

Bringing weight to competition policy



The economic downturn has contributed to an increase in the importance of competition law issues in Spain and Portugal, but there are clear differences in the ways in which the domestic regulators in each country are implementing competition policy, say experts.

The nature and relative volume of the issues lawyers now see inevitably reflects the depressed nature of the wider economy. There is much less emphasis on merger control – there are fewer transactions and fewer still of significant size – but a continuing rise in importance of state aid, cartel and abuse of dominant position claims.

"The Spanish Comisión Nacional de la Competencia (CNC) has publicly stated that the economic difficulties are better remedied with more competitive markets and has increased its enforcement and advocacy activities. As a result, antitrust compliance has become a genuinely important issue for many companies, and a key strategic issue in certain economic sectors," says Jaime Folguera, Head of Competition at Uría Menéndez.

La crisis ha resaltado la importancia del Derecho de la competencia en España y Portugal, aunque hay claras diferencias en las políticas de cada regulador y autoridad nacional. En España, la Comisión Nacional de la Competencia se ha convertido en protagonista del mercado, ya consolidados y con menor nivel de agresividad, especialmente en inspecciones por cárteles. En Portugal, los abogados expresan cierta envidia hacia el país vecino ya que la Autoridade da Concorrência ha acertado en el control de concentraciones, pero las investigaciones por conductas anticompetitivas aún no muestran la solidez necesaria.

Passive aggressive

In Spain, lawyers report that after a flood of leniency applications following the enactment of whistle-blowing and leniency legislation in 2009, the volume of cartel and restrictive practices actions initiated by the CNC may however now be levelling out.

"The CNC has managed to send a clear message as to the dangers and liabilities that lie ahead for companies engaging in cartels or other restrictive practices. It is now well-established as a force in the market," says Jaime Pérez-Bustamente, Head of Competition at Linklaters in Madrid.

Significant also, as a result of this success, is the emergence of follow-on actions, say others. "The number of leniency cases may have plateaued but the fall-out from those cases already decided is now upon us. Businesses are more aware of their rights. The Judges in the commercial courts are also more aware of competition issues, and much more ready to enforce them," says Rafael Allendesalazar, partner with Howrey Martínez-Lage in Madrid.

A new maturity is also evident within the CNC, say some. The initial fervour and adversarial stance often taken has been replaced by a more measured attitude,

especially as regards cartel investigations. The CNC is more experienced and perhaps more reflective in the way it seeks out and manages cases.

"The CNC arguably used its new whistle-blowing and leniency powers to shake-up the market and to communicate that anti-competitive behaviour will face heavy sanctions. Now it is using more self-restraint. Its agents are more experienced and there is less tension," says Marcos Araujo, Head of Competition at Garrigues in Madrid.

Competition lawyers in Spain state that the CNC has therefore proved a success in fostering a stronger competition culture in Spain. The high media profile of "dawn raids", sector enquiries, and prosecutions has induced the requisite fear among businesses, while it is also now looking to engage better with the Government and legislators.

"The Spanish authority is particularly proactive in the field of cartel prosecution but also in the promotion of competition. In the last year, a number of interesting reports have been issued analysing competition issues which should now generate changes of law in areas such as intellectual property and administrative contracts," says Gerard Pérez Olmo of Madrid's Gold Abogados.

Nonetheless some lawyers continue to question some of the CNC's working methods. It is not "mono-coloured" say some, there remain areas of strength and weakness. In addition, there is a sense that the CNC has encouraged leniency applications from businesses that do not warrant them.

"Certain conduct has been notified as illegal under the leniency policy where there was not enough evidence of such cartel activity. This could point to a new strategy whereby companies in doubt of having breached the law decide to play it safe and apply for leniency with very little to bring forward to the competition authority. This strategy may lead to unnecessary, costly and lengthy proceedings," says Raimundo Ortega Bueno, Counsel with Jones Day in Madrid.

Passive passive

Any assessment of the state of competition law and enforcement in Portugal must be taken in context, say lawyers there. There is no doubt that the competition arena is completely different to that which existed before the 2003 Competition Act. However while the goal of enacting modern competition legislation has been achieved – with reform of the Act now under consideration – there remains a considerable imbalance in the application of competition rules.

