

EU & Competition Report 2013: A culture of change



Portugal's new competition law and Competition Authority (PCA) Council may finally be what instills a lacking competition culture in the country, say lawyers, while Spain's new Super Regulator has everyone on tenterhooks as to whether or not it is a positive step forwards.

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It's all change in Iberia's EU & Competition area. The EU Commission's (the Commission) scrutiny of its competition community is on the rise, and authorities continue their fight against cartels and other anticompetitive practices.

2012 and 2013 have seen numerous developments in the Iberian antitrust and competition arena and one thing is for sure, lawyers agree – EU and Competition is taking the stage as an increasingly crucial practice area.

At an EU level, says Francisco Cantos, Head of EU & Competition at Freshfields Bruckhaus Deringer Spain, probably one of the key developments has been the draft EU Damages Directive.

The publication in mid-2013 of the so-called 'package of compensation of damages' is finally intended to unlock a 2005 initiative, and the most important step made by the Commission in the field of Competition, according to Luis Berenguer, former President of Spain's National Competition Commission (CNC) and Senior Adviser at Broseta Abogados. "When the proposed Directive is definitely adopted, those negatively affected will have an essential element to claim the damages caused by anti-competitive behaviour and this will intensify the deterrent effect, especially of cartels."

Private enforcement is a hot topic, and the Commission's proposal recommends common principles for injunction and compensatory collective redress mechanisms concerning violations of rights granted under EU Law as well as the proposal for a Damages Directive on actions. It is expected that the directive, when adopted, will allow the creation of the necessary tools for more effective private enforcement, says João Paulo Teixeira de Matos, Head of EU and Competition at Garrigues Portugal. The Draft Directive grants private claimants access to a minimum amount of evidence necessary to pursue damages actions in national courts, explains Sönke Lund, a Partner at Monereo Meyer Marinello Abogados. Member States will need to introduce rules allowing national courts to order disclosure of evidence needed to prove antitrust damages. "And we expect that the consequent transposition into national law will have a direct consequence a large rise of private litigation cases before national courts," says Ramón García-Gallardo, EU and Competition Partner at King & Wood Mallesons SJ Berwin, Madrid.

Commission clampdown

The Commission continues to fight against mergers that fall within its thresholds and launched two public consultations this year to make administrative procedures less burdensome for businesses and stimulate competitiveness within the EU.

One is to extend the EU merger control regime to cover non-controlling minority shareholdings. Many clients have voiced their concerns about this proposal, say lawyers, as the current merger control system already imposes very significant costs on companies, and it makes little sense to simply extend the current system, and its flaws, to cover minority stakes. Such changes would be replicated at national level, which would aggravate the problem further.

Additionally, 2013's Commission decision prohibiting the UPS/TNT Express merger, and 2012's blocking the Deutsche Börse/NYSE Euronext and Ryanair/Aer Lingus

deals show how the Commission will not hesitate to block mergers that it considers raise serious concerns if the parties are not able to offer suitable remedies, says Javier Ruiz Calzado, Vice Chair of Litigation and EU and Spanish Competition Partner at Latham & Watkins.

From an EU perspective, 2013 has seen a key development in the so-called ‘e-books case’, under which arrangements between several book publishers and Apple have been found to be restrictive of competition and, therefore, illegal. The case represents a major antitrust intervention in a rapidly-developing and expanding consumer technology sector, says Oriol Armengol, EU & Competition Partner at Pérez-Llorca, and highlights the international nature of antitrust enforcement in global markets. The economic crisis has also highlighted the assessment of State Aid measures by the Commission to ensure that such measures comply with EU rules, and a State Aid reform programme is underway, say lawyers, earmarking public funds to help industries and companies in need.

Increasing inspections

Investigation bodies across the Iberian Peninsula have been extremely active. In Spain, there have been recent significant changes in inspection practices and there is controversy surrounding how these take place and breaches of legal privilege, says José María Jiménez-Laiglesia, Head of EU & Competition at DLA Piper Spain. “This is unfortunate as we should have already a settled practice.”

