

**Participation in anti-competitive practices by company's directors and officers**

Madrid, October 2019

The Spanish Supreme Court (SC) has recently interpreted article 63.2 of the Spanish Competition Act (CA), that provides:

*"[...] when the offender is a legal entity, a fine of up to 60,000 euros may be imposed on each of its legal representatives or on individuals who are part of the management bodies that have participated in the agreement or decision.*

*Those individuals who, being part of the management bodies, had not attended the meetings or had voted against or saved their vote are excluded from the sanction".*

The background of the case can be summarized as follows:

- i. The Spanish Competition and Markets' Commission (CMC) fined a Spanish business association, several of its member companies and some officers and directors of both for participating in a cartel.
- ii. One of the sanctioned officers challenged the decision before the High Court (HC), that revoked the fine imposed on her. The HC ruled that article 63.2 CA allows to sanction officers of companies involved in anti-competitive decisions or agreements when their intervention was decisive in the adoption of the decision.

In the case at hand, the HC considered that the officer had not had a significant participation, but an accessory one, despite the fact that she was the general secretary of the association.

- iii. The State's attorney challenged the HC's judgment before the SC. She asked the SC to determine whether article 63.2 CA requires that participation by directors and officers of the sanctioned entities be *decisive* and, hence, that *ancillary* participation is not sanctionable.

The SC, following the ECJ judgment *AC-Treuhand AG v European Commission* on the liability of legal entities with a passive or minor participation in the anti-competitive actions, ruled that<sup>1</sup>:

- Article 63.2 CA only applies to the participation of specific individuals, i.e. those who are legal representatives or members of the management bodies of the sanctioned entity. Participation by other individuals falls outside the scope of this

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<sup>1</sup> Judgment of the Administrative Chamber of the Supreme Court number 1288/2019, dated 1 October 2019.

provision regardless how significant their contribution to the anti-competitive conduct was.

- This provision does not require that the participation is *decisive* or *essential*.
- Article 63.2 CA only requires *participation*, and this includes passive ways of participation as for example attending the meetings in which the anti-competitive decisions or practices were taken without expressly opposing them.

This criterion is very similar to that provided for in article 237 of the Spanish Companies Act to establish directors' liability for detrimental actions or omissions:

*"All members of the management body adopting the detrimental decision or performing the respective act shall be liable [...], unless they prove that having taken no part in its adoption or implementation, they were unaware of its existence or, if aware, took all reasonable measures to prevent the damage or at least voice their objection thereto".*