Table of Contents

---

01 The Supreme Court annuls several High Court judgments in connection with a decennial liability insurance cartel (Judgement of 27 May 2015).

On 12 November 2009 the NMCC issued fines amounting to a total of € 120 million on several insurance and reinsurance companies for their participation in an arrangement to fix minimum prices for decennial liability insurance policies; its application; the performance of surveillance measures for monitoring compliance and the performance of retaliation measures for punishing non-compliance.

The High Court annulled the decision of the NMCC on the basis of several reasons (which varied throughout the parallel proceedings of the various proceedings concerned): *(i)* In some cases, the High Court considered that the participation of the accused companies had not been sufficiently proved, *(ii)* in other cases, the High Court declared that there were possible and reasonable explanations for the unlawfulness of the conduct and, *(iii)* it considered that, regarding the behavior of the companies, there were alternative explanations to the mere existence of an anticompetitive agreement (*i.e.,* information sharing required to establish risk premiums, although the commercial margin was established by each company independently).

Finally, the Supreme Court has annulled some of the High Court's rulings in this decennial insurance case because it has considered that the alternative explanations submitted by the companies were insufficient to exclude their liability. The Supreme Court considered that the exchanges of information had the purpose of harmonizing minimum tariffs and contractual conditions for insurance and reinsurance policies and that

[1] The NMCC is the result of a merger back in 2013 of various national Regulatory Authorities in areas such as telecommunications, energy, railways, airports and postal services, together with the national Competition Authority. In this newsletter the former Competition Authority is referred to for simplicity as the NMCC (which has inherited responsibility for all Competition Authority decisions).

various monitoring and retaliation measures existed, that by themselves amounted to anticompetitive conduct.

Notwithstanding the foregoing, the Supreme Court upheld the annulment of the NMCC's decisions on the appeals lodged by two of the companies concerned. In these particular cases, the Supreme Court has confirmed the conclusions of the High Court concerning the lack of evidence regarding each of the two relevant companies' participation in the anticompetitive conduct.

02 The National High Court (High Court) has annulled the decision of the NMCC fining Sociedad Estatal de Correos y Telegráfos, S.A (Correos) for abuse of dominant position (Judgment of 1 July 2015).

On 21 January 2014, the NMCC fined € 8.17 million on Correos for abusing its dominant position on the wholesale market for postal services (access to the postal network) and on the retail market for postal services involving large senders (business customers) in Spain.

The NMCC Council found that Correos offered "key accounts" (corporate customers with contracts worth more than € 100,000 in postal services per year) significantly higher discounts than those offered to Correos' competing operators. This policy was applied even though the alternative operators were contracting similar postal services in sufficient volumes to be considered "key accounts" in their own right.

According to the NMCC, this constituted a margin-squeeze, which prevented alternative operators from competing, because they could not offer their services to consumers without incurring losses.

The High Court, however, has concluded that Correos, with its discount policy, was not preventing alternative operators from competing for business customers. In particular, the High Court has considered that the conduct has not been sufficiently evidenced since Correos' competitors could (in the particular facts of the case) have used their own capacity to reach the targeted customers without having to resort to Correos' network.

03 The NMCC has fined the Las Palmas and Guadalajara Bar Association and the General Council of Spanish Advocates for anticompetitive practices (Decisions of 15 and 29 September 2015, files SACAN/31/2013 and S/0491/13).

The NMCC has fined the Las Palmas Bar Association €19,400 for a collective recommendation on prices contrary to Article 1 of the Spanish Competition Act (**SCA**).

Apparently, the Bar Association decided in favor of a member for having charged the professional fees calculated according to the *"Orientation Criteria for the calculation of Professional Fees issued by Las Palmas Bar Association"*.

Additionally, the amendments introduced to these criteria were disseminated through the website of the professional association and information circulars, with the effect that such dissemination could end up becoming the price of reference for all professionals.

The NMCC has recalled that, after the legal amendments introduced by the Omnibus Act (which implements hointo Spanish law), all decisions adopted in the framework of professional associations must comply with the current regulations on competition.

Moreover, on a separate proceeding, the NMCC has fined the General Council of Spanish Advocates (€ 59,983) and the Guadalajara Bar Association (€ 30,000) for breaching Article 1 of the SCA. In particular, the NMCC has considered the following:

(i) The Bar Association has imposed restrictive conditions for its members to exercise the statutory free legal assistance in Guadalajara. According to its regulations, it is required to belong to the Guadalajara Bar in order to provide free legal assistance in the Guadalajara territory.

(ii) The General Council of Spanish Advocates has recommended all the Spanish Bars to homogenize their conduct regarding the residence requirements in order to get access to the in court representation service.

