Cartel, information exchange and private damage claims. ENRIQUE SANJUAN. Court of Appeals of Málaga. (Spain)

TEXT

In Spain, the control and protection of competition´ infringements is divided into two different jurisdictions: on the one hand, the control of the agencies' decisions is carried out through the administrative courts; on the other hand, the exercise of private actions is heard by the commercial courts specialised in the matter.

Following the transposition in Spain of Directive (EU) 2014/104, private claims arising from the decisions of both European and national competition agencies have been activated.

A common problem that has arisen in both jurisdictions is the assessment of the damage when in cases of competition infringement, we find cartels in which the infringers exchange information.

In both jurisdictions, the courts have emphasised that a cartel in which only information is transmitted between the cartel participants can also affect the market and therefore produce damages susceptible to private claims.

In this sense, this has been resolved in different recent decisions of the Spanish Supreme Court that we are commenting on:

- *STS, Contencioso section 3 of 20 April 2021 ( ROJ: STS 1795/2021 - ECLI:ES:TS:2021:1795 )*
- *STS, Contencioso section 3 of 06 May 2021 ( ROJ: STS 1878/2021 - ECLI:ES:TS:2021:1878 )*
- *STS, Contencioso Section 3 of 13 May 2021 ( ROJ: STS 2020/2021 - ECLI:ES:TS:2021:2020 )*
- *STS, Contencioso Section 3 of 13 May 2021 ( ROJ: STS 2040/2021 - ECLI:ES:TS:2021:2040 )*
- *STS, Contencioso section 3 of 17 May 2021 ( ROJ: STS 2021/2021 - ECLI:ES:TS:2021:2021 )*

What the Supreme Court of Spain is ultimately saying is the following:

> *The assessment of the anti-competitive effects of an information-sharing agreement between competing undertakings requires taking into consideration the conditions and circumstances in which the practices take place, in particular, the specific framework in which the agreements take place, the economic and legal context in which the undertakings operate, the nature of the goods and services covered, as well as the structure and actual operating conditions of the markets concerned.*
>
> *The qualification of an information exchange agreement as an infringement "by object" requires that it is duly established that it has a sufficient degree of harmfulness for competition by examining relevant aspects, in accordance with the case law of the CJEU.*
>
> *Exchanges of information on elements that condition, integrate or affect prices in a relevant way, even if they do not directly relate to final prices, constitute an infringement by object and can be considered as a cartel.*

Its practical application in the Commercial Courts occurs because once the conduct has been sanctioned, those affected will be able to claim damages as a result of it. Once a follow-on claim has been brought before these courts, one of the common allegations from the defendants is that the exchange of information can be considered a collusive practice by object , but in reality it does not produce any damage since in the chain following the offending companies there will be their own transaction costs, discounts and finally a net price that depends exclusively on them and therefore there has not been a repercussion of the damage from those who exchanged information to those following them in the chain.

The classification of an information exchange agreement as an infringement 'by object' requires that it is duly established that it has a sufficient degree of harmfulness for competition through the examination of relevant aspects, in accordance with the case law of the CJEU. Exchanges of information on elements that condition, integrate or affect prices in a relevant manner, although they do not directly refer to final prices, constitute an infringement by object and can be considered as a cartel. '(Case T 472/13 *H. Lundbeck A/S* of 8 September 2016)

The essential idea underlying all this is to start from an initial error of assessment. It is considered that, as the conduct is punishable by object, it is not necessary for it to produce effects, but in reality, the conduct by object itself entails a significant degree of harmfulness that leads precisely to the presumption of damage rather than its exclusion.

In the *T-Mobile case* (C-8/08), the CJEU noted the causal link between the conduct (even informative) and the production of the damage and the presumption that this is the case. In fact, it states that *'...the national court is required to apply, in the absence of proof to the contrary which it is for the latter to provide, the presumption of causation established in the case-law of the Court of Justice, according to which those undertakings, if they remain active on the market, take account of the information exchanged with their competitors'*. And this regime must be considered since the *Otis* 435/18 Case of 12 December 2019 (CJEU) where it is stated that (30) *'...any harm which has a causal link with an infringement of Article 101 TFEU must be capable of giving rise to reparation in order to ensure the effective application of Article 101 TFEU and to preserve the useful effect of that provision*', but that ( 31), it is not necessary in this respect, that the harm suffered by the person concerned has, in addition, a specific link with the "objective of protection" pursued by Article 101 TFEU.

From this point onwards, the effect on a market derived from an exchange of information may or may not produce damage if we consider the elements highlighted by the Supreme Court in the judgments mentioned above:

1.- The conditions and circumstances in which the practices take place.

2.- The specific framework in which the agreements take place.

3.- The economic and legal context in which the companies operate.

4.- The nature of the goods and services covered.

5.- The structure and actual operating conditions of the affected markets.

Beyond all this, an exchange of information that affects the market is in itself an element that not only affects those who participated in the cartel but also their competitors, since its implementation in the market (with higher or lower prices) will affect the set of products or services to which it refers and will generate a non-competitive market precisely because of the knowledge that is transmitted. In the *Groupement des cartes bancaires* (Case C-67/13 P) it was made clear that in this type of conduct the harmful effect must be assessed in order to exclude the conduct from Article 101 TFEU but there is evidence (a presumption to that effect) that, unless proven otherwise, that such damage occurs: '*That case-law takes account of the fact that certain forms of coordination between undertakings may, by their very nature, be regarded as harmful to the proper functioning of the normal play of competition (see, to that effect, in particular, the judgment in Allianz Hungária Biztosító and Others, EU:C:2013:160, paragraph 35 and the case-law cited)*'. It goes on to say that *'It has thus been established that certain collusive conduct, such as that which leads to horizontal price fixing by cartels, may be regarded as so capable of producing negative effects, in particular on prices, quantity or quality of goods or services, that a demonstration of concrete effects on the market for the purposes of applying Article 81(1) EC ( 101 (1) TFEU) may be considered unnecessary (see in that regard in particular Clair, 123/83, EU:C:1985:33, paragraph 22). Indeed, experience shows that such conduct results in output reductions and price increases leading to a misallocation of resources to the detriment in particular of consumers*.'