ANTITRUST LIABILITY OF PUBLIC ENTITIES ACTING AS AWARDING POWERS IN PUBLIC PROCUREMENT…THE HESITANT SPANISH CASE

BY ANTONIO MIÑO LÓPEZ[1]

1 Lawyer at the Xunta of Galicia (Regional Administration of Galicia, Spain) and bachelor by contract at the University of Vigo. Phd. in Law, (University of A Coruña), Master in EU Consultancy Projects (Université Libre de Bruxelles) and Postgraduate in Intellectual Property and Competition Law (University of Santiago de Compostela).

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I. INTRODUCTION

In Spain, as in other continental systems, the rules for attributing antitrust liability are conditioned by the imperfect relationship between Competition, Administrative, and Criminal Law. On one hand Competition is, regarding infringements and sanctions, a (not far from the trunk) branch of Administrative law, whereby both disciplines share general principles and boundaries. On the other hand, administrative rules on penalties are built upon Criminal law's fundamental principles and guarantees - as are the rules for setting liability. However, the abovementioned links are not comprehensive in either case. Administrative law is less stringent than Criminal law, and lacks its degree of accuracy in setting out categories of lawbreakers and penalties. Currently, Articles 27 and 28 of the Criminal Code distinguish between authors (perpetrator, inductor, necessary collaborator) and accomplices. In contrast, Article 64 of Law 39/2015 of the Common Administrative Procedure, uses an imprecise clause: "person or persons allegedly liable."

The genus-species link between Administrative and Antitrust Law causes the imprecision of the first to affect the second. The traditionally unquestioned theory of antitrust liability points only to the author, tantamount to the actual perpetrator of the anticompetitive behavior. Therefore, Article 101 TFEU and Article 1 of the Spanish Competition Law apply to undertakings engaging in cartels or in horizontal or vertical restrictions. Article 102 TFEU and Article 2 of the Spanish Competition Law address dominant operators abusing their market power in the ways described by those articles.

This position renders useless any discussion on the antitrust liability of the awarding powers. Notwithstanding, two doctrines drawn by the EU Courts, and one from the Spanish Supreme Court, make the issue far from being crystal-clear. First, the attribution of liability for collusive conduct to a cartel's consultant and auxiliary operators is several decades old, and has received full support from the European Courts since 2004 (*Treuhand* doctrine). This would have looked like a rising chance to go after contracting authorities. However, that window seems to have closed when the *Fenin* doctrine took the stage, for it exempts from Competition Law enforcement those buying entities who do not allocate their purchased goods or services to the market. Finally, following a fast-evolutionary process, the Spanish Competition Authority and the Supreme Court severed the connection between antitrust liability and economic activity, which entitles them to sanction on the basis of a (public) entity's mere participation in the infringement, irrespective of whether they have acted as economic operators or as regulatory bodies.

II. TARGETING CONSULTANTS AND COLLABORATORS: *TREUHAND*

At the EU level, the persecution of cartel facilitators goes back to the beginning of 1980. In *Italian Flat Glass*, the European Commission blamed some manufacturers involved in the illegal conduct, but also a consultant who had actively facilitated it on which, however, it did not impose a fine.[2] The Commission's decision on the *Polypropylene* cartel concluded that Fides Trust (a consultancy firm) was essential to the success and duration of the cartel, managing the complex exchange of information between the cartelized companies. However, only the cartelized firms were fined, not the consultant.[3] Therefore, by the end of the 1980s the Commission was already arguing that facilitating the cartel was contrary to Article 81 ECT, yet exempted the facilitators from fines.

This position changed significantly, however, with the decision adopted in the organic peroxides cartel and the confirmatory judgment of the CFI in 2008 – *Treuhand I* – followed by *Treuhand II* in 2015.[4] Both cases dealt with the participation in a cartel of a consultancy firm whose role was auxiliary (summarizing, organizing meetings for the cartel participants (which it attended and in which it would actively participate), collecting and supplying data to the participants on sales for the relevant markets, offering to act as a moderator in case of tensions between the undertakings concerned, and encouraging the parties to find compromises, for which it received remuneration).

