CPI's Europe Column Presents:

CPI TALKS...

...with Cani Fernández

President of the Spanish National Commission on Markets and Competition (CNMC)

CPI COMPETITION POLICY INTERNATIONAL

September 2020

In this edition of CPI Talks… we have the pleasure of speaking with Cani Fernández, President of the Spanish National Commission on Markets and Competition ("CNMC").

Thank you, Ms. Fernández, for sharing your time for this interview with CPI.

1. The COVID-19 crisis has dominated the headlines and the economy for the past few months. How has the CNMC dealt with the issues brought about by the pandemic, and what is to be learned from this experience? What should be the role of competition enforcement as the economy seeks to recover?

The COVID-19 crisis has tested our ability to react promptly and I can say that I am very satisfied with the results. Companies are going through a very complicated situation and urge the Public Administration for swift responses. I believe the CNMC has been up to the task and I am fully confident that it will continue this path.

The state of alarm was declared in Spain on March 14, and the suspension of all administrative deadlines was also declared. The Royal Decree included the possibility of agreeing to continue the procedures in specific cases for the protection of the general interest or the basic functioning of services. Based on this disposition, the CNMC Board agreed, on April 6, to continue with the proceedings indispensable for those aims. The objective was avoiding anti-competitive practices or market manipulation, and also guaranteeing the proper functioning of markets for the benefit of consumers and users. The CNMC was particularly vigilant regarding infringements such as price fixing, price gouging, and market sharing. In this context, an investigation about the production of ethanol needed for gels was opened due to the acute increase in ethanol prices.

Furthermore, on March 31, the CNMC set up a specific mailbox (covid.competencia@cnmc.es) to centralize all complaints and queries related to the enforcement of competition rules in the context of the COVID-19 outbreak. We have received more than 700 emails and opened several investigations in the financial and the funeral services sectors. We have been fully coordinated with the European Commission and with other national authorities affected by the same issues as well as with consumer organizations.

On the other hand, 15 mergers were cleared during the state of emergency (from March 14 to June 21, 2020). In all of them, the parties justified the urgency of the clearance for different reasons. The suspension of deadlines finished on June 1, 2020, so merger procedures continued on a regular basis from then on.

As reported in the ECN joint statement, when requested, the CNMC has provided informal guidance on the compatibility with competition rules of certain cooperation agreements. The companies involved must justify that they are necessary, proportional, and temporary, according to the exceptional circumstances to face COVID-19. The CNMC has received some inquiries about possible cooperation agreements regarding health insurance compensation schemes in private hospitals, medical devices, and health products, the implementation of the EBA guidelines in the financial sector and, more recently, retailers at the airports.

All informal assessments have been provided to companies in line with EU case law on Article 101.3 of the Treaty and within record time: less than 10 days despite the suspension of administrative procedures during the state of alarm.

The post COVID-19 context will also require a quick response to undertakings. Cooperation agreements or acquisitions of failing firms must be evaluated by competition authorities in a timely manner to be useful.

We will face several challenges for the handling of procedures, such as the limited access to the relevant information, the need to adopt extra measures for carrying out dawn raids, or the assessment of mergers that involve companies in difficulties calling for the failing firm defense.

2. Last year, the Spanish Supreme Court ruled for the first time on the liability of company officers for involvement in anti-competitive practices. According to the Supreme Court, any involvement, even secondary, in anti-competitive conduct is sufficient for officers to be sanctioned. What is your view on the role of individual liability in competition enforcement?

The Supreme Court has played quite a relevant role in the issue of individual liability for anti-competitive practices. Economic sanctions to directors were possible under Spanish Competition Act since 1989. However, after an initial period in which the CNMC predecessor had applied this sanction in several (seven) cases,[1] it was not applied for a number of years, after our Appeal Court overturned a sanction imposed in 2012 to a chairman of a professional association.

In January 2015 the Supreme Court, in the context of a decision related to our sanctioning framework and the method of calculating fines on undertakings, insisted on the deterrent role that fines for managers should play in competition law enforcement.

Since 2015, the CNMC has sanctioned directors in a number of cases (in fact, in seven different cases since 2016[2]) as the Competition Directorate and the CNMC Board considered that, apart from the penalty applicable to infringing undertakings or associations, an additional individual penalty should be imposed on the legal representatives or managers who played a particularly important role in the commission of the infringement. Up until now, all the CNMC decisions but one related to managers of a professional association have been confirmed by the Appeal Court/Supreme Court. In line with this, Spanish law provides that natural persons may benefit from leniency.