"Based on any criteria we are now at a much higher level as regards the understanding and application of

competition law principles, but in Portugal competition law perhaps faces some specific issues, particularly in relation to the clarification of the antitrust rules of procedure," says Carlos Botelho Moniz, Head of European Law and Competition at Morais Leitão Galvão Teles Soares da Silva & Associados (MLGTS).

There is a sense that in the merger control arena things are going well. The regulatory authority, Autoridade da Concorrência (AdC), has shortened clearance times and the process is regarded as efficient and effective – albeit the transactional markets are currently not so active. Average merger approval periods have reduced from 1.8 months in 2007 to 1.4 months in 2010.

"The major issue is on the restrictive practices side where there is a sense of confusion over the policy priorities and the position sometimes taken by the AdC. In the antitrust area it has made very deep sectoral enquiries but often there are no clear conclusions or precise indications in relation to enforcement priorities," adds Botelho Moniz.

Since the appointment of a new leadership Council led by President Manuel Sebastião AdC investigations have faced delay, it has pursued cases erratically and often sought to make an example of highly subjective business practices, say lawyers.

"After almost eight years of existence, the AdC is to a certain extent now seen as a soft enforcer and very much concerned with closing old cases, but somehow less committed as a competition policy maker. If reducing the time for adopting decisions was the main goal in the past, rebirth as an active enforcer should be the challenge for the near future," says Ricardo Oliveira, EU and Competition partner at PLMJ.

To many in Lisbon, the contrasting prominent position taken by the CNC is admired. "We look at the situation in Spain where the CNC has been purposely aggressive in investigating and progressing its agenda on the antitrust side, through the pursuit of cartels and the promotion of its leniency powers, but do not see the same reality in Portugal," says João Paulo Teixeira de Matos, competition partner with Garrigues in Lisbon.

A major criticism is the transparency of the institution. The AdC has undertaken investigations and achieved prosecutions with only limited public disclosure. "Despite the severity of the fines imposed the rationale behind them remains unclear. The findings that determined anti-competitive behaviour had occurred in three of the cases have not been made public. You cannot have a public body making secret decisions," says Miguel Mendes Pereira, a regulatory partner at Abreu Advogados in Lisbon.

Miguel Gorjão-Henriques, competition partner at Sérvulo agrees. "There are issues around the transparency of the AdC but also the ability of Parliament to ensure full accountability regarding the Authority's performance. It does not seem equipped to ensure an adequate and rigorous control, based on the levels of analysis we have seen so far."

Recurring issues

Regardless of the ways in which the competition authorities tackle their remits competition issues continue to recur in the market, say lawyers. Anecdotal evidence suggests that the economic downturn is bringing increasing pressure on companies to enter into anti-competitive behaviour.

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"In times of economic crisis, companies are more eager than ever to have some sort of control over the prices at which their products are sold. In this context, they may be tempted to restrict competition, by exchanging sensitive commercial information with their competitors," says Oriol Armengol, competition partner with Pérez-Llorca in Madrid.

Others note however that with an increased profile, companies are becoming more aware of competition obligations and the rights available to them to address infringements. "Cartel prosecution has become a top priority across the EU and in Spain but which does not now only involve the administrative side of the problem, but the possibility of facing private damages claims in an increasing number of jurisdictions," says Jose Maria Jimenez-Iglesia, at DLA Piper in Madrid.

Aligning European collective redress mechanisms is an issue that is gaining increasing momentum within the EU's Competition Authorities. "The European Commission is expected to bring new EU initiatives to try to eliminate national procedural hurdles which are viewed as having so far prevented the launch of effective redress actions," says Ainhoa Veiga, partner with Araoz & Rueda in Madrid.

In Spain, the number of claims for damages is growing but there remain cultural barriers before private "follow-on" actions really take off, say some. Portugal will likely however this year experience its first follow on damages claim for infringement of competition rules. "It is an area of opportunity and one that we are actively working on as important cases are emerging, as well as issues arising out of the sector enquiries undertaken by the AdC," says Gonçalo Anastácio, competition partner at SRS Advogados in Lisbon.

A question of priorities

The economic downturn is not only bringing new pressures to businesses but also to regulatory agencies, which have not proved immune to the austerity measures being implemented by national governments.

The CNC's annual budget of €13.3m has remained relatively steady, while the €10.7m set aside for the AdC at the start of 2010 was subsequently reduced to €9.1m. In light of such economic realities, the regulators have to prioritise and be more selective towards those cases in which it has the best chances of success or will make the strongest impact, say some lawyers.

