

EU, COMPETITION & PUBLIC LAW REPORT 2011: BRINGING WEIGHT TO COMPETITION POLICY

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The economic downturn has contributed to an increase in the importance of competition law issues in Spain and Portugal, but there are clear differences in the ways in which the domestic regulators in each country are implementing competition policy, say experts.

The nature and relative volume of the issues lawyers now see inevitably reflects the depressed nature of the wider economy. There is much less emphasis on merger control – there are fewer

transactions and fewer still of significant size – but a continuing rise in importance of state aid, cartel and abuse of dominant position claims.

“The Spanish Comisión Nacional de la Competencia (CNC) has publicly stated that the economic difficulties are better remedied with more competitive markets and has increased its enforcement and advocacy activities. As a result, antitrust compliance has become a genuinely important issue for many companies, and a key strategic issue in certain economic sectors,” says Jaime Folguera, Head of Competition at Uría

Menéndez.

In Spain, lawyers report that after a flood of leniency applications following the enactment of whistle-blowing and leniency legislation in 2009, the volume of cartel and restrictive practices actions initiated by the CNC may however now be levelling out.

“The CNC has managed to send a clear message as to the dangers and liabilities that lie ahead for companies engaging in cartels or other restrictive practices. It is now well-established as a force in the market,” says Jaime Pérez-Bustamente, Head of Competition at Linklaters in Madrid.

Significant also, as a result of this success, is the emergence of follow-on actions, say others. “The number of leniency cases may have plateaued but the fall-out from those cases already decided is now upon us. Businesses are more aware of their rights. The Judges in the commercial courts are also more aware of competition issues, and much more ready to enforce them,” says Rafael Allendesalazar, partner with Howrey Martínez-Lage in Madrid.

A new maturity is also evident within the CNC, say some. The initial fervour and adversarial stance often taken has been replaced by a more measured attitude, especially as regards cartel investigations. The CNC is more experienced and perhaps more reflective in the way it seeks out and manages cases.

“The CNC arguably used its new whistle-blowing and leniency powers to shake-up the market and to communicate that anti-competitive behaviour will face heavy sanctions. Now it is using more self-restraint. Its agents are more experienced and there is less tension,” says Marcos Araujo, Head of Competition at Garrigues in Madrid.

Competition lawyers in Spain state that the CNC has therefore proved a success in fostering a stronger competition culture in Spain. The high media profile of “dawn raids”, sector enquiries, and prosecutions has induced the requisite fear among businesses, while it is also now looking to engage better with the Government and legislators.

“The Spanish authority is particularly proactive in the field of cartel prosecution but also in the promotion of competition. In the last year, a number of interesting reports have been issued analysing competition issues which should now generate changes of law in areas such as intellectual property and administrative contracts,” says Gerard Pérez Olmo of Madrid’s Gold Abogados.

Nonetheless some lawyers continue to question some of the CNC’s working methods. It is not “mono-coloured” say some, there remain areas of strength and weakness. In addition, there is a sense that the CNC has encouraged leniency applications from businesses that do not warrant them.

“Certain conduct has been notified as illegal under the leniency policy where there was not enough evidence of such cartel activity. This could point to a new strategy whereby companies in doubt of having breached the law decide to play it safe and apply for leniency with very little to bring forward to the competition authority. This strategy may lead to unnecessary, costly and lengthy proceedings,” says Raimundo Ortega Bueno, Counsel with Jones Day in Madrid.



Juan Martín Menéndez



Miguel Riaño

Passive passive

Any assessment of the state of competition law and enforcement in Portugal must be taken in context, say lawyers there. There is no doubt that the competition arena is completely different to that which existed before the 2003 Competition Act. However while the goal of enacting modern competition legislation has been achieved – with reform of the Act now under consideration – there remains a considerable imbalance in the application of competition rules.

“Based on any criteria we are now at a much higher level as regards the understanding and application of competition law principles, but in Portugal competition law perhaps faces some specific issues, particularly in relation to the clarification of the antitrust rules of procedure,” says Carlos Botelho Moniz, Head of European Law and Competition at Morais Leitão Galvão Teles Soares da Silva & Associados (MLGTS).

There is a sense that in the merger control arena things are going well. The regulatory authority, Autoridade da Concorrência (AdC), has shortened clearance times and the process is regarded as efficient and effective – albeit the transactional markets are currently not so active. Average merger approval periods have reduced from 1.8 months in 2007 to 1.4 months in 2010.

