

# COMPETITION AND PUBLIC LAW REPORT 2010: REGULATION WITH TEETH: IBERIA'S COMPETITION REVOLUTION

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**Competition lawyers across Iberia agree that the financial crisis has had a clear impact on the type of work they are now seeing, but equally significant has been the increasing confidence and remit of national competition authorities.**

**Consequently, the full impact of new competition laws and implementation of new tools in both Spain and Portugal are only really now being felt, they say.**

There may be a continuing fall in merger control issues but the start of the year has still seen competition law issues dominate headlines across Iberia. State aid issues continue to grow as governments look to stimulate new economic growth, with growing European Commission concern about the extent of support being offered to sectors including finance, transport and mining. Iberia has also now seen it's first-ever whistle-blowing and leniency prosecutions and convictions.

# Leniency

Portugal saw its first convictions under the country's leniency programme, (introduced in 2006 amending the 2003 Competition Act) in December. The Portuguese Competition Authority (Autoridade da Concorrência – AdC) imposed fines totalling €14.7m on five catering companies for operating a pricefixing cartel.

The companies involved – Trivalor, Eurest, Uniself, ICA/Nordigal and Sodexo – received fines between €6.8m and €357,000, but the case is significant also because individual managers were prosecuted, says Carlos Botelho Moniz, Head of the EU and Competition Law Department at Morais Leitão Galvão Teles Soares da Silva & Associados (MLGTS).

"The AdC stated that its main objective when imposing fines on the managers of four out of the five companies involved was to emphasise that companies should be operated according to competition law, and that managers should actively prevent company conduct infringing the law."

In Spain, competition law enforcement is undergoing a similar revolution, irrespective of the current economic crisis, says Helmut Brokelmann, partner with Howrey Martínez Lage in Madrid. "We have seen a radical increase in cartel enforcement activity by the Spanish competition authority (Comisión Nacional de la Competencia – CNC) and now follow-on damages claims before the civil and commercial courts."

The CNC has launched over 40 cartel investigations in the last two years and, in October 2009, the first damages were awarded to the victims of a cartel, in the sugar market, with further claims currently pending before the courts.

"The last year has seen a record amount of investigations initiated by the Spanish authorities as well as in the number and amount of fines imposed in antitrust cases. Not only the number, but also the amount of the fines has increased over the last year, during which the CNC has shown an increasing trend to impose significantly higher fines," says Casto González-Páramo, Head of EU & Competition law at Lovells in Madrid.

Exactly a year after leniency was introduced in Spain, this February has seen its first leniency convictions. Fines totalling around €8.3m were handed out to Henkel, Sara Lee, Puig Beauty & Fashion and Colgate Palmolive España for maintaining a cartel focused on shower gel products. As the whistleblower, Henkel had its €4.2m fine cleared, while Sara Lee's was reduced by 40%, after reportedly filing its leniency claim a mere 15 minutes after Henkel lodged a claim with the CNC.



"The leniency programme is clearly a useful and important tool, and is here to stay, but issues still have to be clarified with the process, says Ángel Valdes, competition partner at Eversheds Lupicinio. "Under Spanish law the first through the door of the CNC gets full immunity, the second only partial immunity, but it is not always the first that provides the most useful or frankest information."

Lawyers are in agreement that the impact of such an outcome will be significant, and that high fines will be forthcoming in future cases.

"We see leniency applicants walking away with no fines, and a reduced level of fine for those parties that have cooperated with investigations. The message sent out to the media is that there is little flexibility for those that do not co-operate," says Francisco Cantos, Head of Antitrust, Competition and Trade at Freshfields Bruckhaus Deringer in Madrid.

## Fervour

Issues however remain about how the national competition authorities conduct their investigations, say lawyers, with a number of cases notably now pending before the Spanish courts testing the ability of inspectors to remove certain types of information during dawn raids.

In addition, many note that the AdC and CNC have been very adept at using the media to publicise their campaigns.

"What is significant is the level of publicity the CNC is giving to their investigations from the outset, in some cases even naming companies being investigated for anti-competitive behaviour, which may in some senses infer guilt even if no case is subsequently filed. This contrasts to what happens at the EU level, where only the sector is made public," says Marco Araujo, Head of EU and Antitrust at Garrigues.

