



JONES DAY
COMMENTARY

REFORM OF SPANISH UNFAIR COMPETITION LAW OBLIGES COMPANIES TO REVIEW THEIR TRADE POLICIES

Have you ever experienced a shock when receiving the bill for your car repairs? Has a dentist ever said you needed seven fillings when your teeth were perfectly healthy? Did you ever regret ordering the daily special at your favorite restaurant without knowing the price? If the response to any of these questions is yes and you are a consumer, a company or a professional in Spain, then you may want to keep reading.

On 30 December 2009, the Spanish Parliament approved the reform of Unfair Competition Law 3/1991.¹ If we take into account the significant changes made, **the reformed law can almost be considered a new unfair competition law. It extends to consumers the protection once afforded only to business, and its general clause expands the**

range of conduct constituting unfair competitive practices, while at the same time amending procedural questions, promoting codes of conduct, and clarifying what had formerly been a source of confusion: the statute of limitations for claims of unfair competition.

Companies and traders will now have to analyze their commercial practices from an almost totally new perspective. Until the modification of the old law, certain actions could be denounced by companies (but generally not consumers) as constituting unfair competition, while the rights of consumers (general contracting conditions, improper practices *vis-à-vis* consumers, etc.) were regulated under public law. Claims of unfair commercial practices made by consumers fell into a legislative vacuum.

¹ Transposition into Spanish law of two Community Directives: Directive 2005/29/CE of the European Parliament and of the Council dated 11 May 2005, relating to unfair commercial practices by companies in their dealings with consumers on the internal market, and Directive 2006/114/CE of the European Parliament and of the Council dated 12 December 2006, on deceitful and comparative advertising.

THE PURPOSE OF THE PROTECTION

The purpose of the law is “the protection of competition in the interests of all those who participate in the market”, but it now extends that protection from companies and professionals to consumers, doing so by means of a labyrinthine definition of “practices contrary to good faith”. Any action directed towards consumers that is contrary to “professional diligence” (understood as the level of competition and special care expected from a businessman in accordance with honest market practices) is considered unfair if it distorts or is capable of distorting the economic behavior of the average consumer in a significant manner (“economic behavior” being understood as a consumer’s decision to select an offer, contract for or retain a product or service, pay a price or exercise his contractual rights). Businessmen reading this may tremble—aside from being difficult to understand, this general clause is totally ineffective for the purpose of conducting self-assessments of their corporate commercial practices.

Clarity aside, however, the first practical consequence of the reformed law’s wording is that the commercial practices aimed at companies and professionals will be analyzed under standards that differ from those intended for consumers:

- Acts between *companies and professionals* will be analyzed according to the good-faith objective, which means that businessmen and professionals should examine the jurisprudence and use doctrine to verify the meaning of behavior that is “objectively contrary to good faith”.
- *Consumers*, on the other hand, will be considered the victims of acts contrary to the requirements of good faith when such acts are capable of distorting their economic behavior; *i.e.*, when the acts lead them to make decisions they would not have made in other circumstances. Curiously, this definition brings to mind the crime of fraud, particularly if we take into account the text of acts of deception that result in the distortion of the consumer’s economic behavior.

UNFAIR ACTS (CHAPTERS II AND III)

The reformed law distinguishes between two types of unfair conduct:

- “Acts of unfair competition”, which include most of the acts of unfair conduct recognized in the earlier statute and affect *companies and professionals as well as consumers* (the latter in Articles 5, 7 and 8) in Chapter II.
- “*Commercial practices with consumers and users*” in Chapter III. This separation does not exclude the *locus standi* of the companies to present actions based on Chapter III, provided that their interests are directly harmed or threatened.²

Acts of Unfair Competition (Chapter II)

The reform took advantage of the opportunity to review the wording of the original rules of this chapter. In particular, it reformulated Articles 7 (acts of deception) and 10 (acts of comparison)³ and deleted Article 8 (gifts, premiums and analogous situations). However, to the relief of many in the business community, no amendments were made to the regulations for acts of confusion (Article 6), denigration (Article 9), exploitation of reputation, violation of secrets, induction to breach of contract, violation of procedures, discrimination and economic dependence, and sale at a loss (Articles 12 to 17).

