

## ***ROYAL DECREE 378/2003, Implementing the Competition Act 16/1989, July 17th, concerning block exemptions, individual authorizations and Competition Register.***

• PRELIMINARY CHAPTER. Objective .....	2
• CHAPTER I. Block Exemption .....	2
• CHAPTER II. Individual authorization Proceedings .....	4
• CHAPTER III. Competition Register .....	9
• CHAPTER IV. Appeals .....	10
• Additional provision. ....	11
• Transitional Provision. ....	11
• Repeal provision. ....	11
• First Final provision. ....	11
• Second final provision. ....	11
• ANNEX I .....	11

March 28, 2003.

(Official State Gazette No. 90, of 15th April 2003)

(Non-official Text)

Competition Act 16/1989, July 17th, prohibits in its Article 1 practices among firms which restrict or may restrict competition wholly or in part in national markets.

But Act 16/1989 also envisages the possibility that some of this prohibited practices (agreements among firms, decisions, recommendations and others) may be individually authorised, provided that they comply with certain prefixed provisions, when they are beneficial for markets, hence established in Article 3. Along with this, Article 5 allows Government to authorise those categories of practices which in line with Article 3 may be object of an individual authorisations, by means of block exemption regulations, this technique coming from the European Law.

According to those provisions, Royal Decree 157/1992 was passed incorporating to Spanish legislation the exemptions of those agreements or practices affecting national markets which were already exempted in the Community Law through the same technique.

Since then, the Community legislation concerning block exemption regulations on this issue has gone under substantial modifications with the adoption of new regulations, among them Commission Regulations (CE) No 1400/2002, 240/1996, 2790/1999, 2658/2000, 2659/2000 and 358/2003. This new regulations have introduced important changes in this area giving more scope for action to firms without enough powers to affect market conditions and thus the authorities attention focusing towards those cases with more economic incidence.

Arguments of necessary economic and legal coherence between national and European legislation and of legal certainty to Spanish firms recommend to substitute Royal Decree 157/1992 by a new one incorporating the new European block exemption regulation, including the one on the insurance sector which was not incorporated then because it was

not adopted. At the same time, the automatic reception into national regulations of the European block exemption regulations modifications and substitutions has been expressively admitted in this new Royal Decree.

Along with the adaptation of National legislation on block exemption regulations to European legislation in force, this Royal Decree also modifies certain aspects of the individual authorisation proceedings established in Chapter II, to align it to reforms operated by Act 52/1999 and by Act 1/2002, and to introduce as well the possible improvements detected after ten years of the former Royal Decree effective application.

In that sense, the individual authorisation proceedings before the Competition Court (Tribunal de Defensa de la Competencia) have been simplified to avoid excessive casuistry giving more flexibility and scope of action to the Court assessment, in any case preserving interested parties guarantees. This new Royal Decree also solves interpretation difficulties stemming from former disconnection among Articles 4.2 y 4, 10.4 y 46.3 of Act 16/1989 concerning the maintenance of a practice which is being object of an individual authorisation proceedings. At the same time, it is also envisaged to present directly before the Competition Court individual authorisation renewal requests, the Tribunal assessment being based on a report from the Competition Service supervising the concrete authorisation. And finally, revoking and modification circumstances for individual authorisation are detailed with its corresponding proceedings along with a new Article on block exemptions withdrawals.

In any case, central and regional competences on individual authorisation proceedings will be exercised under the framework of Act 1/2002, February 21st, for the co-ordination of State and Autonomous Communities competences on competition defence issues.

Chapter III on the Register specifies the accessible information for the general public and modifies the pieces of information to include in the Register concerning merger control in line with Royal Decree 1443/2001.

Finally, this Royal Decree modifies some aspects of the challenging regime to adapt it to the new content of Article 47 of Act 16/1989.

Wherefore, at the request of the Minister of Economy, with the approval of the Minister of Public Administrations, in accordance with the report of the Council of State and previously deliberated by the Cabinet in its meeting held on March 28th, 2003

I DECREE AS FOLLOWS:

## **PRELIMINARY CHAPTER. Objective** ➔

### **Article 1. Objective**

This Royal Decree has for objective to authorize the categories of agreements, decisions, recommendations and concerted or consciously parallel practices foreseen in Article 5 of Competition Act 16/1989, July 17th, to order the proceedings for granting individual authorizations established in Article 4 of the Act and to regulate the Competition Register.

