New criteria for the determination of fines for anti-competitive business practices

(Commentary on the Spanish Competition and Markets Authority's Decision of 26 February 2015 re Dairy Industries 2)

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1. Introduction

This is the first decision of the Spanish Competition and Markets Authority (abbrev.: CNMC) following the publication of the Supreme Court's judgments of 29 January 2015 (*BCN Aduanas*), 30 January 2015 (*ASCAN*), 30 January 2015 (*Forde Reederei Seetouristik Iberia*) and 30 January 2015 (*Williams & Humbert*) that override the interpretations given by the *Audiencia Nacional*, the superseded Competition Authority (abbrev.: CNC) and the CNMC concerning the rules for calculating the penalties laid down in the Spanish Competition Act and in the CNC's Communication of February 2009.

2. New criteria of the CNMC in the determination of penalties

CNMC's decision of 26 February 2015 re Dairy Industries 2, following the doctrine of the Supreme Court, clarifies the question concerning the interpretation of the ceiling on penalties and sets out the new criteria for calculating penalties as follows:

2.1. *Upper limit on penalties*

The decision of the CNMC states, firstly, that the expression "total turnover", used in art. 63(1) of the Competition (Antitrust) Act as a basis to calculate the percentage of fine for each type of infringement, unquestionably refers to all company activities and not, as was being held by the *Audiencia Nacional*, to those related to the activity in the market affected by the unlawful conduct.

Secondly, given that the Supreme Court has rejected the interpretation postulated by the CNMC of considering the limits provided in the aforementioned art. 63(1) of the Competition Act as levelling thresholds, the decision corrects the previous doctrine and holds that the percentages should be regarded as a ceiling or upper limit on penalties. This new doctrine means that the 10% limit is the ceiling of a scale of penalties that starts at 0% for conduct of less seriousness or importance among that considered very serious and reaches 10% for conduct regarded as the most serious within the same category. Within such scale, the adjustments made to the penalty must be in compliance with the criteria set out in art. 64 of the Competition Act.

2.2. *Overall percentage depending on the seriousness of the infringement*

The decision of the CNMC states, moreover, that the behaviour held anti-competitive in this case falls under the legal construct of the cartel and therefore characterises it as very serious, so that, in line with the above, the upper limit of the penalty that may be imposed on each company will be 10% of its total turnover in the financial year preceding the decision.

Following this doctrine, the decision begins by determining what percentage of seriousness applies, in general, to the unlawful conduct within the scale from 0% to 10% of the total turnover of each of the companies. In this regard, the CNMC,

after applying the following criteria - a) the extent of the infringement; b) the characteristics of the affected market; c) the duration of the anti-competitive business practices, and d) the effects on consumers or other economic operators - concludes that the punishment should lie in the middle of the scale (5%) without prejudice to relevant adjustments having to be made in the adjustment (individualisation) of penalties stage.

In this respect, the CNMC has measured the extent of the infringement on the grounds that the combined market share of the infringing companies exceeds 50% in the affected territories; that the characteristics of the market are, from a geographical point of view, various regional markets and from the point of view of the product, raw milk supply – raw material related to basic consumer goods; that the duration of the business practices has generally been twelve years, and the effects on consumers or other economic operators are reflected in this case in significant economic losses for farmers, which can lead to their exclusion from the market.

2.3. *Adjustment of penalties*

For the individualisation of penalties, following the parameters indicated in art. 64 of the Competition Act and given that no relevant mitigating or aggravating circumstances have been observed, essentially two parameters have been used in this case – the conduct of the company in the affected market and the duration of such conduct – factors which are closely related to the illicit profits made (art. 64(1)(f)) and the damage to third parties (art. 64(1)(e). As to the first, account was taken of the turnover of each company in the market directly affected by the business practice - defined, as already mentioned, as supply of raw milk - and the market share each company in said market. Regarding the second, the real-time role of each company was estimated. The application of these criteria allowed for upwards and downwards adjustments to the penalty.

Also, and to ensure the penalty acts as a future deterrent, the illicit profits made by each company during their respective role in the cartel was taken into account. In this regard, the CNMC, based on the evidence on record, established a benchmark at 10% of the turnover. This percentage is not used directly, but serves to adjust the fine when compared with the estimated illicit profits, so that if the penalty to be applied is too large compared to the illicit profits made during the infringement, it shall be adjusted to ensure proportionality. Under these considerations, the penalty percentage rate applicable to total sales in 2014 should be reduced when there is a clear disproportion between the resulting fine and the estimation of illicit profits made by the company compared to the equivalent ratio between the two factors for the other companies.

3. Other issues addressed in the decision

The CNMC´s decision has pronounced itself on other issues related to its sanctioning powers:

— *Intent:*

The decision confirms the doctrine that it is only possible to fine companies that have intentionally infringed competition rules. In this case, intent has been sufficiently proved by handwritten notes of some companies, emails exchanged between them, knowledge of the existence of public complaints picked up by the media and by the penalties previously imposed by national competition authorities for events similar to those which are the subject of these disciplinary proceedings.

— *Transfer of undertaking:*

In this case the principle of economic continuity is applied to sanction a company that has acquired an infringing company.

— *Distress:*

According to the decision, an infringing company's going into liquidation precludes the imposition of the appropriate financial penalty.