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Spanish Competition Law Newsletter

Highlights

— The Spanish Supreme Court Confirms the Annulment of a €120 Million Fine Imposed by the CNMC on Telefónica, Vodafone and Orange for Abuse of Dominance in the Wholesale Markets for Termination of SMS and MMS

— The CNMC Closes an Abuse of Dominance Case against Oracle for the Second Time following a Judgment of the Spanish Supreme Court Clarifying the Scope of Judicial Review of Competition Cases by Limiting Lower Court's Ability to Substitute the CNMC's Reasoning with the Court's Own

The Spanish Supreme Court Confirms the Annulment of a €120 Million Fine Imposed by the CNMC on Telefónica, Vodafone and Orange for Abuse of Dominance in the Wholesale Markets for Termination of SMS and MMS

In three judgments delivered in December 2018 and January 2019, the Spanish Supreme Court confirmed the annulment of fines amounting to a total of €120 million imposed on the three main telecoms operators in Spain (i.e., Telefónica, Vodafone and Orange) for abuse of dominance in the wholesale markets for the termination of text messages ("SMS") and multimedia messages ("MMS").[1]

[1] Judgment of the Spanish Supreme Court of December 21, 2018, Case 1867/2018 (appeal 5720/2017), ECLI:ES:TS:2018:4566, Judgment of the Spanish Supreme Court of January 8, 2019, Case 1/2019 (appeal 5618/2017), ECLI:ES:2019:253 and Judgment of the Spanish Supreme Court of January 14, 2019, Case 1857/2018 (appeal 6552/2017), ECLI:ES:TS:2018:4393.

Background

In December 2012, the Spanish Competition Authority ("CNMC") held that three mobile network operators ("MNOs") in Spain had abused their dominant positions by charging excessive prices in the wholesale markets for the termination of SMS and MMS.[2] In reaching these conclusions, the CNMC noted that the prices of wholesale SMS and MMS termination services in Spain were high, and remained stable over the relevant period, despite considerable traffic increase and cost reductions, and were among the highest in Europe. Telefónica, Vodafone and Orange were fined €46,490,000, €43,525,000 and €29,950,000, respectively.

Judgment under Appeal

As previously reported,[3] the Spanish High Court overturned the CNMC's decision in September 2017.[4] The Spanish High Court found that the CNMC's reasoning and investigation leading to the definition of the relevant markets were flawed. In particular, the CNMC had not sufficiently proven that each MNO's respective network constituted a separate market for the termination of SMS and MMS. The CNMC had simply relied upon a report from the Spanish telecommunications regulatory authority rather than conducting its own case-specific analysis of the relevant markets. Additionally, the CNMC's decision contained multiple inconsistencies and the CNMC had failed to provide sufficient reasoning for its conclusions.

Judgment of the Supreme Court

On appeal, the Spanish Supreme Court was tasked with ruling on the scope of the Spanish High Court's judicial review of the CNMC's complex economic assessments, in particular, with regard to the definition of the relevant markets and to the finding of dominance. The Supreme Court held that judicial review should extend not only to the accuracy of the evidence upon which the CNMC had relied, but also to the relevance and suitability of such evidence for the purposes of supporting the CNMC's conclusions. The Supreme Court concluded that the Spanish High Court was entitled to annul the CNMC's decision due to the existence of inconsistencies and to the CNMC's failure to state reasons.

Implications

These judgments demonstrate how the Spanish courts are closely scrutinizing not only the CNMC's procedure, but also the substance of its decisions, revealing a trend of increasingly intense judicial review in Spain.

[2] *Mensajes cortos* (Case S/0248/10), CNMC Decision of December 19, 2012.

[3] Cleary Gottlieb National Competition Quarterly Report, July-September 2017.

[4] Judgment of the Spanish High Court of September 4, 2017, appeal 41/2013, ECLI:ES:AN:2017:3556. See also judgment of the Spanish High Court of September 1, 2017, appeal 40/2013, ECLI:ES:AN:2017:3555 and judgment of the Spanish High Court of September 1, 2017, appeal 36/2013, ECLI:ES:AN:2017:3564.

The CNMC Closes an Abuse of Dominance Case against Oracle for the Second Time following a Judgment of the Spanish Supreme Court Clarifying the Scope of Judicial Review of Competition Cases by Limiting Lower Court's Ability to Substitute the CNMC's Reasoning with the Court's Own

On April 10, 2018, the Spanish Supreme Court annulled a judgment of the Spanish High Court, finding an abuse of dominance in a case against Oracle where the Spanish Competition Authority ("CNMC") had found no infringement.[5] The Supreme Court clarified the scope of whether it was appropriate for the High Court to impose its own reasoning on the CNMC by mandating that it accept the High Court's view of the facts and law.

Following the Supreme Court Judgment, on October 4, 2018 the CNMC reopened proceedings and, on February 29, 2019, the Council declined to find that Oracle had infringed Article 2 LDC and Article 102 TFEU for the second time.[6]

The first decision of the CNMC in this case in 2013 provided a rare example of the CNMC's Council ("Council")—the authority's decision making body—departing from the investigative findings of the CNMC's Directorate for Competition—the investigative body.[7]

On appeal, the High Court preferred the approach of the investigative body and mandated that the Council follow that approach.[8] The Spanish Supreme Court held that, in so doing, the High Court acted beyond its remit. Instead, the High Court, in disagreeing with the reasoning of the Council, should have returned the case to the CNMC and required that it re-reason the case, but without ordering it to reach the outcome preferred by the High Court. This implies that appeals against a Council decision, even if successful, are likely to be returned to the Council and will not be overturned directly by the High Court, creating an additional hurdle for applicants.