Others sense also that a new approach to competition analysis is already being seen, with more flexibility and more economic-minded decisions. "The most important change emerging in the antitrust world is behavioural economics. It is an important incremental advance in our understanding, just as informational economics was before it. It will change our understanding of competition policy because it has a number of implications for the way in which markets work," says Juan Jimenez-Iglesia, at DLA Piper in Madrid.

Economic analysis of concentration issues may have added relevance in Spain over the coming year where lawyers sense a relative upturn in transactional activity, especially in areas such as banking and finance in Spain as the country's savings banks (cajas) continue to consolidate.



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“The last few months have borne witness to an increase in the number of transactions filed with the CNC, relative to 2008 and 2009, and the pre-notification procedure for the majority of transactions has been consolidated. Penalties have been imposed on mergers subject to notifications that were carried out before they were authorised or filed before the CNC,” notes Javier Menor, partner with Deloitte Abogados in Barcelona.

Another area of evident importance as the downturn continues is the application and interpretation of state aid rules as Governments look to protect markets and market players. “It remains to be seen whether, overall, actions taken by competition authorities in the last two years particularly those intended to help “stabilise markets” – such as in relation with the financial crisis – shall bring clients as well as the authorities themselves new strategic issues and challenges,” questions Veiga at Araoz & Rueda.

Smoking guns

Lawyers suggest that an aid to both the AdC and CNC in the current economic climate, would be to publish deeper analysis enabling both practitioners and companies to be aware of decision-making practice and to understand what conduct may be considered anti-competitive.

In addition, there is scope for more co-operation and “joined-up” thinking between regulators. There may be less work on concentration cases by value, as transaction levels have dropped, but market share issues continues to arise at both the national and European level. An issue, say some, is that even in those cases with a pan-European dimension, the CNC fixates on the Spanish element perhaps at the cost of seeing the bigger picture. “There remains limited interplay between sector regulators, but there is a sense among some operators that the CNC is being selective in its approach,” says Alvaro Iza at Freshfields Bruckhaus Deringer in Madrid.

“From our experience, we must conclude that the European Commission is still not entirely aware of how critical the situation is in several member States, including Portugal, and seems willing to penalise companies much more than is reasonable. The crisis we live in also does not encourage parties – including public parties – to exercise fully its procedural rights and the Commission seems also to restrict – way beyond the case law – the procedural rights of parties,” says Gorjão-Henriques at Sérvulo in Lisbon.

Some suggest however that a lack of resources is impacting on the quality of investigations being undertaken and thus prompting a greater emphasis on sector reports, in which suspect practices are identified. “We sense that some investigations are progressing without actual hard proof of wrongdoing, or merely because companies have proved unwilling to co-operate with investigations,” says Jaime Folguera at Uría Menéndez in Madrid. There is an evident shifting of the burden of proof regarding prohibited conduct towards market players themselves, say lawyers. This approach presents a challenge to lawyers defending their clients, who are presumed guilty of anti-competitive behaviour without any hard evidence. It is true that investigators are always

looking for the “smoking gun”, says Araujo at Garrigues.

“But in some cases, the regulators are using economic analysis to infer the existence of anti-competitive conduct, avoiding the need to prove agreements or concerted practices. That is certainly not the role of economics in infringement proceedings, and

is liable to result in false convictions of perfectly competitive initiatives”, says Araujo at Garrigues.

Engagement

Despite their frustrations lawyers have however to continue to engage with both the regulators and the legislators if they are to help progress the development and application of competition rules, they say.

“Our aim is to advocate the positive aspects of competition law and to work on influencing the legislation and regulator at different levels, including suggesting amendments to the Competition Act,” says Botelho Moniz, a member of the Portuguese Association of Competition Lawyers established for such a purpose.

The concern, say many, is that competition policy will otherwise become irrelevant. “We have a sense that the AdC’s point of view is very different to ours. We are very concerned at how they see the future of competition policy and enforcement in Portugal. There is no commonality or shared understanding,” says Oliveira at PLMJ.

Competition law is being applied less and procedural and material changes, although recognised as necessary by lawyers and public authorities, do not seem to move forward. “The competition authority has to have an ‘authority’. Without this it carries no weight and businesses in Portugal have no fear of competition enforcement,” says Nuno Ruiz at Vieira de Almeida.

