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EU & Competition Report 2017: Lack of bite



Competition enforcement in Spain has weakened due to uncertainty surrounding the country's competition authority, though it has increased significantly in Portugal – meanwhile, the EU directive on antitrust damages will make clients less likely to apply for leniency

Competition enforcement in Spain has suffered due to the problems endured by the Spanish competition authority. It is now proposed that the National Commission on Markets and Competition (CNMC) be split into two entities in an effort to make it function better. While this is seen as a positive step, partly because the commission is inviting opinions on how it can improve the way it operates, it has also had negative repercussions – the uncertainty surrounding the organisation has meant that its competition enforcement function has not performed as well as would have been expected. However, the EU Directive on antitrust damages claims will

What have been the most significant developments in the area of EU and Competition in the last year?

"The EU Commission's increased scrutiny of new business models and their impact on consumers. The commission is focused on ensuring consumers are treated fairly in the roll out of new services and ways of doing business, with companies engaged in e-commerce or digital platforms remaining in the spotlight." **Álvaro Iza, partner, Freshfields Bruckhaus Deringer**

"At EU level, (i) massive fines imposed in cartel cases (notably in the truck manufacturers case); (ii) the European Commission has initiated investigations again on vertical agreements (notably in the e-commerce field); and (iii) the European Court of Justice has followed an effects-based approach towards exclusivity and loyalty rebates in the Intel case." **Alberto Escudero, partner, Baker McKenzie**

"All over Europe, national competition authorities seem to have increased their efforts to combat public bid rigging. For example, the UK Competition Authority has launched several initiatives in the last two years to help contracting authorities to detect and report potential bid rigging practices – similarly, in 2016 the Portuguese Competition Authority launched an on-going campaign "Fighting Bid-Rigging in Public Procurement". **Manuel Bermúdez Caballero, senior associate, Deloitte Legal**

"In view of the steady growth of online sales in the EU over the past years, the European Commission launched an inquiry focused on consumer goods that are frequently sold online. The final report of the European Commission shows its concerns about price transparency, the increasing control of manufacturers over distribution networks, the use of data in e-commerce and the adoption of geo-blocking measures, among others." **Henar González, partner, Herbert Smith Freehills**

"We have seen a reduced number of leniency applications partly due to uncertainty over how subsequently being prohibited from being hired will apply to leniency applicants, and partly due to concern over the potential increase in private damages in the wake of new legislation that aims to increase such actions." **Marta Delgado, partner, Jones Day**

"The Spanish competition authority seems to be consolidating a new approach to its fining policy after the Spanish Supreme Court annulled the previous and EU-inspired fining guidelines. Meanwhile, the authority and courts have made progress in defining the situations where individuals can also be fined for their involvement in antitrust offences." **Borja Martínez Corral, director, KPMG Abogados**

"At an EU level, the Intel decision issued by the Court of Justice of the European Union, as it sets aside the judgement of the General Court, addressing the situation from the perspective of the effects of a certain practice (fidelity rebates) and not from the formalistic approach of the Hoffmann-La Roche case." **Sofia Ferreira Enriquez, partner, Raposo Bernardo**

"At national level, 2017 witnessed a significant increase in behavioural and cartel-related work, following a series of high-profile inspections carried out by the Portuguese Competition Authority. It is significant that the authority decided to carry out in a short span of time more inspections than it had done in the past few years combined." **João Pateira Ferreira, managing associate, Linklaters (Portugal)**

generate opportunities for lawyers. Meanwhile, the Portuguese Competition Authority has significantly stepped up its enforcement efforts and carried out a significant amount of dawn raids in the last year.

Jaime Pérez-Bustamante, partner at Linklaters and a member of the firm's partnership board, highlights the implementation of the EU Directive on antitrust damages claims as one of the key developments in the area of EU and competition law in the last 12 months. Meanwhile, Pérez-Bustamante also highlights the long-awaited Court of Justice long decision in the Intel case, which annulled the fine of €1.1 billion imposed to the company in an abuse of dominance case. He adds: "This is the first time that the court has required an effects-based analysis in an exclusivity rebate case." It is anticipated that the court's decision could embolden companies like Google and Apple which have received significant fines from the EU. Google was fined €2.4 billion after a seven-year investigation concluded the company had abused its internet search monopoly. Meanwhile, in 2016, the Irish government was ordered to claw back €12 billion in unpaid taxes from Apple, after the EU Commission ruled that the company's tax arrangements in Ireland constituted illegal state aid.

