

Jorge Masía

Briefing on the Supreme Court's decision that the proceedings in which the CNMC imposed fines of 30 million euros on REPSOL and CEPSA had expired

A. Introduction

1. The Contentious-Administrative Chamber of the Supreme Court has annulled two resolutions of the Council of the National Commission on Markets and Competition ("CNMC") of February 2015, after finding that the proceedings had expired. The CNMC had imposed fines amounting to 30 million euros on the companies REPSOL S.A. ("REPSOL") and Compañía Española de Petróleos S.A.U. ("CEPSA"), on the grounds that they had entered into coordination agreements, non-aggression pacts and exchanges of strategic information between service stations.

B. Alleged breaches

2. The CNMC found four breaches of Article 1 of Law 15/2007 of 3 July 2007 on the Defence of Competition ("LDC") and Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Specifically, the acts in question took place in the period between 2011 and 2013 and were as follows:
 - (i) A coordination agreement between CEPSA and REPSOL regarding the Brea de Aragón and Illueca service stations;
 - (ii) A non-aggression pact between CEPSA and REPSOL concerning interference by each of them in the stations operated by the other;
 - (iii) Exchanges of strategic information between CEPSA and REPSOL in relation to those service stations managed by each of them and branded and supplied exclusively by the other operator; and,
 - (iv) A non-aggression pact on prices between CEPSA and DISA Corporación Petrolífera S.A. ("DISA") and an agreement between them regarding the prices to be applied in Ceuta.
3. As a result, the CNMC imposed fines. One of these fines was imposed on REPSOL for an amount of 20 million euros and another one was imposed on CEPSA for an amount of 10 million euros.

C. Expiry of the proceedings

4. Article 36 of the LDC establishes a maximum period of 18 months from the date of initiation of the sanctioning proceedings for the issuing and notification of the resolution that ends the proceedings. As both sets of proceedings were initiated on 29 July 2013, their latest end date was originally 29 January 2015.

5. In turn, Article 11.4 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition provided in Articles 81 and 82 of the Treaty ("**Regulation 1/2003**") establishes the obligation to inform the Commission of certain antitrust infringement proceedings, omitting the regulation regarding the start date for the calculation of the period for the suspension of national proceedings. Therefore, under the principle of national procedural autonomy, reference is made to the Spanish regulation, specifically to Article 12(f) of Royal Decree 261/2008 of 22 February, which approves the Regulation on Antitrust ("**RDC**"), which establishes that the suspension will begin to run from the date of **adoption of the decision**.
6. Article 11.4 of Regulation 1/2003 provides for a maximum period of 30 days for informing the Commission. In the present case, 26 calendar days elapsed between the suspension decision and its subsequent lifting.
7. Consequently, under the aforementioned Article 12(f) of the RDC, the Supreme Court added to the start date a total of 26 calendar days during which the proceedings were suspended. Therefore, the latest date for the CNMC to end the proceedings was **24 February 2015** and not 29 January 2015, as initially foreseen (i.e. without the referral of information to the European Commission, which was actually carried out).
8. It should be emphasised that the Supreme Court considered that the *dies ad quem* of the 18-month period of Article 36 of the LDC is the date of the notification of the decision. This is apparent, first of all, from the wording of Article 36, in that it states that the limitation period is "to issue and notify", indicating by the use of the conjunction "and" that the sanctioning proceedings are terminated once the parties have been notified of the decision. Secondly, this approach is consistent with other precedents of the Supreme Court itself and the Spanish High Court¹.

D. Conclusions

9. In this case, the sanctioning decision was issued on 20 February 2015 and the parties were notified on **25 February 2015**. Consequently, the Supreme Court declared the expiry of the sanctioning proceedings on the grounds that the maximum time limit was exceeded by one day, given that the *dies ad quem* is the date on which the parties are notified, as explained above.
10. Therefore, it is wrong to consider the date of submission of information to the European Commission, i.e. 18 December 2014, as the start of the suspension period, which would mean that there was no expiry, as established by the Spanish High Court.
11. The Supreme Court has made it clear that the start of the suspension period is the date on which the decision is issued to suspend the maximum period for resolving the case until the European Commission responds to the information sent or the 30-day period of Article 11.4 of Regulation 1/2003 elapses, and not the date on which it is agreed to send the information to the European Commission.
12. Consequently, the Supreme Court annulled the contested judgments of the Spanish High Court and upheld the contentious-administrative appeals, so that the resolutions issued by the CNMC Council and, consequently, the fines of 30 million euros imposed on REPSOL and CEPSA were annulled.

¹ See Judgment of the Spanish High Court (Contentious-Administrative Chamber) 18/2017, 16 December (ECLI:EN:AN:2016:4914) (f.j. 4); Judgment of the Supreme Court (Third Chamber) 2293/2016, 25 October (ECLI:ES:TS:2016:4566) (f.j.4); and, Judgment of the Supreme Court (Third Chamber) 2505/2016, 23 November (ECLI:ES:TS:2016:5193) (f.j. 2), among others.

CONTACTS



Juan Jiménez-Laiglesia
Partner, Competition

jjimenezlaiglesia@perezllorca.com
T. +34 91 436 04 53



Jaime de Blas
Partner, Competition

jdeblas@perezllorca.com
+34 91 436 33 10



Pablo Figueroa
Partner, Competition

pfigueroa@perezllorca.com
T. +34 91 389 01 78



Jorge Masía
Counsel, Competition and Litigation

jmasia@perezllorca.com
T. +34 91 423 47 31

www.perezllorca.com | Madrid | Barcelona | London | New York | Brussels

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