In *Treuhand I*, the complainant held the traditional theory according to which EU law only allows sanctions against the perpetrators of an infringement, understood as (1) companies belonging to the categories set out in Article 81 TEC (101 TFEU) which (2) are parties to the restrictive agreement and (3) operate in the market affected by the infringement, (4) given that the agreement can only be concluded between companies that have the status of competitors, suppliers, or plaintiffs in the affected market. Since EU Law does not contain penalty provisions for accomplices or inducers, sanctioning them would violate the principles of legality of penalties and certainty of criminal law. However, the Court of First Instance adopted a test to assess the antitrust liability of a facilitating company based on two concurrent elements: (1) the market in which the facilitator operates and (2) the circumstances of its participation. Regarding the first point, the CFI goes far beyond the traditional view by including among the restrictions of competition those created in the market affected by the cartel (intra-cartel agreements, other horizontal or vertical agreements) as well as in related or emerging markets (cartel-facilitator agreement). Regarding the second, for the facilitating practice to be punishable the auxiliary intervention must be active, deliberate, committed to the organization and implementation of the cartel, and profitable for the accomplice.

Treuhand II strengthened both arguments. As to the market, Article 101.1 TFEU covers all agreements and concerted practices adopted in horizontal or vertical relations, regardless of the market in which the parties operate. Regarding participation, the facilitator must make an active contribution to the cartel, for which it played an essential role. It must also be deliberate, so that its behavior falls directly under the activity of the cartelized companies, and its goal is the realization, with full knowledge of cause, of the anti-competitive objectives pursued by the group. It is not necessary, then, that the facilitator pursues its own commercial objectives; it is enough for them to obtain a profit from their performance, e.g. in the form of retribution.[5]

By expanding the scope of markets and activities, *Treuhand* widened the reach of antitrust liability by adding to the author a second subjective term of imputation: the facilitator (accomplice). And by enlarging the categories of infringers European jurisprudence brought Competition closer in line to Criminal codes, bypassing Administrative Law. It would seem that the doctrine is enough to prosecute contracting authorities facilitating bid rigging in public procurement. But blind adoption of this finding would be wrong, since *Treuhand* makes antitrust liability dependent on carrying out economic activities as a market operator. It is a different case, *Fenin*, which sets out whether and how a public contracting authority meets the economic activity test, and whether they must be included or excluded from the scope of Competition Law.

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2 Commission Decision 81/881/EEC of September 28, 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV.29.988 - *Italian Flat Glass*), OJ L 326, 13.11.1981, at pages 32-43.

3 Commission Decision 86/398/EEC of April 23, 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV.31.149 - *Polypropylene*), OJ L 230, 18.08.1986, at pages 1-66.

4 Judgment of the Court of First Instance, of July 8, 2008, T-99/04, *AC-Treuhand*, Judgement of the European Court of Justice of October 22, 2015, C-194/14 P, *AC-Treuhand*.

5 Judgment of the General Court of November 10, 2017, T-180/15, *Icap plc and others v. European Commission*. Appeal case before the Court of Justice, C-39/18 P.

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III. RE-ENTRY INTO THE MARKET AS A PRE-CONDITION OF PROSECUTION: *FENIN*

FENIN is the principal association of businesses which deal in medical goods and equipment, particularly medical instruments, used in Spanish hospitals. In 1997 FENIN submitted a complaint for abuse of dominant position to the Commission, alleging systematic delays in payment by the SNS management bodies. Since these are by far the main purchasers, the members of FENIN cannot exert any commercial pressure on them. The CFI/CJ dismissed the plea, holding that the SNS management bodies do not act as businesses when purchasing from the members of FENIN for two reasons.[6] First, because the SNS operates according to the principle of solidarity, is funded by social security contributions and other State funding, and provides services free of charge on the basis of universal coverage. Second, and more interestingly, in order to determine whether the purchaser is an economic operator, it would be incorrect to dissociate the purchasing activity from the products' subsequent use. The economic nature of the purchase depends on whether the subsequent use of purchased goods amounts to an economic activity (offering goods and services in the market). Otherwise, even massive acquisitions by a "monopsonistic" entity are not economic activities, whereby they would remain outside the scope of Competition Law.

As in *Treuhand*, The ECJ adopts the economic activity test in *Fenin* to determine whether a body is subjected or exempted of Competition Law. According to the literal terms of the CFI and ECJ judgements, no contracting authority can be fined for facilitating or engaging in anticompetitive practices during the tender or implementation of the contract, since it uses the goods or services purchased internally for carrying out its own tasks. However, this finding is less indisputable than the judgements suggest, for it depends on the type of public contract. It is a correct assumption for public works, public supply and public service contracts. But not so for public works and public service concessions where third parties to the contracting authority and to the contractor ("users") employ the goods and services purchased and pay the concessionaire for the use. This is quite obvious when the concessions have counterparts in the private sector and there are (scarce) conditions for competition (e.g. hospitals, gyms).