Fundamentally the issue is one of belief. “Does the AdC actually believe in competition principles or is it content to be an interpreter of regulation,” ask lawyers. It is very difficult to access cartels or deter monopolistic practices without a credible enforcement agency. The result in the Portuguese market is that there is a loss of deterrent effect. The AdC cannot catch everyone but the fear of being caught has to be real.

There is no doubt among the Portuguese legal community of the benefits of competition law principles, in promoting market efficiency and reducing artificial barriers to entry, but companies have to see the rules in action, say lawyers. “First of all we need an active enforcement role otherwise everything else is theoretical,” says Teixeira de Matos at Garrigues.

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Nonetheless lawyers see continued demand among the largest domestic and multinational companies for competition expertise. “The context of credit squeeze for companies, cutback of profits and anticipated aggressive



market strategies challenges companies to procure efficiency, new markets and new services landmarks. Significant restructuring and possibly consolidation of certain industries can be expected once market conditions have stabilised," says Armando Martins Ferreira, partner with Abreu Advogados.

Joaquim Caimoto Duarte, Counsel with Uría Menéndez in Lisbon agrees. "Merger control work is growing slowly and is expected to continue to do so in 2011."

Lawyers in Spain take an almost opposite approach to the voracity of the regulator. "The trend towards a stricter approach to competition law enforcement by the CNC has moved a growing number of companies to pay more attention to the prevention of future problems in this regard by implementing internal compliance schemes," says Casto González-Páramo, competition partner at Hogan Lovells in Madrid.

Indeed, lawyers agree that compliance work is now a major area of activity.

"Compliance is a major issue in many areas and one of the main concerns as regards competition law. Companies feel that they must carry out preventive work in order to avoid costly and lengthy investigations," says José María Beneyto, competition partner with Gómez Acebo & Pombo in Madrid.

A recurring issue for Spanish law firms is one of conflicts as a result of cartel investigations, say some. "If a client comes with concerns that they may be in a cartel situation it is not uncommon to

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Alvaro Iza, Freshfields Bruckhaus Deringer



find that among the other members may be one, two or even three other clients," says Andrew Ward, competition partner at Cuatrecasas Gonçalves Pereira in Madrid.

Competition law is a growth practice with a proliferation of law firms active in the sector, and increasingly seen as a vital element of a firm's commercial and regulatory practice.

Firms are also increasingly specialising along merger control, state aid and restrictive practices and, as in Portugal, along business sector lines.

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Lawyers in Spain therefore predict a continued increase in enforcement and advocacy activities, dawn raids and leniency applications. "On occasions, the CNC is perceived to hold an overly strict stance on market practices and to sustain the existence of infringements even if no significant restrictive effect is proved. No changes are anticipated for 2011 unless the Courts adopt case-law substantially reducing the scope of CNC's investigative powers," says Folguera at Uría Menéndez.

Public and Administrative Law – disputes rising in scale

The complex economic situation has clearly led to an increase in litigation and public law disputes, say lawyers in Spain. The upturn has been significant in the procurement field as the number of public tenders has decreased and the Government has sought to revisit existing projects.

"The stress that the economic and financial crisis has put on some long-term service of PPP contracts, for example, has lead in some cases to intense and complicated negotiations between the contracting authorities and the contractors, and in some cases open litigation between the parties," says Mariano Magide, a public law partner with Uría Menéndez in Madrid.

The budgetary constraints faced by public authorities are also prompting a need for new contractual schemes, while the reform of sectors such as the saving banks (cajas), has also been a key issue during the last year. "Over the coming months, we can expect that all

these trends will still play an important role. Additionally, the conversion of some public bodies – such as AENA or Loterías del Estado – into companies and their partial privatisation will be issues in the short and medium term," he adds.

The current economic situation is inevitably prompting clients to be more selective in the issues for which they seek external advice, say others. "There are far fewer projects and the main activity is to renegotiate existing projects with a difficult viability or economic imbalance, as well as renegotiating with third-parties, including financial entities, regarding the economics of problematic projects," says Lucas Osorio, partner with Hogan Lovells in Madrid.

The situation is equally acute in Portugal, say lawyers there. Major projects including sections of the proposed high speed rail network and new Lisbon airport have been

delayed or postponed, but this has not necessarily meant a reduction in the administrative law needs of clients – merely affected the emphasis.