The powers of inspection are interpreted by the Competition Authority in a very broad manner, adds says Jaime Pérez-Bustamante, Competition Partner at Linklaters Madrid. “The rights of defence of the companies and the privacy concerns of their employees are not given sufficient weight and consequently many dawn raids are being challenged in the courts.”

Clients are increasingly interested in the powers of the Competition Authority from an IT perspective, particularly in light of the massive use of laptops, mobile phones, tablets, etc, as well as tools such as internet messaging, cloud services and so on, says Álvaro Pascual, Head of Competition, Regulation and Trade at Herbert Smith Freehills Spain. It is becoming increasingly difficult for advisers to confidently oppose the authority trying to access certain categories of information, particularly given the blurred boundaries between professional and personal use of IT.



“The old Council concentrated on reorganisation and restructuring, and succeeded in keeping a good Merger Control Department, however it had a poor enforcement record. The new Council is expected to take a proactive stance, especially in relation to enforcement.”
Carlos Botelho Moniz, Morais Leitão, Galvão Teles, Soares da Silva & Associados

The PCA is also focusing on exchange of sensitive information and materials particularly in the banking sector, as evidenced by the biggest dawn raid ever in Portugal, carried out on 15 banks in early 2013 to obtain evidence of any exchange of commercially sensitive information between the banks involved, says Luís Silva Morais, Founding Partner at EU, Competition and Economic Regulation boutique Luís Silva Morais & Associados. “Curiously it is a matter in which the PCA seems to be aligned with the Commission investigations on rate manipulation by banks, and it is bound to be

a test case for the PCA.”

The ‘Super’ Regulator

Undoubtedly the biggest change in Spain has been the creation of the National Markets and Competition Commission (CNMC), merging the CNC with the energy, telecommunications, railways regulation and mail services bodies.

No one in the EU has made such a radical change to their regulators – perhaps with the exception of the Netherlands – and the change seems to have been prompted

by a desire to avoid clashes between competition and regulatory authorities, explains Pedro Callol, Head of EU & Competition at Roca Junyent. “In particular, the CNC and the Telecoms NRA were at loggerheads in the framework of the Abertis price-squeeze case in the media signal transmission market.”

The reaction of the Spanish antitrust community has been rather negative, say lawyers. Even the Commission manifested its concerns about the moves. However, by contrast with telecoms or the energy national regulators, the EU Commission has no legal standing to say how the national competition authorities should be organised, explains Rafael Allendesalazar, EU & Competition Partner at Martínez Lage, Allendesalazar & Brokelmann. “They can say they don’t like it but that is about as far as it goes.”

The general consensus among antitrust lawyers is that the CNC was working fine and, although there were natural discrepancies from a legal perspective, the system did not need to go through a complete overhaul. “What we want from the CNMC is to ensure that we have at least the level of service that we had before,” says José Antonio de la Calle, Managing Partner of DelaCalle Abogados. “When we speak with clients the thing they hate most is uncertainty. We need to manage their expectations – and establishing confidence in the new system at the moment is a challenge.”

One of the problems is that there are issues that have not been regulated, explains Begoña Barrantes, Senior Associate in EU & Competition at Clifford Chance, Spain, such as the way that the regulatory and competition chambers of the Council will interact in certain instances when exercising competences which corresponded to the regulators and the competition authority under the previous regime.

Going forward, the key is to ensure the preservation of the 2007 Competition Act, stresses José María Jiménez-Laiglesia, Head of EU & Competition at DLA Piper Spain. “It is a good instrument, it works and gives us and our clients a predictable framework.”

However, leaving policy decisions aside, there are technical provisions within the Competition Act that do need to be addressed, in particular those concerning coordination of regulatory and competition law jurisdiction, says Patricia Liñán Hernández, EU & Competition Partner at CMS Albiñana & Suárez de Lezo.