04 The NMCC has fined Grifols S.A. (Grifols) for failure to notify the acquisition of certain assets of Novartis International A.G. (Novartis)

The NMCC has fined with € 106.500 Grifols for failure to comply with the obligation to notify a concentration subject to the *minimis* market share threshold (*i.e.,* when the turnover of the target does not exceed the € 10 million the market share threshold increases up to 50%).

In particular, the NMCC considers proved that the acquisition by Grifols of Novaris executed on 9 January 2014, without previous notification, constitutes an infringement of the Spanish Competition Act (**SCA**). The transaction was finally notified on 10 March 2015.

The Directorate of Competition (**DC**) found about the transaction through press release announcements dated on 12 November 2013 and the corporate websites of both companies.

According to the Decision, Grifols considered that the market share resulting from the transaction in the market of diagnostic business of blood transfusions (*i.e.,* the relevant market) was 49%. However, after the pertinent information requests, the NMCC concluded that the actual market share was 52.2%. Therefore, the transaction met the legal notification threshold and should have been notified for merger clearance prior to its implementation.

05 The NMCC has fined Mediaset and Atresmedia for breaching mandatory commitments attached to the concentrations, Telecinco / Cuatro and Antena3 / La Sexta.

The NMCC has imposed fines of € 3 million and € 2,8 million respectively on Gestión Telecinco S.A. (**Mediaset**) and Antena 3 Televisión S.A. (**Atresmedia**) for infringing the commitments to which the authorisations of both past acquisitions of sole control over Cuatro and La Sexta, respectively, were subject. The purpose of the commitments breached was to ensure that advertisers could continue to buy advertising space separately from each of the channels of the new group following the concentration.

The NMCC considered that both Mediaset and Atresmedia have breached their commitments to not create pricing policies that directly or indirectly link the advertising space of (respectively) Telecinco and Cuatro and, Antena 3 and La Sexta channels.

Moreover, regarding Atresmedia, the NMCC has also considered that the commitments concerning the acquisition of media contents and content commercialization have been breached. In particular, the goal of the commitments imposed was to ensure that the audiovisual contents acquired by Atresmedia were offered periodically to the market.

Finally, it should be noted that this is the second fine imposed on Mediaset for infringing the commitments it undertook within the context of the Telecinco/Cuatro merger. In February 2013, the former NMCC imposed a fine of EUR 15 million on Mediaset also for breaching its obligation to separately market advertising space on the Telecinco and Cuatro channels.

06 The NMCC has fined Orange Espagne, S.A.U. (Orange) for preventing its users from switching their fixed telephone line operator (Decision of 22 October 2015, file SNC/DTSA/1847/14 PORTABILIDADES IRREGULARES ORANGE).

The NMCC has fined Orange € 120,000 for preventing 525 users from switching their fixed telephone line operator between 2013 and 2014.

Portability (the change of fixed telephony service provider keeping the same telephone number) is regulated as an essential right of users. According to the Telecommunications Act, the operator (*i.e.,* in this case, Orange) is obliged not to perform any action which may delay the portability, unless a qualified justification exists.

According to the data of portability analysed by the NMCC, Orange rejected one out of every five portability applications in 2013, which places Orange only behind ONO as the operator with more portability applications rejected. On 2014, Orange has been the operator which has rejected more numbers of portability (*i.e.,* almost 16% of the total requested).

Orange has defended itself by claiming the so-called "inactive line" in 17% of the cases rejected. This is an argumentation used for portability applications of clients who have previously terminated the service and only after termination do they require portability. Thus, according to the NMCC analysis, Orange unjustifiably and repeatedly prevented the portability of 525 users.

07 The NMCC has amended the Notice on short form merger filings.

After a public consultation period, the NMCC has amended the "Notice on short form filings" (**Short form Notice**).

The new short form notice is due to the merger of regulators into the NMCC (*i.e.,* a single agency roof). In particular, the integration of the former regulatory agencies (Telecommunications, Energy, Transport, Postal Sector and Competition) should enable speedier reviews in merger control proceedings in regulated industries, where the law requires a report of the sector regulator as part of the merger review process.

The NMCC has considered appropriate to amend the Short form Notice indicating that in cases where the criteria of Article 56 of the SCA is met (*i.e.,* cases qualifying for a short form merger filing), regarding a concentration in a sector regulated by the NMCC (*e.g.,* energy, telecommunications), a long form filing will no longer be required, unless a sector report is required from a national Regulatory Authority whose functions have not been assumed by the NMCC (e.g., banking mergers since the NMCC does not have powers in the area of financial services or banking).

The practical effect of this is to expand the reach of the short form, which in turn means a lower filing fee and a less burdensome merger filing form.