“The major issue is on the restrictive practices side where there is a sense of confusion over the policy priorities and the position sometimes taken by the AdC. In the antitrust area it has made very deep sectoral enquiries but often there are no clear conclusions or precise indications in relation to enforcement priorities,” adds Botelho Moniz.

Since the appointment of a new leadership Council led by President Manuel Sebastião AdC investigations have faced delay, it has pursued cases erratically and often sought to make an example of highly subjective business practices, say lawyers.

“After almost eight years of existence, the AdC is to a certain extent now seen as a soft enforcer and very much concerned with closing old cases, but somehow less committed as a competition policy maker. If reducing the time for adopting decisions was the main goal in the past, rebirth as an active enforcer should be the challenge for the near future,” says Ricardo Oliveira, EU and Competition partner at PLMJ.

To many in Lisbon, the contrasting prominent position taken by the CNC is admired. “We look at the situation in Spain where the CNC has been purposely aggressive in investigating and progressing its agenda on the antitrust side, through the pursuit of cartels and the promotion of its leniency powers, but do not see the same reality in Portugal,” says João Paulo Teixeira de Matos, competition partner with Garrigues in Lisbon.

A major criticism is the transparency of the institution. The AdC has undertaken investigations and achieved prosecutions with only limited public disclosure. “Despite the severity of the fines imposed the rationale behind them remains unclear. The findings that determined anti-competitive behaviour had occurred in three of the cases have not been made public. You cannot have a public body making secret decisions,” says Miguel Mendes Pereira, a regulatory partner at Abreu Advogados in Lisbon.

Miguel Gorjão-Henriques, competition partner at Sérvulo agrees. “There are issues around the transparency of the AdC but also the ability of Parliament to ensure full accountability regarding the Authority’s performance. It does not seem equipped to ensure an adequate and rigorous control, based on the levels of analysis we have seen so far.”



Vanda Cascão

Recurring issues

Regardless of the ways in which the competition authorities tackle their remits competition issues continue to recur in the market, say lawyers. Anecdotal evidence suggests that the economic downturn is bringing increasing pressure on companies to enter into anti-competitive behaviour. "In times of economic crisis, companies are more eager than ever to have some sort of control over the prices at which their products are sold. In this context, they may be tempted to restrict competition, by exchanging sensitive commercial information with their competitors," says Oriol Armengol, competition partner with Pérez-Llorca in Madrid.

Others note however that with an increased profile, companies are becoming more aware of competition obligations and the rights available to them to address infringements. "Cartel prosecution has become a top priority across the EU and in Spain but which does not now only involve the administrative side of the problem, but the possibility of facing private damages claims in an increasing number of jurisdictions," says Jose Maria Jimenez-Iglesia, at DLA Piper in Madrid. Aligning European collective redress mechanisms is an issue that is gaining increasing momentum within the EU's Competition Authorities. "The European Commission is expected to bring new EU initiatives to try to eliminate national procedural hurdles which are viewed as having so far prevented the launch of effective redress actions," says Ainhoa Veiga, partner with Araoz & Rueda in Madrid.

In Spain, the number of claims for damages is growing but there remain cultural barriers before private "follow-on" actions really take off, say some. Portugal will likely however this year experience its first follow on damages claim for infringement of competition rules. "It is an area of opportunity and one that we are actively working on as important cases are emerging, as well as issues arising out of the sector enquiries undertaken by the AdC," says Gonçalo Anastácio, competition partner at SRS Advogados in Lisbon.

A question of priorities

The economic downturn is not only bringing new pressures to businesses but also to regulatory agencies, which have not proved immune to the austerity measures being implemented by national governments.

The CNC's annual budget of €13.3m has remained relatively steady, while the €10.7m set aside for the AdC at the start of 2010 was subsequently reduced to €9.1m. In light of such economic realities, the regulators have to prioritise and be more selective towards those cases in which it has the best chances of success or will make the strongest impact, say some lawyers.

Others sense also that a new approach to competition analysis is already being seen, with more flexibility and more economic-minded decisions. "The most important change emerging in the antitrust world is behavioural economics. It is an important incremental advance in our understanding, just as informational economics was before it. It will change our understanding of competition policy because it has a number of implications for the way in which markets work," says Juan Jimenez-Iglesia, at DLA Piper in Madrid.

Economic analysis of concentration issues may have added relevance in Spain over the coming year where lawyers sense a relative upturn in transactional activity, especially in areas such as banking and finance in Spain as the country's savings banks (cajas) continue to consolidate.