## **CHAPTER I. Block Exemption** ➔

## Article 2. Block Exemption

1. Vertical agreements. Pursuant to the provisions of Article 5.1 a) of Competition Act 16/1989, July 17th, agreements in which two or more undertakings are involved and operating, in the agreement terms, at different levels in the production or distribution line and related to the conditions under which undertakings can purchase, sale or resale certain goods or services and relate only to the Spanish market, are authorized provided that they comply with the provisions established in:

- a. Commission Regulation (EC) No 2790/1999, of 22 December 1999 on application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, or in those Community Regulations that substitute it.
- b. Commission Regulation (EC) No 1400/2002, of 31 July 2002 on application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, or in those Community Regulations that substitute it.

2. Technology Transfer agreements. Pursuant to the provisions of Article 5.1 a) of Competition Act 16/1989, July 17th, agreements in which only two undertakings are participating and imposing restrictions regarding the acquisition or use of industrial or intellectual property rights, or know-how, are authorized provided that they are related only to the Spanish market and they comply with the provisions established in Commission Regulation (EC) No 240/1996, of 22 December 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements, or in any Community regulation that substitute it.

3. Horizontal agreements. Pursuant to the provisions of Article 5.1 b) of Competition Act 16/1989, July 17th, agreements belonging to any of the following categories and relate only to the Spanish market, are authorized subject to the compliance with the conditions established for each category here below:

- a. Specialization agreements, provided that the agreement complies with the provisions established in Commission Regulation (EC) No 2658/2000, of 29 November 2000 on application of Article 81 (3) of the Treaty to categories of specialisation agreements, or in those Community Regulations that substitute it.
- b. Research and Development agreements, provided that the agreement complies with the provisions established in Commission Regulation (EC) No 2659/2000, of 29 November 2000 on application of Article 81 (3) of the Treaty to categories of research and development agreements, or in those Community Regulations that substitute it.

4. Agreements in the Insurance sector. Pursuant to the provisions of Article 5.1 of Competition Act 16/1989, July 17th, the categories of agreements that relate only to the Spanish market, are authorized subject to compliance with the provisions established in Commission Regulation (EC) No 358/2003, of 23 February 2003, on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.

5. To the purposes of applying the four foregoing sections, it will be considered that the contents of each of the categories mentioned is that defined by the corresponding Community Regulations.

### **Article 3.** Withdrawal an exemption.

1. The Competition Court may withdraw the benefit of an exemption in the terms provided under the foregoing Article where it finds that, in a specific case, an exempt agreement has effects which are incompatible with the conditions laid down in Article 3 of Competition Act 16/1989 of July 17th.

2. The withdrawal procedure for an exemption may be initiated if any of the following specific circumstances concur:

- a. When no effective competition exists in the market for identical or similar products.
- b. When excessive prices are applied to the products contemplated in the agreement.
- c. When concerted horizontal practices exist referred to sale prices.
- d. When agreements regulated by Commission Regulation (EC) No 2790/99, of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, Commission Regulation (EC) No 1400/2002, of 31 July 2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, or Commission Regulation No 240/1996, of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements, or those that substitute them, have an impact on more than 20 per cent of the market quota of the product or products contemplated and of those considered identical or similar by the users.
- e. When the existence of a network of similar agreements leads to a cumulative effect thus restricting considerably effective competition.
- f. When intermediaries or users may not obtain the products contemplated under the terms usually applicable in markets other than those affected by the agreement or certain obstacles exist for other suppliers to enter the market in question.

3. Likewise, said procedure may be filed when the conditions for withdrawal established in Community Block exemption Regulations concur for their application to a specific agreement.

4. The proceedings in order to revoke an exemption may commence either ex officio, at the request of the parties or by the Competition Service (Servicio de Defensa de la Competencia) and will be conducted pursuant to the procedures established in Article 15 of this Royal Decree.

### **Article 4.** Agreements excluded from the exemption regime.

When in light of the nature of the contents of an agreement it does not fit exactly in any of the exempt categories, the parties must request an individual authorization according to the procedure provided under Article 38 of Competition Act 16/1989 of July 17th.

## **CHAPTER II. Individual authorization Proceedings ➔**

#### **Article 5.** Authorization application

1. The individual authorization applications concerning agreements, decisions, recommendations and forbidden practices pursuant to Article 3 of the Competition Act must be submitted to the Competition Service by completing the form herein appended as a Annex to this Royal Decree.
2. The application request for an authorization must include in any event all necessary data to assess the nature and impact of the conduct and in particular the circumstances of the parties involved, the object of the application and information on the market(s) affected.
3. When several Undertakings, or groups or associated undertakings take part in the agreement, decision, recommendation or practice, the applications will be submitted in the same form which will be signed by all the parties involved or by a duly authorized agent on behalf of all of them. If the form is submitted by only one of the undertakings, the latter must establish that it has sent a copy of the application to the other undertakings.
4. The applicant must attach the documents required in the Annex abovementioned including either the original documents or a certified copy. The text of the agreement or contract, or the description of the practice for which an authorization is requested must be drafted in Spanish, and if it is drafted in another language then a translation into Spanish of the text must be included.