There is an evident fervour about the way the CNC is conducting its operations, suggest others. "The CNC has definitely adopted a more aggressive approach in its fight against cartels and abuses by dominant players at the national level. In general terms, there seems to be no single area of business which has not been put under scrutiny by the authority," says Gerard Pérez Olmo, of Madrid boutique GOLD Abogados.

In Portugal, lawyers say, the competition authority has also adopted a broad approach, and recently announced an intention to focus renewed attention on essential consumer goods and services sectors, including the food, telecoms, liquid fuel and pharmaceuticals sectors.

## Education

Nonetheless lawyers emphasise that some companies continue to think that their business sector demands an alternative analysis or interpretation under competition rules.

"Many clients continue to think that what competition issues they have should be relatively straightforward, and perhaps subject to a special and different interpretation to that which prevails within the CNC," says Rafael Allendesalazar, partner with Howrey Martínez Lage in Madrid. "But it doesn't matter who you are or what sector you operate in. Although the economic and legal context must be taken into account, competition rules still apply."

It remains the case that only the most sophisticated clients are fully educated about the total significance of competition rules, both as they impact on their business strategy and the way they run their operations, say some experts.

"The situation has changed dramatically over the past five years, but while I believe that Spain's major companies are aware of the issues at stake, this awareness is not always evenly spread within their organisations. A challenge for us now is to help our clients create the necessary compliance programmes that will help them avoid future problems," says Jaime Perez-Bustamente, Head of Competition at Linklaters in Madrid.

Andrew Ward, competition partner with Cuatrecasas in Madrid agrees: "The penny is starting to drop for companies active in Spain, but even where they are aware of the risks, detecting and preventing infractions in practice is difficult and requires a thorough analysis of how their businesses operate."

"There has been a strong willingness to look outside of the country for guidance, and to work with recognised international bodies not only to help create the regulatory framework but also to structure the Exchange and regulatory institutions."

Luis Miguel Nunes, PLMJ



But others suggest that it is not merely an issue of awareness, some companies continue to willingly take risks.

"Some of the investigations have revealed quite sophisticated efforts to avoid detection, even in the face of the rising level of fines and high profile media coverage of anti-competitive behaviour. The legal departments in a business may understand the issues, but this is not to say it penetrates throughout the entire organisation," says Cantos at Freshfields.

## **Merger control**

An area of legal work that lawyers say has clearly been impacted by the financial crisis, has been merger control. But although deal levels may be a significantly off previous years, there are indications that new transactions are beginning to appear, even if the wider economic situation remains difficult.

"There is clearly much less transactional work and thus much less merger control work before both the Spanish and European authorities, but we do get a sense that a slight recovery is beginning to emerge," says Jaime Folguera, Head of the Competition practice at Uría Menéndez in Madrid.

Marcos Araujo at Garrigues, agrees: "We have seen a downturn in merger control work, but there has been continuing activity as regards second phase proceedings, so the situation as a whole is not as negative as deal numbers may at first suggest."

There may be fewer mergers but experts emphasise that this does not mean there is any less analysis of their relative merits, or demerits, on the part of the regulators.

"Many of the deals being proposed are proving increasingly more difficult to pass. Despite the wider economic scenario it is still not easy to get through the regulatory process even where the target is in financial difficulties. We see the regulators looking very closely at the relative merits of individual transactions and at both the EC and domestic level there is a reluctance to follow the 'failing firm' doctrine," says Folguera.

The majority of notifications in Portugal have related to the restructuring of groups and small acquisitions, given the reluctance of companies to enter into large deals and the liquidity difficulties many still face, say lawyers there.

Some suggest however that merger control may yet be reborn after a relatively poor 2009, and in any event concentration issues may be a more sensitive issue in small markets like Portugal even when total sales are not high. The 2003 Competition Law notably contemplates a market share threshold for merger control.

"Companies operating in a small scale may face more difficulties as a result of the crisis and be forced to exit the market through a merger. In such cases, even if the turnover threshold of €150m is not met, the market share threshold will nonetheless allow the AdC to assess many such mergers," says José Luís da Cruz, competition partner at PLMJ.

Additionally, concentration levels tend to increase as less efficient companies exit markets, but national competition authorities should take a more cautious approach when adopting decisions, believes fellow PLMJ partner Ricardo Oliveira. "In Portugal, where the crisis was first felt in mid-2008, the AdC has been adopting a higher number of non-opposition decisions with commitments attached – 13 in the last two years and a total of 25 since 2003."