"The last few months have borne witness to an increase in the number of transactions filed with the CNC, relative to 2008 and 2009, and the pre-notification procedure for the majority of transactions has been consolidated. Penalties have been imposed on mergers subject to notifications that were

carried out before they were authorised or filed before the CNC," notes Javier Menor, partner with Deloitte Abogados in Barcelona.

Another area of evident importance as the downturn continues is the application and interpretation of state aid rules as Governments look to protect markets and market players. "It remains to be seen whether, overall, actions taken by competition authorities in the last two years particularly those intended to help "stabilise markets" – such as in relation with the financial crisis – shall bring clients as well as the authorities themselves new strategic issues and challenges," questions Veiga at Araoz & Rueda.

Smoking guns

Lawyers suggest that an aid to both the AdC and CNC in the current economic climate, would be to publish deeper analysis enabling both practitioners and companies to be aware of decision-making practice and to understand what conduct may be considered anti-competitive.

In addition, there is scope for more co-operation and "joined-up" thinking between regulators. There may be less work on concentration cases by value, as transaction levels have dropped, but market share issues continues to arise at both the national and European level. An issue, say some, is that even in those cases with a pan-European dimension, the CNC fixates on the Spanish element perhaps at the cost of seeing the bigger picture. "There remains limited interplay between sector regulators, but there is a sense among some operators that the CNC is being selective in its approach," says Alvaro Iza at Freshfields Bruckhaus Deringer in Madrid.

"From our experience, we must conclude that the European Commission is still not entirely aware of how critical the situation is in several member States, including Portugal, and seems willing to penalise companies much more than is reasonable. The crisis we live in also does not encourage parties – including public parties – to exercise fully its procedural rights and the Commission seems also to restrict – way beyond the case law – the procedural rights of parties," says Gorjão-Henriques at Sérvulo in Lisbon.

Some suggest however that a lack of resources is impacting on the quality of investigations being undertaken and thus prompting a greater emphasis on sector reports, in which suspect practices are identified. "We sense that some investigations are progressing without actual hard proof of wrongdoing, or merely because companies have proved unwilling to co-operate with investigations," says Jaime Folguera at Uría Menéndez in Madrid.

There is an evident shifting of the burden of proof regarding prohibited conduct towards market players themselves, say lawyers. This approach presents a challenge to lawyers defending their clients, who are presumed guilty of anti-competitive behaviour without any hard evidence. It is true that investigators are always looking for the "smoking gun", says Araujo at Garrigues.

"But in some cases, the regulators are using economic analysis to infer the existence of anti-competitive conduct, avoiding the need to prove agreements or concerted practices. That is certainly not the role of economics in infringement proceedings, and is liable to result in false convictions of perfectly competitive initiatives", says Araujo at Garrigues.

Engagement

Despite their frustrations lawyers have however to continue to engage with both the regulators and the legislators if they are to help progress the development and application of competition rules, they say.

"Our aim is to advocate the positive aspects of competition law and to work on influencing the legislation and regulator at different levels, including suggesting amendments to the Competition Act," says Botelho Moniz, a member of the Portuguese Association of Competition Lawyers established for such a purpose.

The concern, say many, is that competition policy will otherwise become irrelevant. "We have a sense that the AdC's point of view is very different to ours. We are very concerned at how they see the future of competition policy and enforcement in Portugal. There is no commonality or shared

understanding," says Oliveira at PLMJ.

Competition law is being applied less and procedural and material changes, although recognised as necessary by lawyers and public authorities, do not seem to move forward. "The competition authority has to have an 'authority'. Without this it carries no weight and businesses in Portugal have no fear of competition enforcement," says Nuno Ruiz at Vieira de Almeida.

Fundamentally the issue is one of belief. "Does the AdC actually believe in competition principles or is it content to be an interpreter of regulation," ask lawyers. It is very difficult to access cartels or deter monopolistic practices without a credible enforcement agency. The result in the Portuguese market is that there is a loss of deterrent effect. The AdC cannot catch everyone but the fear of being caught has to be real.

There is no doubt among the Portuguese legal community of the benefits of competition law principles, in promoting market efficiency and reducing artificial barriers to entry, but companies have to see the rules in action, say lawyers. "First of all we need an active enforcement role otherwise everything else is theoretical," says Teixeira de Matos at Garrigues.

"We have had high expectations as a result of the 2003 Act and there has been a clear and far reaching expansion of competition rules and policy. We thought the sky was the limit but have been sadly brought back to earth," adds Botelho Moniz.