Courts and council

Lawyers praise the former CNC’s more recent approach to competition enforcement. And in its last months the CNC opened a lot of investigations, but they are still pending before the new Regulator – and the clock is ticking, says Marcos Araujo, Head of EU & Competition at Garrigues, Spain. “Hopefully the appointment of Eduardo Prieto as Director of Competition will speed things up and ensure there is no further backlog.”

The increase in the level of fines in recent years has been astonishing, both at national and EU level, say lawyers. Fines imposed by the Spanish competition authority for cartel infringements increased from €57m in 2007 to more than €454m in 2013. But at the same time, says Iñigo Igartua Arregui at Gómez-Acebo & Pombo, Madrid, the enhanced prosecution of cartels in Spain is constantly being questioned before Courts.

The Supreme Court has reviewed, frequently reduced and annulled many of the penalties imposed by the CNC, with lawyers estimating around 50 percent of appeals against fining decisions as partially or entirely allowed. “We have seen some judicial review moves by the Spanish Audiencia Nacional that are very relevant, in particular it has changed the way in which the amount of fines are determined,” says Jaime Folguera, Head of Competition at Uría Menéndez, “which is a courageous move”.

The appointment of a new Council has also raised some concern. “Unfortunately, with the appointment many feel we lost an opportunity to have made a real difference to their approach and include people with day-to-day legal and real world experience in the field of Competition Law,” says Rafael Baena, Head of EU and Competition at Ashurst, Spain.

Given the lack of experience of part of the new Council, explains Casto González-Páramo, Head of Competition at Hogan Lovells, Madrid, it can probably be expected that, at least in the beginning, its decisions will mostly follow the proposals of the Directorate of Investigation.

But the new Council is made up of entirely new people and this may be a good thing as it could bring a fresh perspective and approach to certain improvable aspects of the decision phase, says Cani Fernández, Head of EU & Competition at Cuatrecasas Gonçalves Pereira, for example the use of hearings before the Council, something that was much needed.

All change

Portugal also has a new Competition Council to contend with, as well as a Competition Law that has only been in force for a year. Lawyers say that so far the country has lacked a competition culture, however these two moves are a step in the right direction.

The new Law harmonised the domestic regime with that of the EU, created a specialised Competition Court, as well as the conditions for stronger competition enforcement. The PCA now has a complete set of tools, at the same level as that of the most advanced authorities in the world, says Gonçalo Anastácio, Head of EU & Competition at SRS Advogados. “The challenges of the past year have prompted a clear statement at political level that the country needs more efficient enforcement.” And both the Government and Troika are pushing clear political messages addressing the lack of competition.

“The creation of a cartel unit is also a clear message that the Authorities are focusing on compliance,” according to Ricardo Bordalo Junqueiro, Of Counsel in EU & Competition at Cuatrecasas Gonçalves Pereira, Lisbon.

However, with only just over a year in place, the practical impact of the new law is still difficult to assess, says Adelaide Moura, Managing Partner at A.M. Moura Advogados. “So far, it seems that the changes in the new law and especially the reinforced powers of the PCA have not produced significant additional changes or constraints to companies.”

2013 has therefore been a very important year to analyse decisions of the new Court and the PCA in to be able to identify the trends in terms of law interpretation and application, says Sofia Ferreira Enriquez, Head of EU and Competition at Raposo Bernardo. And of the few relevant decisions available to date, the trend has been for the court to confirm the important conviction decisions of the PCA, say lawyers.

The PCA has also published a set of guidelines providing more transparency on the application of its terms, and last year disclosed its three priorities: to optimise its work on competition enforcement and advocacy, to contribute to effective application of the new Competition Act, and to bolster its capacity to act, explains Joana Gomes dos Santos, Associate in the Competition Department at Caiado Guerreiro & Associados.

Since then the PCA has been very active with cases spanning from ex officio merger control, to the application of fines for abuse of dominant position, anti-cartel investigations and effective enforcement and also sector regulatory policy advisory. “We believe that this increased active and intervening role has played an important part in preventing, or reducing the number of, abuses and anticompetitive practices that would otherwise have flourished in this crisis environment,” says Ricardo Henriques, Senior Associate in Competition at pabr.