## **Private enforcement**

Growing fines and publicity surrounding anticompetitive business issues – notably cartels – leads many to believe that the private enforcement of damages claims for is an area that many lawyers believe will be a growing issue. Joaquín Almunia, the new EC Competition Commissioner, is also reportedly looking to encourage an increase in such actions.



"What is clear is that the coming years will see movement towards more private damages claims. It is not merely the level of fines that will significantly impact on those companies caught by the authorities, but the claims that will inevitably result from aggrieved parties," says Antonio Creus, Head of Competition at Bird & Bird in Madrid.

Issues nonetheless remain around information gathering, and the sharing of evidence by the regulatory authorities, so it may be some time before we see companies launching their own pre-emptive claims, some suggest.

"Infringements of antitrust laws cause public harm, which is the main rationale for public enforcement, but victims of these infringements also experience private harm. Needless to say that proving antitrust damages is troublesome, because one is trying to measure what would have happened if the antitrust infringement had not occurred," says Juan Jiménez-Laiglesia, partner with DLA Piper in Madrid.

In this respect, some believe it will be necessary for Courts to adopt a more relaxed standard of proof in order to make private damages claims a viable reality.

Nonetheless, the first major cases may now be on the horizon in Portugal. Recent reports have indicated that the Portuguese State may be considering the possibility of suing the five companies involved in the catering cartel, as the focus of much of their business was public hospitals, schools and prisons.

Others note that in some instances it may already be too easy for smaller companies to allege competition infringements, notably for abuse of dominant position.

"Companies may use the process to raise their own profile, in what is a very technical area particularly in highly regulated sectors such as energy or telecoms, and where the regulators may on occasion be too quick to jump to the conclusion that there is a case to answer," says Araujo at Garrigues.

The level of fines imposed is also an issue of contention, with notable interest in the possibility of reaching settlements with competition authorities ahead of expected punitive private damages claims.

"The possibility of settlement at EU level means that companies face a new set of factors when deciding the best defence strategy. For example, is settlement worthwhile, despite the small reduction of the fine offered (ie 10%), because it may result in a decision that may be detrimental in defending future damages claims," says Cantos.

Allen de Salazar agrees, adding that "The pecuniary feature should be the ability of companies that can prove they have been anti-competitively excluded from a market to subsequently launch private damages claims against the infringer."

Many question however the ability of the national Courts to fully understand the complex technical or market definition issues in competition cases, even with the growing willingness of parties to use competition issues to frustrate competitor actions and transactions.

"The use of interim measures was a key part of Endesa's hostile takeover defence on three fronts: a Spanish mercantile court, the Spanish Supreme Court and the Court of First Instance. Judges applied accelerated procedures and responded quickly. It clearly helps if it is a high stakes case, but even in ordinary proceedings, interim measures are key because the Judiciary in Spain is frustratingly slow,"

says Miguel Odriozola, Head of Competition at Clifford Chance in Madrid and who advised Endesa in the €35 billion takeover battle.

## State aid

Beyond the increasing strategic use of competition law by companies, hugely significant to the continued viability of many sectors has been the growth in state aid, note others. But the apparent laissez-faire attitude of the EU and domestic regulators towards such interventions may now be coming to an end.

"We have a sense that the more flexible position of the EC, for example, since the onset of the financial crisis, is now being questioned, while we are also seeing significant debate around the merits of a second wave of state interventions," says Araujo.



Notable in Spain has been the role of the Government and Regional Authorities in the consolidation of the country's savings banks – caixas in Galicia and Catalonia and cajas elsewhere – and particularly the role of the €9bn Fund for Orderly Bank Restructuring (FROB in Spanish) established in June 2009 by the Bank of Spain to inject liquidity into the worst performing institutions.

FROB – advised by Garrigues on EU issues – has been the subject of EC interest, as also have the Spanish governments' measures to withdraw paid advertising from national television channel RTE, imposing a levy on all commercial television and telecommunications companies to pay for the service, and in its decision to choose Spanish coal to power the countries' power stations.

In Portugal, without a doubt the issue of state aid has been most significant in the financial sector. "Since the end of 2008, specific and up-to-date advice for clients within such sector has been on the up, because of the various modifications to EU law on State aid as a result of the global economic and financial crisis," says Joaquim Caimoto Duarte of Uría Menéndez in Lisbon.