The amount of the sanction has not been, until now, the most crucial element, but the reputational effect of the sanction to the officers is called upon to play a huge role in the deterrence perspective. As opposed to the identity of the investigated companies, the name of the officers under investigation are not public at the time of the opening of the procedure. However, when the final CNMC board decision is taken and published, the names of the sanctioned directors are included both in the final decision within the CNMC web page and in the press release, also published in the CNMC web page, which entails possible repercussions in the general and specialized press. The Supreme Court has explicitly confirmed the prevalence of the general interest that requires the publication of the sanctioning decision with the name of the directors or managers

affected, even before the sanctioning decision is confirmed in court, for public knowledge.

Regarding the degree of intervention necessary to sanction, indeed, as suggested in the question, the Supreme Court, and previously the Appeal Court, has specified that it is necessary that directors sanctioned have managed and directed and not merely executed the agreements taken by another body. The Supreme Court refers to the "proactive and driving role of the anticompetitive agreements," and "direct and personal participation."

Moreover, the confirmatory judgements of CNMC decisions sanctioning directors of undertakings also sanctioned for anti-competitive conduct have contributed to demarcate the concept of director or manager for individual liability purposes. According to the Supreme Court, the extent to which the Spanish Competition Act uses the terms to refer to natural persons who may be fined in the event of an infringement committed by an undertaking makes it possible to include both directors (whether they are members of the Board of Directors or are considered *de facto* directors) and management staff.

Besides, in the framework of the ECN+ transposition to Spanish national law, the draft bill reforming our Competition Act, currently under public consultation, has substantially increased the maximum amount of the pecuniary sanction to directors from 60,000 euros to 400,000 euros, which the CNMC hopes will lead to a corresponding increase in the deterrent effect.

3. Discussions worldwide over the past year have focused on competition law in the digital economy. The EU Crémer Report, the German Competition Law 4.0 Report, and others have called for new mechanisms to rein in the power of large technology companies. What is your perspective on this debate? Are the current Spanish rules adequate to ensure competitive digital markets?

The inspection, investigative, enforcement, and fining powers of the CNMC as a competition authority are aimed at the effective performance of its functions, that is, to preserve, guarantee, and promote the existence of effective competition as accurately and efficiently as possible. In order to achieve those goals, it is important to take into consideration all the recent changes in the actual economic framework, especially the ones related to technology, digital markets, or platform evolution.

We are closely and actively following the most recent discussions in different international fora (especially within the ICN, ECN, and OECD) on whether or not the available regulatory tools need to be adapted to ensure proper competition in the context of digital markets.

The CNMC has taken the opportunity to contribute to the recent European Commission initiative regarding the new complementary tool to strengthen competition enforcement, the so-called "New Competition Tool," which considers modern economy, that is, not only digital but also other markets, many of them but not all in a growing process of digitalization. In our contribution we have tried to emphasize the need to avoid over-regulation or regulation that distorts investment and innovation and to avoid

creating entry barriers for smaller operators. We understand that, first of all, before any further intervention, it is essential to make a serious analysis of which are the gaps, if any, of the current framework of Articles 101 and 102 TFEU (and the existing *ex ante* regulation) to deal with competition problems in a market.

The CNMC's experience with digital markets and current disposable tools is quite positive. As it is well known, with regard to mergers, the Spanish Competition Act has an additional threshold in place (apart from annual turnover of the undertakings involved in the merger) that considers the market shares of the companies concerned. This additional threshold has proven quite effective to capture many mergers in the digital sphere, even in a context of low turnover. It has been a useful tool for the CNMC to review potentially worrisome mergers that would have escaped scrutiny otherwise and to refer to the European Commission these cases of potentially challenging mergers when they had an international reach but lacked a Community dimension under the EC Merger Regulation (*Facebook/WhatsApp* and *Apple/Shazam* are probably the most shining examples).

Naturally, market shares have been the starting point of the analysis. The assessment of the CNMC in the merger control area is typically complemented by an evaluation of the market structure, the competitive dynamics, and business models, as well as the regulatory context, which allows considering specific risks in the digital markets such as so-called killer acquisitions.

Moving from merger control to antitrust practices, the CNMC's experience with the application of Articles 101 and 102 TFEU indicates that any analysis related to market scenarios qualifying as structural competition problems must necessarily be conducted on a market-by-market basis. And we must be aware also of the dynamism of digital markets, featured by disruptive innovation and abrupt changes in apparently solid competitive advantages.

