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EU & Competition 2012: Regulatory change: re-starting Iberian competition policy

The economic downturn across Iberia continues to impact on the competition arena. There may be less merger control activity, but State Aid, antitrust and cartel issues remain at the top of lawyers' agendas, especially in Spain. A major concern of lawyers in Portugal however is the draft of a new Competition Law, which will impact on policy, enforcement and judicial decision-making.

For Spanish lawyers competition law is now a major area of work. The national regulator the Comisión Nacional de la Competencia (CNC) is among the most high profile of all Spain's regulatory agencies having pursued an aggressive policy towards tackling anti-competitive behaviour.

The key issue facing clients is the risk of non-compliance in an environment where business pressures are ever-tougher, says Jaime Pérez-Bustamante, Head of Competition at Linklaters in Madrid. "In Spain, companies face a CNC with very limited discretion to reject complaints. Its agenda is often set by opportunistic complainants, rather than by a conscious effort to seek out and prioritise – or reject – cases based on the public interest and how consumers would benefit from an intervention."

A key area of focus has been the pursuit of cartels, with companies often underestimating the risks of being involved in investigations, say lawyers. "Sometimes companies were unaware that this activity was taking place; in other cases it was not perceived as a risk. All that is now history as cartel detection has improved so much. But in this context companies that divert resources away from compliance run the risk of putting themselves in danger," says Marcos Araujo, Head of Competition at Garrigues.

Despite the pressure on the Government to reduce public spending, the CNC looks to be providing value for money.

"As a general rule, we do not expect that the budgetary restraints will affect the resources currently in the hands of the competition authorities," says Jaime Folguera, Head of Competition at Uría Menéndez in Madrid. "In Spain, in particular, it has been announced that more stress will be put on sector enquiries aimed at promoting a high degree of competition in certain sectors."

Trade associations have been the subject of increasing scrutiny by the CNC and many are now seeking advice even when they are not the target of an investigation.



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“They want to ensure that their operations and procedures are compliant in advance of any eventual concerns. The demand for specialised cartel-related advice is therefore at this moment not only reactive but also proactive,” says Pedro Suárez, Competition Partner at Ramón y Cajal in Madrid.

M&A activity may be far off the pre-crisis peaks but merger control work does continue, note others. And in a depressed economy the CNC is devoting more resources to analyse the merits of transactions. But with a lack of finance, more companies are also looking at alternative ways of growing market share, which is also attracting closer competition analysis, says Rafael Baena, Competition Partner at Ashurst in Madrid.

“The options are consolidation, in order to produce economies of scale, or co-operating with other companies, especially clients and suppliers. Co-operation is more and more important and the authorities at both the national and EU level will have to pay more attention to vertical issues.”

Non-compliance

In Portugal, the economic environment may be even more challenging but the competition issues being faced are different. The main issues faced are a lack of antitrust enforcement by the national regulator, the AdC, and the potential impact on the economy of the situation facing the euro and Portugal's position in it, say lawyers in Lisbon.

A recurring issue is therefore how to ensure companies comply with competition rules in a market in which the AdC is not a feared entity, say many.

“Meeting this challenge may prove increasingly more demanding as the majority of Portuguese companies are struggling with shrinking budgets including for compliance purposes,” says Ricardo Oliveira, Competition Partner at PLMJ in Lisbon.

Despite the Portuguese Government's ongoing privatisation programme, lawyers in Portugal report a significant drop in domestic merger work. But as businesses fight for survival, and market share, competition issues may become increasingly important for those that survive, says Miguel Gorjão-Henriques, Competition Partner at Sérvulo.

“Market restructuring seems to be a key concept: it is worth noting that market attentiveness towards dominant companies' behaviour would seem to be relevant. Although there are no positive



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expectations if you consider the AdC's apparent lack of interest in competition advocacy and compliance."

Increased powers

A lack of regulatory interest is not something Spanish lawyers complain of. Indeed, all eyes are now on the CNC to see how a recent change of leadership will affect enforcement policy.

Joaquín García Bernaldo De Quirós, a career Judge, was appointed President last October following the end of Luis Berenguer's tenure – whose own profile as a cartel buster exceeded that of his agency. García Bernaldo De Quirós' arrival may lead to a less "results orientated" approach, suggest some, and help to improve the quality and consistency of the CNC's legal analysis.

"We hope for more flexibility and more considered decisions. You simply cannot put forward a case before a competition authority without sound economic rationale," says Juan Jiménez-Laiglesia, Litigation and Regulatory Partner at DLA Piper in Madrid.

Competition legislation and enforcement policy remain however in constant evolution. Spain's Competition Act was only rewritten in 2007 yet further regulatory and structural changes have been proposed by Spain's new Government.

"The CNC's new President has publicly praised the accomplishments under Luis Berenguer and embraced continuity, but within the Government's agenda is a major restructuring of sector regulators and agencies, the CNC included," explains Ainhoa Veiga, Partner with Araoz & Rueda in Madrid. The Government has expressed a desire to increase the CNC's powers to coordinate and supervise the activities of other sector-specific regulatory bodies, such as the influential energy (Comisión Nacional de Energía – CNE) and telecoms (Comisión del Mercado de las Telecomunicaciones – CMT) regulators, in regard to which it has increasing jurisdictional overlap.

