist, which have explicitly been excluded of this questionnaire (telecoms, energy, water supply, and railways), sectors in which state-created monopolies exist are, mainly, the following: post, central markets, tobacco, ports and airports, airlines, shipbuilding, lottery, intellectual property.

Unlike in the case of agreements⁷, no legal exemption is applicable to cases of abuse of dominant positions (recall Article 6.3). Thus, the assessment of dominance and of abuse in those sectors would be the same as in the other cases.

A picture of the State's presence in the Spanish economy can be learnt at: www.sepi.es. Go to "WELCOME" for the English version and then to "GET TO KNOW SEPI" and COMPANIES".

II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law)?

6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:

- **What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?**
- **To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.**

⁷ "Article 2. Legally Authorised Conduct.

1. Without prejudice to the application of community provisions on the matter of defence of competition, the prohibitions in article 1 (uncompetitive agreements) shall not be applied to such agreements, decisions, recommendations and practices as result from the application of a law.

On the contrary, they shall be applicable to the situations of restricted competition that are derived from the exercise of other administrative powers or that are caused by the action of the public authorities or public companies without such legal protection. (...)"

All the information on privatization processes in Spain throughout the years is available in English at: www.sepi.es. Go to “WELCOME” for the English version of the web and then to “PRIVATIZATION”.

As for the advocacy role of the *Tribunal de Defensa de la Competencia*, Articles 2.2 and 26 of the Competition Act state the following:

“Article 2. Legally Authorised Conduct.

(...). 2. *The Competition Court may formulate a motivated proposal to the Government, through the Ministry of Economy, requesting it to adopt or, as the case may be, urge the competent public authority to modify or suppress the restricted competition situations that have been established according to the legal regulations”.*

“Article 26. Consultative Functions.

1. *The Competition Court may be consulted on the matter of competition by the Legislative Chambers, the Government, the various ministerial Departments, the Autonomous Communities, Local Corporations, Chambers of Commerce and business organisations, trade unions or consumer and user associations.*

2. *The Court shall promote and carry out research projects and studies on the subject of competition.*

3. *The Court shall inform as to the government bills or draft laws by which the present Act is partially or wholly amended or repealed and as to the draft regulations following on from same”.*

The *Tribunal de Defensa de la Competencia* has made use of such faculties in several some occasions, presenting reports on the following subjects⁸:

- “The exercise of liberal professions”, in 1992.
- “Political remedies that can favour free competition in the service sector and correct the harm caused by monopolies”, in 1993.
- “Competition: Balance and new proposals 1995”, which included an analysis of the progress made following the *Tribunal*’s past reports and recommendations in the sectors of banking, ports, distribution of oil products, cinema and pharmacy offices, in 1995.
- “Report on the fixed prices of books”, in 1997.
- “Report on competition in the sector of commercial distribution”, in 2003.
- “Report on the services of Technical Inspection of Vehicles”, in 2004.
- “Report on entry barriers in the concrete sector”, in 2006.

Also, throughout the years *Tribunal* has informed many legislative projects. It’s influence on those aiming at enhancing competition in the Spanish economy from 1996 and those related to regulation of specific sectors (such as telecommunications, energy, transport, etc.) are worth mentioning.

⁸ All of them are available in Spanish at: www.tdcompetencia.es.

D. General

1. From among the following, how would you characterize your jurisdiction: developed / developing / transitioning? Developed.

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.

The documents which are available in English have been indicated throughout the questionnaire.