08 The NMCC has approved the draft regulation for high-speed broadband wholesale markets.

On 18 November the NMCC has approved the project of regulation regarding the wholesale markets for high speed Internet in Spain. After analysing the competitive conditions of the said markets the NMCC has identified Telefónica as the one operator having significant market power with regard to the wholesale broadband markets in Spain. For that reason, the NMCC is proposing certain obligations to be imposed upon Telefónica in the different wholesale markets. In particular, and taking into account the different competitive pressures that Telefónica faces in each of the said markets, the NMCC proposes the following:

- With regard to the direct access market, the NMCC carries out a segmentation of the territory according to the existing competitive conditions. The regulator identifies 34 Spanish cities (covering 26% of the Spanish population, with Madrid and Barcelona amongst them) in which at least three operators have deployed, or are currently deploying, next-generation broadband networks (**NGNs**) covering 20% of the households. According to the project, the NMCC does not intend to regulate access to Telefónica's network in the mentioned cities (although the obligations related to access to the local loop will stay the same). Concerning the remaining Spanish cities, the NMCC proposes that Telefónica should be obliged to provide virtual operators with unlimited access to Telefonica's NGNs. The access will need to be provided at a price enabling virtual operators to match Telefónica's retail offers.

- Regarding indirect access market, the NMCC also distinguishes two different areas according to the competitive conditions of the market. The NMCC aims to eliminate all the current obligations imposed upon Telefónica regarding the most competitive areas, where Telefónica accounts for around 31% of the retail access (703 stations). By contrast, in the less competitive areas Telefónica's market share exceeds 62%. The NMCC aims to oblige Telefónica to provide wholesale indirect access to the copper and fibre networks, also removing the current 30 Mbps limit.

- When it comes to the corporate indirect access market, according to the regulator there is a lack of competition so that it is advisable to make wholesale indirect access available to competitors in the whole of Spain.

The European Commission and the Spanish Ministries of Industry and Economy have the opportunity to submit comments to the NMCC within one month, which will be incorporated into the final decision to be approved by the regulator.

The project has sparked great criticism from Telefónica. According to the economic press, the operator has expressed its intention to cut investments for the roll-out of NGNs if the final decision by the NMCC sticks to the current project.

09 The European Court of Justice (ECJ) has issued a landmark judgment clarifying on how antitrust law should treat cartel "facilitators" (Judgment 22 October 2015, *Treuhand*, C-194/14P).

On 22 October 2015, the ECJ has issued a judgment on appeal against the European Commission (**EC**) decision in the Heat Stabilisers cartels (Commission v AC-Treuhand AG C-194/14 P). The ECJ stated that a fine can be imposed under Article 101 TFUE on a consulting firm for facilitating cartel conduct even if the firm is present on a market other than the cartelised market.

The EC held AC-Treuhand (a Swiss consulting firm) liable for a total fine of € 348,000 for its participation in the Heat Stabilisers cartels. The Swiss consultancy appealed to the General Court (**GC**) claiming that it provided certain services to the cartel but did not participate in an agreement or concerted practice. In that regard, the

GC's judgement established that a consulting firm could be liable for an infringement of Article 101 when it actively and intentionally contributes to a cartel. Thus, the GC upheld the EC decision.

AC-Treuhand appealed to the ECJ arguing that its contracts with the cartelists had the object of providing services and that it did not participate in an agreement or concerted practice as such. The ECJ found that the conduct was directly linked to the efforts of the cartelist, and stated that it cannot be concluded that the action taken by AC-Treuhand constituted a mere peripheral service that was unconnected with the obligations assumed by the producers and the restrictions of competition. Thus, according to the ECJ, the company's conduct was "directly linked" to the cartel efforts and if it avoided prosecution this would "negate the full effectiveness" of anti-cartel law.

In terms of the amount of the fine, AC-Treuhand argued that the imposition of a lump sum constitutes a derogation form the 2006 Fining Guidelines and the Commission could have based the fine on the fees charged for the services provided to the participants of the infringements. Finally, the ECJ agreed with the GC and rejected these arguments based on the following facts: *(i)* that deviating from the Guidelines was permitted in this instance because AC-Treuhand was not present and had no sales on the cartelised market and, *(ii)* that the fees charged by AC-Treuhand do not accurately reflect either the economic importance of the infringement or the extent of AC-Treuhand's participation.

Editorial Board:

Pedro Callol García (pedro.callol@callolcoca.com)
Jorge Manzarbeitia Pérez (jorge.manzarbeitia@callolcoca.com)
Manuel Cañadas Bouwen (manuel.canadas@callolcoca.com)
Santiago Roca Arribas (santiago.roca@callolcoca.com)
Laura Moya (laura.moya@callolcoca.com)

More information at: www.callolcoca.com