

2017 ICN Cartel Workshop - Mini-Plenary #9:  
SANCTIONS FOR COMPETITION LAW INFRINGEMENTS

SPAIN

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I. General:

1. Can your NCA impose sanctions or does it have to refer the case to a governmental body or to a judicial court?

**The NCA (*Comisión Nacional de los Mercados y de la Competencia* —CNMC—) can impose monetary sanctions directly without having to refer the case to another body. Potential criminal sanctions and debarment are applied by other bodies.**

II. Monetary sanctions on companies:

2. Are monetary sanctions on companies established as a maximum percentage of the company's turnover or as a maximum lump sum?

**In the Spanish Competition Act monetary sanctions are established as a maximum percentage (up to 10%) of the company's total turnover in the year immediately preceding the year of the imposition of the sanction.**

3. Is there a standard method for calculating sanctions, and if so, is this method public?

**Not currently. In February 2009 the CNMC issued and started applying its Guidelines on the calculation of sanctions for competition law infringements, which contained a method which was similar to the one applied by the European Commission. However, a judgment of the Spanish Supreme Court of January 2015 declared that method contrary to the Spanish Constitution. It also declared that the CNMC has to determine the amount of its fines as a percentage of the company's total turnover. As of January 2015, the CNMC determines its fines in accordance with the Supreme Court judgment but it has not issued to date new Guidelines.**

4. What role is attributed in the determination of the amount of the fine to (a) the value of sales of the company in the market to which the infringement relates; (b) total turnover of the company; (c) the fact that the company belongs to a group (parental liability)?

Monetary sanctions are calculated as a percentage of the total turnover of the company. The value of sales of the company in the market to which the infringement relates is taken into account to determine the seriousness of the infringement and thus the level of the fine, but its weight is significantly reduced as compared to the role it played under the 2009 Guidelines and to the role it plays in the European Commission's Guidelines on fines.

Regarding parental liability, the Spanish Competition Act (Art. 61(2)) —in line with AKZO case-law of the European Court of Justice— sets forth a rebuttable presumption of joint and several liability of the parent company. The CNMC's practice as to whether it takes into account the group's turnover seems to be erratic; if the parent company is declared joint and severally liable the group's turnover will be taken into account, but the CNMC has not always indicted the parent company and/or asked for the group's turnover.

5. What other factors are taken into account when determining the amount of the fine?

The Spanish Competition Act (Art. 64(1)) establishes that the amount of the fine has to be determined taking into account, among other factors: the joint market share of the infringing companies; the dimension and characteristics of the affected market; the scope and the duration of the infringement; the effect of the infringement on the rights and interests of consumers and other economic operators and the illegal profits obtained through the infringement.

The Spanish Competition Act also contains an open list of aggravating and mitigating circumstances, such as the repeated commission of infringements, the individual degree of responsibility or instigation of the infringement or the adoption of enforcement measures (aggravating circumstances) and the non-implementation of the conduct or the collaboration with the CNMC outside leniency provisions (mitigating circumstances).

6. Are leniency and/or settlement reductions foreseen?

The Spanish Competition Act provides for leniency reductions, but settlement does not exist to date in Spanish competition law.

7. Does the fact that a company has a compliance program affect the level of the sanction?

No, in line with the European Commission, the NCA does not take into account the existence of compliance programs when determining the sanctions (although there

has been one precedent in which the CNMC explored the possibility of considering an ex-post corporate compliance program as a mitigating circumstance).

8. Does your NCA explain in detail how the fines have been calculated in each case?

**While the CNMC applied its 2009 Guidelines, it included in every decision the detailed mathematical calculation of monetary sanctions.**

**After the Supreme Court annulled these Guidelines, the methodology applied now is less clear. As such, current infringement decisions provide an explanation on the calculation of the fines, which respond to a certain pattern. However, these explanations do not include the mathematical methodology used to determine the exact sanction nor how some of the variables have been calculated.**

III. Other types of sanctions on companies:

9. Independently of whether national law defines it properly as a sanction, is there a provision of debarment of companies from public contracts when they infringe competition law?

**Yes, this provision has been included in the Spanish Public Procurement Act as of October 2015. However, it has never been applied to date (the legal framework is not entirely clear and there are doubts within the CNMC about the enforcement of this provision —and also its nature as a sanction—).**

10. In case it does exist, is debarment applicable when the company incurs in any competition law infringement or only in particularly serious infringements (e.g. cartels or bid rigging cases)?