A great deal of the demand is being placed on the renegotiation of concessions and public private partnerships (PPP). Public authorities, both for economic and political reasons, feel the need to renegotiate PPPs already in force while financing difficulties are also forcing parties back to the negotiating table," says Lino Torgal, public law partner at Sérvulo.

Both companies and the public authorities are preparing for new more austere times, say lawyers in Lisbon. In some cases, when the projects are cancelled or indefinitely postponed, compensation is on the table. Firms are therefore seeing clients contemplate more "big ticket" disputes than engage in the negotiation path that characterised previous years.

"Risk assessment has become more strict and will likely remain so. Otherwise, the issues at stake in the global public law activity will probably remain unchanged," says Bernardo Diniz de Ayala, Public law partner with Uría Menéndez in Lisbon.

Uncovering the reasons behind Portuguese competition decisions

There is a communication problem with the Portuguese competition authority, say some. You cannot have a public body making secret decisions



Miguel Mendes Pereira

Ante la falta de claridad en las decisiones nacionales de competencia, las empresas portuguesas en ocasiones tendrán que recurrir a fuentes extranjeras para guiarse, afirma Miguel Mendes Pereira, socio de Abreu Advogados en Lisboa.

Companies with issues before the Portuguese Competition Authority (Autoridade da Concorrência – AdC) need to be aware that a lack of clarity in competition decisions sometimes means having to look elsewhere for guidance, says Miguel Mendes Pereira, a regulatory partner at Abreu Advogados in Lisbon.

"In order to advise on the merits or risks of specific actions there has to be consistency of decision-making which generates legal certainty. We have this in the merger control field but the tougher challenge is understanding restrictive practices decisions."

The AdC concluded 26 investigations last year with five resulting in prosecutions. The investigations encompassed the animal food and health sector, professional associations and health care equipment sector, but that there had been prosecutions at all has been made public in only two out of the five cases, says Mendes Pereira, himself a former Lead Legal Adviser at the AdC.

"Despite the severity of the fines

imposed the rationale behind them remains unclear. The findings that determined anti-competitive behaviour had occurred in three of the cases have not been made public." In such an environment it is therefore impossible to learn from the AdC what is right and what is wrong, he says. There is no way to superimpose clients' current issues on past decisions because there is nothing to compare.

"There is no legal requirement on the AdC to publish its findings but if it is serious about building a body of case law then it has to define its objections so that others can understand how the law is interpreted and cases decided."

As a result, it is often necessary to take a lead from European Commission decisions or the approach of other national competition authorities, says Mendes Pereira. "There is no 'safe harbour' defence as regards purely national cases – we cannot rely 100 percent on these decisions – but at least it helps to set out a framework within which the AdC might decide."

Building a better competition framework



Manuel Sebastião

A pesar de la crisis financiera, la Autoridad Portuguesa de la Competencia se ha mantenido firme en sus políticas de control y defensa de la competencia, afirma su presidente Manuel Sebastião.

Portugal's Autoridade da Concorrência (AdC) has faced the financial crisis with a policy that there should be no deviation from strong competition enforcement and advocacy, says its President Manuel Sebastião.

"Good institutions and good laws make a good country. We are obliged to consider all possible competition infringements and in line with this our focus is towards sectors and practices that have a major impact on consumers and the functioning of the market."

The AdC has had demonstrable success, including reducing average merger notification periods down from 1.8 to 1.4 months, but the downturn has seen it face challenges in terms of its own budget constraints, says Sebastião. Total expenditure in 2010 was €8.6m against an original budget of €10.7m.

"Resources are limited so we need to focus on greater efficiency. Our target was to close 2010 without any cases on the books older than three years from the date it was opened to the final decision. This objective was reached."

The AdC can now use its resources more effectively and reach decisions more quickly but still build on solid legal grounds, he says. With anti-cartel enforcement and the telecoms sector, specifically pay TV content, as the priorities for 2011.

"In addition, we are looking to strengthen accountability, transparency and the links with our stakeholders, as well as to further improve the efficiency and speed of investigations and legal processes," says Sebastião.

Portugal has only recently had its first leniency prosecutions but they showed that the regime works, emerging developments will further prove the point.

"A competitive culture is crucial for the functioning of a market, and the legal community cannot be faulted if they use all the means of defence at their disposal. Whether these means are adequate or excessive is something that warrants the attention of those responsible for the legislation – who we hope will support our ambition of improving the domestic legal framework."

