

IN-HOUSE LAWYERS AT THE FOREFRONT OF THE FIGHT AGAINST CARTELS

Posted on 29/04/2010



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General Counsel must ensure processes exist to discover and deter anti-competitive behaviour

The increasingly high profile of competition regulation and regulators, and headlines detailing the dramatic success of anti-cartel and leniency investigations and applications, are prompting in-house lawyers to encourage greater emphasis on compliance and training within their business, participants stated at a recent In-House Club General Counsel Breakfast.

'In Spain, the Comisión Nacional de la Competencia (CNC) has clearly taken a very aggressive approach to tackling cartels, which it sees as harmful not only to specific markets but the economy as a whole. Virtually every significant sector of the economy has experienced an investigation,' stated Jesi's Moreno Vivas, Company Secretary and Head of Legal at Correos y Telégrafos, who moderated the debate: *Cartel or Leniency. Surviving the new Competition Regime – the new legal risks?*

Competition law enforcement in Spain has undergone a revolution, agreed Jaime Pérez-

Bustamante, Head of Competition at Linklaters in Madrid, who comoderated the breakfast. Since its formation in 2007, the Spanish competition regulator has launched over 195 cartel investigations, undertaken over 60 inspections, and imposed fines in excess of €195m.

In October 2009, the first damages were awarded to the victims of a cartel in Spain, in the sugar market, with further claims currently pending before the courts, and almost exactly a year after a leniency mechanism was introduced, this February saw the first whistle-blowing 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 'whistle-blower' Henkel had its €4.2m fine cleared, while Sara Lee's was reduced by 40%, after reportedly filing a leniency claim a mere 15 minutes after Henkel lodged its own with the CNC.

As well as the focus on the behaviour of specific companies, participants noted that the CNC now has a growing focus on professional associations and trade bodies, assessing the role they play in determining market sector norms, agreements and price controls. A recurring concern for General Counsel is how to manage the impact of an investigation and 'dawn raid' , understanding the limits of inspectors powers, what constitutes a 'fishing expedition' , and what communications may be covered by professional privilege – those between the company and the inhouse legal team or just those with external legal counsel.

In Spain, the CNC has the power to inspect not only a company's premises in order to uncover and seize relevant documents and communications, but also the homes and vehicles of the Directors and officers. Inspectors are however happy for lawyers – internal or external – to accompany them as they perform their duties, stated one who attended the debate. They explained however that while the search warrants used to access a premises will identify the aim of the inspection, there will inevitably be specific 'key words' that will inform specific electronic or email searches.

Recent investigations have uncovered cartels comprising a mere handful of companies to sectorwide abuses, a recent EC investigation in the cement sector focused on 77 companies, noted Moreno Vivas.

'A company needs to have processes and contingency plans that stretch from the very top to the very bottom of the organisation. These must be intended not only to deter anti-competitive behaviour but also to deal with abuses if they are discovered.'

The challenge for General Counsel is not merely having the relevant understanding of the threat and repercussions of anti-competitive behaviour, but in communicating the importance of this right across their organisations, believes Pérez-Bustamante.

As one General Counsel stated, 'Besides the monetary impact of a prosecution, through fines and now damages claims, there is also the reputation risk which is unquantifiable. The stakes are so high that awareness cannot be merely left to the lawyers we must ensure it become a training and compliance concern for the whole business.'

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