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Competition damages claim: inappropriateness of precautionary measures requiring the CNMC to refrain from issuing a report requested by a Commercial Court

1. Context of the application for the precautionary measure

On 10 February 2022, Commercial Court No. 1 of Oviedo (the “**Court**”) requested that the Spanish National Commission on Markets and Competition (the “**CNMC**”) publish a report for the resolution of a claim procedure for alleged damages arising from anti-competitive conduct sanctioned by the decision of the European Commission of **19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 – Trucks)**. In that regard, the claimant brought an appeal for judicial review against what the appellant calls the “injunction to cease the de facto action”, requesting as a precautionary measure that the CNMC refrain from issuing the report requested by Commercial Court No 1 of Oviedo. *Id est*, the claimant calls into question the due collaboration of the administration (in this case, the CNMC) with the administration of justice.

On 22 June 2022, the Contentious-Administrative Chamber (Sixth Section) of the Spanish High Court issued Order 983/2022 (ECLI:ES:AN:2022:5846A), with Miguel de los Santos Gandarillas Martos as rapporteur, in which it ruled that the precautionary measure requested was not admissible (hereinafter the “**Order of the National High Court**”).

2. Invalidity of the content of the official formal request and of the precautionary measure sought

This case arises from a claim for damages against one of the companies sanctioned by the European Commission, in whose proceedings the Court on 10 February 2022 requested the cooperation of the CNMC “*to issue a report on the points detailed in the Order of 28 October 2021 issued in ordinary proceedings 151/2019 and the Annex thereto*” (hereinafter the “**Request**”). At the same time, the claimant requested, in administrative proceedings, the precautionary measure consisting of the suspension of the “enforceability” of the Request issued by the Commercial Court of Oviedo 1 in order for the CNMC to refrain from issuing the required report.

The claimant calls into question the Court’s action in relation to the due collaboration between the CNMC and the administration of justice, insofar as it casts serious doubts on the Court’s request for a report from the CNMC. In the words of the Spanish High Court itself: “*What is being asked of the Chamber, through the precautionary measure, is that we suspend the enforcement of a judicial decision from a commercial judge, who has requested a legally required report from the regulatory body*”.

The Request to the CNMC was based on the legal regime of *amicus curiae*, provided for in articles (i) 5.2 of Law 3/2013, of 4 June, creating the CNMC (hereinafter “**Law 3/2013**”); (ii) 76.4 of Law 15/2007, on the Defence of Competition (hereinafter the “**LDC**”); and, (iii) 15 bis of the *Ley de Enjuiciamiento Civil* or Spanish Civil Procedure Act (hereinafter the “**LEC**”).

The Order of the Audiencia Nacional recalls that article 130.1 of the *Ley Reguladora de la Jurisdicción Contencioso-Administrativa* or Law Regulating Contentious-Administrative Jurisdiction (hereinafter the “LJCA”) provides that, after a detailed assessment of the interests in conflict, the precautionary measure may only be granted when the enforcement of the act or the application of the contested provision could cause the appeal to lose its legitimate purpose.

For this reason, and considering repeated pronouncements of the Spanish Supreme Court, as well as the presumption of validity of the Administration’s acts, it maintains that the general rule is that administrative acts are enforceable.

In this regard, the Spanish High Court considers that there is no evidence of irreparable harm or loss of the legitimate aim of the appeal, because the concept of irreparable harm has to do with the enforceability of the administrative act and not with the Administration’s compliance with a judicial decision.

3. Conclusions

The Order determines that the precautionary measure requested by the claimant, consisting of the CNMC refraining from issuing the requested report at the Court’s request, goes beyond the purpose and object of precautionary justice. This is because it is not only a positive measure, a circumstance that does not exclude the provision of Article 130 of the LJCA, but it goes further and, through what the claimant has called the “injunction to cease the de facto action”, seeks to have the Spanish High Court interfere in the decision of a Commercial Court and in its enforcement.

It is worth recalling that Law 3/2013 grants the CNMC the power to issue reports as an advisory body when a court so requests, including its opinion on the quantification of compensation for anti-competitive conduct.

The CNMC has fulfilled a total of nine injunctions from the Commercial Courts in relation to claims for damages linked to four different decisions of the European Commission since 2013.

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