**The Spanish Procurement Act refers to “serious infringements” in the field of competition.**

11. Are there criminal sanctions applicable to companies for competition law infringements (i.e. do legal entities have criminal liability)?

**Apart from being an infringement of competition law, bid rigging in public contracts may constitute as well a criminal offence under the Spanish Criminal Code.**

**Additionally, since 2010 legal entities have in general criminal liability under Spanish law and certain conducts that amount to competition law infringements can be a**

**criminal offence —not only bid rigging but also cartels in general and other manipulations of prices— (although there have been no convictions to date).**

**Under the Spanish Criminal Code, the existence of an effective compliance program can mitigate or eliminate the criminal liability.**

12. Are leniency and/or settlement reductions —in case they exist— also applicable to debarment and/or criminal sanctions?

**No.**

IV. Sanctions on individuals:

13. Can employees/managers be sanctioned for competition law infringements committed by their company?

**Yes, in addition to the fine imposed on the infringing company, a fine can be imposed as well on certain individuals.**

14. Are sanctions on individuals limited to monetary sanctions or is disqualification foreseen as well (as either an administrative or criminal sanction)? Can individuals be criminally indicted for competition law infringements?

**Sanctions on individuals for competition law infringements are limited to monetary sanctions; no disqualification is foreseen in Spanish law.**

**The Spanish Criminal Law Code includes criminal offences that are similar to certain competition law infringements (cartels, bid rigging...) and thus individuals can be criminally indicted (although there have been no convictions to date).**

15. In case they are foreseen, are sanctions on individuals limited to certain types of employees/managers?

**Yes, according to the Spanish Competition Act (Art. 63(2)) sanctions can only be imposed on individuals that are either (a) legal representatives or (b) persons forming part of the management bodies and which have intervened in the agreement or decision (the CNMC argues that this refers to the illegal agreement or decision).**

16. Do certain additional requirements have to be met to impose a sanction on an individual (e.g. a particular involvement in the infringement) or is the infringement by the company sufficient for the individual to be sanctioned for it?

**No additional requirements need to be met; the individual only has to be within one of the two said categories.**

17. Are leniency and/or settlement reductions on sanctions on individuals—in case they exist— also applicable to debarment and/or criminal sanctions?

**Leniency is applicable to the monetary sanctions imposed on individuals, but not to potential criminal sanctions.**

V. Judicial review:

18. Can the sanctions imposed by the NCA be reviewed by judicial courts?

**Yes, decisions of the NCA can be reviewed before judicial courts.**

19. Is the role of the courts limited to reviewing the decision of the NCA or do courts have full jurisdiction, and therefore they can decide the opportune sanction in each case, and even increase the sanction imposed by the NCA.

**Judicial courts have full jurisdiction to review the decisions of the NCA, including deciding on the level of the sanctions. However, unlike the European Court of Justice, Spanish courts must respect the ‘*reformatio in peius*’ prohibition (i.e., they cannot increase the amount of the fine).**

20. In practice, how often do courts review the level of the sanction imposed by the NCA.

**Quite often, especially after the Spanish Supreme Court voided the method of calculation of fines contained in the 2009 Guidelines.**

VI. Damages:

21. Are follow-on claims for damages usual in your jurisdiction?

**Follow-on claims have not been usual to date in Spain but they are an emerging field are of competition law enforcement, which may also be enhanced in the next years as a consequence of the adoption by the EU of its Damages Directive and its implementation into Spanish Law in May 2017.**

22. If so, does the NCA (a) take into account the potential claims when setting the level of the sanctions? (b) intervene in the process of awarding damages?

**(a) No, the NCA does not take into account potential civil claims when setting the level of monetary sanctions.**

**(b) Yes, Spanish law provides for the NCA's intervention in the civil process awarding damages.**

VII. Final:

23. Briefly describe any specificity and/or recent development regarding sanctions in your jurisdiction that you consider particularly relevant.

**The most significant recent developments in Spain regarding sanctions for competition law infringements have been:**

- **The annulment by the Supreme Court in 2015 of the NCA's method for calculating fines contained in its 2009 Guidelines, and the current need for the CNMC calculate its fines differently from the European Commission, which served as its model in its former guidelines.**
- **Since 2016, the application by the CNMC of the provision enabling it to fine individuals (which already existed but was not applied in practice).**
- **Although they are not sanctions and their impact on those is unclear, there has been a significant increase in the number of follow-on damages claims.**
- **A modification of the public procurement legislation which should make debarment easier/more common, although its enforcement and procedure for application is still controversial.**