The revised statute considers **acts of deception** (Article 5) as acts unfair to consumers, companies and professionals. “Act of deception” is broadly defined as “the provision of information that is misleading or could be misleading”, according to a lengthy catalogue of elements. This article deals with actions like the following:

- Selling products which were illicitly obtained, or which infringe the rights of third parties, to distributors who believe they are acquiring them legitimately;
- Concealing the fact that after-sales service will be carried out by telephone in another language or during unsuitable hours (because the switchboard is in another country); and

² In accordance with Article 33.1, any person who takes part in the market and whose economic interests are directly harmed or threatened by the unfair conduct is permitted to exercise the actions foreseen under the reformed law. Similarly, the former law foresaw the possibility that consumers would bring actions against companies, even when no unfair practices had been formulated against them.

³ Article 11 was modified only to introduce the concept of “professional”, together with that of “businessman”.

- Unnecessarily replacing spare auto parts without the prior consent of the customer.

The reformed law also warns against errors that can occur in relation to pricing. Companies that follow complicated pricing schemes, such as mobile-phone service providers and travel agents, may have to rethink those schemes or improve how their pricing is communicated to users in order to avoid being accused of unfair conduct.

Deception by omission or concealment of information (Article 7) is likewise considered unfair conduct. This applies to businessmen, professionals and consumers alike and includes the following:

- Price concealment by businesses (such as a waiter's recommendation of the daily special without mentioning how pricey it actually is, a hairdresser's offer of a shampoo or treatment that significantly increases the client's total cost with no prior warning, or a telephone sale that neglects to inform the buyer of the delivery fee); and
- Information withholding (such as failing to inform the buyer of his right to return or exchange the product without a reason within a specified period, or selling road-safety products without specifying that they have not been officially approved by the government).

Aggression, harassment, constraint and exertion of undue influence are also introduced as behavior constituting unfair conduct (Article 8), whether it applies to consumers or to businessmen and professionals. Included in this category are the following:

- Cases of extreme constraint or harassment ("use of force") that could be analyzed under the Criminal Code;
- Use of improper influence by professionals, such as a doctor's recommendation of unnecessary medical procedures, or unnecessary tasks undertaken by an attorney in order to increase fees;
- Attempts to wear down consumers (as through repeated sales calls or visits) or to create confusion (such as attempts to sell services by overwhelming potential clients with positive details about the services while neglecting to report the less attractive ones);

- Preventing users from terminating contracts by making the termination process so complicated that users give up in sheer frustration; and
- Threatening to take legal action when there is no basis for such action.

Acts of comparison (Article 10) are regulated in a more rigorous manner than they were under the former law, due to the introduction of jurisprudential criteria for making commercial comparisons. Comparing goods or services remains legal, but it may be considered unfair conduct if the goods or services being compared do not have the same purpose or satisfy the same needs and if the comparison is not made in an objective manner between one or more essential, pertinent, verifiable and representative characteristics of the goods or services (including the price). Under this article, the application of brand names or trademarks to imitations or replicas (such as an advertisement for the "replica of a Rolex watch" or "an Aston Martin engine") is prohibited.

Acts of Unfair Competition With Regard to Consumers (Chapter III)

The reformed law regulates **acts of deception towards consumers** (Articles 20 to 27) separately from the acts of deception described in Article 5, introducing cases of unfair conduct towards consumers⁴ like the following:

- Practices that cause a consumer to confuse a company's goods or services, registered trademarks or distinctive brands with those of a competitor;
- Displaying a quality-assurance seal or other distinction without having obtained the necessary authorization;
- Deceitful promotional practices that have long been used to entice customers, such as offering insufficient quantities of sale items or holding sales of extremely brief duration, making offers intended to promote a different product or service (the "bait and switch" practice), refusing to provide the goods or services offered, or (a practice curiously common among carpet retailers) pretending to be in liquidation in order to promote a stock clearance;
- Deceitful practices regarding the nature and properties of the products or services, their availability and the after-sales service, such as proclaiming that a nonmedical product or service can cure, falsely