Applying competition rules in the media sector

The media sector is undergoing structural change and this means a greater need to fine-tune the competition law policy affecting it

The Spanish media sector is one in transition and where competition issues are having a transformative effect on established ways of doing business, says Pedro Callol, Head of Competition at Roca Junyent in Madrid.

"Indicative has been the CNC's decision to declare illegal certain agreements entered into by La Liga football clubs, television broadcasters and right's accreditors. It has ruled that exclusive broadcast rights may not last more than three years, bringing contractual and economic uncertainty for both sides of existing agreements."

The broadcasters and football clubs are apposing the decision, in a number of cases of appeals in which Callol is active, but which the CNC is defending on the grounds that extended agreements act as a barrier to new market players.

"Football broadcast rights are clearly attractive and valuable assets, but the legitimacy of the CNC's position is in question also because it contradicts new legislation (media act) that stipulates a four-year limit." The issue raises concerns

as to how "joined-up" are the competition regulators and legislature.

"We have seen mismatches between the actual regulation and the way policy is enforced but also a lack of co-ordination between regulators – it means increased legal uncertainty, expense and the potential for, inconsistency in the commercial exchanges."

The CNC may be making greater efforts to influence new legislation and increase communication with other regulatory bodies, but competition concerns continue to arise. A number of cable and pay TV channels are now challenging the implications of last year's Media Act, and the levy placed on media companies following the withdrawal of commercial advertising from the national broadcaster TVE.

"No-one doubts the role competition law can play in encouraging efficient markets, and the media sector is undergoing rapid change, but there can also not be grey areas of interpretation. Legislation and regulation have to be fine-tuned."



Pedro Callol

El sector de los medios de comunicación en España se está transformando y el Derecho de la competencia tiene un gran impacto en el modo de hacer negocios, afirma Pedro Callol, de Roca Junyent.

Doing business through public law

In the current climate there is even greater need for regulatory issues to be looked at from a commercial perspective, says José Luís Esquível, principal of niche Lisbon firm Esquível Advogados.

"Clients do not want academic opinions and as a commercial adviser you cannot sit on the fence. What is vital is that they are in the best possible position in the contracts they already have and in those they contemplate entering into."

New opportunities in the infrastructure and projects sectors may be much fewer as a result of the financial difficulties Portugal now faces, but concessionaires, financing entities and construction companies must ensure they remain up-to-date with both legislative and political developments, he believes.

"Some major projects remain in the planning phase while the merits of others are being reassessed. It is not simply the case that the Government has stopped executing projects, it just means that they are now looking at them in much different, perhaps longer-term, ways."

Portugal still needs investment in

the rail and airport sectors but the most expensive projects are inevitably on hold. Significant transport concessions are still up for tender, albeit the Government wants to get the best financial terms.

"The Portuguese Audit Court has put clear restraints on the ability of companies to renegotiate contracts but the Government still often wants to make adjustments. Companies have to be prepared to negotiate where necessary."

Portugal's municipalities are in a worse economic situation than the central Government, he says, so contracts at a local level may be more vulnerable to alteration. "Different types of demands are being placed on companies in the water sector, which is managed locally, for example, than the transport sector which is often managed at the national level."

Ultimately what clients require is to understand the risk matrix, says Esquível. "This means deconstructing the client's aims and the Administration's desires, and inevitably placing more emphasis on contractual terms that may have previously avoided or not demanded scrutiny."



José Luís Esquível

Con el actual clima económico, la necesidad de que los asuntos regulatorios y administrativos se vean desde una perspectiva comercial es aún mayor, opina Jose Luis Esquível, del despacho Esquível Advogados.

Portuguese courts overturning regulator's decisions

Appeal courts challenging the levels of analysis of Portugal's Competition Authority



Nuno Ruiz

La revocación de una multa de 38 millones de euros impuesta a Portugal Telecom ha reafirmado la necesidad de un análisis profundo en los procedimientos por conductas anticompetitivas, dice Nuno Ruiz, de Vieira de Almeida.

The recent dismissal of a €38m fine imposed by the Portuguese Competition Authority (PCA) on Portugal Telecom by Lisbon's Commercial Court (LCC) has reinforced the need for objectivity in claims of anti-competitive behaviour, says Nuno Ruiz, Head of Competition at Vieira de Almeida.