"In industries such as telecoms or energy, dealing with a dual regulatory enforcement system, with sector-specific regulators on the one hand, and the CNC, on the other hand is a major challenge," says Francisco Cantos, Head of Competition at Freshfields in Madrid.



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At the same time, there are also proposals for the CNC to absorb the activities of the competition authorities of Spain's 17 Autonomous Regions – Castilla La-Mancha having already closed its agency citing budget cuts.

While some lawyers suggest that a more joined-up approach to competition is no bad thing, many are nonetheless concerned that a “super” CNC may become increasingly creative (as well as strict) in its interpretation of competition issues. Statements have already been made to the effect that Government agencies may even face fines for facilitating cartels.

“There is a sense that the CNC is becoming obsessed and starting to see cartels everywhere,” says Jesús Alfaro, Competition Partner at CMS Albiñana y Suárez de Lezo.

The coming months will see the outcome of appeals emanating from Spain's first cartel and leniency cases with some lawyers predicting the possibility that a number of decisions may be overturned. Nonetheless, the CNC's aggressive approach continues, including the current focus on trade associations and the exchange of confidential information between competitors.

“In this regard, the CNC has been one of the first national authorities to apply, quite aggressively, the new EC Guidelines on Horizontal Agreements,” says Gerard Pérez Olmo, Partner at GOLD Abogados in Madrid.

Lawyers report however an apparent decrease in new leniency applications in recent months, in part because of the uncertainty surrounding earlier decisions.

“The number of leniency new investigations is not negligible, but we have not seen the wave of cases we had a couple of years ago. On the other hand, the fact that the CNC's new President comes from the judiciary may now help reinforce the legal robustness of decisions,” says Oriol Armengol, Head of Competition at Pérez-Llorca.

The initial fervour may have subsided but companies must try to fight any temptation to relax their behaviour in this regard, believe others. “The investigative emphasis is focusing more towards preventing horizontal agreements, and this is particularly relevant as regards exchanges of sensitive information, which at the end of the day is being treated by the CNC as a 100 percent cartel,” says Miguel Odriozola, Competition Partner with Clifford Chance in Madrid.



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Antitrust activity on the whole remains constant but merger control work has been affected by the general downturn. However with fewer cases before the CNC lawyers still express concern over the length of both pre-notification and notification procedures, even with the introduction last year of a de minimis rule exempting certain smaller transactions from seeking competition clearance.

“From a merger perspective, the main challenge continues to be diverging approaches between competition agencies around the world, both in terms of length of the authorisation procedures and on the substantive analysis,” says Cani Fernández, Head of Competition and EU at Cuatrecasas Gonçalves Pereira in Madrid.

European influence

Spain and Portugal are also inevitably affected by developments at the EU level. With lawyers highlighting the vertical and horizontal block exemptions and accompanying guidelines adopted in 2011 as containing welcome clarifications, in addition to developments on information exchange with national regulators, while looking ahead, many point to the likely adoption of the long-awaited EU directive on private damages actions.

Yet some also highlight the continuing flexibility being shown particularly in State Aid cases, as the EC continues to react to the impact of the economic downturn throughout Europe – evident not only in the substance of the cases handled, but also in a more stringent approach to timelines and review periods.

“At the EU level, the financial and economic crisis has obliged the authorities to regulate against the clock since the peak of the crisis in 2008, but also to execute and enforce competition policy in a more flexible way. This is a trend that is expected to last into 2012, at least from the enforcement side,” says Iñigo Igartua, Competition Partner at Gómez-Acebo & Pombo.

Both the EC and CNC have shown greater flexibility to accommodate procedural deadlines where transactions required early clearances due to financial or budgetary constraints, say others. “This must be recognised as a sign of greater efficiency and perhaps a more ‘market oriented’ approach by the authorities,” says Antonio Martínez, Competition Partner at Allen & Overy in Madrid.



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Pressure

Pressure from Brussels is also being felt in Portugal, notably in the form of the commitments the Government gave to the “Troika” of the EC, ECB and IMF as a condition of its €78bn financial assistance package agreed in 2011. Included among which was reform of the court system and of the national competition regulation – with a new draft Competition Law proposed by the AdC.

“This draft was the result of a perceived insufficiency regarding the substantive tools already available to the AdC to pursue its objectives. With the enactment of a new Law, a substantial increase in the degree and depth of public enforcement is expected, as well as a shift in policy with, for example, clearer enforcement priorities,” says Pedro Fajardo, Competition Partner with CMS Rui Pena in Lisbon.

In the Government’s public consultation period the AdC’s proposals were however strongly challenged by various parties including the Portuguese Competition Lawyer’s Association, but the draft of which is currently before the Parliament, as are proposals to create a distinct Competition Court. “Significant legislative amendments to the Law are expected following the consultation period but we still expect that the AdC’s enforcement tools will be enhanced,” says Joaquim Caimoto Duarte, Competition Counsel at Uría Menéndez in Portugal.

