Interview with Ms Cani Fernández, Chairwoman of the Spanish *Comisión Nacional de los Mercados y la Competencia* (CNMC)

Internal

1. José Rivas*: First of all, many thanks, Cani, for accepting this interview, your second one with World Competition. We believe this is a great opportunity to promote the work of the CNMC beyond the traditional channels. And especially after the International Competition Network(ICN) Annual Conference which took place in Barcelona in October 2023, where the CNMC acted as host authority. So, my first question is, what is your assessment of the ICN Conference, which broke attendance records?*

Cani Fernández: My assessment could not be more positive. Not only it is a question of how many people attended – 98 delegations in person and more than 200 people joined online during the sessions, so over 600 people in total – but also the different jurisdictions that attended (140 jurisdictions are now members of the ICN), which gives you a flavour of how things are evolving in both young and well-established competition authorities.

It was also an excellent opportunity for networking and bilateral meetings in an atmosphere of cooperation. For instance, many delegations signed Memorandums of Understanding during these meetings. It gave us the chance not only to get to know our peers, but also how they work, what are their obstacles, how can we work together to solve them etc. I paid particular attention to delegations from developing countries, especially Latin American countries, which are trying to reach a mature level of experience in terms of competition law.

Overall, I believe it was a great success, and there was a very good environment for everyone to help each other and exchange views, which is the ultimate goal of the ICN – especially because we live in a globalized world, and we face similar challenges.

2. José Rivas: *In the same vein, how do you see the role of the CNMC within the ICN?*

Cani Fernández: I think the CNMC has played a prominent role within the ICN for several years already. Apart from hosting this year's ICN Conference, we have organized other ICN events, such as the Cartel Workshop in Madrid in 2016,

'Interview with Ms Cani Fernández, Chairwoman of the Spanish *Comisión Nacional de los Mercados y la Competencia* (CNMC)'. *World Competition* 47, no. 1 (2024): 1–10.

also a great success to which, at the time, World Competition devoted a guest editorial, and more recently the Advocacy Working Group in 2022. We have proven, and so it has been praised by our colleagues, our ability to organize events on short notice and to adapt to the circumstances.

Furthermore, we play an important role as co-chairs of several working groups within the ICN. For instance, between 2019 and 2022 we were co-chairs of the Merger Working Group, and since 2022 we are co-chairs of the Unilateral Conduct Working Group along with our colleagues from France and Japan. We are also members of the ICN's Steering Group, where we cooperate in the programming of the work of the ICN itself.

The CNMC is deeply committed to the values of international cooperation, not only at a European level, but also acting as a link with the Latin American competition authorities, with whom we have deep roots, and we cooperate closely, for example, through the Ibero-American School of Competition. Cooperation in the international scene is in the CNMC's DNA, as it is our shared goal that the protection of competition in the market is not only valuable, but also because of the impact it has on our societies.

3. José Rivas: *Let's get the crystal ball out now: what do you think the competition authorities should focus on? What are going to be the trend areas in the next couple of years?*

Cani Fernández: For sure digital is going to be one of the main areas, although it is becoming less and less clear what is 'traditional' and what is 'digital'. The new framework we have put in place at EU level with the Digital Markets Act (DMA) and the Digital Services Act (DSA) is now starting to become a reality. We also have clear rules for gatekeepers, and we must supervise whether the obligations under Articles 5 and 6 of the DMA are going to be fulfilled or not in our jurisdiction, so for sure that will keep us busy.

We are very aware that competition will continue to be a tool that we favour, not only because it is in our DNA, since the CNMC is also an *ex-ante* regulator, which is very relevant because we also have functions to fulfil under the DSA, but also because we believe that competition is paving the way for a clear definition of new infringements that are not yet defined under the DMA. In my view, the future proving of the DMA relies on competition, and that is why we are very active in the digital area. As you know, we have an ongoing investigation against Google which is not covered by the DMA, and another investigation against Booking.com. We continue to work hard in the digital sector with the existing competition tools because we believe they are also useful.

To sum up, the interaction between the DMA and competition is going to keep us busy, not only because we will be able to learn how to better use competition as compared to the DMA, but also how to cooperate with the European Commission – it will be a learning curve, but I am positive that it will work out. As you know, the Commission is exploring the possibility of mixed

teams with people from different national competition authorities and the Commission for the implementation of the DMA, so this will definitely take time and resources.

