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## The CNMC's finding of concerted practice and market sharing is declared null and void on the grounds that the National High Court considers that the imputation of the anti-competitive infringement was not proven by circumstantial evidence

The judgment of the National High Court of 20 June 2022 [ECLI:ES:AN:2022:3109] annuls the decision issued on 10 November 2016 by the Competition Chamber of the Council of the National Commission on Markets and Competition (the “**CNMC**”) in disciplinary proceedings S/0555/15 PROSEGUR-LOOMIS (the “**2016 Resolution**”).

### 1. The 2016 Resolution

The 2016 Resolution imposed a fine of 39,419,776 euros on Prosegur Compañía de Seguridad, S.A., its subsidiary Prosegur Servicios de Efectivo España, S.L. (together, “**Prosegur**”) and Loomis Spain, S.A. (“**Loomis**”), for the alleged commission of a single and continuous infringement relating to concerted practices consisting of the sharing of the market for cash-in-transit and cash-handling services in Spain. The CNMC considered that this collusive conduct was part of a common plan organised with the aim of preventing third party operators from entering the market, so that the two entities could share clients and business between them, while respecting the clients and routes already held by each of them. The CNMC acknowledged that there was no express written agreement between the parties. In order to categorise the conduct, the CNMC relied on an alleged exchange of information. Specifically, the CNMC used as evidence the internal e-mails of employees and the attitude adopted by the two entities in the market -not putting themselves forward for certain tenders. All these indications pointed (according to the CNMC) to the alleged existence of a prior agreement or, at least, a coordination of actions to protect the rival's position in the market.

### 2. The National High Court's criteria with respect to the 2016 Resolution

In the contentious-administrative appeal brought by the appellant (Prosegur), the infringement of the right to the presumption of innocence was highlighted, as the CNMC had not carried out a complete, objective and contextualised assessment of the possible commission of the infringement between 2008 and 2015 by the sanctioned parties. In Prosegur's view, the CNMC did not provide an alternative and objective explanation based on reasons of rationality and economic efficiency. The Sixth Chamber of the National High Court considered that the CNMC did not sufficiently prove the existence of a common plan and a concerted practice between Prosegur and Loomis. Specifically, the National High Court questioned the evidence, which consisted exclusively of statements contained in employees' internal e-mails, which were decontextualised. The reasons used by the CNMC to assume the existence of a common plan could be due to other reasons of business strategy of each of the companies. Consequently, according to the National High Court, the circumstantial evidence should not have been assessed, since it should have been proved that the conduct revealed had been carried out as part of a common and concerted plan between the sanctioned companies. According to the Sixth Chamber of the National High

Court, there is no element of cohesion or complementary link between the actions carried out by the sanctioned entities that would make it possible to conclude that a concerted practice existed. For this reason, the National High Court declared the 2016 Resolution null and void, with the consequent exemption of Prosegur and Loomis from liability.

### 3. Brief consideration of circumstantial evidence

Proving infringing conduct in competition law by means of circumstantial evidence is widely accepted by constitutional case law (for example, Constitutional Court judgments 174 and 175/1985). In fact, it is common practice in cartel cases, as long as the evidence **(i)** is directly proven; **(ii)** has persuasive force; **(iii)** is sufficiently convincing for the judge; **(iv)** is directly related to the consequences to be drawn from it; and **(v)** there is no reasonable alternative explanation that could invalidate the conclusions reached by the Administration.

Indirect evidence takes on a fundamental role, since sometimes, depending on the market context, the anticompetitive conduct and the nature of the infringers, it is difficult for the competition authority to obtain other direct evidence of participation in concerted practices or collusive agreements. The burden is on the CNMC to rebut the presumption of innocence enjoyed by the alleged infringing companies. Likewise, in order for circumstantial evidence to be considered by the Courts, the evidence needs to not be based on mere conjecture, but on fully proven facts.

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