Many lawyers suggest however that the major issue in Portugal is not the quality of the Competition legislation but rather the consistency of approach by the AdC. In the past two years it has issued only two negative antitrust decisions and does not make its rulings public.

“The competition authority has always desired more power, but it seems not to have used the power it already has. Ultimately the AdC has been paving the way for regulators, private parties and courts to decide what the competition policy options should be,” says Nuno Ruiz, Head of EU and Competition at Vieira de Almeida.

But while the Antitrust Division may not be highly thought of, the Merger Control and Economic Research Unit is.

“Merger control has continued on a steady path to increased predictability, transparency and swiftness. It may now be considered in line with enforcement best practice around the world,” says Oliveira at PLMJ.



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Levels of antitrust enforcement activity have therefore not changed significantly in the downturn although change has been felt elsewhere. One already successful measure imposed by the Troika has been to encourage the sale by the Portuguese Government of its remaining shares in major public businesses.

“Until now there have been no significant changes in Portuguese legislation besides last year’s highly publicised elimination of the State’s ‘Golden shares’ and the other special rights it held in a number of public companies. But 2012 will bring new developments,” says Sofia Ferreira Enriquez, Competition Partner at Raposo Bernardo in Lisbon.

Persistent approaches

Looking ahead therefore, lawyers in Spain predict a steady increase in competition issues and the powers of the CNC, while those in Portugal see continuing uncertainty.

Spanish lawyers sense a continuing focus on cartel investigations perhaps aided by developments at the EU level, including the long-awaited Private Enforcement Directive to be approved in 2012.

Likewise, the relatively large number of appeals of CNC decisions will now begin to be decided. “It is important to note the willingness of the Audiencia Nacional to reduce the fines imposed by the CNC when the principle of proportionality has not been respected,” says Martínez at Allen & Overy. Merger control is likely to remain at present levels, but perhaps because of the economic environment some predict this may yet mean a rise in complexity.

“The wider liquidity issues facing business may mean an increased use of the ‘failing firm’ defence. But the same environment may also ‘encourage’ businesses to engage in horizontal and vertical collaborations, with the objective of reducing their costs and commercial risks – behaviour that the CNC is determined to target,” says Javier Menor, Head of Competition at Deloitte Abogados.

On top of this, State Aid and public financing will continue to grow, say others. With the aviation sector, and particularly Authorities’ support of local airports, already prompting high-profile judicial challenges.



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Private prosecutions

The relative reluctance of the AdC to prosecute perceived cartel activity may also prompt an upturn in private damages claims in Portugal, believe some.

“If the AdC fails to enforce antitrust rules one solution is for aggrieved parties to seek redress themselves, and we predict a rise in private enforcement claims. There will not be a flood of cases but a wave that we think will steadily grow,” says Miguel Mendes Pereira, Partner with Vieira de Almeida in Lisbon.

Essential in this is the proposed creation of the new Competition Court, adds leading competition practitioner Mario Marques Mendes. “We may have concerns over the physical location of the Court, an hour outside Lisbon, and who the actual Judges will be, but the fact that it exists is a major step forward – it helps to put competition enforcement on the map.”

Others reiterate that in the current enforcement climate the use of alternative competition remedies may increase.

“The AdC is the primary enforcement body but it is not the only one. The ability of parties to launch their own actions and the creation of a dedicated Competition Court will mean that issues are given more analysis, and if the AdC will not act the Judges will,” says Armando Martins Ferreira, Head of Competition at Abreu Advogados.

Merger control activity will though remain depressed, believe many, in part because proposed Competition Law modifications may make merger notification harder, with likely changes to market share threshold levels. Reports of potential mergers among Portugal’s banks are discounted but a number of lawyers do point to the telecoms sector as throwing up increasingly complex issues.

“Many of the competition concerns we now see have a direct connection to the economic environment: companies are concerned about the future and are either cutting down on their compliance spending or engaging in actions that may infringe competition rules. Portugal’s new Competition Law will not cure these problems but it may make people more aware of them,” says João Paulo Teixeira de Matos, Competition and Litigation Partner at Garrigues in Lisbon.

Others remain cautiously optimistic over the Eurozone’s ability to progressively solve its debt overhang albeit any bounce in international investor confidence for both Spain and Portugal will likely be limited.



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“Bearing in mind the complex perspective for 2012, we expect to maintain the level of antitrust work derived from investigations, as well as a growing number of companies implementing compliance training,” says Casto González-Páramo, Head of Competition at Hogan Lovells in Spain.

Lawyers in Portugal are looking further ahead. “The situation in Portugal is a difficult one. But while the Government’s ongoing privatisation programme is first and foremost about raising money it is also helping to liberalise the economy, and in this respect promoting a greater degree of competition between operators. Add to this clearer competition regulation and it may ultimately benefit everybody,” concludes Anastácio at SRS Advogados.

Source: Iberian Lawyer