

Interview with Mr. Luis Berenguer Fuster, President of the Spanish Comisión Nacional de la Competencia

Dear reader,

As its editor, I would like to begin the December 2009 issue of *World Competition* by inviting you to read our interview with Mr. Luis Berenguer Fuster, President of one of the most high profile, active and recognized EU competition authorities: the Spanish *Comisión Nacional de la Competencia* (the CNC). Mr. Berenguer has kindly agreed to answer some questions at a particularly exciting moment, with the incoming Spanish EU Presidency for the first half of 2010.

Jose Rivas: Dear Mr. President, thank you very much for kindly accepting my invitation for an interview, in which we will focus on some of the “hot topics” on the CNC’s desk. On the basis of your experience of the new system introduced following the 2007 Spanish Competition Act, what do you consider to be the main benefits and drawbacks, if any, of the changes made?

Luis Berenguer Fuster: *The benefits are visible in all three areas in which we operate: merger control, promotion of competition and prosecution of anticompetitive behaviour. In merger control in particular, the administrative burden and timeframes have been reduced, and we benefit from an increased independence essential to establishing our credibility and effectiveness as a competition authority. In the promotion of competition, we are very satisfied to see that our sectoral reports are well-received, and our non-binding observations on legislative proposals are often taken up by the relevant Ministries. Further, the effectiveness of our new model is reflected in the number of ex officio cases and the success of the new leniency program.*

However, there are still areas in which we must continue to improve, and others in which it may be beneficial to set new targets.

Jose Rivas: What impact do you consider that the incoming *Spanish EU Presidency* will have on the activities of the CNC? The workings of the European Competition Network are not very transparent to the outside world. Does the National Competition Authority of the country with the Presidency play a more relevant role during the six-month period?

Luis Berenguer Fuster: *The Spanish EU Presidency will give us the opportunity to organize the European Competition Day, an event traditionally organized by the EU Presidency in which members of competition authorities, government bodies, national and Community courts, the business community, lawyers and scientists exchange views on competition policy and law. Its additional*

‘Interview with Mr. Luis Berenguer Fuster, President of the Spanish Comisión Nacional de la Competencia’.
World Competition 32, no. 4 (2009): 445–448.

importance next year is that it will be one of the first and most relevant public events in which the new European Commissioner for Competition will participate, should the current Commissioner not be re-elected.

The CNC is very satisfied with the European Competition Network, which is working well. The level of transparency relates to the issues discussed therein, such as surprise inspections to be carried out in coordination with the European Commission and/or other national competition authorities.

Jose Rivas: In September 2007, the new Spanish Competition Act came into force and the CNC replaced the former Spanish Competition Service and Spanish Competition Tribunal. One of the main developments is that the new Act empowers the Spanish mercantile judges to apply Spanish Competition rules. To what extent has this possibility been exploited?

Luis Berenguer Fuster: *As you know, the option existed before the entry into force of the 2007 Competition Act, but only with regard to EU Competition rules. Now one can bring a case before a mercantile judge based on Spanish Competition rules.*

It should be noted that the CNC has special powers of investigation which the judges do not have. These special powers put us in a better position to investigate certain anticompetitive practices, such as cartels. On the other hand, the judges are more used to assessing legal questions arising in contractual relationships for example.

Having said that, it is true that to date mercantile judges have not been confronted with a significant number of antitrust cases. Most of the cases handled to date concern contractual conflicts between petrol companies and operators of fuel service stations, which have resulted in a number of preliminary rulings by the European Court of Justice on the distinction between genuine and non-genuine agents and the application of the old and current Vertical Block Exemption Regulations.

Something which particularly strikes me is that cases of abuse of dominant position, which in many occasions may be entirely based on legal assessments, are not brought before mercantile judges.

Jose Rivas: In the last two years, the CNC has carried out an impressive number of cartel investigations. At the time the new leniency program was launched the press reported you as a bit sceptical about its usefulness in a country like Spain: judging by the large number of cases opened, was the new leniency program useful or is it a question of policy that the CNC initiates so many cases ex officio? Do you expect this impressive trend to continue?

Luis Berenguer Fuster: *It is true that I was sceptical on the acceptance and effectiveness of the leniency program in Spain. In fact, when the first Commission Notice on the non-imposition or reduction of fines in cartel cases was adopted, back in July 1996, I even wrote an article criticizing this tool.*

My views have changed dramatically and we are now very satisfied, even surprised, as to how well the Spanish leniency program is working. Let me tell you story:

The leniency program entered into force on Thursday, 28 February 2008. However, rumours circulated that the Regulation could enter into force by the beginning of that week. Well, on Friday 22 February, I received a phone call telling me that there were people queuing at the entrance of

the CNC. I could hardly believe it. I passed by the CNC that weekend and saw that there were people, in cars, who spent the entire weekend queuing.