#### **Article 6.** Mending

If the authorization application does not comply with the conditions laid down in precedent Article, the interested party will be requested to correct any deficiency or to present the mandatory information within the time-limit of ten days, warning the applicant that, in case that request is not satisfied, its petition will be consider retired and will be filed, pursuant a previous resolution declaring the demission.

#### **Article 7.** Admission of application and hearing of the interested parties

1. Once the application have been submitted in due form, in the Service order of initiating the authorization proceedings, an Instructor and a Secretary shall be appointed. The interested parties shall be informed of such appointments with an explicit reference of the date of initiating the proceedings and the correspondent authority in charge to decide on it.
2. Once the proceedings is initiated, the Service will issue a note on its key issues, so that any person who may provide information thereon within a maximum period of fifteen days. The foregoing succinct note will be published in the Official State Gazette and when applicable in one of the main newspapers with national coverage or with the greatest coverage in the province where the practice contemplated in the application takes place, as provided by Article 36.5 of Act 16/1989.
3. At the same time, the Service will conduct the inquiries it deems expedient, will hear the persons who are to be considered as interested parties and will request the mandatory report of the Consumers and Users Council as provided under Article 22.5 of the Act 26/1984, of July 19th, General for the Defence of Consumers and Users.

#### **Article 8.** Examination of the Application

1. Within the maximum time-limit of thirty days from the date of the application reception, as

provided under Article 5, the Service will conduct the above proceedings, will assess the application and will submit these to the Court.

2. When the Service considers that the information provided is clearly insufficient to issue a legal recommendation, it will request from the applicant that it furnishes the necessary data and information within the time-limit of ten days, and the legal period of thirty days will be held in abeyance until such request has been complied with.

3. In the Service assessment, it will state whether the agreement, decision or practice does not require an authorization or otherwise if it is subject to an authorization or otherwise.

4. If it considers that an authorization may be granted, the Service will make express reference to the applicable authorization pursuant to Article 3 of the Competition Act, and if applicable, if any amendments, conditions or obligations must be established, as well as the period for which such authorization is granted.

#### **Article 9.** Lodging the proceedings before the Court.

1. The Court, once the proceedings have been submitted, will decide, within five days, on their admission, considering if the relevant background has been supplied. Otherwise, it will request from the Service to conduct the appropriate inquiries, which may be supplemented by any others deemed expedient by the Court, always within the time-limit established.

2. Prior to issuing a decision, the Court, once it has decided on the admission of the proceedings and appointed a rapporteur, will hear, when applicable, and as many times as it considers appropriate, the interested parties and the Service, either jointly or separately, and could decide the discovery of evidence that must take place within the time-limit decided. When it becomes necessary to establish amendments, conditions or obligations to the authorization, or when the Service has resolved against the application filed, the hearing will be perceptible.

#### **Article 10.** Burden of proof.

The burden of proof of all acts, data or circumstances invoked as circumstances which, according to Article 3 of Competition Act 16/1989, July 17th, may lead to an authorization, lies with the applicant.

#### **Article 11.** Contents of the Resolution

1. The resolution granting or refusing an authorization shall be reasoned.

2. The resolution granting the authorization will include in its affirmation, the type or types of authorization applicable according to Article 3 of Competition Act 16/1989, July 17th, and separately each of the amendments, conditions, obligations or impositions which may be established and the results of its non-compliance, as well as the period of time for which such authorization is granted and the date on which it comes into force, that never can be before the date the application was submitted.

3. Fines against infringement of Article 1 of Competition Act 16/1989, July 17th, can not be imposed related agreements, decisions, recommendations or practices included in the application, that could take place from the date it was submitted, only if the Court had pronounced against them, according Article 10.4 of the mentioned Act. The resolution refusing an authorization will include, when applicable, a summons for the applicants and

other perpetrators of banned practices which have been party to the proceedings so that they abandon such practices, cautioning them that otherwise they shall incur in the penalties contemplated in Article 10 of Competition Act 16/1989, July 17th.

#### **Article 12.** Notification and Registration of the Resolution

1. Notice of the resolution will be served on the applicant and other interested parties, if applicable, within the time-limit of six months reckoned from the date on which the authorization application was properly filed, notwithstanding that the time-limit can be interrupted according the Article 8 of this Royal Decree. The Competition Service will also be informed of the decision so that it may record the same in its Register.

