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Briefing note February 2015

The Supreme Court clarifies the criteria to calculate fines for antitrust infringements

The Spanish Supreme Court has rejected the method of setting fines for antitrust infringments set forth in the Communication on fines of the former Spanish Competition Authority (*Comisión Nacional de la Competencia*) of 6 February 2009 the ("**Communication**" and the "**CNC**") and calls on the legislator to modify the Spanish Competition Act 15/2007 ("**SCA**") in order to adapt the deterrent function of fines to the principle of proportionality.

In its judgment, the Supreme Court establishes that 10% of the turnover included in the SCA does not constitute a "corrective threshold", but the maximum level in the range of fines within which the fines for very serious antitrust infringements must be calculated.

Furthermore, the Supreme Court states that the "total turnover" concept encompasses the turnover generated in all the economic activities of the infringing company, and not only the turnover generated in the specific activity affected by the infringement, as the Spanish High Court has interpreted since March 2013.

Key issues

- The judgment rejects the Communication's method of setting fines for contravening the principle of proportionality, and calls on the legislator to modify the SCA in order to make the setting of fines more predictable.
- Until the SCA is amended, fines will be set exclusively on the basis of Articles 63 and 64 SCA and in light of the principle of proportionality.
- The 10 % of the total turnover does not constitute a "corrective threshold", but the maximum value in the range of fines within which to set a fine for very serious infringement.
- Such total turnover must encompass the turnover generated by all economic activities of the infringing company, and not exclusively the turnover generated in the specific activity affected by the infringement.
- Even though it admits that the Communication led to a disproportionate level of fines, the judgment reduces legal certainty in relation to the setting of fines.

Introduction

In its judgment of 29 January 2015, case *Transitarios 2*, the Supreme Court has addressed for the first time the divergence between the Spanish High Court (ever since its judgment of 6 March 2013 on one of the *Vinos de Jerez* cases) and the current Spanish Competition Authority (*Comisión Nacional de los Mercados y de la Competencia*) ("**CNMC**") as regards the setting of fines for antitrust infringements. Such divergence has also arisen within the CNMC itself, as may be inferred from its contradictory decisions taken during the last year.

Specifically, the Supreme Court has adressed two issues concerning the interpretation of Article 61.3 SCA, which establishes the maximum limits for competition fines: (i) the 10% limit, either as a "corrective threshold" or as the maximum value in the range of fines within which to set a fine for a very serious infringement; and (ii) the scope of the "total turnover" concept, that is to say, whether it refers to the turnover generated in all economic activities of the infringing company or only to the turnover generated by the infringing company in the activity affected by the infringement.

On the first issue, concerning the nature of the 10% limit, the Supreme Court has upheld the view of the High Court since the latter's ruling in case *Vinos de Jerez*, rejecting the method of setting fines set forth in the Communication. In contrast, on the second issue concerning the scope of the "total turnover" concept, it has endorsed the CNMC's position.

In rejecting the criteria laid down in the Communication, the Supreme Court's judgment casts some doubts on the appropriate methodology for calculating the amount of fines to apply from now on. The modification of Title V of the SCA thus seems to be one of the possible alternatives to bring legal certainty to this area.

Analysis

Article 63.1 SCA establishes that the CNMC may punish minor, serious or very serious infringements with fines up to 1%, 5% and 10% of the infringing company's total turnover, respectively.

Nature of the 10% limit

The first controversial issue concerns the 10% limit in relation to very serious infringements. According to the Communication, the CNMC had interpreted that such percentage constituted a mere "corrective threshold". In other words, the setting of fines involved two phases. In the first phase, the CNMC determined the basic amount of the fine, which would be subsequently increased, depending on the duration and other factors, without setting a maximum limit of the fine at this time. In the second phase, the CNMC verified whether or not the preliminary amount of the fine calculated during the first phase exceeded the "corrective threshold", that is, the 10% of the company's total turnover. If the preliminary amount was below the 10% limit, that figure would become the final amount of the fine imposed on the firm. Conversely, if the preliminary amount exceeded the 10% limit, the fine would be "corrected" and set at 10% of the total turnover, which actually happened in a large number of cases.

