The Supreme Court confirms when executives can be sanctioned for the anticompetitive behavior of their companies

Judgment of the Supreme Court of 28 January 2020

Background

Article 63.2 of the Spanish Law on Defence of Competition (LDC) allows the Spanish Competition Authority (CNMC) to impose fines up to 60,000 Eur to legal representatives and executives who participate in agreements or decisions adopted by the companies or associations they represent in breach of the LDC. During the last twelve months, the case law has outlined the requirements for the application of this article.

In 2019, the Supreme Court endorsed the competence of the CNMC to fine executives on the basis of article 63.2 and confirmed that the publication of their names does not violate their right to honor and personal privacy (judgments of 28 March and 9 April of 2019). Later on, the Supreme Court clarified the requirements to impose sanctions on executives (judgment of 1 October 2019), and more recently, it has provided more details about the criteria and conditions to be taken into account on this matter (judgment of 28 January 2020).

An individual may be fined on the basis of article 63.2 of the LDC if he or she (i) is effectively a "legal representative" or a "person who belongs to any management body" of the infringing company (subjective condition) and (ii) "has participated" in the illegal agreement or decision (objective requirement).

Who is a legal representative or executive?

Individuals may only be sanctioned if they are legal representatives or members of a management body of the infringing undertaking. The CNMC, therefore, cannot impose fines to other individuals, even if they have had a decisive intervention in the agreement or decision adopted by the company or association in breach of the LDC.

The Supreme Court, in this judgement, clarifies who may be deemed as a member of a management body.

This judgment confirms that a management body may be a single person. If a sales director agrees prices with a competitor, he or she will not be able to use as a defence the fact that there is no collegiate body making decisions on sales.

The Supreme Court considers as an executive of a company, any person that is entitled to adopt decisions that mark, condition or direct the business of such company.

It falls upon the CNMC to prove, on a case by case basis, that a given person is, in fact, an executive (or a member of a management body), and that such person performs the mentioned functions.

Further, the Supreme Court understands that bearing the label of "executive" is not sufficient to consider someone as an executive. It is necessary, as indicated, to analyze its functions, autonomy and responsibilities; and to assess whether the person or body in question, for the purposes of deciding about the unlawful action, is subordinated to other bodies different than the general shareholders meeting. The appointment of the executive and his or her reporting obligations, as well as the by-laws and the organizational chart of the company, are also important elements to look into.

Finally, the Court makes it very clear that individuals performing technical or administrative functions, or other less qualified roles, shall not be deemed as executives and, therefore, cannot be fined on an individual basis.

Objective condition: participation in the anticompetitive agreement

The second condition to impose a fine to an executive or a legal representative is the proof of his/her "participation" in the unlawful agreement or decision. Regarding this requisite, the Supreme Court reaffirms that the participation does not need to be express, active, decisive or essential.

The Supreme Court, in view of the EU case law regarding the assessment of the participation of undertakings in anticompetitive agreements, concludes that the persons who intervene in an unlawful agreement (and therefore the ones that can be individually fined) are not only the ones actively participating in such unlawful agreement or decision, but also those intervening in a subordinated, ancillary or passive manner by means of their presence in meetings at which anticompetitive agreements or decisions are concluded without clearly opposing them or reporting them to the administrative authorities.

From the Supreme Court's rationale, it is unclear what an individual should do to avoid being accused of passively participating in an anticompetitive agreement. Is it enough to take just one of the two described actions (oppose the agreement or report it to the authorities)? Or, to the contrary, is it necessary to both oppose the agreement and report it to the authorities? While some paragraphs of the judgement may allow to defend that the sole opposition of the executive should be sufficient; other parts of the judgement are less clear in this respect.

In our opinion, requiring executives to report to the competent authorities to be exempted from personal liability is disproportionate. The Law punishes those who participate in an anticompetitive agreement or conduct; and the express opposition of a person should be a sufficient to understand that such person has not participated in the infringement. In some cases, the executive may consider that reporting to the authorities is the most appropriate course of action to protect its own or the company's interests, but reporting against an association, a competition or your own company is something complicated, and it would not be reasonable to fine those who do not do so.

Finally, it is important to bear in mind that the intensity of the participation of the executive may be relevant to determine the amount of the fine, but not the existence of liability. The mere participation in an unlawful agreement in the terms described above, even if such participation is irrelevant, is sufficient for the executive to potentially face liability.