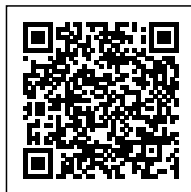


THE CONTINUING COMPETITION LAW CHALLENGE

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Competition law concerns continue to prompt legal departments to have to find not only new ways of transmitting the importance of compliance but also of ensuring the message is understood

A recent meeting of Iberian Lawyer's In-House Club in Barcelona brought together an invited group of General Counsel from leading Catalonia-based companies to discuss competition concerns. Particularly, how to better prevent and where

necessary manage inspections and potential investigations by the Spanish Comisión Nacional de la Competencia (CNC) and European Commission's competition authorities.

Moderated by Abertis Head of Legal Marta Casas and Linklaters' competition partner Jaime Pérez-Bustamante, debate participants stressed the importance of raising awareness about competition issues throughout their companies.

The challenge, said many, is not merely expanding their own legal teams understanding of the issues, or the potential liabilities for anti-competitive behaviour, but how to properly convey to all company departments, and especially to sales and marketing personnel, what behaviour is illicit and what the legal consequences may be both for the company and for individuals.

"Adherence to competition law principles is vital for business at all levels. The CNC's focus and success over the past year on breaking up cartels demonstrates the importance companies' legal departments must have not only to ensure corporate operate within the rules, but also that all employees understand the dangers," said Casas.

Pérez-Bustamante highlighted the increasing activity of the CNC, and the process that surrounds 'dawn raids' on companies' premises. In addition, he noted the rising volume and value of fines being imposed by national and EU competition authorities, and the increasing emphasis towards the use of leniency tools in cartel investigations and prosecutions.

General Counsel from multinational companies including General Electric, PepsiCo and Cargill drew attention to the importance within their own organisations of effective compliance programs intended to prevent breaches of competition regulation. In addition, participants highlighted the importance also of having the unconditional support of the Board and management team in order to implement any such protocols company-wide.

"The key is to raise awareness in an easily absorbed way and this task normally now falls to the legal department," said John Rigau, Vice-President of Legal at PepsiCo Europe. For some General Counsel this brings additional responsibility to the company legal and compliance teams and there is a continuing search for the most effective ways of not merely passing the message across but ensuring that it is taken into account in the way business is actually conducted.

"Today, having a specific company protocol is no longer a mitigating factor so any error can have serious consequences. Legal departments have to utilise simple albeit perhaps more creative ways of transmitting the message, such as through the use of videos, software, or even through mock inspections," suggested Pérez-Bustamante.

Such demands however place additional burdens on in-house teams who must take on an educational as well as supervisory role. The illegality of concepts such as cartels may be relatively simple to explain to non-lawyers, say some, but other areas of competition law, such as abuse of dominance, are clearly more subjective and often require an understanding of precedents and economic analysis, which lawyers may not even be best placed to do.

A clear challenge for Spanish lawyers can also be gaining sufficient practical understanding of some competition concepts, especially because of the clear influence of Anglo-Saxon law in its development at the European level, said others. Such differences can again make it difficult for lawyers to explain issues clearly to company managers. While in a purely legal context, constitutional concerns are in any event also now being raised over some Spanish competition law provisions, especially those related to leniency.

Finally, General Counsel highlighted the challenge of keeping up to date with developments in the role it is playing in encouraging the continuing inflow into Spain of new or expanded legal remedies – notably potential liability for civil damages a breach may bring – and the growing trend towards the criminalisation of anti-competitive behaviour. It is a trend that Spain might very well follow in the near future.