Nonetheless lawyers see continued demand among the largest domestic and multinational companies for competition expertise. "The context of credit squeeze for companies, cutback of profits and anticipated aggressive market strategies challenges companies to procure efficiency, new markets and new services landmarks. Significant restructuring and possibly consolidation of certain industries can be expected once market conditions have stabilised," says Armando Martins Ferreira, partner with Abreu Advogados.

Joaquim Caimoto Duarte, Counsel with Uría Menéndez in Lisbon agrees. "Merger control work is growing slowly and is expected to continue to do so in 2011."

Lawyers in Spain take an almost opposite approach to the voracity of the regulator. "The trend towards a stricter approach to competition law enforcement by the CNC has moved a growing number of companies to pay more attention to the prevention of future problems in this regard by implementing internal compliance schemes," says Casto González-Páramo, competition partner at Hogan Lovells in Madrid.

Indeed, lawyers agree that compliance work is now a major area of activity. "Compliance is a major issue in many areas and one of the main concerns as regards competition law. Companies feel that they must carry out preventive work in order to avoid costly and lengthy investigations," says José María Beneyto, competition partner with Gómez Acebo & Pombo in Madrid.

A recurring issue for Spanish law firms is one of conflicts as a result of cartel investigations, say some. "If a client comes with concerns that they may be in a cartel situation it is not uncommon to find that among the other members may be one, two or even three other clients," says Andrew Ward, competition partner at Cuatrecasas Gonçalves Pereira in Madrid.

Competition law is a growth practice with a proliferation of law firms active in the sector, and increasingly seen as a vital element of a firm's commercial and regulatory practice.

Firms are also increasingly specialising along merger control, state aid and restrictive practices and, as in Portugal, along business sector lines.

"Restrictive practices and behavioural work is less affected by transactional levels, and perhaps even more acute in times of economic uncertainty. Competition law is not regarded by clients as a commodity practice," says Alvaro Iza, Competition partner with Freshfields Bruckhaus Deringer in Madrid.

Lawyers in Spain therefore predict a continued increase in enforcement and advocacy activities, dawn raids and leniency applications. "On occasions, the CNC is perceived to hold an overly strict stance on market practices and to sustain the existence of infringements even if no significant restrictive effect is proved. No changes are anticipated for 2011 unless the Courts adopt case-law

substantially reducing the scope of CNC's investigative powers," says Folguera at Uría Menéndez.

Public and Administrative Law – disputes rising in scale

The complex economic situation has clearly led to an increase in litigation and public law disputes, say lawyers in Spain. The upturn has been significant in the procurement field as the number of public tenders has decreased and the Government has sought to revisit existing projects.

"The stress that the economic and financial crisis has put on some long-term service of PPP contracts, for example, has led in some cases to intense and complicated negotiations between the contracting authorities and the contractors, and in some cases open litigation between the parties," says Mariano Magide, a public law partner with Uría Menéndez in Madrid.

The budgetary constraints faced by public authorities are also prompting a need for new contractual schemes, while the reform of sectors such as the saving banks (cajas), has also been a key issue during the last year. "Over the coming months, we can expect that all these trends will still play an important role. Additionally, the conversion of some public bodies – such as AENA or Loterías del Estado – into companies and their partial privatisation will be issues in the short and medium term," he adds.

The current economic situation is inevitably prompting clients to be more selective in the issues for which they seek external advice, say others. "There are far fewer projects and the main activity is to renegotiate existing projects with a difficult viability or economic imbalance, as well as renegotiating with third-parties, including financial entities, regarding the economics of problematic projects," says Lucas Osorio, partner with Hogan Lovells in Madrid.

The situation is equally acute in Portugal, say lawyers there. Major projects including sections of the proposed high speed rail network and new Lisbon airport have been delayed or postponed, but this has not necessarily meant a reduction in the administrative law needs of clients – merely affected the emphasis.

A great deal of the demand is being placed on the renegotiation of concessions and public private partnerships (PPP). Public authorities, both for economic and political reasons, feel the need to renegotiate PPPs already in force while financing difficulties are also forcing parties back to the negotiating table," says Lino Torgal, public law partner at Sérvulo.

Both companies and the public authorities are preparing for new more austere times, say lawyers in Lisbon. In some cases, when the projects are cancelled or indefinitely postponed, compensation is on the table. Firms are therefore seeing clients contemplate more "big ticket" disputes than engage in the negotiation path that characterised previous years.

"Risk assessment has become more strict and will likely remain so. Otherwise, the issues at stake in the global public law activity will probably remain unchanged," says Bernardo Diniz de Ayala, Public law partner with Uría Menéndez in Lisbon.