Contrary to what some voices may say, the success of the leniency program in Spain did not end following the first week of its entry into force. Companies have been making use of the system since then and we are very satisfied that this is happening. The combination of our active policy and the success of the leniency program have resulted in an impressive number of cartel investigations. This trend will indeed continue.

Jose Rivas: The way in which the CNC has carried out Forensic IT searches in its inspections has been the subject of widespread debate within the Spanish antitrust legal community. What is your view on the recent judgment of the Spanish Audiencia Nacional which seems partly critical of the way in which the CNC carried out certain inspections?

Luis Berenguer Fuster: *Whilst the situation is provisional in that the judgment can be appealed before the Supreme Court – we may in fact appeal as we disagree with some aspects of the judgment – we are satisfied that the Audiencia Nacional has in general validated our inspections practice. Indeed, the Audiencia has only declared irregular the part of the inspection it considers to go beyond the scope of the investigation.*

It has also validated the practice of conducting the inspections with both an Inspection Order signed by the Director of Investigation and a judicial authorization.

Jose Rivas: What is your interpretation of the judgment as regards the safeguarding of legal professional privilege in the context of inspections carried out by the CNC? To what extent does it vary from the EU interpretation as stated in the landmark *Akzo* case of the CFI in which “even with a cursory look at the document” in question, the authority may infringe legal professional privilege?

Luis Berenguer Fuster: *We obviously agree with the Audiencia Nacional, since it is the position the CNC has defended, when it states, that the stage of the case is very preliminary and that it remains to be seen what use the CNC will make of the documents found, whether they are covered by legal professional privilege, and ultimately, whether the rights of defence are infringed.*

Many criticize this approach saying that the infringement exists from the moment documents covered by legal professional privilege are removed. We disagree. Accepting this simplistic approach would undermine the powers of the CNC and would dramatically reduce our chances of finding evidence of cartel behaviour.

*With regard to those who say that this approach is different from the one developed in *Akzo*, my reply would be yes, it is. But again, the situation is provisional in that the case may end up with the Spanish Supreme Court.*

Jose Rivas: Zero tolerance for cartels is a priority area for the CNC and the European Commission. Can we expect the level of fines to increase in order to increase deterrence for cartelists?

Luis Berenguer Fuster: *Yes, the level of fines will increase.*

For many years the Spanish Competition Authority has made great efforts to “educate” the Spanish community about competition law and explain what type of practices are prohibited. We think the Spanish business and legal community is mature and aware enough of the gravity of

infringing competition law and therefore it is now time to start increasing the deterrence. Record fines will come.

Jose Rivas: Absent criminalization of cartels in Spain, is the ever increasing level of fines the only possible deterrence? Do you believe there is a need for the use of additional sanctions such as fines to individuals as permitted under Spanish legislation?

Luis Berenguer Fuster: *Criminalization of cartels is clearly an exception in Europe and is not on the agenda, nor part of the debate, in Spain.*

Fines to individuals can be imposed in the Spain on those legal representatives or board members that participate in a cartel. In fact, maximum fines have doubled from 30.000 to 60.000 euro in the 2007 Competition Act. However, to date no fines on individuals have been imposed by the Spanish Competition Authority under the new law.

Jose Rivas: Do you think that damages actions will develop in Spain? Has the experience been successful to date?

Luis Berenguer Fuster: *I firmly believe that damages should be awarded to the victims of anticompetitive prices. Fines imposed by the CNC or other competition authorities do not compensate the real victims of cartel behaviour.*

The experience to date in Spain has been scarce, to say the least. The most relevant case, in which 25 million euro in damages were originally granted, was ultimately annulled by the appellate court.

There is a real need for a Damages Directive and I am convinced that the Directive would push damages actions forward. While it obviously raises a number of very sensitive issues, it is to a certain extent disappointing that the Directive has not yet been adopted within the mandate of EU Commissioner Kroes.

Jose Rivas: Whilst fine settlement procedures exist at EU level and in other EU jurisdictions, no such procedure exists at national level in Spain. Curiously enough, such a procedure exists at the level of one of the Spanish regional competition authorities. Is the CNC considering introducing a settlement mechanism? If so, what form would it take? If not, why?

Luis Berenguer Fuster: *No, the CNC is not considering introducing a settlement mechanism. Firstly, because it is doubtful that such a mechanism fits within the legal framework of the 2007 Competition Act, and secondly, because there is no need for such a mechanism.*

Our system already provides a reward for those companies which admit their participation in an illegal cartel, which can be higher than the 10% settlement reduction provided by the European Commission. In addition, the leniency program allows for immunity and fine reductions of up to 50% and its attractiveness should be safeguarded.

The Competition Act allows for settlement in cases where no fines are imposed. However, we disagree with the fine settlement procedure introduced by one of the regional competition authorities. The CNC could challenge it but for the time being we have not done so.

Jose Rivas: It has been a great pleasure discussing these interesting issues with you. On behalf of the readers of World Competition, I wish you the best of luck in all your future work.