IV. MEDDLING WITH PUBLIC ENTITIES: AN OVERVIEW

The Spanish national and regional competition authorities rarely enforce antitrust liability against contracting authorities. A great deal of cases has investigated abuses of dominant position in public service concessions. In sum, three positions are sustained, often overlapped: (1) appealing to constitutional grounds; (2) sanctioning the concessionaire; (3) distinguishing between the contracting authority and its parent administration.

A first type covers accusations of predatory prices and unfair competition in the management of gyms and sports facilities. The handling of these centers is managed by local authorities or outsourced to public service concessionaries. In both cases user fees are usually far lower than those set by private competitors, even close to zero. Competition authorities hold that several constitutional articles imposing on public authorities the duty to protect public health and promote sports provide sufficient coverage to apply the exemption set out in Article 4.1 SCL and make Competition law inapplicable. Second, the role of the contracting authority in the contractor/concessionary abusive behavior is played down on the grounds that the latter, as the dominant operator in the market, has a special responsibility to ensure the competitive implementation of the contract or concession. The contractor enjoys a great deal of autonomy to implement the contract, so that it can check and fix any anticompetitive practices and promote pro-competitive management of the service. Third, the refusal to fine the contracting authority disappears for tenders not put forward by public administrations but by state-owned companies. The finding shows that public powers setting up private entities to manage public services have to accept that the former share the same properties and requirements as private companies, and must therefore abide by Competition law.

Underlying the first two positions is the seminal idea that Competition law only applies to economic operators. EU and Spanish public procurement law deem that contracting authorities are regulatory bodies and customers. Because of the first role they set up the framework and set out the rules for the tender to take place and the contract to be implemented. As customers, they take advantage of the acquisitions but do not carry out economic activities. The third position sets an "artificial" difference between contracting authorities – administrations and state-owned firms – regardless of whether they commit the same misbehaviors. It appears as a formal argument lacking substantial foundations.

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6 Judgment of the Court of July 11, 2006, C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities*. Precedente case before the General Court, T-319/99.

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The evolution towards a more open point of view did not follow a strictly linear progression. The conceptions summarized above coexisted with decisions that proposed piercing the veil and clarifying whether, under the appearance of unilateral administrative roles, the contracting authority acts as a company.[7] Some regional competition authorities have also fined public administrations or submitted to settlement without even mentioning *FENIN*. In any case, the first landmark we have is *SESCAM*.[8] With this decision the Spanish Competition Authority started down a line of thought that blames public administrations for achieving market shares above contract law and for price fixing agreements with industry associations. The Decision established that a regional Health Service which agreed to distribute the provision of medication to health centers from, among a large group of pharmacists did not act as a regulatory body, but as an economic operator that reached a collusive agreement on market shares with the regional pharmacist association. The decision annulled the agreement but did not fine the parties. However, the authority pointed out that the same outcome attained according to the public contracts law, "in theory should exclude the application of antitrust legislation."

A second decision in that direction was *Uva de Jerez*.[9] The Spanish Competition Authority sanctioned the Junta of Andalucía for having facilitated and signed the Strategic Plan for Sherry wine, which incorporated a price fixing agreement between the companies involved. The decision offers three innovations regarding *SESCAM*. First and foremost, an entity does not need to qualify as an economic operator to be prosecuted and sanctioned: for the first time a decision attributed antitrust liability to a public administration acting as a regulator. Second, the decision imposed an actual fine on a public administration. Third, one of the arguments for intervention by the Competition Authority was the inexistence of a channel to appeal to a Court against material activities undertaken by public entities, such as organizing or participating in meetings with the cartel members.