In this regard, the Supreme Court admits that the interpretation of such 10% as a "corrective threshold" corresponds to the European Commission's method of setting fines for antitrust infringements, endorsed by the Court of Justice. Nevertheless, the judgment recalls that Member States have autonomy to follow their own national infringement procedures and their sanctioning systems when applying European Union ("**EU**") competition rules in their territories, provided that they respect the general principles of effectiveness and equivalence. This is due to the lack of harmonization of EU law on proceedings and fines even when EU substantive rules are applied, in particular, Articles 101 and 102 of the Treaty on the Functionning of the EU ("**TFEU**").

Thus, the Supreme Court deems that the Communication's method of setting fines often involves a "*bias towards high amounts of fines*", which is contrary to the principle of proportionality. In this vein, it considers that this interpretation is not compatible with either the spirit of Spanish punitive law, or with Spanish constitutional guarantees.

On the basis of these considerations, the Supreme Court, along with the High Court, refuses to interpret the 10% limit as a "corrective threshold" and states that the percentages included in Article 63.1 SCA constitute the maximum reference levels

from which fines must be calculated "downwards" by taking into consideration the general criteria laid down in Article 64 SCA.

Concept of turnover

The second issue deals with the concept of "total turnover" as established in Article 61.3 SCA.

The CNMC has traditionally considered that such concept corresponds to the turnover generated in all of the activities of the infringing company. In contrast, in *Vinos de Jerez* and subsequent judgments, the High Court interpreted that the total turnover to be taken into account when setting the fines referred only to the turnover generated by the infringing company in the activity in which the infringement had taken place.

In this regard, the Supreme Court has endorsed the CNMC's view and has established that the "total turnover" concept encompasses the turnover generated in all of the economic activities carried out by the infringing company.

However, the Supreme Court underlines that, in light of the principle of proportionality, the company's turnover in the sector affected by the infringement is always relevant when individualising the fine, but not when calculating the maximum amount that the fine could reach.

On these grounds, the Supreme Court urges the CNMC to recalculate the fine imposed on the claimant, on the basis of its interpretation of Articles 63 and 64 SCA.

In addition to the two main issues already described, the Supreme Court suggests a partial modification of the SCA so as to make the setting of fines more predictable.

Finally, the judgment adresses the deterrent aspect of fines within the framework of Spanish competition law. In this regard, the Supreme Court recognizes that fines serve as a deterrent to prevent antitrust infringements, but it highlights that this must always respect the principle of proportionality. Thus, the Supreme Court recalls that there are other mechanisms to increase the deterrence level, such as the private enforcement of competition law or the individual liability of companies' directors as per Article 63.2 SCA.

Comment

The judgment states that the method of setting fines of the Communication clashes with the principle of proportionality, and points out that such method could lead to excessive fines.

Nevertheless, the direct outcome of the judgment will not necessarily be lower future fines imposed by the CNMC – except maybe on those companies with ongoing judicial reviews on decisions taken on the basis of the Communication –, but rather the lack of predictability in determining the amount of the fines.

Thus, until the SCA is amended, fines will be set exclusively on the basis of the principle of proportionality and Articles 63 and 64 SCA, which only establish the range of the fines and some vague criteria for their calculation, but not a specific method to determine the amount of the fine.

Meanwhile, as regards ongoing judicial reviews, it can be inferred from the judgment that the Supreme Court is likely to ask the CNMC to recalculate the amount of the fines in those decisions appealed in which the Communication has been applied. It could also be expected that, under the principle of prohibition of *reformatio in peius*, the CNMC, when recalculating the fines during the execution of the judgment, will not increase the amounts initially imposed. In this sense, it seems reasonable that the fines in ongoing judicial reviews could be reduced as a result of the "*bias towards high amounts of fines*" that the Supreme Court attributes to the Communication. In any case, as already mentioned, the judgment does not ensure that future fines will necessarily be lower, since the 10% maximum limit of the total turnover remains unchanged.

Lastly, the Supreme Court vigorously reiterates the autonomy of the Member States as regards the procedures and sanctions to be used when applying Articles 101 and 102 TFEU, provided that they comply with the general principles of effectiveness and equivalence. This seems to be relevant, for instance, when assessing whether the legal professional privilege between lawyer and client (in particular, during dawn raids carried out by the CNMC) should be extended to in-

house lawyers, or whether the European Commission's decisional practice and the case-law of the Court of Justice are relevant in this regard merely due to the fact that EU substantive law is being applied.

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