Factual background: HP claimed that limitations placed by Oracle on its software for servers may push HP server users to move to Oracle's brand of servers.

In 2011, Hewlett Packard ("HP") complained that Oracle was abusing its dominance in database management systems.

HP took issue with the manner in which Oracle was offering Enterprise Edition, a popular database system, for servers built around Intel's processors. In particular, HP complained that Oracle was making its technology more expensive and, ultimately, unavailable for servers running on an Intel processor. This was important for HP, as most of HP's servers run on Intel processors whereas Oracle's own server brands run on Sun processors. Put simply, HP was concerned that Oracle was making it difficult to run Enterprise Edition on an HP server, thereby potentially driving HP's clients interested in using Enterprise Edition to Oracle's own competing brand of servers.

[5] Judgment of the Spanish Supreme Court of April 10, 2018, Case 583/2018 (appeal 3568/2015), ECLI:ES:TS:2018:1362.

[6] *Oracle* (Case S/0354/11), CNMC Decision of February 20, 2019.

[7] Oracle (Case S/0354/11), CNMC Decision of February 26, 2013.

[8] Judgment of the Spanish High Court of September 24, 2015, appeal 168/2013, ECLI:ES:AN:2015:3126.

The CNMC declined to find an antitrust infringement despite its investigative body recommending that it do so

The CNMC's decision making process includes two phases. In the first phase, the investigative body of the CNMC investigates the facts and issues a recommendation to the CNMC's Council, which is empowered to establish liability and set fines. Usually, the Council follows the investigative body's recommendation.

In this case, the investigative body of the CNMC concluded that Oracle was dominant in a market for a type of database management system and that Oracle's conduct in this market had been abusive and discriminatory. In particular, the investigative body found that changes in Oracle's approach to licensing Enterprise Edition had made HP's servers less attractive. The investigative body held that Oracle's conduct was capable of excluding HP from the market for high-end servers and was likely to lead to consumer harm.

On this basis, the investigative body made a proposal to the Council to find an infringement of Article 2 LDC and Article 102 TFEU.

The Council did not follow this proposal, with which it disagreed on several grounds, including on the approach to market definition and, irrespective of how the market was defined, on whether the conduct at issue amounted to an abuse. The Council declined to find that Oracle had infringed Article 2 LDC and Article 102 TFEU.[9]

The Spanish High Court sided with the investigative body, mandating that the CNMC adopt a decision reflecting that body's findings

HP appealed the decision. The High Court examined the factual and legal reasoning of the CNMC's case, including the findings relating to market definition and the legal qualification of the conduct.[10] The High Court sided with the analysis of the investigative body, which it preferred to the approach adopted by the Council.

The High Court issued a judgment requiring the Council to issue a new decision. The High Court held that this decision should take as "established" the factual conclusions of the investigative body and conclude there had been an infringement. The High Court explicitly left to the Council to officially determine liability and decide on whether a fine was appropriate.

The Spanish Supreme Court quashed the High Court's judgment, which had impermissibly substituted the CNMC's reasoning with the High Court's own

The CNMC and Oracle appealed this judgment to the Spanish Supreme Court.[11] The appellants criticized the lower court's judgment on two key grounds. First, the CNMC claimed that the High Court's judgment ignored the content of the Council's decision, in particular the reasons stated by the Council for not finding dominance. Oracle also claimed that the High Court had not given sufficient reasons to support its conclusion that there had been an abuse of dominance.

The Supreme Court upheld both pleas. It summarized both pleas together as a criticism of the lower court's "lack of reasoning." The Supreme Court's rationale for quashing the lower court's judgment appears to focus largely on a concern that the High Court had substituted the Council of the CNMC's s reasoning with its own by mandating the Council to adopt the position of the investigative body in its decision. On these facts, such a substitution was improper. The High Court had not shown that there was "no alternative to accepting the statement of facts of the investigative body."[12]

Here, the High Court, without finding such serious flaws, had preferred the assessment of

[9] *Oracle* (Case S/0354/11), CNMC Decision of February 26, 2013.

[10] Judgment of the Spanish High Court of September 24, 2015, appeal 168/2013, ECLI:ES:AN:2015:3126.

[11] Judgment of the Spanish Supreme Court of April 10, 2018, Case 583/2018 (appeal 3568/2015), ECLI:ES:TS:2018:1362.

[12] *"No hay otra alternativa viable sino la consistente en aceptar el relato de hechos recogido en la propuesta de la Dirección de Investigación."*

the investigative body over that of the CNMC's Council. In other words, according to the Supreme Court, the High Court's concern with the CNMC's process was that the Council's reasoning was insufficient, in particular because it did not include an adequate assessment of the evidence.

The Supreme Court clarified that insufficient reasoning does not provide grounds for the High Court to mandate the Council to adopt the High Court's preferred assessment. It is not for the judicial body reviewing a decision to replace an authority's insufficient reasoning with its own. The appropriate approach is not to correct the errors, but rather to return the case to the CNMC so that the regulator can resume proceedings and decide in a fully-reasoned manner. The Supreme Court annulled the administrative decision and referred the case back to the CNMC. The CNMC then reopened the case and declined to find an infringement for the second time.

This case provides an interesting qualification of the power of the High Court in competition appeals. The Supreme Court appears to have clarified that an appellant's best prospect—at least in a case not involving "manifest error" by the Council—is for the case to be sent back to the Council, for them to decide it again. There's no guarantee it will decide it differently.

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