"The Courts finally acknowledged Portugal Telecom's (PT) position. The LCC's decision highlights its readiness to follow European Union decisions, making it an exemplary case as regards the application of competition law in Portugal," he believes.

In August 2007 the PCA fined PT for allegedly refusing competitors TV Tel and Cabovisão access to its network ducts. The PCA considered access to the ducts vital to any company wishing to develop pay TV or triple play services in Portugal.

"In the PCA's opinion, PT's access refusal was intended to protect its own TV Cabo subsidiary. The PCA considered PT's ducts network an essential infrastructure with no objective justification for access denial," says Ruiz, who advised PT.

PT disagreed. Most pay TV operators were already using the ducts network, although it accepted that it had denied access to a

limited number of sections based on the need to dispose of spare capacity and for maintenance and development.

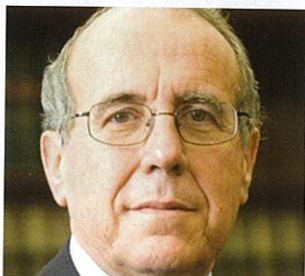
"The LCC confirmed that PT was subject to competition laws notwithstanding its position as the universal service provider and that it enjoyed a dominant position in the market. However, it also found that access denial would only be abusive if PT's ducts were indispensable for new market entrants in the event that alternative infrastructure didn't exist or would be technically or economically unfeasible to replicate."

The LCC concluded that replication of the entire network would be economically unfeasible although replication of limited sections was not and that alternative broadcast methods existed. The PCA subsequently appealed to the Lisbon Court of Appeal, which agreed with PT's acquittal.

"The case indicates the strength of PT's belief in its own position against the PCA's findings. Its competitors could make use of alternative ways to develop their networks, and occasional access denial to certain sections was an inevitable act as a result of the limited capacity in the infrastructures," concludes Ruiz.

Imposing the rules of the game

In the current business climate the continued rigid application of competition law rules can play a vital role in helping to encourage economic recovery



Luis Berenguer

Para que las empresas españolas sigan creciendo, tienen que ser ágiles, innovadoras y eficientes. Todas ellas son características que promueve los principios de la Competencia, afirma Luis Berenguer, Presidente de la CNC.

"In order for Spanish companies to continue to prosper in both the domestic and international arenas they must be agile, innovative and efficient. These are all characteristics that competition law encourages," says Luis Berenguer, President of Spain's competition regulator, Comisión Nacional de la Competencia (CNC).

Competition principles must be adhered to in both the good and bad times, he says. But while there may be no room for flexibility in the way the CNC applies policy there may be flexibility in the way punishments are enforced.

"We maintain a 'zero tolerance' approach in the way we apply and enforce competition law but are open to exploring alternative ways in which fines are repaid. There is no benefit to the economy if a fine imposed sends a company into insolvency."

An area in which the CNC has had evident success has been in breaking cartel behaviour. Recent investigations have focused on the hair products sector, Jerez wine producers, IP rights management societies and public works sub-contractors.

An evident emerging trend however has been for businesses to seek negotiated settlements with the CNC through "conventional terminations", says Berenguer. Cartel members are now coming forward at very early stages and looking to remedy any anti-competitive behaviour they may have entered into. "There is a competition culture developing in Spain and businesses are fearful of investigation and prosecution. Settlements enable businesses to remedy wrongdoing while avoiding public disclosure and reputational damage. They are putting their hands up in order to make amends privately."

Many may applaud the CNC's successes but much work remains to be done, believes Berenguer. A significant area of current emphasis is on reducing barriers to entry to doing business in Spain and lobbying the Government to apply competition principles in Ministerial decision-making. "We need the Government to take into account the competition implications of proposed reforms. We want the rules of the game to be adhered to at all levels."

GUIDE TO LEADING LAWYERS

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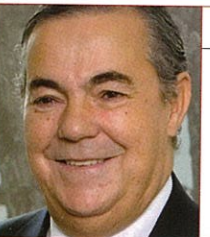
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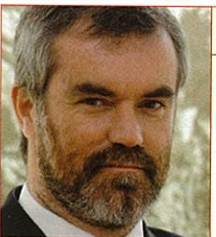
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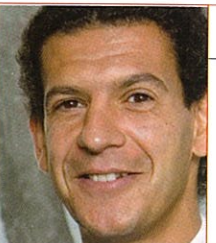
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