The proportionality principle in competition law

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*Antonio Martínez*
Partner, Madrid
Tel +34 91 782 9952
antonio.martinez@allenovery.com
During the, almost, five years of the existence of the Spanish Competition Authority (Comisión Nacional de la Competencia, the CNC), one of the main characteristics of its enforcement activity has been the imposition of high fines. As a general rule, the amount of the fines levied by the CNC is significantly higher than those imposed by its predecessor (the Tribunal de Defensa de la Competencia). In its 2010/2011 Annual Report, the CNC itself acknowledged that the fines levied in cases dealt with under the new Spanish Competition Act (Ley 15/2007, de Defensa de la Competencia, the LDC) "are significantly higher than those imposed under the previous LDC of 1989".

As the CNC has expressly indicated in several of its Decisions, the aim of this increase in the amount of its fines is twofold: on the one hand, crushing conduct contrary to competition law and, on the other hand, creating deterrents for future conduct. These two objectives are within those legitimately sought by the enforcement activities of competition authorities.

Therefore, there is nothing to say against the fact that crushing and deterring anticompetitive conduct could lead to higher fines… provided, obviously, that in each case the infringement has been sufficiently established and that, when calculating the amount of the fine, the proportionality principle has been respected.

It is worth mentioning that the fining powers of the CNC are limited by the said proportionality principle according to which the fine to be levied should be individualised "in order to adjust it to the seriousness of the fact[s]" (as laid down by the Spanish Supreme Court’s (Tribunal Supremo), Judgment of 24 May 2004, case nº 7600/2000, among others).

Indeed, the proportionality principle is explicitly provided under Spanish Law - for any kind of administrative fines – at Article 131 of Spanish Act of Administrative Rules of Procedure (Law 30/1992, of 26 November). More importantly, the proportionality principle is a general principle of law accepted under European and national case-law. In order to ensure that the proportionality principle is respected, the LDC provides – at Article 64 – a non-exhaustive list of elements that the CNC should take into account when calculating the amount of the fines.

An example illustrating the relevance of the proportionality principle when assessing the fining powers of the CNC is that during a period of just over one year (ie from November 2010 to February 2012), the Spanish Appeal Court (the Audiencia Nacional) has issued at least six judgments in which it has slashed fines levied by the CNC because they were not proportionate.

One might argue that, during this period, the number of judgments issued by the Audiencia Nacional in which CNC’s Decisions were upheld is significantly higher than those in which fines have been reduced. However, the mere existence of these judgments is relevant since it shows that, in a non-negligible number of instances, the Audiencia Nacional has dissented from the CNC when according importance to the proportionality principle, which is an essential aspect of the fining powers of this authority.

In the following paragraphs we briefly summarise the main elements leading the Audiencia Nacional to take the view that the fines levied by the CNC in the cases at stake did not respect the proportionality principle.

The first element retained by the Audiencia Nacional refers to the fact that the fined company was subject to a legal framework that, in similar circumstances (though not identical), justified the kind of conduct that the CNC fined. Therefore, in its judgment of 22 November 2010 (case nº 365/2009, Consejo Regulador del Vino de Jerez), the Audiencia Nacional indicated that although this circumstance was not sufficient to completely release the fined entity from its liability – in application of the proportionality principle – it was nevertheless sufficiently important to award a very significant reduction (75%) of the fine levied by the CNC.

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The existence of a given legal framework was also taken into account by Audiencia Nacional when it decided - once again pursuant to an infringement of the proportionally principle – to halve the fine imposed on a trade association in its judgment of 13 October 2011 (case nº 795/2009, _Inprovo_). In this judgment, the Audiencia Nacional indicated that the high representativeness of the infringing association could not be considered an aggravating circumstance leading to an increase of the fine, since such representativeness was a direct consequence of the legal framework applicable to the inter-professional associations in that sector.

A second element in which the Audiencia Nacional has relied upon to reduce the fines imposed by the CNC, refers to a **lack of the individualisation** of the fine in light of the specific circumstances generating liability for the infringing company. These pronouncements were adopted pursuant to the case-law of the Spanish Supreme Court (_Tribunal Supremo_), according to which "the participation of several entities as co-authors of the same anticompetitive conduct does not necessary lead to the same degree of intensity [in their participation]" (judgment of 19 March 2008, case nº 3063/2005, among others). For this reason, by judgments of 10 November 2011 (appeal 846/2009, _CEOPAN_) and of 15 February 2012 (appeal 834/2009, _FIAB_), the Audiencia Nacional awarded 50% reductions of the fines levied on two trade associations.

