

Competition Alert - February 2015**The Spanish Supreme Court has issued a landmark judgment regarding the interpretation of the 10% turnover limit for cartel fines.***

The Supreme Court (SC) has partially confirmed the interpretation followed by the National High Court (NHC) over the last two years regarding the limit of 10% of the company's turnover established under Article 63 (1) of the Spanish Competition Act (SCA) for the calculation of fines.

In its recent judgment, the SC has construed the legal provision as meaning that the percentage limits under Article 63 (1) SCA are the maximum limits of fines that may be imposed by the Spanish Competition Authority, the National Markets and Competition Commission (NMCC).

The main consequence of this interpretation is that the calculation method for fines established by the Notice of the NMCC of 6 February 2009 *"implies in most cases the establishment of an upward bias in the amount of the fine, which is contrary to the principle of proportionality, and the subsequent application of the 10% of the turnover as a mere way of correction"*. The interpretation of Article 63(1) SCA currently followed by the NMCC is incompatible with Spanish administrative law and, in particular, with the principle that penalties must have a proper legal basis, which requires the *"legal predetermination of the upper and lower limits of fines"*.

Secondly, the SC has rejected the interpretation followed by the NHC in its later decisions according to which the percentage limits established in Article 63 (1) SCA must be applied to the turnover corresponding to *"the sector of the company's economic activity where the infringement has taken place, that is to say the market sector directly or indirectly affected by the infringement"*. The SC has established that according to a literal interpretation of the legal provision the turnover to be considered in this regard must always be the total turnover. The use of this magnitude for the calculation of the maximum amount of fines is not contrary to the Spanish Constitution.

With this judgment the SC has addressed the existing doubts related to the calculation of fines as regulated under Article 63 (1) SCA, doubts which emerged as a result of the appeals against the NMCC's decision in case *Vinos Finos de Jerez (S/0091/08)*. The judgment also amounts to a deviation from the usual practice of the European Commission and the European Union Court of Justice case law regarding calculation of fines, on the grounds that the calculation of fines and penalties for infringement of the fining subject is a strictly national matter, as opposed to the application of the material rules on competition law which must be consistent throughout Europe on the basis of EC Reg. 1/2003. Finally, the SC expressly states that the SCA's Notice on Calculation of Fines is no longer adequate; likely, hence, the entire fining practice of the SCA will have to be revisited at the administrative level.

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