



Andalusian tenders reach the CNMC, which confirms that circumstantial evidence is not an absolute rule

Judgment of the National Markets and Competition Commission (CNMC) of 12 January 2016. Procedure S/DC/05523/14, SAS

Background

In recent years, the Andalusian Health System (SAS) has made several calls to select the medicinal products to be dispensed by Andalusian pharmacies, when in official prescriptions said medicinal products are prescribed by active ingredient. We are talking about the well-known “Andalusian tenders”, against which the Government has filed two positive conflicts of jurisdiction and one constitutional appeal before the Constitutional Court, all currently pending resolution.

Opinion of the CNMC

The resolution in question demonstrates that, at the end of 2014, the SAS filed a complaint before the CNMC against the Ministry of Health, some renowned sector associations and even several pharmaceutical companies for supposed collusive behaviour. According to the SAS, such conducts consisted of a possible collective recommendation by the Ministry aimed at the pharmaceutical companies “so that they do not participate in calls organised by the SAS”, in addition to a supposed boycott of SAS calls, in the form of a ministerial decision to review the price of some medicinal products selected at the SAS tender. Furthermore, the SAS also reported possible agreements between pharmaceutical companies to refrain from bidding and signing the agreement with the SAS.

The CNMC declared that the Ministry had acted outside the scope of application of the competition law as it had acted within the scope of its powers pursuant to the law in force and not as an economic operator.

As regards the decision of the pharmaceutical companies to refrain from bidding or signing the agreement with the SAS, the CNMC considered that said decision could reasonably be based upon legal uncertainty affecting the design of the tenders, against which constitutional appeals had been filed. This uncertainty could sufficiently justify the action of pharmaceutical companies, without the parties necessarily having agreed to act in the same way.

The latter CNMC reasoning is interesting, insofar as it reveals that the doctrine of circumstantial evidence is not an absolute rule. Based on this doctrine, authorities may establish that the competition law has been breached based on fully proven facts and provided that there is a precise, direct link between the facts and the breach. Thus, after analysing the facts, the court may conclude that the action taken is a result of previous agreements that infringe competition law, as no other rational explanation exists. On this occasion, the CNMC deemed that the action taken by the companies could be attributed to legal uncertainty, without the parties necessarily having agreed to act in the same way.