Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

09-Nov-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2016)73
Unclassified

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution by Spain

-- Session IV --

1-2 December 2016

This contribution is submitted by Spain under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.

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JT03405025

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SANCTIONS IN ANTITRUST CASES

-- Spain --

1. Introduction

1. Since the entry into force of the Spanish Competition Act 15/2007, the Spanish Competition Authority followed the same fining scheme as the EC and other European countries. The fining guidelines published in 2009 had a similar approach to that of the European Commission Fining Guidelines of 2006 and explained how fines were to be determined when applying articles 63-64 of the SCA. A basic amount of the fine was calculated as a proportion of the affected market turnover (AMT) with the limits established on article 63. As a practical consequence, this method established high fines for serious infringements reaching in many cases the upper limit of 10% of total sales of the preceding year.

2. On March 2013 the National Court changed the previous interpretation of article 63 of the Competition Act in two ways: The legal maximum of 10% in article 63.1 should be interpreted as an upper limit of a range of fines, and at the same time "*total turnover*" in article 63.1 should be understood as "*total affected market turnover*", which should be used as the base to impose the fine. An immediate practical consequence of that ruling was a significant reduction of fines after the jurisdictional review (between 45 and 95% of the original fines imposed by the CNMC). The judgement created a situation full of uncertainty as the CNMC kept on using the fining guidelines until January 2015.

3. The Supreme Court judgement of January 29 2015 offered the definitive guiding principles: upheld that the range of fines of 0-10% should be used and that the upper limit of this range of fines must be reserved for the worst possible infringements, but this rates should be applied to total sales of the infringing company (and not only in the affected market) in the year preceding the fine. This judgment also underscored the need to consider the specific dimension of the affected market as a reference to ensure proportionality of fines (especially with multiproduct companies). The Supreme Court's jurisprudence has ended a long period of disagreement between the Competition Authority and the National Court, with a significant reduction in uncertainty as a result.

4. Since February 2015 all fines are set using a new methodology that follows the Supreme Court's interpretation of articles 63 and 64 of the Competition Act. Using this new method the CNMC imposed fines in 2015 of more than 500 million euros on 14 cartel cases (250 companies fined) and 25 million on other competition infringements. The highest fine imposed reached 131 million euros on automobile manufacturing companies. In the first three quarters of 2016 the CNMC has imposed fines for anti-competitive behavior of nearly 200 million euros.

2. Deterrence of antitrust fines in Spain

5. This section compares the actual fines imposed by the Spanish Competition Authority (first the CNC and now the CNMC) from 2011 through 2015 with the optimal deterrent fine for each case. The conclusion is that imposed fines are quite below the level that would be able to deter companies from infringing competition laws.

6. The guiding principle is that antitrust fines should be high enough to deter potential behaviour contrary to antitrust laws.[1] Therefore the optimal fine should be a deterrent fine that makes unprofitable for businesses the formation or continuity of a cartel[2]. The optimal level of antitrust fines should be based on the turnover on the affected market, illicit gains made by the undertakings involved, and the probability of detection.

7. The optimal fine calculations provide the competition authority with a benchmark to compare actual fines and provide conclusions on their deterrent capacity. Regarding the specific calculation of an optimal fine for each case, the relevant literature[3] emphasizes that first it is necessary to estimate the excess annual profit or illicit profit obtained by each company due to the anticompetitive behaviour. It is defined as the difference between the profit obtained by infringing companies and profit they would have obtained when firms compete. The excess annual profit is determined by three parameters: the competitive mark-up (m), the cartel overcharge (k) and the price-elasticity of demand (ε). The competitive mark-up is the increase in price above marginal costs not due to collusion, i.e. in the competitive scenario. The cartel overcharge is the increase in price due to collusion.

8. The excess annual profit will be lower if the competitive mark-up increases because it implies a higher profit margin in the absence of collusion, and the illicit profit will be higher if the cartel overcharge is higher. It is difficult to estimate both parameters, but as a proxy of the competitive mark-up we can use a firm's gross operating margin or, in the absence of firm-level data, industry-level gross operating margins using data provided by the Bank of Spain. Concerning cartel overcharges we can rely on data provided by the parties involved in the case or in its absence we can use benchmark estimates produced by different authors. Allain et al. (2013)[4] estimate that the value of the cartel overcharge is in a range between 5 to 20%. We finally need an estimate of demand elasticity to calculate excess profit but as it is complex to provide an estimate of the elasticity in specific cases, we usually rely on a range of values using the results of empirical studies, with a lower limit of zero (when demand is not sensitive to price changes) and an upper limit equal to $\varepsilon = -2$ for markets that are quite sensitive to price changes.

9. Using the range of values estimated by Allain et al. to indicate the most probable values according to literature, the illicit gain margin would range between 3.0% ($m = 0.20$, $k = 0.05$ and $\varepsilon = -2$) and 23.1% ($m = 0.05$, $k = 0.30$ and $\varepsilon = 0$) of the turnover in the affected market.

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1 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.9.2006).

2 The deterrence approach rather than the compensatory approach is especially desirable when the cartel can be thought of being equivalent to a theft or a scam, so it would never pursue a legitimate purpose, and the logical thing would be to pursue its total deterrence. As all sanctioning systems are imperfect, and fail to punish all unlawful behaviors, a compensatory system may never have a general deterrent effect.