New leadership

The PCA also recently appointed a new Council, and lawyers are optimistic. Many of the problems Portugal used to have with competition law were that the PCA's interpretation of the previous Competition Act sometimes failed at court. “The reason the past Council had no results is that they didn't learn from the lawyers – we raise

problems, doubts and concerns and give them perspectives,” says Nuno Ruiz, Head of EU & Competition at Vieira de Almeida & Associados. “Without these they failed before the courts.”

The old Council concentrated on reorganisation and restructuring, and succeeded in keeping a good Merger Control Department, however it had a poor enforcement record, says Carlos Botelho Moniz, Head of EU & Competition at Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS). “The new Council is expected to take a proactive stance, especially in relation to enforcement.”

It is also heavily focused on pursuing anti-cartel enforcement through leniency cases, but they will need to show a strong hand before there is a solid base for the multiplication of such cases, says Ricardo Oliveira, Head of EU & Competition at PLMJ. “There are many upsides to the new Competition Law and Board, but the best way to describe our feeling at the moment is cautious optimism.”

“The Competition Law as it is now is a powerful instrument, and with the appointment of the new Chairman, we hopefully have someone on the Board whose knowledge and background anticipates a thorough understanding of the realities of the market and an effective application of the law,” says Mário Marques Mendes, Founding Partner of Marques Mendes & Associados.

Help or hindrance

Regulatory activity within the EU continues to be of the utmost importance to facilitate the entry and expansion of companies into new global markets. The performance of the Commission and members of the International Competition Network (ICN) authorities, coordinated among themselves and with other competition authorities outside the EU, has improved progressively, says Luis Berenguer, Senior Adviser at Broseta Abogados, resulting in the strengthening of legal certainty and facilitating the presence of companies in other markets.

“Of course, there are still many barriers remaining to global business,” says Ainhoa Veiga, EU & Competition Partner at Araoz & Rueda, “but, generally, I would say EU regulation overwhelmingly helps more than hinders business to operate and compete in international markets”.

This harmonisation of EU competition rules allows foreign investors to manage their expectations, for instance, as legal consequences of anti-competitive practices, says António de Macedo Vitorino, Competition Partner at Macedo Vitorino & Associados, and helps clients operating and competing in international markets.

Some practical aspects of EU regulation, while providing a guarantee of legal certainty to companies and to their investments, can still hinder. The money laundry regulations, for example, oblige all contracting or advising parties to identify in a very detailed way the individuals and companies involved in an operation and the property of the final shareholders when the parties involved are companies. Sometimes the information required is hard to get, says Ángel Valdés, Head of EU and Competition Law at Lupicinio Abogados International Attorneys, and dealing with it delays operations.

EU Merger Control Regulation also has some undesired effects in transactions carried out in non-EU countries. As thresholds are exclusively based on the turnover of the undertakings concerned, transactions carried out by two or more large EU companies in, for instance, Asia or America, usually also require EU clearance. This gives rise to hindering the capability of EU companies to invest abroad, says Antonio Martínez Sánchez, Competition and Antitrust Partner at Allen & Overy. “In most cases, such obstacle does not seem necessary to guarantee free competition.”

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In the end, one needs to look at the bigger picture, says Rui Souto, Senior Associate in Commercial and Competition at Pedro Raposo & Associados, and understand that EU Competition rules seek competition and economic efficiency and the avoidance of artificial barriers to the entry of new players in the market caused by other market players, monopolies and/or oligopolies.

In Portugal in particular, a big issue revolves around whether the country has the adequate incentives that allow companies to be competitive and compliant with corporate regulations. “But I understand that the Government and regulators are doing their best to modulate the existing conditions and mechanisms to improve such incentives and give objective perspectives, especially to investors in general,” says Armando Martins Ferreira, Head of Competition, Regulatory and EU at Abreu Advogados. “There are constraints impeding competition, everyone could point out an extensive list – we need more transparency and effective accountability.”

