

THE SPANISH MARKETS AND COMPETITION COMMISSION TOUGHENS SACTIONS ON INDIVIDUALS FOR COMPETITION LAW OFFENCES

14 May 2015 | Madrid
Legal Briefings

On 22 April, José María Marín Quemada, Chairman of the Spanish Markets and Competition Commission ("**CNMC**"), appeared before the Spanish Senate's Economic and Competitiveness Committee to explain the CNMC's Plan of Action for 2015.

One of the key elements of the Chairman's presentation was the intended toughening of sanctions, up to €60,000, on corporate officers involved in a resolution or practice prohibited by the Spanish Competition Act 15/2007, of 3 July (Ley de Defensa de la Competencia, or "LDC"), to add to armoury of deterrents offered by the regime of sanctions established by the LDC.

To quote the Chairman of the CNMC:

"I should also mention that the deterrent afforded by the system of sanctions is grounded — and this is an avenue that we wish to strengthen — on the provisions of article 63.2 of the Competition Act, which establishes fines of up to €60,000 for officers who are involved in a banned resolution or decision; this is a new issue that I have wanted to share with you today".

Those statements are even more significant given the place chosen by the Chairman of the CNMC to first announce the new direction taken in applying the sanctioning policies of the LDC. The novelty of the statement is also significant in that the CNMC's intention to toughen sanctions on individuals was not included among the 148 measures set out in the "Plan of Action" approved by the CNMC in January this year.

We summarise below the sanctioning regime contained in the LDC with regard to individuals and the decisions rendered by the Spanish competition authorities in some key cases.

1. THE REGIME OF SANCTIONS ON INDIVIDUALS ESTABLISHED BY THE LDC

According to article 63.2 LDC, the CNMC has the power to impose sanctions of up to €60,000 on the legal representatives or the members of executive bodies that have been involved in passing a resolution or decision prohibited by the LDC. That article exempts from those sanctions individuals who, albeit being members of the indicated bodies, did not attend the meetings at which the resolutions or decisions were passed or who voted against those resolutions or decisions, or who abstained from voting.

Article 63.2 LDC is clear that these sanctions are in addition -"as well as" - to those that are imposed on the company or association that has breached the provisions of the LDC.

It is worth mentioning that the possibility of imposing fines on the legal representatives and corporate officers was already established in article 10.3 of the former Competition Act of 1989, although in that case up to the significantly lower amount of €30,000

2. THE DECISIONS OF THE SPANISH COMPETITION AUTHORITIES

In recent years, and especially since the LDC entered into force, in very few cases have the Spanish competition authorities decided to impose sanctions on individuals for competition law infringements.

The above notwithstanding, we summarise below the decision-making trends of the Spanish Competition Tribunal (Tribunal de Defensa de la Competencia, or "**TDC**") and the Spanish Competition Commission (Comisión Nacional de la Competencia, or "**CNC**").

2.1. The decisions of the TDC

The now-defunct TDC imposed several sanctions on individuals in application of article 10.3 of the Competition Act of 1989.

From a material perspective, the TDC's decisions suggest that, in order to impose sanctions of this kind, it is necessary to provide evidence that the legal representative or corporate officer played a particularly significant role in committing the offence. For example:

- In the Faconauto case (1993), the TDC imposed a fine of 100,000 pesetas (approximately €600) on the chairman of a professional association in the automotive sector for his "active involvement" in preparing a collective recommendation to car showroom workshops to increase per-hour labour prices for services rendered.
- In the Boutiques Pan Asturias case (1993), the TDC imposed a fine of 200,000 pesetas (approximately €1,200) on the secretary of a professional association in the bakery sector in the region of Asturias as a result of his "individual and significant involvement" in establishing a price-fixing agreement among operators in the bakery sector.
- In the Ortodoncistas de Castilla y León case (1996), the TDC imposed a fine of 100,000 pesetas (approximately €600) on each of three people who played a "decisive role" in a professional association passing a resolution to ensure its members made joint fixed-price bids in a public tender process in the healthcare sector.
- In the Asentadores de Pescado case (1996), the TDC imposed a fine of 500,000 pesetas (approximately €3,000) on each one of the members of the executive committee of a professional association who voted in favour of an anti-competitive resolution. The association's chairman was fined one million pesetas (approximately €6,000) as the TDC found that "he had had a greater role in passing the resolution and putting it into practice".
- In the Lencería Gijón case (1996), the TDC imposed fines of 100,000 pesetas and 50,000 pesetas (approximately €600 and €300, respectively) on the chairmen of two professional associations for their "significant role" in the orchestrated boycotting of an aggressive commercial policy implemented by a market operator.
- In the Feriantes de Huesca case (2001), the TDC imposed a fine of 150,000 pesetas (approximately €1,200) on the chairmen of two professional associations in the public fairs industry who displayed an "active role" in making a recommendation to their members to boycott.
- On the other hand, in the Taxis de Barcelona case (2001), the TDC decided not to impose sanctions on the legal representatives – contrary to the opinion of the investigating body – as evidence had not been provided that the legal representatives of the signatories of the anticompetitive resolution had had a "significant role" in that resolution being passed.
- Finally, in the Excursiones Puerto de Sóller case (2007), the TDC imposed a fine of €6000 on the chairman of the awardee of a public transportation contract due to his "key role" in committing the competition law offence.

In light of the precedents of the TDC, it is clear that the main requirement to impose sanctions on an individual for competition law offences is that person's role in implementing the anticompetitive practice in question.

2.2. The decisions of the CNC

Between 2007 and 2013, the former CNC displayed a far more timid approach than its predecessor when imposing fines on individuals.

Nevertheless, the CNC did also sanction individuals for their role in breaching the LDC, although more selectively.

In particular, in the CEOE case (2012), the CNC fined the chairman 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 the eyes of the CNC, those statements constituted a collective recommendation to increase prices, for which the chairman and the association that he represented (which was also fined by the CNC) were both liable.

However, in its judgment dated 15 October 2013, the Spanish appellate court, the Audiencia Nacional, annulled the CNC's fine on the basis, primarily, that those statements could not constitute a competition law infringement. The Audiencia Nacional made it clear that the chairman had not made the statements in question in his position as head of the professional association, but rather as chairman of a hotel chain. The Audiencia Nacional also pointed out that the aim of the statements was not to encourage operators to increase prices, but merely referred to a scenario that could occur in the market.

3. CONCLUSION

In recent years few sanctions have been imposed in Spain on legal representatives or corporate officers for competition law offences. When sanctions have been imposed, it has in general only been in cases where it has been possible to prove an individual's special role in a competition law offence being committed.

The recent statements made by the Chairman of the CNMC before Spanish Parliament as to the need to toughen those sanctions could mark a significant change of direction with regard to competition sanctions in Spain.

If confirmed, corporate officers and legal representatives that have played a significant role in a competition law offence would be at greater risk of facing fines of up to €60,000. It should also be taken into account that the potential sanctions faced by those individuals would be independent from any sanctions imposed on the company or association in question for the competition law offence committed.

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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