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**The Use of Presumptions in Cartel Cases in Spain and
the EU - on the Outer Limits**

ICN Conference

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Front picture: Four Towers, Financial District, Madrid

Content

- Presumptions regarding mother/subsidiary and economic continuity
 - The right to be presumed innocent
 - Per se anticompetitive conduct and the presumption of anticompetitive effects in cartels
 - Presumption of harm caused by cartels
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Mother /
Subsidiary
Liability

01

- Competition authorities and courts generally apply **single economic entity doctrine**.
 - *Iuris tantum* presumption? Parent company is joint and severally responsible if it holds all or almost all capital in subsidiary which has committed infringement
 - Supreme Court has repeatedly confirmed the CNMC's use of parent liability presumption, e.g., Fluid pumps, professional haircare products, freight forwarding, rental cars.
 - **Rebutting the presumption?:** necessary to show that subsidiary acted with complete autonomy (absence of decisive influence)
 - ☑ evidence admitted: rules of internal management, Minutes of the Managing Committee or Board of Directors
 - ✗ Separate legal personality
 - ✗ Not engaged in daily management in subsidiary
 - ✗ Subsidiary does not follow all instructions
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Mother /
Subsidiary
Liability

01

High burden to rebut presumption

Decision of 31 July 2010, exp. S/120/08

The CNMC declared that the parent company did not have a decisive influence over a subsidiary newly acquired b/c:

- **Takeover long after infringing conduct** started
 - **internal restructuring** of the infringing entity, **changes in management after merger** and the communication to cartel members that it **ceased taking part in the conduct**.
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Mother /
Subsidiary
Liability

- **Art. 61 SCA**

- Infringing entity is the natural or legal person that carries out the illegal conduct
- Conduct of a company is imputable to the company controlling it

01

- **Repsol case**, Supreme Court Decision of 23 May 2019, file 2117/2018)

- Mother company condemned
 - Repsol argued that the law enabled CNMC to condemn the mother company as joint and severally liable for payment of the fine imposed on subsidiary but that primary liability belonged to the subsidiary having executed the conduct
 - High Court agreed – first prong refers to joint and several liability, but liability is of the entity responsible, so antitrust decision erred by imputing liability on mother
 - Supreme Court: overturns High Court confirming the EU presumption *when the mother company has supplanted and replaced the will of the subsidiary*
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Mother /
Subsidiary
Liability

01

- **Conclusion:** *Supreme Court's judgment aligns with EU law as to the result BUT under EU law there seems to be some additional indication that liability belongs to the 'undertaking' as a group – which would enable the authorities to allocate liability also to daughter and even mother companies.*
 - However there are some indications that **liability should be imputed to the 'undertaking' as a 'group' under EU law** as well
 - Case T-203/01: imputes liability to subsidiary derived from mother company conduct
 - Case C-93/13: imputes administrative liability to sister company
 - Reference for a **preliminary ruling by Provincial Court in connection with damages claim to Daimler** (trucks cartel)
 - Remaining question is to what extent such interpretation may, under national constitutional law, clash with a right of individual companies to be presumed innocent in cases where they have not intervened and cannot have done so
 - **Gap between the 'economic unit' and the distinct legal personality of the various companies** forming a group or 'economic unit'
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Presumption of Innocence

02

- Right to be presumed innocent stems from Article 25 of the Constitution and the Treaties on protection of fundamental rights to which Spain is party (ECHR)
 - Judgment of 27 September 2011 of the ECtHR, **Menarini**
Diagnostics required *in depth examination of the elements of fact of an incriminating nature in order to be able to rule on a possible infringement of the competition rules applied.*
 - Presumption of innocence involves that:
 - *The **sanction is based on incriminatory evidence**;*
 - *The **burden of proof belongs to the accusing party**, without anyone being obliged to prove their own innocence*
 - *Infringement and the participation of the accused **must be proved beyond doubt***
 - *Duty to state reasons by the Competition Authority which includes a **proper assessment of the evidence** presented by defendant*
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Circumstantial
Evidence Test /
Concerted
Practices

03

- Decision 10 May 2006, *movie distribution*, case 588/05
- As a matter of due process it is possible to presume the existence of a concerted practice contrary to Article 1 SCA if:
 - (a) The **known facts**, which serve as basis for the inference of a concerted practice, **need be sufficiently proved**; they cannot be mere suspicions.
 - (b) The **causal link** by virtue of which the connection between the known facts and the inferred fact is found, must be **well established**.
 - (c) There are **not any alternative plausible explanations** that justify the identity in the commercial conditions.

Circumstantial
Evidence /
Concerted
Practices

03

- *Woodpulp case*, (joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 - *Ahlström Osakeyhtiö and others v Commission of the European Communities*:

parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors

- Decision of 11 de mayo de 1998, *Video Tapes*, exp. 387/96

*according to the diversity of qualities and video material cost existing in the market, **the market tends spontaneously to establish prices in its levels. In this sense, it would be a phenomenon derived from the spontaneous process for the establishment of prices in the relevant market.***

Circumstantial
Evidence /
Concerted
Practices

03

- In conclusion:
 - first, **economic operators are not deprived of the right to adapt themselves intelligently** to the existing and anticipated conduct of competitors;
 - second, in the absence of other evidence, there must be **absolute identity in the amount of price changes and dates** but, even then, **rational alternative explanations must be taken into account.**

Circumstantial
Evidence /
Concerted
Practices

03

- Article 1 SCA is similar to Article 101 TFEU with the addition that “***consciously parallel conduct***” is also caught by the prohibition.
- **Article 3.2 of EU Regulation 1/2003**, of 16 December 2002, on the implementation of the rules of competition laid down in Articles 101 and 102 of the Treaty (Regulation 1/2003) states that:
“The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101.1 of the Treaty, or which fulfil the conditions of Article 101.3 of the Treaty, or which are covered by a Regulation for the application of Article 101.3 of the Treaty. [...]”
- Question of due process: **FECE v. Hollywood** majors investigation: EU NCAs may have an incentive not to find that the conduct affects trade between Member States – if the national law provision is more stringent

Presumption of
Harm
(administrative
liability)

04

- EU and national law distinguish between "by object" or "by effect" conduct
- Hard core cartels (price fixing and market sharing) are **deemed to have the object of restricting competition by object** bearing in mind the economic and legal context of which the conduct forms part (ECJ Judgment of 11 September 2017 in case C-67/13, *CB/Commission*. Para 78, for a very recent example of the discussion see ECJ Judgment of 2 April 2020 in case C-228/18 - *Budapest Bank and Others*)
- In such situations there is a presumption *iuris et de iure* that the conduct harms competition and therefore the **Competition Authority does not need enter into an analysis of the effects of the conduct**
- This can become a **major due process consideration** – competition authorities may have incentives to find the existence of by object restrictions
- **Textbooks investigation** in Spain where the approval of a Code of Conduct to avoid undue influence at the stage of book selection by schools has been treated as "by object"

Presumption of Harm (civil liability/damages claims)

04

- Article 17.2 of EU Directive 2014/104 (**Damages Directive**):
 - 2. *It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.*
- *Iuris tantum* presumption
- Damages Directive does not cover vertical restraints - defines cartel as:

agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors
- Presumption has been extended by some national implementing legislation to RPM situations

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