3 See Buccirossi, P., Spagnolo, G. (2007), "Optimal Fines in the Era of Whistleblowers. Should Price Fixers still Go to Prison?", en Ghosal, V. and Stennek, J. (Eds.), The Political Economy of Antitrust (Contributions to Economic Analysis, Volume 282), Emerald Group Publishing Limited, pp. 81 –122.

4 Allain, M.L., Boyer, M., Kotchoni, R., Ponssard, J.P. (2013), "Are cartel fines optimal? Theory and evidence from the European Union", Série Scientifique, Cirano (Montréal), Juillet 2013.

10. When a firm decides to join a cartel or comply with the collusive strategy and enjoy the illicit profit it must bear in mind the possible fine together with the probability of detection. However, the probability of detection is difficult to estimate, since data on the number of cartels that have been detected is available, but it is unknown how many are still operating on the market. Therefore, we will select a value of the annual probability of detection that is representative of the most reliable empirical estimates made so far. Assessing the estimates of several authors[5], it seems prudent to accept the annual probability of detection of an anticompetitive conduct to oscillate around 15%. Then a global probability of detection for each case can be computed according to the duration of the infringement.

11. The optimal deterrent fine can be calculated using different values of the illicit gain margin –in the range between 3% and 23%– and the annual probability of detection. More specifically, the deterrent fine is obtained by dividing the illicit profit estimate by the global probability of detection. Therefore we can now compare fines imposed by the Spanish Competition Authority on infringements of article 1 of the Competition Act, between January 2011 and December 2015, with optimal deterrent fines estimated for those cases.

12. To perform the comparison, a deterrence ratio for each case is calculated by dividing the real fine imposed by the optimal deterrent fine. If this ratio is equal to one then the fine imposed would be equal to the optimal fine, if it is greater than one then the fine would be over deterrent and if it is below one it would be under deterrent.

13. The following table shows the results of calculating deterrence ratios for all competition cases of the CNMC since 2011 assuming that the illicit profit margin is the minimum of the range of probable values, i.e. 3.0%. The table shows that the mean value of the ratio "fine imposed / optimal deterrent fine (minimum)" is 0.64. This result implies that even for the most conservative scenario fines imposed have been on average 36% below the optimal deterrent fine. What is more relevant, around 80% of the companies have values under one and the average value of the ratio for that subset of firms is 0.36, so the fines imposed on this group of companies are on average 64% below the optimal dissuasive fine.

Ratio of fine imposed / optimal deterrent fine (min.)

	TOTAL		**>= 1**			**< 1**		
	Mean value	**# of firms**	**Mean value**	**# of firms**	**% of total # of firms**	**Mean value**	**# of firms**	**% of total # of firms**
Jan 2011 to Oct 2013	0.60	338	1.48	69	20.4	0.38	269	79.6
Oct 2013 to 31 Jan 2015	1.03	97	2.11	34	35.1	0.44	63	64.9
Feb 2015 to Dec 2015	0.52	229	1.83	31	13.5	0.31	198	86.5
Total	0.64	664	1.72	134	20.2	0.36	530	79.8

Source: CNMC

5 Bryant, P., Eckart, W. (1991), "Price fixing: the probability of getting caught", Review of Economics and Statistics, No. 73, pp. 531-540.

Combe, E., Monnier, C., Legal, R. (2008), "Cartels: The Probability of Getting Caught", Bruges European Economic Research Papers, No. 12.

Ormosi, P. (2013), "A tip of the iceberg? The probability of catching cartels", Journal of Applied Econometrics, No. 29, pp. 549-566.

14. The deterrence ratios have been computed for the complete period and for three sub-periods: until the creation of the CNMC, from that moment until the Supreme Court's judgment in January 2015, and from that moment until the end of the year. The table shows that the greatest deterrence was recorded in the second period (1.03), while deterrence was quite similar in the first and third sub periods (0.60 and 0.52), although slightly lower in the third period. This result is roughly consistent with the new method of fine setting, as before the ruling fines frequently reached the upper legal cap of 10%, while with the new procedure fining rates are usually below the upper end of the penalty arc.

15. If we used not the minimum value but the average illicit gain margin (13%) between the two extremes of the interval of most probable values (3%-23%), practically all deterrence ratios would be significantly below one, which would mean that fines would be significantly under deterrent.

3. Conclusions

16. We have studied the deterrence ability of the fines imposed by the Spanish Competition Authority from 2011 through 2015. By comparing them with the optimal fine for each case we were able to determine whether they are deterrent or not. Our analysis shows that fines were significantly under deterrent during the complete five-year for the most conservative scenario, and the results were even more striking when average values of the parameters are used in the analysis.

17. Of course, other determinants of deterrence were not included in our previous analysis, e.g. the reputational damage for the companies with publicly imposed fines, which would increase the deterrent effect of competition enforcement. On the other hand, other factors, such as the lowering of fines during judicial review, would lower the deterrent effect. But even so, the results of our analysis are quite robust since they correspond to a very conservative scenario. Therefore, an increase in fines should be one of the objectives of the Spanish Competition Authority in the near future.

18. However, the potential deterrent effect of fines should be combined with that of other tools, such as fines imposed to managers –which began to be applied a few months ago– and damage claims before the courts, which will be a possibility when the Damages directive is finally transposed to Spanish law.