



As businesses increasingly go digital, clients are seeking clarification of how competition law impacts on their rapidly evolving business models

MINEFIELD

T

EU & competition law is becoming a more complex field of practice. As business become increasingly digitalised, so clients are desperate for more clarity regarding how competition law impacts on their activities. Consequently, competition lawyers are in great demand, particularly as private enforcement could be set to increase substantially. Cuatrecasas' partner **Cani**

Fernández says law firms expect to see a lot more interest in competition compliance from clients in all sectors. She adds that, in particular, the "recently announced reform of the EU rules on vertical agreements, together with the much greater interest in electronic platforms and digital markets around the world will hopefully lead to greater clarity and may require businesses to make changes to their distribution arrangements." Law firms are experiencing a significant increase in demand for compliance advice, especially from clients looking to pre-empt problems. Jaime Pérez-Bustamante, partner at Linklaters, says: "Having innovative compliance tools and

flexible programmes that can be tailored to each client's needs has become increasingly important." He adds: "The transposition of the Damages Directive is also another opportunity". In Spain, private enforcement has yet to pick up momentum but when it does, Pérez-Bustamante says law firms "will need to be prepared and will need to have the necessary credentials for the increased amount of private competition law litigation". He adds that public procurement remains "an area of opportunity in Europe and particularly in Spain, with the Spanish Competition Authority very much focusing its efforts on fighting bid-rigging in public procurement".

ANTITRUST UNDER THE SPOTLIGHT

Freshfields partner **Álvaro Iza**, says the biggest opportunity nowadays is the boom in damage claims “arising from antitrust-related wrongdoing”. She adds: “The litigation arising from the trucks cartel has been the first case in which antitrust has come under the spotlight in Spain”.

Antonio Guerra, partner at Uría Menéndez, says another major opportunity for law firms is the “integration of economic and forensic capabilities within legal services”. He adds that the “scope for efficiency through using new technologies means firms dragging their feet concerning the implementation of cutting-edge tools risk not only foregoing the chance of reaping first-mover benefits but also lagging behind the rest of the pack”.

EU & Competition lawyers currently face a number of significant challenges, according to Pérez-Bustamante. He says: “The legal issues regarding the application of traditional antitrust principles to new economy firms and new business models remains one of the biggest challenges, as shown by the Google cases before the European Commission”. Furthermore, he adds: “As awareness of competition rules grows, non-cartel types of antitrust infringements are becoming more common and potential infringements are becoming more sophisticated and harder to identify”.

Meanwhile, Cuatrecasas partner, **Andrew Ward**, says the “rapid evolution of markets, and particularly the rise of digital markets, gives rise to new business models,

new competition issues and a demand for new approaches and solutions from both new and traditional businesses”.

Freshfields counsel **Enrique Carrera** warns that competition lawyers are highly dependent on the relevant antitrust authority’s enforcement priorities and output. Therefore, the “decline of leniency applications makes it more difficult for authorities to detect anticompetitive conduct and the activity levels may suffer as a result”, he says.

According to Guerra, the more sophisticated approach that EU and national competition authorities are increasingly taking in relation to new “theories of harm” in highly technological and digital markets “requires that a significant degree of economic reasoning be factored in”. He adds that this means EU and competition practitioners need to make their legal reasoning more flexible so that it transcends “rigid categories that have been deeply enrooted in this area for many years”. That said, he adds that the “cross-cutting character of contemporaneous competition issues is not limited to the more economic approach to competitive assessment”. He continues: “It also increases the need for awareness of the technical aspects of the different affected sectors, and, thus, the involvement of experts at the different stages of procedures before competition authorities”.

DAMAGES LITIGATION ON THE RISE

Irene Moreno-Tapia, counsel at Cuatrecasas says: “We expect to see an increase in competition damages litigation as a result of

the experience gained by courts and parties in the current trucks cases, a corresponding decrease in the number of leniency cases as the cost to leniency applicants of damages litigation becomes clear, but otherwise increased enforcement by authorities at every level”. According to Guerra, a growing trend is the “enforcement of competition rules in the digital economy and the possibility of using them as a tool to foster the objectives of the EU digital agenda”. On the one hand, he says the discussion “revolves around the better suitability of ex ante regulation to guarantee a level playing field in highly technological or online markets where competition rules might need an overhaul to avoid a high risk of false negatives”. He adds: “On the other hand, where competition rules are preferred, a whole change of paradigm, rather than fine-tuning, is being sounded out in areas such as merger control or abuse of dominance”.


Pérez-Bustamante says digital collusion is a “growing area of concern for antitrust authorities and remains an area of uncertainty for companies”. He adds: “The use of pricing algorithms to coordinate prices - even with no human intervention - will indeed be an area of focus for authorities in the future”. In addition, he says the “economic use” of large amounts of data, and specifically big data, which has become an increasingly important aspect of some companies’ business models, will also “attract the attention of antitrust authorities and, in the future, new types of infringements such as abuse of data dominance may become common”.

STEPPING UP FIGHT AGAINST CARTELS

Meanwhile, in Portugal, the country's competition authority has increased its activity and is continuing to emphasise the fight against cartels, says SRS Advogados partner **Gonçalo Anastácio**. He adds that this is one of the priorities for the president of the Portuguese competition authority, Margarida Matos Rosa. Anastácio adds that the authority has also prioritised "improvement in the detection of non-notifications in merger control". He also says that another big opportunity for law firms relates to "antitrust litigation stemming from the transposition of the Private Enforcement Directive into

Portuguese Law". He also believes there will be notable international opportunities, due to developments in competition law in the Portuguese-speaking countries of Angola, Mozambique and Cape Verde. There is likely to be a significant increase in private damages actions, according to PLMJ partner **Ricardo Oliveira**.

"The trucks case has been the precursor of this tendency which will likely be further reinforced in the near future," he says. Meanwhile, recruiting young talent will be a major challenge for law firms, according to Oliveira. "With the explosion in the amount of competition work over the last couple of years the pool of young talent has become narrow in comparison with law firms' needs."

Morais Leitão partner **Joaquim Vieira Peres** says the biggest competition-related opportunities in Portugal concern the significant increase in private enforcement of competition law, "in particular follow-on damages actions related to competition law infringements found by the EU Commission or by the Portuguese competition authority". He also says he expects public enforcement activity initiated by the Portuguese competition authority will continue to increase in all areas "including in merger control (for example, concerning violation of the notification and stand-still obligation) and concerning cartels (for example, bid rigging in public procurement procedures)". (b.c.) 



RICARDO OLIVEIRA

PRIVATE DAMAGES ACTIONS SET TO DEVELOP GREATLY OVER THE COMING YEAR WITHIN THE PORTUGUESE MARKET

Portuguese firms should be prepared for an increase in private damages actions, which are set to be further reinforced in the near future

According to **Ricardo Oliveira**, Partner and Head of EU & Competition at PLMJ, Portuguese firms should be prepared for a dramatic increase in private damages actions over the coming year. This development will provide firms with new opportunities within the EU & Competition market. "The trucks case has been the precursor of this tendency which will likely be further reinforced in the near future," explains Oliveira. "[This is since] Portuguese Competition Authority has adopted a relevant number of infringement decisions over the last couple of years."

Whilst these new opportunities are arising for law firms in Portugal, there are a number of challenges also which could pose issues for these same firms. "The recruitment of young talent is probably the biggest challenge," Oliveira states. The number of newly-qualified lawyers is diminishing when compared to the requirements of the firms looking to hire them. Oliveira explains that "with the explosion of the amount of competition work over the last couple of years, the pool of young talent has become narrow in comparison with law firms' needs."