Another significant recent development, according to Pérez-Bustamante, was the Spanish National Commission on Markets and Competition (CNMC) taking the step of announcing a new policy of imposing fines on individuals involved in competition infringements in cartel cases. However, some lawyers argue that the fines on individuals (which go up to a maximum of €60,000) may be an insufficient deterrent. DLA Piper partner José María Jiménez-Laiglesia says proposals to split the CNMC into two separate bodies – one focusing on competition and one concentrating on regulating markets – has undermined the organisation as it has restricted its enforcement capability and says that there has been a recognition that "mistakes were made [when six separate entities were merged to form the CNMC] and the CNMC has been losing cases". Casto González-Páramo Rodríguez, partner at Hogan Lovells, said the CNMC has finally opened up and allowed competition law experts to give their opinion on how to "improve the application of competition law". He adds: "This is a remarkable change, there have been public consultations on topics such as merger control procedure and the leniency programme – this has increased interaction with the CNMC."

There now seems to be a "breath of fresh air" at the CNMC, according to Oriol Armengol, partner at Pérez-Llorca. "There are new board members who will hopefully help to smooth over internal conflicts that have adversely affected the institution's work and prestige," he says. Armengol adds that the implementation of the EU Directive on antitrust damages claims will reduce the incentive for clients to ask for leniency. "There could be a decrease in leniency applications, which may result in fewer cartels being discovered," he says.

The view that the EU Directive could reduce the number of clients seeking leniency is echoed by Bird & Bird partner Patricia Liñán. "Leniency is at risk," she says.

Liñán adds that there has been a decrease in legal work related to anti-competitive behaviour, partly because of the decrease in the CNMC's activity. However, she adds

that the cost to companies of infringing competition law is increasing and therefore it is essential that companies invest in compliance.

Another significant pending issue in the field of competition law is the CNMC's consultation regarding guidelines on imposing fines, says Antonio Martínez, partner at Allen & Overy. "The 2009 CNMC guidelines on imposing fines were set aside in 2015, and now comments are being invited on new guidelines, in which the principle of proportionality needs to be taken into account."

Cuatrecasas partner Andrew Ward says one concern for clients is that some recent European Commission decisions – such as the ruling that the Irish government

should recover €12 billion in unpaid taxes from Apple and record fines imposed on Google – could signify a trend towards a more “populist, combative path, compared to the previous approach of seeking solutions through commitment decisions”. He adds that, although such decisions appear to give greater certainty, cases like Google do not actually “provide much guidance as to what companies must do in order to comply and as a result do not contribute positively to the development of competition law”.

Explosion in cases

Jiménez-Laiglesia says another opportunity for law firms is advising clients on their business practices from a competition perspective. He adds that the amount of work available to competition lawyers is also dependent on the level of M&A activity in the market. Jiménez-Laiglesia also says that, despite the EU Directive on antitrust damages, he does not expect to see an “explosion in damages cases”.

If there is an increase in competition damages claims, the risk for competition lawyers is that competition work could go to litigation departments in future, “which may impact partners’ income in non-lockstep firms”, says Pérez-Bustamante.

According to González-Páramo Rodríguez, in the event of a rise in antitrust damages claims, an issue for major law firms could be conflict of interest in that leading firms will often be involved in cases as a defendant.

Lawyers say clients are now concerned about potential damages claims and the associated reputational impact. In general, awareness of competition law among clients in Spain is on the increase. Another opportunity for law firms is the introduction of a new law related to public procurement, Armengol explains. He adds that the new law will bring about an amendment of the Competition Act that will enable the CNMC to prevent companies involved in bid-rigging from being awarded public procurement contracts by the Spanish state.

Some major companies have in-house legal teams focusing on competition law, according to Martínez. He adds that some in-house departments ask law firms to provide them with training on competition. Meanwhile, Uría Menéndez partner Alfonso Gutiérrez says state aid cases may create business opportunities for lawyers in the future. He adds that some clients are recruiting competition lawyers for their in-house teams to “reinforce competition compliance and culture.”