## Upturn

Some lawyers admit that the past 18 months have seen many aspects of competition law tested to the extreme. Once isolated instance of state aid issues are now commonplace, cartel investigations and leniency applications are breaking new ground, and what few merger clearance issues there are continue to raise new questions.





"I think we will now see the AdC take a much more discreet approach in some respects. There may be less cases but there will be, I hope, a much more rigorous and efficient approach in the analysis of matters."

Nuno Ruiz, Vieira de Almeida

## Regulators coming of age

Lawyers in Spain agree that despite individual issues they may have with CNC decision-making, the institution is a far better one than the two separate policy and enforcement bodies that preceded it.

"Institutionally the CNC is very well run, and the success story is the integration in 2007 of the Servicio, which sat in the Ministry of Economy, and the decision-making Tribunal for the Defence of Competition," says Marco Araujo at Garrigues. "The CNC President, Luis Berenguer has allowed a certain degree of internal debate to develop which is also a good development, but there can be lot of internal voices, and some variability depending on which members of the CNC you run up against."

Notable has been the expansion of staff numbers over the past year as both the remit and success of the CNC has increased. "Thanks to the addition of a Chief Economist to the team, the CNC's decisions pay more attention to explaining the underlying economic reasoning of their decisions, which has helped increase transparency and predictability," says Oriol Armengol, Head of Competition at Pérez-Llorca in Madrid.

Nonetheless, others note that procedural issues still remain.

Specifically, that judicial review is still the only way of holding the CNC to account. "A fundamental flaw in the system is the inability, in the vast majority of cases, to get an oral hearing before the Council of the CNC.

To prevent the parties from presenting their case in person before the decision-makers in the Council forces, in practice, the members of the Council to rely on how the rapporteur presents the facts and the legal issues.

All parties involved should benefit from oral hearings and I cannot understand why they are not held more often", says Jaime Perez-Bustamente of Linklaters.

The issue is particularly sensitive as fines continue to rise as the CNC increases its focus on cartels and dominance transgressors. Some suggest that the CNC is demonstrating excessive zeal, by prosecuting cases in which there has been no infringement, or overlooking time limitations. Notable has been the recent scrutiny of trade associations.

"Many companies now show big concern over their participation in trade associations. In the present context, many associations are trying to develop new initiatives, some of which have the risk of being considered anti-competitive," says Gerard Pérez Olmo, partner at Madrid's firm GOLD Abogados.

Increasingly, the CNC is now playing the role of Spain's economic "watchdog", say others. "It has focused increasing supervision in markets in which the application of competition rules is more delicate due to the market structure or as a result of the applicable regulatory environment, notably the electricity, natural gas, petrol station and telecom sectors," says Eduardo Abril of Garayar

Asociados.

The result is that competition law has now come of age, believe others. "Prior to 2007 competition law might as well not have existed in Spain. The CNC is challenging the status quo. It has raised the profile and importance of competition issues, as well as highlighted the issues at stake for non-compliance," says Marta Delgado Echevarría.

Abuses of dominance and cartel cases continue to be top priorities for Portugal's AdC, prompting an even more determined and effects-based approach, says Carlos Botelho Moniz at MLGTS.

"The reduction in the number of high profile cases brought by the authority in the last year has not been as a result of the economic and financial situation, but rather with a change in strategy, which now seems to be towards prosecuting more precise and serious offences."

After six years of operations, the past year has seen the AdC streamline both its decision-making processes and resources, and efforts are now focused on consolidating its know how. If reducing timescales was the main goal previously, efficiency and quality of the analysis is the challenge for the future, says lawyers. Significant therefore are expected amendments to Portugal's Competition Law to further help adapt it to a new environment.

"The Ministry of Economy has announced the revision of the law which will be an important step forward, in particular as regards procedure. The current general procedure regime is clearly inadequate for competition law infringements," says Gonçalo Anastácio, partner with SRS Advogados.

Nonetheless, lawyers call for more transparency in the opening, conduct and termination of proceedings, and significantly for the publication of decisions and guidelines.

"We have witnessed significant changes in the way the regulators have conducted their business in the last 12 months. The respect for the Clients procedural rights and the transparency issues may still be regarded as the most important criticisms that deserve a change in 2010," says Miguel Gorjão- Henriques, Sérvulo & Associados.

