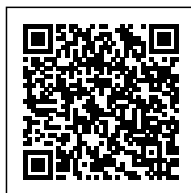


# IBERIA'S TELECOMS GIANTS HIT WITH ANTI-COMPETITIVE FINES

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## **The European Commission sends the market a clear signal that it will not stand for breaches of its competition regulations.**

Recent action against Iberia's largest telecoms companies Telefónica and Portugal Telecom (PT) serves as a harsh reminder of what happens when companies ignore European Commission (Commission) competition rules. It fined the pair €79m for an "illegal non-compete contract clause". Telefónica – which received a fine of €66.8m – and PT – which received a fine of €12.2m – were targeted as a result of a clause in Telefónica's 2010 buy-out contract of Brazilian mobile operator Vivo, previously jointly owned by the companies. The clause indicated that neither side would compete with each other in Spain and Portugal. Although the agreement was abandoned four months later, the Commission found that this clause was a breach of article 101 of the Treaty on the Functioning of the EU.

Uriá Menéndez is believed to be advising Telefónica, with Vieira de Almeida acting for PT.

The fine has prompted a mixed response from the market, with some seeing the move as fairly hard-line by the Commission, while others believe that history shows what to expect from violations. "The Commission seems very aggressive in this case and this is quite a substantial fine," one Spanish Competition Partner told Iberian Lawyer off the record. "The agreement was not what you would deem a 'classic cartel' and on the face of it could have been legal."

In contrast, one Lisbon Partner believes the fine was foreseeable and should not come as a shock. "The clause was not a central part of the deal but instead a side issue," he says also off the record given the sensitive nature of the matter. "It was not intended to come under such scrutiny but it was viewed as a violation and the Commission's record on competition violations is robust."

In a statement by the Commission, it explained that instead of competing with each other in offering clients the most advantageous conditions, as is expected in an open and competitive market, Telefónica and PT deliberately agreed to stay out of each other's home markets. "By preserving the status quo in Spain and Portugal, the agreement hindered the integration process of the EU telecoms sector. Non-compete agreements are one of the most serious violations of EU competition rules, as they potentially result in higher prices and less choice for consumers."

Recent high profile sanctions saw Intel hit with a €1bn fine for abuse of market dominance (which it challenged), while Saint Gobain was fined €896m for cartel activity in the car glass market. Even violations of procedure can be costly – Germany-based power outfit E.ON received a €38m fine after the EU claimed a seal placed on an office following an investigation had been tampered with. The statistics also show that the Commission is getting tougher, in terms of fines and enforcement. Between 1990 and 1994, it imposed €539.6m in fines for alleged cartel activity. This figure rocketed to €9.4bn between 2005 and 2009 and is on course to surpass that total in the next five years (2010–2012 was €5.3bn).

The indications are that the Commission will not be relaxing the rules to help troubled economies encourage growth, and companies are reminded not to focus just on domestic competition issues. They have made it clear that it has strict enforcement policy and it is going to stick with that despite the financial crisis, say lawyers. In Portugal, for example, the competition authority has been less harsh recently with fines so as to not overburden companies even further. But the strong feeling is that the Commission is not going to put competition enforcement on ice and will continue to pursue its policy.

Telefónica announced it is to appeal the fine while PT is reviewing the situation. Even so, lawyers say the Telefónica/PT case is a timely reminder that companies need to ensure they abide by EC rules. Companies need to be extremely careful on competition matters, they warn, as the Commission has always been tough on high-profile breaches but now it is sending out a message to the wider market.