

SPANISH COMPETITION *Highlights ...*

Weekly follow-up: 19 Jun – 23 Jun.

The Spanish Supreme Court admits DHL's appeal against the judgment of the National High Court in Case S/DC/0578/16 Mensajería y Paquetería Industrial.

The grounds of the case

International Courier Colution, S.L. (ICS), a small operator with limited resources to provide its courier services, enters into agreements with other larger operators, including DHL EXPRESS MADRID SPAIN, S.L.U. (DHL) in order to provide national and international services to its customers.

Within the framework of this relationship and by means of unwritten communications, both parties enter into '*client protection agreements*' whereby each party prevents the other from carrying out commercial actions on any of its current clients.

These agreements are therefore not limited to each of the courier service agreements, but cover all client's portfolio of each party, which could constitute an allocation of clients between competitors.

The interest of the court of appeal

The cassation appeal interest is the interpretation of Articles 2(4)(b) and 4(b)(i) of Regulation 330/2010 on the application of Article 101(3) TFEU to certain categories of vertical agreements and concerted practices (now repealed by Regulation 2022/720), in order to determine whether DHL's reciprocal customer agreement with ICS would be covered by it.

In this way, an attempt will be made to (i) elucidate the limits of a non-competition agreement between competitors within a vertical relationship in order not to be anti-competitive; (ii) the relevance of the broad scope of the agreement (all competitor's customers portfolio); and (iii) its consequence in relation to the loss of the verticality nature of the agreement becoming as horizontal agreement.

Not being considered a vertical agreement, they would be horizontal market-sharing agreements between competitors. For these purposes, it is also relevant to consider whether the core and nature of the arrangements is a vertical relationship or whether, on the contrary, it is more in the nature of a horizontal agreement restrictive of competition.