Finally, we look at the Decision issued by the Spanish Competition Authority in *Port of Valencia*.[10] The Port Authority of Valencia participated in the signing of the first agreements between the port's transport operators, in the creation of a registry of heavy vehicles, and in the meetings for the creation and monitoring of Transport Tables. The Government of the *Comunidad Valenciana* mediated and sought an agreement between them. Although the actions taken by the public entities were of a material, non-legal nature, the Decision supported that, when the facilitating public entity combines resolutions or administrative acts with factual conduct, it is up to the contentious-administrative jurisdiction to review the adherence of the former with administrative law, and that the competition authorities sanction the contradiction with Articles 1 and 2 of the Spanish Competition Law ("SCL") on conduct executed in the pursuit of provisions, resolutions, or administrative acts.

The National Audience rulings on appeals to these cases rejected the Spanish Competition Authority's twice-repeated opinion in favor of sanctioning public entities acting as regulators. The court used the traditional argument that Competition Law only applies to economic operators. Hence, it would be the Supreme Court who would decide between custom and novelty. Its position was ultimately ground-breaking since it linked antitrust liability solely to the ability of the conduct to restrict competition, irrespective of the (public/private, economic operator/regulatory body) nature of the perpetrator:

> In the field of competition law there operates a broad and functional business concept; so that what is relevant is not the economic legal status of the subject who perpetrates the conduct, but that its behavior caused or is able to cause an economically harmful or restrictive outcome for competition in the market.

This clause suggests several interpretations. Regarding the topic of this paper, the Supreme Court comes to quote and then accept the *Treuhand* facilitators theory for the "participation" of public entities in the adoption and implementation of restrictive agreements. Neither the *Treuhand* nor the *Uva de Jerez* doctrines have been adopted in public procurement cases, but they can be adapted to this scenario, as we will show next.

7 Decision of the Spanish Court of Defence of Competition, of March 9, 2006, R-499/01, *TKI*.

8 Judgement of the Spanish Supreme Court of March 9, 2015, *SESCAM*.

9 Judgement of the Spanish Supreme Court of July 18, 2016, *Uva y vino de Jerez*.

10 Decision of the Spanish Court of Defence of Competition September 26, 2013, S/314/10, *Puerto de Valencia*.

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V. SUITABLE FOUNDATIONS FOR THE LIABILITY OF THE CONTRACTING AUTHORITIES

This section will assess how an appropriate interpretation of all the doctrines exposed in the above chapters would lay the foundation for attributing antitrust liability to contracting authorities for behavior supportive of collusion in public procurement. It will also show how this opportunity is endangered by the very same Spanish Competition Authority who paved the way for it.

On the one hand, *Treuhand* opened the gates for expanding the targets of antitrust procedures in three directions: (1) auxiliary and instrumental conducts distinct from principal anticompetitive practices; (2) accomplices or facilitators belonging to cartels or to horizontally/vertically restrictive groups; (3) other markets separate from the one where the main restrictive behaviors operate. On the other hand, the Spanish Supreme Court in *Uva de Jerez* goes well beyond *Treuhand*, to which it adds our fourth and fifth findings: (4) it allows competition authorities to prosecute and fine not only economic operators but also public entities acting as regulatory bodies; (5) the profit or retribution is not taken in consideration when becoming a facilitator. Moreover, it bypasses *FENIN*, (5) since the fate of the purchases is no longer a relevant factor for the application of Competition Law against the buyers. As was stated before, competition authorities and courts must only consider the ability of the defendant's conduct to restrict competition.

That was the state of affairs in 2018 when the Spanish Competition Authority issued the Decision on Licitaciones de aplicaciones informáticas. The Authority fined eleven companies for creating a cartel for the provision of computer services and data processing to public administrations throughout the country. The cartel shared data on customers, agreed on prices and commercial conditions, and exchanged sensitive commercial information, in order to make public procurement more expensive. Specifically, the cartel: (1) set up instrumental temporary joint ventures; (2) granted preferential subcontracting to certain companies in exchange for not participating in the tender; (3) submitted cover offers; and (4) agreed with some firms that the latter would not bid in certain tenders in exchange for other kinds of favors. All these practices reduced the competition in the tenders.[11]

In her Dissenting Vote ("DV"), one of the members of the Authority disagreed with the majority position on understanding that the Decision had chosen not to fine the contracting authorities despite evidence that they had participated as facilitators in the commission of the collusive conduct. The DV cited multiple conducts attributed to the contracting entities in the proven facts. Among them, collaboration with the cartel for the elaboration of the bidding documents; its referral to cartel members prior to publication of the contract notice; suggesting the setting-up of a temporary association among potential bidders; preparing the contest in favor of the winning temporary association or wishing that they take part in the tender, etc.