The nature of many digital sectors (extreme economies of scale due to their provision of intangible products, the high degree of networks effects – in particular, indirect ones) leads to a high degree of market concentration, which can be not only oligopolistic but also close to monopolistic. However, the possible gaps in the current regulatory framework detected by the CNMC do not necessarily affect digital markets or fall under the scope of Article 102. Several sectors of the Spanish economy (retail fuel, retail electricity distribution, cement industry, or tobacco production, just to mention the clearest cases) exhibit a market structure fitting in the most common understanding of the oligopoly concept. The CNMC considers there might be some underenforcement regarding tacit collusion when there are no concerted practices or communication between the firms explicating somehow the existence of tacit collusion (for instance, unilateral invitations to collude). In particular, the CNMC believes that facilitating practices making more feasible a focal supracompetitive equilibrium are not easy to accommodate under Article 101 TFUE. The Spanish Competition Act contains a provision (prohibition of conscious parallelism) that in theory could provide legal backing for investigating tacit collusion. However, this provision has seldom been used in practice due to the perceived difficulty in obtaining judicial backing in these cases. As I have just indicated, however, this is not a specific problem of digital markets and

represents an enforcement gap that merits additional consideration. The current ongoing revision of the EU Guidelines covering horizontal cooperation agreements offers the opportunity to ease the burden of proof for fighting tacit collusion.

4. The ECN+ Directive entered into force in 2019, and the deadline for transposition of rules into national law is February 2021. What changes (if any) to the existing rules do you think will be necessary for Spain to comply with the Directive? Are there any other national reforms (institutional or substantive) on the horizon?

Spanish legislation already includes most of the legal provisions required by the ECN+ Directive, although Spain still needs to apply some legal changes to comply with ECN+. For instance, the ability of the CNMC to prioritize and increase the maximum level of fines for abuse and vertical restraints cases needs to be adopted.

At present, Spanish competition law requires a detailed assessment of each and every complaint received by the Competition Directorate. Considering the limited resources, the strict procedural deadlines, and the increasing complexity of the cases, the CNMC has welcomed the new legal provision in the ECN+ allowing for the prioritization of cases, which will allow for a more efficient use of public resources.

Another provision required by the ECN+ Directive that must be transposed to the Spanish Act, and that has been welcomed by the Authority, concerns the limitation of periods for the imposition of fines. According to the Directive, the period for the imposition of fines shall be suspended for as long as another competition authority is investigating the same conduct or there are proceedings pending before a review court. This provision will allow the CNMC to open cases for antitrust conduct in cases referred to Spain by the European Commission or other national authority, regardless of the time consumed for the referral, or to reopen a case that has been dismissed by the courts exclusively on the basis of a formal defect.

The implementation of the ECN+ Directive also gives us the opportunity to make some additional amendments to the Competition Act, ten years after its entry into force in 2007. For this purpose, in 2017 we launched a broad consultation with stake-holders (including competition lawyers, academics, and regional competition authorities) to evaluate the effectiveness of the Spanish Competition legislation. The Competition Act has been a huge success for detecting, sanctioning, and restraining anti-competitive conduct, and also for preventing mergers affecting competition in the markets, but there was unanimous support for some relatively minor amendments such us the incorporation of the settlement procedure into our system – given that such procedures have proven to be highly effective in neighboring jurisdictions, especially in cartel cases – and the possible extension of deadlines in antitrust cases.

Both amendments, as well as other additional minor issues, have been included in the draft Competition Act amendment opened to public consultation by the Ministry of Economic Affairs and Digital Transformation last July.[3]

Although we are convinced the benefits provided by our unique 18-month statutory deadline for antitrust investigations are widely praised, in that it brings together

effectiveness and legal certainty, we believe it might be necessary to set up a longer procedural deadline to ensure the rights of defense for the parties in a case. For this purpose, the draft consultation proposes an increase of the deadline in antitrust cases from 18 to 24 months, increasing at the same time the period for the parties to make allegations from 15 days to one month.

Regarding merger control, the proposal includes the reduction of deadlines in mergers submitted under the short form from one month to 15 working days. This is quite a challenge for the CNMC, but experience has proved that we have been able to clear these simplified mergers within an average time of 20 days.

5. In recent years, the issue of bid-rigging has featured prominently in Spanish enforcement. Has this policy been successful? Do the Spanish authorities have the necessary tools (e.g. collaboration with other public authorities, availability of remedies) to effectively fight collusion in public contracts?

Indeed, the CNMC has reinforced the antitrust action and the effectiveness in the fight against cartels, especially bid-rigging cases. The entry into force of the Leniency Programme in 2008 is one of the reasons of the significant increase in the number of cartels sanctioned, strengthening at the same time our investigation powers with forensic IT tools in dawn raids. Indeed, the Leniency Programme has proved itself to be the most effective tool in the fight against cartels, facilitating detection and subsequent sanction, in particular in cases of cartels that directly affect the general public interest, as public tenders (bid-rigging). Since 2008, we have detected and, following inspections, subsequently sanctioned 31 cartels with leniency applications, 9 of them bid-rigging cases, which otherwise would have probably not been detected by the Competition Authority.

