In the acquisition of companies, clientèle or know-how, non-competition obligations may apply even though they are not expressly agreed

Judgment of the Civil Division of the Spanish Supreme Court of 9 May 2016

Background

The judgment in question concerns a claim brought by the purchasers of the shares of a company called Aerlyper, on the basis they understood that the sellers had failed to comply with a non-competition commitment established in the purchase agreement concerning said shares. Specifically, the purchasers claimed that the sellers failed to comply with said commitment when purchasing shares of Alfa Bravo Servicios Aeronáuticos, S.L., a company that had carried out activities that were competitive with those undertaken by Aerlyper.

In turn, the sellers defended themselves by claiming, amongst other arguments, that the purchase agreement concerning the shares set out that the non-competition obligation on one of the sellers, Mr. Simón, would only come into effect when he stopped working for Aerlyper, which was not the case when Alfa Bravo Servicios Aeronáuticos, S.L. undertook the activities that competed with those carried out by Aerlyper. Therefore, in the opinion of the sellers, when Alfa Bravo Servicios Aeronáuticos, S.L. performed its activities, there was no non-competition obligation binding Mr. Simón.

Enforceability of non-competition commitments

Considering the foregoing, the Supreme Court concluded that, despite the fact that the purchase agreement concerning the shares of Aerlyper did not expressly contemplate that the non-competition obligations imposed on Mr. Simón were in force when Alfa Bravo ServiciosAeronáuticos, S.L. performed its activities, the involvement of Mr. Simón in said company represented a breach of a non-competition obligation that should be considered as having been implicitly assumed by Mr. Simón.

The reasoning used by the Court to reach this conclusion was that, both in the acquisition of a company and in agreements involving the transfer of clientèle or know-how, it may be considered that implicit non-competition obligations apply to the sellers, where appropriate in order to prevent sellers from frustrating the legitimate expectations of the purchasers.

In addition to noting the reasoning used by the Supreme Court on the possibility of implicit non-competition commitments applying to certain types of agreement, various practical conclusions can be drawn from the forgoing. For example, it is worth noting that the reasoning used by the Supreme Court may be applied to several types of agreements common to the pharmaceutical industry, including to agreements regarding the transfer of dossiers for medicinal products. Additionally, we can also conclude that, in the acquisition of companies, clientèle or know-how, insofar as no agreement has been reached regarding sellers assuming a non-competition commitment, it is advisable for the agreement to stipulate that said commitment does not exist.