The Decision did not explain the reasons for acquitting the contracting entities. It simply ignored the question. But it seems clear that they intended for the bidders to set up a successful cartel. Their behavior also met the requirements demanded by the Supreme Court in *Uva de Jerez* for regulators to be considered as facilitators of collusive practices. In fact, the practices imputed to the contracting authorities in this case were equally or more effective in achieving the anticompetitive goals than the practices carried out by the public entities in *SESCAM* or *Uva de Jerez*.

In its most recent decision – *Rutas Navidad Autobuses Madrid* — the CNMC set a solo requirement to start a sanctioning procedure against public sector entities: "it is in any case necessary to subsume its action in any of the offenses defined in the Spanish Competition Act." Otherwise, the issue has to be handled via an administrative tribunal.[12] Despite the apparent crystal-clearness of the expression in italics, its meaning deserves to be elaborated on in future decisions. It could be understood as a step back towards the pre-*Treuhand* position. The *Treuhand* doctrine principal novelty – adopted by *Uva de Jerez* — was to include among the punishable entities those which neither performed nor took part in the anticompetitive behavior, nor were members of the collusive relationship or even operated in the market concerned by the infraction. Literally understood, the Decision comes to hold that public entities are only liable when performing the practices quoted in Articles 101 and 102 TFEU (Articles 1 and 2 SCL), but not when their role is that of facilitator and even less when it is that of a regulatory body.

11 Decision of the Spanish Competition Authority of July 26, 2018, S/DC/565/15, *Licitaciones de aplicaciones informáticas*.

12 Decision of the Spanish Competition Authority of August 30, 2018, SAMAD/08/16, *Rutas Navidad Autobuses Madrid*.

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Should the latter interpretation be correct, it looks like a blatant regression regarding *SESCAM* and (mainly) *Uva de Jerez*. However, it is likely that the finding was conditioned by the case facts. First at all, it is not a public procurement scenario, but a sheer normative intervention of a public power, using its *imperium* to protect the environment (adoption of a Decree by the Madrid City Council that establishes limits on traffic circulation that unequally affect the tourist transport companies). Unlike all the aforementioned decisions and judgements, the analysis here does not focus on a public entity assisting in the formation of a cartel (Articles 101 TFEU/1 SCL,) but deals with Article 102TFEU/2 SCL. The Decision is based on the inexistence of a market where the presumed abuse has taken place. This argument amounts to rejecting the Supreme Court position in *Uva de Jerez*, for it is obvious that a public entity will only be present in a market as an economic operator (*Treuhand*), not as a regulator (*Uva de Jerez*). A more accurate answer would have remarked that the Decree appealed to an overriding reason relating to the public interest (protection of the environment) to restrict the freedom to provide services in a particular market. And this restriction is allowed by the Services Directive 2006/123/EC and the transposing Spanish law.

However, the Competition Authority should have explained the close-the-file Decision from the *Treuhand/Uva de Jerez* facilitator doctrines. It should have been assessed whether (1) the group of transport companies not affected by the banning Decree enjoyed a dominant position on the market and abused or planned to abuse of it; and (2) whether the Decree involved an active and deliberate collaboration in the abusive strategy. It is essential to remark that the presumed abuse would have not been committed by the Council, but by the transport operators. The City Council would be fined in concept of facilitator or accomplice of those practices.

VI. CONCLUSION

The demand of antitrust liability for (contracting) public entities does not have legal backing in Spain. Competition authorities and courts keep a reluctant and case-by-case position under the economic operator paradigm. The *Treuhand* facilitator's doctrine was assumed in the *SESCAM* case for public economic operators carrying out economic activities. The Supreme Court applied it to regulatory bodies in *Uva de Jerez*. However, the Spanish Competition Authority did not even mention the aforementioned doctrine in the last exempting decisions.

However, all the conditions that the EU and internal jurisprudences have set out to fine the contracting authorities engaging in active and deliberate collaboration in anti-competitive behaviors remain in force. Imposing antitrust liability on contracting authorities is a measure directly addressed to (public) customers, beneficial for Competition law enforcement in two ways: (1) a preventive effect before and during the tender, by prompting the contracting authority to use all the legislative remedies to impede the bidders from setting up collusive rings; (2) a side effect during the investigation procedure undertaken by the Competition agency, which will be helped by the contracting authority to fight bid rigging.

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