

THE SPANISH MARKETS AND COMPETITION COMMISSION IMPOSES SANCTIONS ON THEIR CORPORATE OFFICERS FOR THEIR INVOLVEMENT IN A CARTEL

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Legal Briefings

The Spanish National Markets and Competition Commission ("**CNMC**") has for the first time imposed sanctions on the corporate officers of several companies involved in a cartel, which is prohibited by article 1 of the current and former Spanish Competition Act ("**LDC**") and article 101 of the Treaty on the Functioning of the European Union ("**TFEU**").

The corporate officers in question were fined €4,000 in the case of an officer of INDAS, whereas to officers of FENIN were each fined €6,000 and €4,000, respectively. These sanctions have been imposed independently from the fines imposed on these and other companies for infringing those competition regulations.

However, the CNMC's President had already announced the regulator's intention to toughen the sanctions imposed on the individuals more than a year ago in an appearance before the Spanish Senate's Economic and Competitiveness Committee (see [here](#)). This is clear evidence of the CNMC's aim to target its disciplinary policies at corporate officers involved in anticompetitive practices and to identify them by name, in the words of its President¹.

Moreover, the CNMC's Plan of Action for 2016 expressly stated the CNMC's intention to use all available tools to combat cartels: (i) not only by imposing sanctions on corporate officers and legal representatives for competition violations; (ii) but also by encouraging bans on companies that breach competition provisions from entering into contracts with the public administrations, in accordance with the Spanish Public Sector Contracts Act².

So far, there has been scant use of the ability to impose sanctions on corporate officers or the legal representatives of companies involved in a competition offence (see [here](#)). In fact, since the current iteration of the LDC entered into force, only a single fine has been imposed, by the now-defunct National Competition Commission³ ("**CNC**"); the current CNMC had not yet used its powers in this regard.

1. LIABILITY OF THE CORPORATE OFFICERS OF SEVERAL COMPANIES FOR THEIR INVOLVEMENT IN A CARTEL IN THE ABSORBENT PRODUCTS SECTOR

On 26 May 2016, the CNMC decided to impose fines for a value of €128.8 million on certain companies, a sector association and several corporate officers from those entities who had been involved in a cartel in the market of wholesale distribution of absorbent products for serious urinary incontinence, which was funded by the Spanish National Healthcare Service through pharmacies.

Specifically, those companies had participated in an agreement to fix prices of sale to the wholesale distributors of absorbent products marketed through pharmacies from December 1996 to January 2014.

The CNMC considered that, from December 1996 to June 2010, the professional association FENIN has set up a Working Group at which the manufacturers of absorbent products reached agreements to fix the prices of sale to wholesale distribution operators in respect of those products, in particular the pharmaceutical associations and the associations of wholesalers that distribute products of that kind.

It also seems that the manufacturers implemented a common strategy of lodging appeals against competitive tenders launched by certain regional entities belonging to the Spanish National Healthcare System to prevent marketed products from being delivered to non-hospitalised customers (such as nursing homes for the elderly and basic healthcare clinics). According to the CNMC, the aim of the absorbent products manufacturers was to paralyse sales through those channels to uphold their revenues obtained from wholesale sales of those products through the pharmacy channel.

The investigation started as a result of a leniency application submitted by the company Arbora & Ausonia and its successor, The Procter & Gamble, in June 2013. In the light of the application, the CNMC granted those companies and one of their officers immunity from fines for their involvement in the offending practice (€7.19 million and €15,000, respectively). It is the first time that an individual has been exonerated from paying a fine under the leniency programme.

The company INDAS and one of its corporate officers were fined €13.2 million and €4,000, respectively. The same occurred in the case of FENIN, which has been fined €200,000, while the CNMC has fined two of its corporate officers €6,000 and €4,000, respectively.

Furthermore, the CNMC has also sanctioned the manufacturers of absorbent products, SCA, Ontex, Hartman, Barna Import, Textil Plana and Algodones del Bages with fines ranging from €35.1 million to €800,000.

The CNMC has concluded that the corporate officers of Arbora & Ausonia, INDAS and FENIN are liable as a result of their "direct involvement" in the "design and promotion" of the agreements reached by the FENIN Working Group with the aim of fixing the price of sale of the products and making sure that the sales of those products are maintained through the pharmacy channel.

2. DETERMINING THE AMOUNT OF THE FINES IMPOSED ON THE CORPORATE OFFICERS AND LEGAL REPRESENTATIVES

Article 63.2 of the current LDC limits the fines that can be imposed on the legal representatives or on the members of executive bodies involved in a competition offence to a maximum of €60,000.

In order to calculate the fine imposed on each corporate officer, the CNMC has taken into account both objective parameters (such as the severity of the sanction, taking into account the sanction level imposed on the companies that they represent or their governing bodies) as well as certain subjective parameters (the length of time during which each corporate officer was involved in the infringing conduct, each corporate officer's seniority and the type of entity that they represent - whether a company or association).

Therefore, for instance, one of FENIN's officers has faced a higher fine (€6,000) than another of FENIN's officers (€4,000) because the latter was only involved in the infringement in her capacity as Executive Director of the association, whereas the former participated, firstly as Executive Director and subsequently as Secretary General.

On the other hand, the officer from INDAS was subject to a lower fine (€4,000) than the fine imposed on Procter & Gamble's corporate officer (€15,000) because he had participated in the infringing conduct for a shorter period of time.

3. CONCLUSION

The CNMC has confirmed in its Decision dated 26 May 2016 that it intends to identify the corporate officers of the companies or sector associations who are involved in adopting anticompetitive agreements and that it will impose sanctions against them.

The criteria used by the CNMC to impose sanctions personally against those officers is whether or not they have had "direct involvement" in the "design and implementation" of the anticompetitive agreement, assuming an active and leading role in the infringement.

Additionally, the CNMC understands that the sanctions imposed on corporate officers must be set based on finding a balance between proportionality and deterrence, taking into account not only objective parameters related to the severity of the infringements and their degree of unlawfulness, but also subjective parameters such as how long each corporate officer participated in the infringement, their seniority and the type of entity that they represent - whether an association or company.

¹See Expansion, Digital edition on 03 March 2016, "*The CNMC will publish the names of the directors of sanctioned companies*".

²In view of Final Provision Nine of Act 40/2015, on 1 October, on the Legal Regime of the Public Sector, which modifies the Public Sector Contracts Act by including, in article 60.1 b), a ban on companies that have been sanctioned, by final decision, for serious infringements in terms of the "*distortion of free competition*" from entering into contracts with the public sector.

³In particular, in the CEOE Case (2012), the CNC fined the President of the Tourism Committee of the CEOE €50,000 as a result of statements he made as to the need to raise hotel prices in Spain. In fact, that fine was annulled by the Spanish appellate court, the *Audiencia Nacional*, in 2013 primarily on the basis that those statements could not constitute a competition law infringement.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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