

# **2017 ICN Cartel Workshop**

## **Mini Plenary 9: Sanctions**

### **Sanctions in cartel cases in Spain**

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# Summary

- **Recent change in the CNMC's method for setting fines following a ruling of the Supreme Court and its impact on the level of the fine**
- **New sanctions: sanctions on directors, debarment and criminal sanctions; damages as an additional sanction**
- **Judicial review of CNMC's decisions**
- **Impact on the level of leniency applications and deterrence**

# Recent change in the CNMC's method of calculating fines

- **Spanish Competition Act:** maximum fine is 10% of the company's total turnover (art. 63(1)(c) LDC)
- **Feb 2009: Guidelines on Fines** very similar to those of DG COMP: based on turnover in affected market; 10% cap on total turnover.
- **Jan 2015: Judgment of Supreme Court**
  - Fines must be determined directly as a % of the company's total turnover and 10% is to be applied only to the most serious infringement (not applied to date)
  - 2009 Guidelines no longer apply: focus has turned from turnover in affected market to total turnover

# Recent change on the CNMC's method of calculating fines

- **Impact on the level of fines:**
  - **Amount of fine is more unpredictable** and will depend more on the “relative” participation in the infringement.
  - **“Monoproduct” companies**, were often hit with 10% fines under the 2009 Guidelines; under new regime, they are receiving lower fines.
  - **“Multiproduct” companies** risk receiving higher fines as these are being set as a % of their total turnover, which can lead to very high fines compared to the turnover in the affected market.
  - In a majority of cases, **fines recalculated** according to the new method **are lower**.

# Example of new method of setting fines<sup>(\*)</sup> (1)

*(\*) Chief economic advisor*

	A	B	C	D	E	F	G
					= A+D		= E*F
Undertakings	Basic amount	Value of sales in the relevant market (VSRM)	VSRM % [ $\Sigma=100\%$ ]	Percentage of participation in the conduct	Adjusted amount (%)	Total sales previous year (TRPY)	Fine
A	6,50%	350.000.000 €	55,10%	1,75%	8,25%	50.000.000 €	4.125.000 €
B	6,50%	55.000.000 €	8,70%	0,90%	7,40%	1.800.000.000 €	133.200.000 €
C	6,50%	190.000.000 €	29,90%	1,25%	7,75%	15.000.000 €	1.162.500 €
D	6,50%	40.000.000 €	6,30%	0,30%	6,80%	70.000.000 €	4.760.000 €

## Example of new method of setting fines<sup>(\*)</sup> (2)

*(\*) Chief economic advisor*

	B	F	G	H	I	J	K
			= E*F				
Undertakings	Value of sales in the relevant market (VSRM)	Total sales previous year (TRPY)	Fine	Estimated Gains improperly made (% over VSRM) [e.g. 8.65%]	Limit of proportionality	Fine adjusted to limit of proportionality	Fine adjusted to proportionality limit (%)
A	350.000.000 €	50.000.000 €	4.125.000 €	30.295.781 €	31.048.928 €	<b>4.125.000 €</b>	<b>8,25%</b>
B	55.000.000 €	1.800.000.000 €	133.200.000 €	4.760.766 €	4.879.117 €	<b>4.879.117 €</b>	<b>0,27%</b>
C	190.000.000 €	15.000.000 €	1.162.500 €	16.446.281 €	16.855.132 €	<b>1.162.500 €</b>	<b>7,75%</b>
D	40.000.000 €	70.000.000 €	4.760.000 €	3.462.375 €	3.548.449 €	<b>3.548.449 €</b>	<b>5,07%</b>

# New types of sanctions: Sanctions on directors

## ■ Sanctions on directors

- In addition to the fine imposed on the infringing company, a fine can be imposed on certain individuals:
  - (a) legal representatives or (b) persons forming part of the governing bodies and which have intervened in the agreement or decision (the CNMC argues that this refers to the illegal agreement or decision).
  - How the above categories should be interpreted is not settled yet.

## New types of sanctions: Sanctions on directors

### ■ Sanctions on directors

- Provision already existed in 1989 Spanish Competition Act but effective use of this tool by CNMC is recent (June 2016)
- Maximum fine on individuals is € 60,000
- Covered by company's leniency application.
- Directors can also apply themselves.
- No disqualification is legally foreseen.



# New types of sanctions: Debarment

## ■ Debarment

- Debarment of companies from public contracts included in the Spanish Public Procurement Act in October 2015.
- Applicable in case of “serious infringements”
- Never been applied to date.
- Legal framework not entirely clear and doubts within the CNMC about its enforcement.
- Not formally a sanction.
- Leniency not applicable.

# New types of sanctions: Criminal sanctions

## ■ Criminal sanctions

- Certain conducts amounting to Competition Law infringements may constitute as well a criminal offence under the Spanish Criminal Code (cartels, bid rigging, price manipulations...).
- Some cases have been initiated, but no criminal convictions to date
- Since 2010 legal entities have criminal liability under Spanish criminal law
- Under the Spanish Criminal Code, an effective compliance program can mitigate or eliminate the criminal liability
- Leniency is not applicable to criminal offences

## New types of sanctions: Damages

### ■ Damages as an additional sanction

- Damages actions rare in the past but an emerging field today.
- Strong increase expected following the implementation into Spanish Law in May 2017 of the EU Damages Directive.
- Amount of future potential damages is not taken into account by CNMC when determining sanctions, but a qualified mitigating circumstance has been recently introduced if damage is effectively repaired before the CNMC's resolution.
- Leniency not applicable, except for immunity recipient being liable only to its direct customers.

## Judicial review of sanctions

- Decisions of the CNMC, including sanctions imposed, subject to judicial review.
- Courts have full jurisdiction to review, including the power to decide on the level of the sanctions.
- Unlike the European Court of Justice, Spanish courts cannot increase the amount of the fine (*'reformatio in peius'* prohibition).
- Courts review the level of the sanction imposed by the CNMC quite often.

# Impact on leniency applications and deterrence

## ■ Debarment:

- Important deterrent factor
- But since not covered by leniency, it may discourage it.

## ■ Fines on individuals:

- Fines themselves –limited to €60,000- may be not deterrent, but the reputation harm which is associated to them is deterrent.
- Discourage leniency applications from companies or make them more complicated as the interests of the company and the individuals may well diverge.

## ■ Possibility of criminal sanctions:

- Will discourage leniency applications if criminal prosecution of companies starts to be usual and criminal sanctions are not covered by leniency.

# Impact on leniency applications and deterrence

## ■ New method for setting fines:

- Can over-deter multiproduct companies
- May encourage leniency applications

## ■ Judicial review:

- Increasing level of sanctions rises standard for judicial review.
- A track record of successful appeals may discourage leniency applications as CNMC's fines may be viewed as potentially voidable, while the risk of other additional sanctions remains.
- It also decreases deterrence

***Thank you***