The fight goes on

Spain’s Super Regulator is going to be the key focus for the year ahead, say lawyers. The CNC accumulated a great deal of goodwill and was highly recognised, with a reputation as one of the world’s most efficient competition authorities, and it will be a challenge for the CNMC to sustain that level of respect, says Folguera at Uría Menéndez. “But there is a solid base from which to move forwards, with good regulation, competent team of civil servants, independent and hard-working judges, good lawyers and economists and continuity in the body in charge of the cases.”

While the introduction by the Portuguese Government of a much more enforcement friendly framework, after an extensive public debate, has made a world of difference to the competition environment, says Anastácio at SRS Advogados. And the way the new Competition Law was adopted, with a public consultation process involving different stakeholders, is a very positive sign of a new attitude towards the promotion of a competition culture, adds Botelho Moniz at MLGTS.

“But it is only once we see stiff sanctions being applied that we should really see big changes in the competition environment and attitude in Portugal,” says Carlos Pinto Correia, Head of Competition & Antitrust at Linklaters, Lisbon.

“We need to be sensible in relation to enforcement within the limits of reason, as the current Law sometimes allows us to go beyond what is legal or constitutional,” adds Miguel Gorjão-Henriques, Head of EU & Competition Partner at Sérvulo & Associados. “But it is a great basis for the development of a competition culture in Portugal.” Competition is most definitely high on agendas around the EU, with the Commission continuing to clamp down on anti-competitive behaviour say lawyers, and this is a fight that shows no signs of abating. A competition culture is truly beginning to flourish and with it this increasingly important practice area.

Clients’ concerns

Today’s changing competition environment is a real opportunity for lawyers to call their clients’ attention to competition and compliance, says Joaquim Caimoto Duarte, Head of EU & Competition at Uría Menéndez - Proença de Carvalho. The intensification of EU and domestic Competition Authority investigations and sanctioning has led to a huge demand for advice in relation to compliance.

Clients want compliance programmes and self-assessment reports because the companies’ managers are aware of the high fines that may be imposed for Competition Law infringements, says Alberto Escudero, Head of Competition at Baker & McKenzie, Madrid. And given that the total amount of fines imposed by the CNMC in the last year exceeded €400m, clients in all industries are increasingly requesting advice on competition compliance including how to deal with dawn raids, says Crisanto

Pérez-Abad, Head of EU & Competition at Eversheds Nicea, as well as to provide them with substantive competition guidelines and seminars.

In Portugal, clients need for advice ranges from the analysis of restrictive practices, to vertical agreements and their compliance with EU Law, says Patrícia Fragoso Martins, Head of EU & Competition at Campos Ferreira Sá Carneiro & Associados, as well as the assessment of concentrations for purposes of notification to the PCA. In Spain, the key concern continues to be the fight against cartels. But a noteworthy development is that some clients have sought advice over the last year in relation to the Competition Authority's advocacy function, says Pedro Suárez, a Competition and Distribution Partner at Ramón y Cajal Abogados. "Reports issued by the Authority in relation to sectors or proposed legislation are more and more influential, which explains why companies seek to influence the position of the Authority in relation to issues that affect their business."

The current economic situation has also led to certain players to certain horizontal cooperation schemes in order to minimise the commercial risks to which they are exposed. These projects require self-assessment of their compatibility with the Competition regulations, says Joan Torrelles, Senior Associate at Deloitte Abogados thereby ensuring that the implementation of such cooperation conforms to the Law and avoids the serious consequences of non-compliance.

In recent years, many companies have been fined due to exchanges of sensitive information between competitors. This is a 'grey area' as there is a fine line between what could be authorised and what is forbidden by Competition Law, says Gerard Pérez Olmo, Head of Competition and Regulation at GOLD Abogados. "This motivates greater concern between clients and the need for specific advice, both with preventive reasons (compliance) and reactive reasons (defence in investigation cases)."