2. To that purpose, the Court, when notifying the Service of its resolutions will attach the document or documents which set forth the agreement, recommendation or practice which gave rise to the proceedings.

#### **Article 13.** Resolutions on provisional applications.

1. The Court within the time-limit of three months reckoned from the date on which the authorization application was filed and without detriment to the interruptions on the reckoning of the time-limits established on the Article 8 may issue a reasoned resolution providing that the agreement, decision, recommendation or practice which gave rise to the proceedings is not applicable.

2. If within the above time-limit, the Court does not issue a decision, the participating Undertakings may provisionally apply it. In this case, when the Court issues a resolution, refusing said application, or imposing certain amendments, conditions or obligations, the resolution will set the date on which the provisional application will no longer be applicable and it may not have any retroactive effects for the period during which the provisional application was in place, as provided under Article 4.4. of Act 16/1989.

#### **Article 14.** Revocation and amendment of authorizations.

1. When the Court is aware that the beneficiaries of an authorization are in breach of the conditions, obligations or charges provided there under, or that it was granted on the basis of material data which were supplied incorrectly or inaccurately, or that an essential change has occurred in the circumstances considered for its granting, it will issue a resolution establishing the initiation of revocation or amendment proceedings.

2. In case the amendments should be merely formal or not essential, the Court may issue, if appropriate, a resolution amending the original authorization.

3. Once the initiation of the revocation proceedings has been agreed, the Court may decide, following a proposal of the Service, the provisional revocation of the authorization as a cautionary measure subject to the conditions and guarantees set forth in Article 45 of Act 16/1989.

4. Having received the proposal of the Court, the Service will practise the necessary instruction to set the facts upon which the revocation and the modification of the authorization are based. These facts will be concreted and assessed on a report that the Service will provide to the Court within the time-limit of tree months from the day after the reception of the Court resolution that decided the initiation of the proceedings.

5. Having received the proposal of the Service, the Court will decide, within the time-limit of

five days, its admission or devolution to the Service to practise new inquiries which will be completed with others considered adequate by the Service, always within the time-limit established by the Court.

6. Once the proceedings has been admitted and the rapporteur has been appointed, the Court will hear the interested parties and the Service, either jointly or separately, as often as necessary, it may practise the evidences and will issue a resolution that will be notified to the interested parties within the time-limit of six months from the day after the Court resolution establishing the proceedings initiation.

**Article 15.** Withdrawal a block exemption.

1. When the Service considers that there are enough evidences of having produced some of the circumstances established in the Article 3 of this Royal Decree or the revoking conditions established in the exemption European Regulation which allow the Court to withdrawal some block exemption, the Service will initiate the exemption withdrawal proceedings, either ex officio or at the request of the parties.

2. The Service will commit the necessary instruction to establish the facts upon which the withdrawal exemption is based, such facts will be concreted an assessed on a report that has to be provided to the Court within the time-limit of tree months from the day after the initiation of the revoking proceedings.

3. Having received the proposal of the Service, the Court will decide within the time-limit of five days its admission or devolution to the Service in order to practise new inquiries that may be completed with others considered adequate by the Service, always within the time-limit established by the Court.

4. Once the proceedings has been admitted and the rapporteur has been appointed , the Court will hear the interested parties and the Service, either jointly or separately, as often as necessary, it may practise the evidences and will issue a resolution that will be notified to the interested parties within the maximum time-limit of six months from the day after the Court resolution establishing the proceedings initiation.

5. If the beneficiaries of the exemption apply for an individual authorization during the proceedings , it will be conducted jointly with the exemption withdrawal proceedings and the Service will also include its recommendation on the application for an authorization in the report that will be submitted to the Court.

**Article 16.** Renewal of the authorization.

Before expiring the time-limit for which the authorization was given, the interested party will be able to apply for its renewal to the Court. The Court either renews it or request from the Service to initiate a proceedings that will be conducted as the one for granting an individual authorization.

**Article 17.** Authorization application concurrent with sanctioning proceedings.

1. When sanctioning proceedings have been instituted, the interested parties file for an authorization of the agreement, decision, recommendation or practice contemplated in the proceedings, pursuant to the terms of Article 38.2 of Competition Act 16/1989, July 17th, their application will comply with Article 5 of this Royal Decree.



2. The application will be made public in the terms foreseen under Article 7 and its proceedings will be conducted jointly with the sanctioning proceedings. In this case, the Service will submit to the Court the recommendations on the application for an authorisation jointly with its report.