A third element that has been accepted by the Audiencia Nacional to reduce fines during the period analysed, is the **absence of accreditation of the effects** in the market of the allegedly anticompetitive conduct. This element has been retained by the Audiencia Nacional in its judgments of 10 November 2010 (appeal nº 637/2009, _Propollo_) and of 18 January 2011 (appeal nº 266/2009, _FEFE_) to halve the fines levied by the CNC.

A fourth element on the basis of which the Audiencia Nacional has, pursuant to the proportionality principle, reduced a fine imposed by the CNC, is that the infringing conduct was carried out **negligently** (ie without having the intention of restricting competition). This has been expressly recognised as a mitigating circumstance in the already mentioned judgment of the Audiencia Nacional of 10 November 2010 (appeal nº 637/2009, _Propollo_).

All these judgments of the Audiencia Nacional present a common characteristic: the infringing entity was a sector association (or, in the case of the _Consejo Regulador del Vino de Jerez_ a Public Law entity representing various sector stakeholders). However, this does not mean that the reasoning of the Audiencia Nacional in these judgments could not apply to situations in which the infringing entity is a company instead of an association. Both the proportionality principle and the list of elements set forth in Article 64 of the LDC to determine the amount of the fines are common to all kinds of infringements, regardless of the nature of the infringing entity.

Furthermore, in addition to the Audiencia Nacional judgments summarised above, some thought should be given to the elements mentioned in the Guidelines on the quantification of the fines adopted by the CNC in February 2009 (the **Spanish Fining Guidelines**), whose content has guided the fining policy of the CNC as reflected in a significant number of Decisions over the past years.

It is worth mentioning that the Spanish Fining Guidelines establish a fundamentally economically driven methodology for calculating fines. In particular, it retains as the basis for calculating the fine the turnover of the infringing company in the market where the infringement had (or could have had) effects during the period when it took place.

The experience shows – among other possible considerations exceeding the scope of this paper – that this methodology could be penalising in particular those companies manufacturing or selling a single type of product (ie mono-product companies). Unlike business conglomerates, present in different business areas, mono-product companies achieve their turnover from a sole market. Therefore, if this market is the one affected by the anticompetitive conduct, the methodology
laid down in the Spanish Fining Guidelines would normally imply that all the turnover of the infringing mono-product company would be retained to determine the basic amount of the fine. Following this criteria, when the same exercise is carried out for business conglomerates responsible for the same unlawful conduct, the turnover achieved in markets unrelated to the infringement would not be retained.

This may lead to a situation where, for example, the CNC imposes fines on different companies for participating in a cartel, the fines levied on the mono-product companies would represent a significantly higher percentage of their turnover [sometimes even close to the legal cap of 10% of their total turnover provided in Article 63.1.(c) of the LDC], compared to the percentage resulting to apply the same methodology to business conglomerates fined for participating in the same cartel.

So, the question is, at least as regards the mono-product companies, whether the methodology set out by the Spanish Fining Guidelines is always and fully respectful of the proportionality principle or whether the introduction of possible balancing elements for this particular situation would be advisable.

This topic is currently being debated at an European level in connection with the methodology for the quantification of fines followed by the European Commission (which is similar in this respect to the one applied in Spain). In fact, a recent Resolution of the European Parliament, of 2 February 2012, concerning the (2010) European Commission's EU competition policy annual report indicates (and I am quoting) that the European Parliament "waits an adaptation of the fining guidelines concerning ‘mono-product’ undertakings and SMEs, as announced by Commission Vice-President Joaquín Almunia".

A similar debate seems to be advisable in our country, especially if we take into account that in one of the above-mentioned judgments (judgment of 15 February 2012, case nº 834/2009, FIAB), the Audiencia Nacional expressly quoted the European case-law, according to which "Community law contains no general principle that the penalty must be proportionate to the undertaking’s turnover from sales of the product in respect of which the infringement was committed" (ECJ Judgment of 19 March 2009, Case C-510/2006-P, Archer Daniels Midland, recital 75).

In conclusion, the objective is always to strike a balance between, on one hand, the legitimate enforcement of the fining powers of the CNC and, on the other hand, the fundamental right of the companies to be fined only when: (i) the anticompetitive conduct has been duly accredited; (ii) the specific administrative liability has been specifically individualised; and (iii) the fine levied (if any) is proportionate to the gravity of the infringement and the participation of the company.