Nonetheless, as in Spain, the consensus is that the Portuguese economy is clearly better served by having the AdC, with a noticeable increase and wider application of sanctions against those contravening competition rules.

"The general view is that the Authority is being noticeably more effective in the regulation and supervision of the market as well as in the protection of consumers' rights," says Margarida Barrocas, partner with Barrocas Advogados in Lisbon.

"The current crisis has already shown that competition authorities are following a more aggressive competition enforcement policy. In this sense, clients have to be aware that finding adequate substitutes for domestic markets to overcome economic and financial difficulties are increasingly less available to them," says Ainhoa Veiga partner with Araoz & Rueda in Madrid.

Though Portugal's new Competition Act entered into force in 2003, and Spain's in 2007, it is only really now that the courts, lawyers and market have truly begun to fully understand the rules provided, as well as the authorities' understanding of procedures and interpretation of provisions, say lawyers. In Portugal, since 2003, fewer than 20 restrictive practices decisions have been adopted by the AdC and so test cases remain rare.

"Important and substantial amendments to the Portuguese Competition Act are expected in 2010.

Although these have not yet been made public, they will most likely relate to procedural antitrust aspects of the law," says Caimoto Duarte of Uría Menéndez in Lisbon.

Indeed, while lawyers may highlight the need to review processes to improve efficiency, many say it



remains too soon for significant substantive changes – they are still building their know how. In any event, the existing rules can help play a role in Iberia overcoming its economic difficulties.

"We are seeing a rise in cartel focus, a rise in investigations, a slight rise in transactions, and a rise in state aid work, but Spain still has a number of restructuring issues to face – in the real estate, banking, transport and telecoms sectors. The challenge is if the government will encourage developments, even if they mean a negative impact on employment rates," says Folguera at Uria.

## **Public Law**

Given the economic situation and apparent willingness of the Spanish and Portuguese governments to explore projects and infrastructure schemes, lawyers predict an increased emphasis on public or administrative law issues. The prevailing belief remains that it is necessary to initiate public works to offer an economic stimulus, but lawyers nonetheless question the continuing ability of the state to fund works.

"For this reason, collaborative projects between the public-private sector will foreseeably increase, although it should be taken into account that the private sector will also encounter difficulties to obtain financing," says Lucas Osorio, partner with Lovells in Madrid.

Lawyers therefore predict greater use of more deferred payment methods in projects, including shadow toll roads or projects based on payment according to use, while further privatisations are also likely.

2009 may have seen a decrease in new projects in Spain, in real terms, relative to the high level of schemes previously commenced, while lawyers highlight continuing delays in passing new public procurement and concessionaire financing regulation, but many remain optimistic.

"In particular, we believe different PPP structures will be used to deal with the SEC95 standards and avoid an impact on public debt and deficit goals.

Consequently we foresee that the advice required by clients in this field will become more sophisticated and the knowledge of both parties needs and limitations will be essential to provide added value by law firms," says Gervasio Martínez-Villaseñor of Madrid's Garayar Asociados.

Portugal too, faces budgetary constraints, but lawyers there too predict a busy year ahead. "During the second semester of 2009, we witnessed a clear slowdown in many infrastructure projects due to the general elections which took place in September. Most of the relevant projects were postponed and it's only natural that they'll be boosted in the course of 2010. We're already experiencing an increase in our work at that level," says Bernardo Ayala, Head of Public Law at Uria Menéndez in Lisbon.

Lino Torgal at Sérvulo & Associados agrees: "There is strong evidence that the Government intends to recover the national economy through the launch of public infrastructure projects, namely motor and railways concessions contracts, the new Lisbon Airport and several hospitals. We therefore expect the current year to be quite challenging and particularly for the teams involved with PPP contracts and Public Procurement."

Despite such intentions, issues nonetheless still remain, even for those already acquainted with the Portuguese market, say others.

"Portugal's new Code of Public Contracts is quite complex, we have been noticing a major concern in connection with its use, which results in the need for more sophisticated support to clients, especially in the field of public procurement," says Pedro Melo, partner at PLMJ.

José Luís Esquível at Esquível Advogados in Lisbon agrees. The Contracts Code was designed for a different financial environment, he says, and both companies and promoters, and the authorities, must accept that project planning, and project completion, may require more flexibility.

"Expectations need therefore also to be managed, in terms of the clear distribution of risk and the relative profitability likely – which may inevitably be more limited than in the preceding years," he says.