3. The resolution issued by the Court which puts an end to the proceedings will consider separately its decision on the practices or agreements which gave rise to the sanctioning proceedings with the accessory provisions established by Competition Act 16/1989, July 17th, and the decision on granting or refusing the authorization pursuant to the terms set forth in Article 11 of this Royal Decree.

4. If subsequent to the submission of an individual authorisation application a complaint about the same facts were submitted, information about the accusation shall be included in the assessment of the application submitted to the Court.

### **CHAPTER III. Competition Register** ➔

#### **Article 18.** Contents of the Register.

1. The aim of the Competition Register shall be the recording of the agreements, decisions, recommendations and practices which the Court has authorized and those which it has banned either fully or in part, as well as economic concentration operations or take over of Undertakings as provided under Articles 14 and 15 of Competition Act 16/1989, July 17th.

2. The Competition Register will consist of the following Sections: section A), agreements, decisions, recommendations or practices which have been authorized, amended or banned; section B), economic concentrations.

#### **Article 19.** Public nature of the Register

The Register will be public. Publication of its contents will be made following consultation or a certificate issued by the competent official, which shall be limited to the recordings referred to in Articles 20 and 21.

Certificates will be the sole procedure to establish in an evidencing manner the contents of the entries of the Register and will be issued at the request of any person who has a legitimate interest, at the request of an official body or the Association of Consumers and Users.

#### **Article 20.** Particulars which may be recorded under Section A).

The Section on authorized, amended or banned agreements, decisions, recommendations and practices will include the following particulars:

- a. The date on which the decision of the Court was given.
- b. The legal considerations of said resolution.
- c. The nature of the agreement, decision, recommendation or practice which has been authorized, modified or banned.

- d. The time-limit of the authorization.
- e. The amended or revoked clauses, as applicable.
- f. The banned agreements or clauses.
- g. The trade name and registered offices of the undertakings to which those agreements refer.
- h. The names and address of the applicants filing for those authorizations.

**Article 21.** Particulars which may be recorded under Section B).

The section on economic concentrations will record the following particulars:

- a. Trade name of the undertakings which are taking part in the economic concentration operation or in the take over.
- b. Nature of the operation.
- c. Date and content of the decision which concludes the procedure.

**Article 22.** Registration procedure

Entries at the Competition Register will be made in any type of material supports capable of collecting and recording in an accurate manner all circumstances which according to the Law must be recorded thereat, guaranteeing their permanence and inalterability.

## **CHAPTER IV. Appeals** ➔

**Article 23.** Appeals against acts of the Service

1. Decisions issued by the Competition Service which decide directly or indirectly on the matter at issue, or determine that certain proceedings may no longer be continued, or entail the defencelessness or cause irreparable damage to legitimate interests or rights, may be appealed before the Competition Court within the time-limit of ten days.
2. It will be deemed that such defencelessness does not exist in the event that the discovery of evidence requested by a legitimate party is refused when such decision includes the grounds for such refusal and the discovery of evidence requested is clearly inappropriate or untimely, and in any case, when their discovery may be conducted before the Court.
3. In those cases, and in all others when the appeal lodged lacks sufficient legal grounds, the Court may dismiss the same by means of a reasoned resolution.

**Article 24.** Appeals against resolutions issued by the Court.

The resolutions issued by the Court contemplated in this Royal Decree may only be

contested by filing the corresponding administrative appeal as provided under Article 49 of Act 16/1989.

### **Additional provision.** ➔

References to the Competition Court and to the Competition Service.

It will be understood that the references to the Competition Court and to the Competition Service contained in this Royal Decree will mean to be references to the regional competent authorities when competences correspond to the Autonomous Communities according to Act 1/2002.

### **Transitional Provision.** ➔

Agreements already in force.

All agreements which belong to any of the categories listed under Article 2 of this Royal Decree which are already enforceable when this instrument is effected will be considered authorized provided that the exemption terms foreseen in each of them are complied with. Likewise, agreements included in those categories which within the time-limit of six months since this Royal Decree is effected have been modified by the parties in order to adapt them to the exemption requirements contemplated hereunder for their respective category are likewise authorized.

### **Repeal provision.** ➔

Repeal of legislation

Royal Decree 157/1992, February 21st, which develops Act 16/1989 concerning block exemptions, individual authorizations and Competition Register is repealed.

### **First Final provision.** ➔

Developing entitling.

The Minister of Economy may modify the forms set out in the Annex to this Royal Decree by means of an Order.

### **Second final provision.** ➔

Entry into force.

This Royal Decree shall entry into force on the day following that of its publication in the Official State Gazette.

**ANNEX I** ➔

Application Form for an individual authorization (Article 4, Act 16/1989)

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