



The possibility of bringing unfair competition cases to the Spanish Competition Authority

Judgement of the Supreme Court, of 28 September 2018 and of 1 October 2018

Introduction

One of the issues that often arises in the pharmaceutical sector is how to attack the actions of competitors when they are contrary to sector-specific regulations. These Judgements remind us of an alternative legal channel provided by the Spanish legal system -besides the judicial one- that may sometimes go unnoticed. We refer to the possibility of bringing unfair competition cases before the Spanish Competition Authority. As these judgements recall, there are 2 requirements for accessing this channel: there must be an infringement of the Unfair Competition Law (UCL), and such infringement, by distorting free competition, must affect the public interest.

Breach of rules as an unfair conduct

Under the UCL, the following conducts are - among others- considered as unfair: on the one hand, taking a significant advantage through an infringement of laws; and, on the other hand, infringing the rules governing the performance of a business activity. On the first conduct, Spanish case law has clarified that the competitive advantage is significant when it is important enough from an economic point of view or when it produces a diversion of clients in favour of the infringer. In addition, according to this case law, the infringer must use this advantage in a real -and not potential- way, and there must be a cause-effect relationship between the infraction and the advantage gained. Regarding the second conduct, the case law has explained that the rules governing a “business activity” refer to those regulating an “economic activity”. Spanish Courts of Appeals

have stated that some examples of these would be “the rules governing the conditions for marketing and placing medical devices on the market”. In addition, other Spanish courts have indicated that, in these cases, it is not necessary to prove the advantage gained by the infringer, because the mere violation of this kind of rules implies the existence of such advantage (unless proven otherwise).

Public interest and competition distortion

In these judgements, the Supreme Court highlights that in order for the Spanish Competition Authority to act against unfair competition conducts, it is necessary to prove that said conduct, by distorting competition, affects the public interest. The affectation of the public interest is a very controversial requirement. According to the Supreme Court, it will depend on the “significance of the conduct or the circumstances involved”, listing the following as examples: having a dominant position in the market, the market situation at the time of the facts or the capacity of the conduct to obstruct access or permanence of competitors in the market.

Consequently, when a pharmaceutical company infringes specific sector rules, a complaint may be filed before the Spanish Competition Authority without having to prove the advantage gained by the infringer as long as the conduct affects the public interest by distorting free competition. This is without prejudice of the possibility of suing the infringer before the competent courts and/or of the healthcare authorities imposing sanctions, if applicable.