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Competition Alert

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Antitrust Liability of Trade Association Members in case of Infringement by the Trade Association

If your company is a member of one of the myriad of trade associations active in Spain you should stop for a second and think about this: your company may be found to be liable for antitrust fines imposed on the trade association of which your company is a member; and indeed your company is very likely to be found liable, since these associations usually lack any substantial economic capacity and very often association members are unlikely to reach any understanding to finance the association's fine.

Although the below is drafted having Spanish law in mind, the legal conclusions are applicable *mutatis mutandis*, to EU law.

The Spanish Competition Act foresees, with similar drafting to that of EC Regulation 1/2003, that payment of a fine to a trade association *(i)* must be requested from the association concerned on the first place; *(ii)* if the association is not solvent, it is obliged to call from contributions from its members to cover the amount of the fine; *(iii)* if the individual members do not contribute within the time limit set by the Spanish Competition Authority (**SCA**), the latter may claim the fine directly from *any* of the association members who held positions in the governing body of the association at the time the anticompetitive conduct took place; and *(iv)* if all else fails, the Competition Authority may claim the fine from any member of the association who is active in the market where the infringement occurred; *(v)* members of the association shall not pay when they show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the investigation on the matter started.

A great deal of competition enforcement activity has been directed against associations in the last few years (*e.g.*, in Spain, trade associations in the transportation sector, cosmetics, IPRs collecting societies, fruits growers). Up to now, most of those fines are limited in their amount to a EUR 900,000 cap, since the respective conducts prosecuted took place under the law in force prior to the 2007 Competition Act. However, as associations are fined for conduct taking place already under the 2007 Competition Act, fines are likely to exceed that cap and conflicts between associations and their members (and between the members themselves) are likely to arise. Based on our recent experience, when faced with a fine (and particularly if that fine is sizeable), association members are likely to try to avoid payment of their share of the fine at any cost.

It is striking how few publicly available precedents there are on the application of these rules and how little insight they provide, both at the EU and national level. Only in recent months has the SCA issued a decision applying this provision in connection with an anticompetitive conduct case related to a particular type of wine grape. There is also a decision related to a poliuretan foam cartel which only marginally touches on the point. In view of the applicable statute and the limited case law on the topic, our initial conclusions on this matter are as follows:

(1) It is not necessary that the association is declared insolvent by a commercial court. It is enough if the association unilaterally declares itself insolvent, for the system of subsidiary liability foreseen by the Competition Act to kick in.

(2) The wording of the provision indicates that the subsidiary liability by association members is a form of joint and several liability, so that in principle the SCA (or the European Commission *mutatis mutandis* under Article 23 Regulation 1/2003) could choose to claim from a single member for the entire amount of the fine (and leave it to that infringer to claim back against the other members of the association later). But the provision also uses the word "may" indicating that the SCA may also choose to claim the amount of the fine from all or some of the association members and may do so equally or using a weighed system of some kind. The recent practice of the SCA appears to show that the SCA is aware that it could claim against a single association member (on the basis of the joint and several liability regulated by the statute), but it is aware that it also has a margin of discretion, and may not necessarily choose to claim against a single company. The SCA has hinted that it will be asking for payment on a subsidiary basis from all association members who cannot show they did not know/did not apply the illegal agreement; and guilty association

members are being asked to pay amounts in proportion to their respective contributions to the association during the years of the infringement.

(3) In the only precedent which deals with this matter specifically, the SCA seems quite ready to accept the non-participation/distancing defense from the association members. The SCA rules out individual liabilities of various members. This is quite encouraging for individual members, although of course the SCA may well be more stringent depending on the particular facts of each case going forward. Successful defenses include the following:

(a) First, proof that an individual member ceased to be member of the relevant association prior to the facts is an admitted defense.
(b) Second, if the cessation as member of the association takes place subsequent to the petition by the member to leave the association, the latter is taken as relevant date, again a relevant point where associations take some time to process members' requests, or in those cases where the association makes it necessary to pay any outstanding membership fees prior to removing the requesting member from the association.
(c) Active distancing from the illegal recommendation or agreement and evidence of not having implemented the association's recommendation. This includes, for instance, evidence that the recommended pricing was not implemented, or that it was implemented only prior to the illegal recommendation or agreement. Evidence of active distancing is difficult to find in practice.

(4) If a member of a trade association was a successful leniency applicant, this does not shield that member from its subsidiary liability in case the association is insolvent. This may present the paradox that a company which is granted immunity, ends up paying anyway if the relevant trade association is fined, but it is insolvent. Policy considerations regarding reduction of incentives for leniency aside, the SCA considers that the source of liability is not directly the conduct of the association member/leniency applicant (in connection with which the latter may have been granted immunity), but the conduct of the association (which in turn is insolvent) and the *ex lege* subsidiary liability of association members.

In conclusion, this area is of great practical importance for any company (since many companies may be members of trade associations which may find themselves in the spotlight for anticompetitive practices at one point or another). Unfortunately, little public guidance in the form of precedents is available under either EU or national law. However, based on the little precedent there is, the above may be helpful when designing your company's compliance policies.

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