Other contributing elements to this success are a greater effectiveness in the *ex officio* proceedings, the amount of fines imposed, the protection of leniency applicants in private damage claims related to cartel cases, and the deterring effect of CNMC's press releases. Besides, since 2014, the CNMC set up an anonymous whistle-blowing mailbox through which any company or citizen with reliable information about anti-competitive practices can contact the CNMC without a formal complaint being necessary. The identity of the provider of the information is in no case registered, unless the latter so requests using the corresponding boxes on the form. And to reinforce bid-rigging detection with a very proactive approach, we pay close attention to other measures, such as the creation of a Working Group in 2015 to collect information about public tenders stored in the electronic Procurement Platform of the Spanish public sector and other several public institutions in order to develop screening and data analysis techniques which could help in detecting *ex officio* bid-rigging cases; the creation of systems for the automatic detection of signs of infringement to identify possible fraudulent tenders and the collaboration with the most active public administrations in issuing calls for tenders, training them to detect fraudulent bids. Thus, 26 sessions from 2016 to 2019 have provided training to over 1,200 civil servants actively involved in public tenders with the aim of training them on how to detect indicia of potential bid rigging and communicate to the CNMC potential infringements of the Competition Act.

The Working Group has evolved into the creation of an Economic Intelligence Unit within the Competition Directorate of the CNMC in 2018, which investigates the bidding patterns through automated detection tools, among other things.

In summary, fighting bid-rigging is a priority for us. This is reflected in the CNMC action plans, where the detection and sanction of bid-rigging cases[4] takes a prominent place, together with the publication of different Guidelines on Public Procurement and Competition to disseminate bid-rigging detection tools among public procurement bodies and to encourage their collaboration with the CNMC.[5]

As a result, in recent years, the pursuit and punishment of such practices, which are so harmful to the economy, citizens, and the general welfare, has increased, as it is reflected in the number of sanctioned cartels and the ongoing cases: from 1996 to 2009, the Spanish Competition Authority fined only 14 cartels (and no bid-rigging cases), but from 2009 to this year, 77 cartels have been fined, 19 of which were bid-rigging cases.

Let me add that last year the CNMC activated the possibility of companies' disqualification for bidding in Public Procurement, which can be imposed for a period of up to three years. Obviously, this measure established in Spanish law has a powerful deterrent value, as many companies depend on public contracts. To date, the CNMC has declared this ban in three cartel cases.[6] Given the grave consequences such a ban entails, this tool is also reinforcing the leniency system, since disqualification to contracting with the Public Administrations does not apply to leniency applicants.

Some final words to welcome the new era in our enforcement that will come along with the implementation of the ECN+ and the additional measures the Spanish legislation will incorporate. I am sure that the reinforcement of our powers of inspection, the significant increase in the amount of individual fines to directors, and the expected decrease of litigation through the introduction of the settlement procedure, for instance, will strengthen our action and provide for a more efficient use of our limited resources. Is there more to be done? Certainly, but I think we are heading in the right direction to ensure more competition in our market for the benefit of our consumers.

[1] Decisions of May 25, 1993, Case 322/92 *FACONAUTO*; of September 13, 1993, Case 320/92 *Boutiques Pan Asturias*; of January 8, 1996, Case 359/95 *Lencería Gijón*; of November 21, 1996, Case 378/96 *Asentadores de pescado*; of December 12, 1996, Case 364/95 *Ortopédicos Castilla-León*; of October 24, 2001, Case 503/00 *Feriantes Huesca*; of April 3, 2007, Case 611/06 *Excursions Port of Sóller*; and September 26, 2012, Case S/0335/11 *CEOE*.

[2] CNMC Decisions of May 26, 2016, Case S/0504/14 *AIO*; of June 30, 2016, Case S/DC/0519/14 *Infraestructuras Ferroviarias*; of November 10, 2016, Case S/0555/15 *Prosegur-Loomis*; of February 23, 2017, Case S/DC/0545/15 *Hormigones of Asturias*; of May 3, 2018, Case S/0584/16 *Agencias de Medios*; of March 14, 2019, Case S/DC/0598/16 *Electrificación y Electromecánica ferroviarias*; and October 1, 2019, Case S/DC/0612/17 *Montaje y mantenimiento industrial*.

[3] https://www.mineco.gob.es/portal/site/mineco/menuitem.32ac44f94b634f76faf2b910026041a0/?vgnextoid=2daedb82f70a3710VgnVCM1000001d04140aRCRD.

[4] https://www.cnmc.es/en/sobre-la-cnmc/plan-de-actuacion.

[5] https://www.cnmc.es/ambitos-de-actuacion/competencia/normativa-y-guias.

[6] Case S/DC/0598/2016 *Electrificación y electromecánicas ferroviarias*, March 14, 2019 Decision; Case S/DC/0612/17 *Montaje y mantenimiento industrial*, October 1, 2019 Decision and Case S/DC/0626/18 *Rádares Meteorológicos*, February 13, 2020 Decision.