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The importance of participating in the parliamentary process of sectoral rules

Judgements of the Supreme Court of 10 and 28 of June 2019

Background

On June 10 June 2019, the Supreme Court issued a judgement which shows the importance of the parliamentary work for the proper interpretation of rules and the convenience for private companies to actively participate in such works, especially when they involve highly regulated sectors. Later, on 28 June 2019, the Supreme Court issued another judgement warning about the need to fully comply with antitrust regulations when private companies lobby and participate in parliamentary works.

Pharmacists and distribution

The first judgment is about a requirement made by the Catalan health authority to three pharmacists who were at the same time owners of a pharmacy office and shareholders of a company (named BRF, S.A.) engaged in the storage and distribution of medicinal products. As the Catalan health authority understood, according to the provisions of the Spanish Law on Medicines and Medical Devices, owning a pharmacy office was not compatible with owning a medical distribution company. Therefore, the three pharmacists were forced to choose between their own pharmacy office and their shareholding in BRF, S.A.

The Catalan authority specifically backed its position with the Transitory Provision of the Spanish Law on Medicines and Medical Devices which bans pharmacy offices' owners to simultaneously be shareholders of medical distribution companies with less than 100 shareholders. BRF, S.A. had three shareholders, all of them pharmacists owning a pharmacy office.

BRF, S.A. argued that the Transitory Provision infringes the principle of equality laid down in article 14 of the Spanish Constitution to the extent that such Provision unjustifiably discriminates distribution companies with less than 100 shareholders compared to those with more than 100 owners.

The Supreme Court concluded that the Transitory Provision does not infringe article 14th of the Spanish Constitution because such provision had been approved following an adequate parliamentary process with the clear and valid objective to avoid conflicts of interests. According to case law, the parliamentary process (and the documents arising from it) can be used by courts when it comes to the interpretation of laws and regulations. In this regard, the Supreme Court described in this case the parliamentary process that led to the approval of the Transitory Provision and explained how the amendments presented by the different parliamentary groups, both in the Congress and in the Senate, shaped the current text of the Provision.

Lobbies and antitrust rules

The second judgement issued in June is about a fine imposed by the Spanish antitrust authority (CNMC) on two companies in the raw cotton supply sector and a cotton association (all of them, the Lobbyists) for violation of article 1 of the Spanish Competition Law.

The Lobbyists lobbied in favor of a specific text for the unique Additional Provision of Royal Decree 169/2010 which regulates aids in the cotton sector. The CNMC, considering that the aim of the Lobbyists was to prevent their competitors from obtaining aids and that they succeeded in their intent (the final text of the Additional Provision was the one proposed by them), accused the Lobbyists of anticompetitive practices consisting of the foreclosure of the market and the boycott to new competitors.

As a preliminary consideration, the Supreme Court stated that the application of antitrust laws to lobbying activities aimed to obtain a competitive advantage from public authorities (e.g. approval of a specific piece of legislation) cannot be ruled out. In particular, the Supreme Court laid down that when assessing if lobbying activities infringe such antitrust rules, two main elements should be considered: (i) whether the Lobbyists' behavior before the public authority is objectively fraudulent or misleading, and (ii) whether the action of the authority (in this case the approval of the Additional Provision) is lawful.

Regarding the first point, the Court concluded that there was no evidence that Lobbyists' behaviour was fraudulent or misleading. As per the second one, the Court affirmed that the Additional Provision had been approved according to the requirements set forth in the Regulation (EC) No 637/2008 of 23 June 2008 establishing national restructuring programmes for the cotton sector.

Furthermore, the Court indicated that the participation of private companies in the process for the approval of laws regulating national programmes for the cotton sector was foreseen in the mentioned Regulation (CE) No 637/2008 and in the Spanish Law 50/1997.

Finally, the Court recalled that the hearing of private citizens and organizations during the approval process of general provisions that may affect them is required by article 105 of the Spanish Constitution.

Based on the above, the Supreme Court concluded that the Lobbyists' behavior was not anticompetitive.

Conclusion

The participation of private citizens and companies in the process of elaborating and approving laws and regulations is very important. Documents resulting from such process may be used for the interpretation of rules and they can be invoked before the courts for such purpose.

Furthermore, it is also important to recall that coordinated actions of competing companies always raise questions in the field of competition law and, therefore, the content and scope of such actions should be carefully analyzed to reduce the risk of significant fines.