



The Supreme Court clarifies in which cases the recommendations of an association are anti-competitive and illegal

Judgment of the Supreme Court, of 24 of October of 2014

Background

Through the Order SCO 3997/2006, the Spanish Health Ministry determined, for the first time after the entry into force of Law 29/2006, the groups of medicinal products and their reference prices, establishing the formula for their calculation. Such Order included, among others, the minor prices of the presentations of medicinal products for the purposes of their dispensing and replacement by the pharmacist.

In 2007, Laboratorios Davur published some advertisements that contained a comparative table of the minimum prices approved through the Order, and the prices of their medicinal products, being their prices lower. Such advertisements were accompanied by phrases such as: *“there is none as cheap”* and *“with these prices their prescription is very much respected”*.

The Spanish Federation of Pharmacists (FEFE) reacted by publishing advertisements of their own stating that the campaign of Davur implied that pharmacists did not respect the medical prescription and that it would cause *“enormous damages to the pharmacists”*. In their advertisements, FEFE also reminded that, in case of prescription for an active substance, the pharmacist was under no obligation to dispense the cheapest medicine, but rather the one that was listed as having the lowest price in the Order. FEFE, apart from publishing its advertisement through the same media as Davur, also sent it to all the pharmacies in Spain, as well as to several pharmaceutical companies.

After the campaign of FEFE and other similar practices performed by different pharmacists' associations and pharmacies, many Spanish pharmacists informed Davur that they would stop dispensing their products, that their products would not enter their pharmacies and/or that they wished to terminate their commercial relationship with Davur.

The position of the Spanish Competition Authority (CNC)

Davur filed a complaint against FEFE and other associations to the CNC, claiming that they had orchestrated a group campaign against them.

The case 649/08 “Pharmaceutical Generic Products” was resolved in March of 2009. The CNC considered that the performance of FEFE and the rest of associations had infringed the Fair Competition Act because they issued illegal recommendations. The CNC admitted that the reported parties had the right to defend the interests of their associates, but it resolved that such defense could not be made in the form of an anticompetitive agreement.

According to the resolution of the CNC, in order for a recommendation to exist it is not necessary to say exactly how its members have to behave, it is sufficient to give out signals or standardization guidelines of behavior. Moreover, the CNC did not only take into account the information sent by FEFE to pharmacists, but also how the message would be perceived by them. The CNC argued that the fact that FEFE



made reference to the “enormous damages” caused by the campaign of Davur, illustrates that FEFE was valuing the matter in view of the impact that such campaign would have on the profits of pharmacies.

The CNC imposed severe fines, as it considered that FEFE had issued a recommendation tending to homogenize the behavior of pharmacies against Davur. Subsequently, the National High Court confirmed the infringement, although reducing the fines by 50%. Not satisfied with the fine reduction, FEFE appealed. The Supreme Court, after analyzing the case and its doctrine on this matter, annulled the resolution of the CNC, cancelling the imposed fine.

Recommendations

When assessing the specific case, the Supreme Court decided that FEFE did not issue an illegal recommendation, but that it acted in response to a prior release of Davur and that FEFE was just reminding, clarifying and interpreting which was the existing legal criteria regarding dispensation of generic medicinal products. Moreover, the Court gave special importance to the fact that the advertisement of FEFE was published in a temporal context marked by important changes that affected the rules on the dispensation of generic medicinal products. Taking all these facts into account, the Court considered that the information issued by FEFE did not pretend to be a recommendation on how to act, but to clarify possible confusions.

The judgment includes a dissenting opinion of two judges who considered that the conduct of FEFE was capable of affecting negatively the conditions of competition in the market and that they would have maintained the fine.

On the other hand, this is an interesting judgment to the extent that it reviews the doctrine of the Supreme Court in this complex issue.

The Court parts from the idea that evaluating whether or not an illegal recommendation exists is basically a casuistic matter, in which the context and the concurrent circumstances are determining factors. Having said this, the judgment might be interpreted in the sense that there is an illegal recommendation when there is an act, issued by an organization, the purpose of which is that its recipients act in a homogeneous or harmonized way instead of doing it independently and autonomously.

This idea is reinforced by several examples that are described in the judgment, normally referring to acts tending to replace the individual acts of the associates by a joint action. Moreover, in order for an illegal recommendation to exist it is not necessary for the act issued by the association to be binding, it is sufficient if it aims for the associates to behave in the same way.

On the contrary, according to the judgment, there is no recommendation when an association only informs about certain matters, especially if they are complex issues; making it clear to its associates that each one of them must, individually, adopt the decisions that they deems appropriate according to their interests, after having evaluated the information provided.

In any case, in spite of the importance of the element of intent, it is convenient to be very prudent. An act that does not pretend to encourage a homogeneous conduct, but which is objectively able to cause it, that might be capable of generating among all addressees a certain willingness or behavior, can also be subject to penalty.