⁴ Transposition of Articles 5.2.b, 6.2.a and 5.5, as well as Paragraphs 1 to 23 and 31 of Annex I of the Directive.

announcing that the product or service will be available for a limited time only, or creating the false impression that the after-sales service for the product or service promoted is available in a European Union Member State other than the one where it was purchased;

- Pyramidal sales practices, in which the consumer pays in exchange for the opportunity to receive compensation for the entry of other consumers in the plan rather than from the sale of goods;
- Concealed commercial practices, such as promoting a product or service in the media and paying for such promotion without clearly specifying that the goal is publicity; and
- Other practices, such as sending mail that includes a bill or similar document giving the impression that a product or service not requested by the consumer has already been purchased.

Finally, the **aggressive practices** geared towards consumers that were introduced in Article 8 are expanded in Articles 28 to 31. The following are now considered unfair practices:

- Including in publicity materials direct exhortations to children to acquire goods or use services or to convince their parents or other adults to buy goods or contract for services;
- Making sales calls at the homes of consumers against their stated wishes; and
- Making unsolicited and repeated offers by telephone, fax, email or other forms of distance communication (unless doing so is legally justified by contractual obligations).

ACTIONS ARISING FROM UNFAIR COMPETITION AND CODES OF CONDUCT (CHAPTERS IV AND V)

Statute of Limitations of Actions

The court system has long debated a question of enormous practical relevance to the business community: when does the statute of limitations begin for filing an action when the unfair act is ongoing (*i.e.*, not an isolated act, but one that goes on for a period of time without

interruption)? The reformed law has put an end to years of contradictory lower-court judgments and Supreme Court jurisprudence (whose last exponent, with a particular contradictory vote, was the judgment of 21 January 2010). In accordance with Article 35, the statute expires three years *from the moment the conduct ends* (in contrast to the former draft, which caused confusion by declaring that the period expired three years from the act's "taking place"). Businesses should now be aware of the possibility of suing or being sued within three years of the termination of the unfair conduct.

Codes of Conduct

Notable in the remaining chapters is the reformed law's promotion of codes of conduct (Articles 37 to 39). A company accused of unfair competition will receive more favorable treatment from the courts if it adheres to such a code. This legislation rewards a company that follows a code of conduct by:

- Hindering the presentation of claims of certain forms of unfair conduct (contained in Article 5, *acts of deception*⁵);
- Obliging the interested party to insist on the cessation or rectification of the unfair act before presenting the action to the body controlling the code of conduct; and
- Permitting the filing of legal actions only if, 15 days after the receipt of the request, the aforementioned body has not made any declaration or its decision was unsatisfactory or unreliable.

Codes of conduct can be written by corporate groups or associations, and adherence to them is voluntary. However, by presenting a common performance area among companies that are usually competitors, such codes (like the bylaws of associations) can tempt the companies involved to coordinate their behavior in a manner contrary to competition law. Therefore, care must be taken when writing these codes to avoid encouraging anticompetitive conduct.

CONCLUSION

The reformed Spanish unfair competition law describes many new and relevant types of unfair conduct directed at consumers. The companies most affected by the new

⁵ Article 39.1.

categories of unfair conduct will be those that offer goods or services directly to consumers, since those companies may be exposed to claims brought not only by consumers and representative associations, but also by rival companies that believe they were directly affected by the unfair practices aimed at consumers. These claims may have different objectives, but there is little doubt that one of those objectives will be to cause harm to competitors and seek damages. To reduce their exposure to claims, companies should audit their commercial practices to ensure that they conform to the new rules.

Spain's reformed unfair competition law represents an important step towards the application of reliable commercial practices. The harmonization of Spanish legislation with that of the other EU Member States favors the implementation by multinational companies of valid global trade policies in all Member States, significantly reducing their global legal costs and increasing their legal safety in the territory of the European Union.

LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Marta Delgado Echevarría

Madrid

34.91.520.3924

mdelgado@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the author and do not necessarily reflect those of the Firm.