Law firms are providing “more preemptive advice” for clients in relation to competition law, says Ashurst partner Rafael Baena. He adds that it is difficult to tell if there has been an improvement in “competition culture” within companies because the CNMC has been less active.



There is greater awareness of competition law among clients which is good news for competition lawyers, says one partner. However, lawyers report that “behavioural work” is in decline due to the decline in the CNMC’s activity. Yet more clients are now investing in competition compliance programmes, particularly due to the risk of facing a criminal investigation, according to Baena.

The role of external lawyers in helping to ensure clients do not infringe employment law is still very important, says Ward. “Specialist outside counsel have a breadth of [competition law] expertise that in-house lawyers will rarely have,” he says.

Ward believes lawyers in private practice are better placed to benchmark clients’ competition compliance programmes against industry best practice and adds that although smaller organisations specialised in compliance programmes have emerged, full-service law firms have a “significant advantage due to their access to colleagues specialised in data protection, white collar crime and employment law”.

Some competition-related legal work is becoming more commoditised, says Martínez. However, he adds that clients also require more sophisticated advice where the impact of technology is limited and a lot of partner involvement is required as it concerns the interpretation of human behaviour. In general, clients want more information on legal costs and more efficiency from a technological perspective, Baena says. He adds: “Competition law is not a commodity, a lot of expertise is really important to avoid risks.”

Portugal: Greater enforcement

In Portugal, the main development in 2017 from a competition perspective has been the Portuguese Competition Authority (PCA) significantly increasing its enforcement efforts, says MLGTS partner Joaquim Vieira Peres. “Throughout the year, the authority carried out extended dawn raids in the retail distribution, insurance, driving schools and rail maintenance sector,” he explains. However, the authority’s actions have been controversial, Vieira Peres adds. “It imposed a fine of €38 million on energy company EDP and supermarket operator Continente for entering into a joint promotional campaign, which the authority viewed as including a horizontal non-compete agreement similar to a cartel,” he says. “The theory of harm of the case is very questionable and the decision has been appealed, but the authority’s views on joint promotional agreements – which are similar to agency agreements – and on the concept of ‘potential competition’ are cause for concern.”

PLMJ partner Ricardo Oliveira echoes the view that the Portuguese competition authority’s enforcement activities have been unprecedented. “It [the PCA] has carried out nearly 40 dawn raids over the past year, which is far in excess of what we’ve seen during prior years,” he says. “The sectors targeted include retail, insurance, railway maintenance, driving instruction and transport.” Oliveira says such activity is generating significant opportunities for law firms.

Decisions in pending cases related to dawn raids carried out by the PCA are keeping law firms busy, says Cuatrecasas partner Ricardo Bordalo Junqueiro. “On the other hand, some landmark competition authority investigations have moved forward which is a positive development, considering the PCA’s reputation for taking a long period of time to investigate cases.”

Competition in the market for EU and competition-related legal service has never been greater, according to Oliveira. “There is an increasing number of law firms developing capabilities to pitch for top-tier competition work,” he says. “This trend has been reinforced by the perception that the regulator’s activism will open up significant opportunities for high added-value work.”

At the EU level, one of the biggest recent developments has been the leading truck producers’ cartel case that has led to “multiple follow-on claims by countless parties, in particular in German courts, which is probably the first real pan-European judicial claim of its sort”, says Luís Romão, senior associate at CMS Rui Pena

What are currently the biggest opportunities for law firms in the area of EU and Competition?

“In Spain, the CNMC (Comisión Nacional de los Mercados y la Competencia) is not only maintaining its scrutiny of cartels – including bid-rigging – but is also expected to set up an economic intelligence unit, with the aim of using statistic tools to unveil collusive behaviour.” **Carlos Végez, head of competition, Broseta**

“Participation in international transactions continues to be an opportunity, as we see consolidation continues to occur in several sectors of activity. Depending on the proactivity of competition authorities and their effect on deterrence, competition compliance programmes may also be important, especially when coupled with anti-fraud and anti-corruption programmes.” **Margarida Rosado da Fonseca, of counsel, DLA Piper ABCC**

“Two sectors that can offer great opportunities include public sector contracting and e-commerce. In relation to e-commerce, the activity of online platforms will be a huge focus – the European Commission has proposed an amendment to merger regulations as e-commerce is now eluding these controls.” **José Ayllón, partner, Ecija**

The transposition of the damages directive constitutes a very important opportunity, not only for competition lawyers, but also for litigators, with whom it is necessary to work side by side. It is essential to disseminate what this regulation means, to make people aware of the new possibilities regarding the right to claim.” **Jorge Álvarez, partner, Ontier**

“The development of new digital business models, such as the collaborative economy, and the globalisation of demand and supply through e-commerce, is a great challenge and a great opportunity.” **Carlos Hernández Rivera, partner, RCD – Rousaud Costas Duran**

“Financial markets require highly sophisticated and rigorous advice. Demand in this area is increasing. Prevention and compliance are also expanding areas of work.” **Roberto Vallina Hoset, senior associate, Roca Junyent**

“Private enforcement of competition law will become an opportunity with the projected implementation of the EU directive on private enforcement (Directive 2014/104/EU) into Portuguese law.” **Cláudia Fernandes Martins, senior managing associate, Macedo Vitorino & Associados**

What are the biggest challenges EU & Competition lawyers currently face?

"Given the significant increase in the Portuguese Competition Authority's activity, one of the biggest challenges antitrust lawyers will face will be the approach taken by the Portuguese appeal courts in important matters raised at appeal level, such as access to evidence or rights of defence." **Joaquim Caimoto Duarte, counsel, Uría Menéndez-Proença de Carvalho**

"The interpretation of which activities could be considered collusion, oligopoly and collective dominance and which are not, and clarification of the definition of affected markets could be considered a big challenge for law firms." **Adolfo Soria, partner, BDO Abogados**

"The uncertainties around the outcome of Brexit. As negotiations unfold and pressures develop, many issues will emerge for lawyers on every transaction or investigation and we will have to evaluate and consider how to manage and allocate new risks." **Ainhoa Veiga, partner, Araoz & Rueda**

"Working together with litigators and economic experts in damages claims and understanding and dealing with very complex technology and e-commerce in a greater range of issues and contexts." **Iñigo Igartua Arregui, partner, Gómez-Acebo & Pombo**

"Creating a culture of competition in Spain. There is still a need to raise awareness among stakeholders and society in general about the importance and relevance of EU & Competition law." **Pedro Rubio, partner, Ontier**

"Adapting their traditional public enforcement practice to a mixed practice where private enforcement will take an increasingly important role. This certainly requires acquiring a set of skills in private litigation that most specialist competition teams in Spain lack." **Pedro Suárez, partner, Ramón y Cajal**

"Raising awareness among natural and legal persons of the need to comply with EU and competition law." **Francisco Espregueira Mendes, partner, Telles de Abreu Advogados**

"With the introduction of the GDPR and the PSD2 [the second payment services directive], the EU regulator has continued to focus on the e-commerce sector and competitiveness within that industry. Lawyers around Europe have struggled to keep up with the legal blowback from the continuous stream of innovation applied to e-commerce, banking and finance, among others – 2018 promises to be a year full of new challenges for lawyers." **Ricardo Rodrigues Lopes, partner, Caiado Guerreiro**

"Understanding the new economy and also the upcoming separation of the CNMC into two different bodies, as well as the modernisation of the law to correct the errors of the past." **Diego Crespo, partner, Marimón Abogados**

"Competition law enforcement is moving into new areas of law, such as civil law (follow-on damages actions) and criminal law (the new CNMC policy to fine executives, which requires a quasi-criminal defence), for which competition lawyers must be prepared." **Helmut Brokelmann, managing partner, Martínez Lage, Allendesalazar & Brokelmann**

& Arnaut. He also highlights the European Commission's e-commerce sector inquiry and the subsequent cases it has brought against some retailers in relation to business practices that restrict competition and limit consumer choice.

EU and competition lawyers in Portugal face a number of challenges connected to global trends, according to Margarida Rosado da Fonseca, of counsel at DLA Piper ABBC. She adds: "For example, growing protectionism and screening of foreign investment, coupled with increased state aid in countries where it is not scrutinised – unlike within the European Union - meaning therefore, there is not a level playing field. These challenges require more pragmatism on the part of lawyers and awareness of clients' businesses to facilitate legal solutions which suit them best and take into account the overall perspective."

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