Artificial intelligence (AI) is another element of concern, both in terms of the new tools that it offers us in order to increase our enforcement capabilities, and also in terms of imputability criteria. AI is the next frontier. This, together with the combination of data in terms of privacy, will be our main challenge.

Moving on to more 'domestic' issues, as Head of the Spanish competition authority, I think that it is important that the CNMC increases its *ex officio* detection capabilities, not only when it comes to digital and AI, but in general we have to work hard to improve our capabilities because the world is getting more and more sophisticated, and we have to keep up with it too. We also have to work on improving our *ex officio* detection capabilities because, as you know, damages actions are making it more and more difficult to count on leniency applications. This is helping us being more credible, which itself will also increase the incentives to go for leniency.

4. José Rivas: *Going back to the topic of the ICN Conference, you moderated a panel on the role of courts in antitrust law and how cooperation between authorities and courts can be improved. What would be your main takeaways in this regard?*

Cani Fernández: This is a topic that I have very close to my heart, probably because I have been in both sides: now as head of a competition authority, and in the past as a référendaire at the General Court of the EU, where I was able to witness the challenges and the problems that the judges face. I have also been a practicing lawyer most of my career. I am therefore able to see that each of us, in our respective tasks, encounter difficulties that sometimes are taken for granted by the other. I have always thought that through dialogue and understanding we can improve the tasks that we have been assigned, and we can make things easier for the other.

The idea behind this panel was to find a common ground – obviously, respecting the roles of each other: judges are absolutely independent; we, the authorities, have to take action in the first place; and lawyers have to defend their clients' rights.

Bearing this in mind, I think the panel was useful to appreciate why sometimes courts find it difficult to understand things that authorities take for granted when enforcing competition law. That is why it is very important to lay the facts clearly, as it is all about the evidence. In other words, you cannot assume that the courts will understand the connection between the facts and the consequences. Moreover, courts will find it very easy to establish some effects when it is not necessarily the case, while we have to rely on by-object infringements. Currently, we have a discussion on whether the Guidance on the application of Article 102

TFEU should be turned into Guidelines, and whether in fact this has made it so difficult for enforcers to apply Article 102 and for judges to understand it. Maybe, with a bit of understanding, we may end up having a better approach to the enforcement, and judges may have a better approach to the evidence. I feel that sometimes cooperation is just a matter of speaking the same 'language'. So that was more or less the idea behind this panel.

The panel was also interesting because we discussed the different features and peculiarities of the many enforcement systems. For example, we sometimes take for granted that everyone works under the same standard of proof, and this is not true when you are confronting a criminal enforcement as opposed to an administrative one, for example. What does separation of powers mean when you are both the authority and adopting the final decision as opposed to situations where the authority has to go before the court? Is that providing us with the same level of evidence or not? These are questions that, if you clarify at the beginning, you understand why in some systems 'beyond reasonable doubt' may be the standard, whereas in other systems this is not likely to be the case.

We also had the possibility of listening to judges explain how sometimes procedural problems may be so crucial that they cannot even go to the substantial analysis, and this is something worth reflecting on.

Another interesting topic discussed during the panel was whether pecuniary penalties are causing sufficient deterrence or not. And the conclusion was that in fact they do not. It is rather easy, for example, if there is a cartel that lasts more than a year and the increase of price is more than 10%, then the cartel pays off. Judges were agreeing on this, and they better understood, for example, the need of a ban on public procurement procedures or the penalties to individuals.

To sum up, during the panel we tried to understand each other's position and I proposed the possibility of having future workshops on these issues. So, I hope someone will pick up the suggestion and puts it in motion because it is essential that courts and authorities make things easier for one another.

***5. José Rivas**: In fact, you have already addressed what was going to be my next question on the issue of pecuniary sanctions. I think that Spain is a good example of a jurisdiction where, beyond pecuniary sanctions for companies, individuals can be sanctioned too and, more recently, the exclusion from public tenders. On this latter point, there has been a change in the way this is going to be applied in Spain. Could you explain this a bit further?*

Cani Fernández: Yes, absolutely. Until very recently, the CNMC proposed the possibility of imposing the exclusion of public tenders to the *Junta de Contratación Pública del Estado*, an administrative body in charge of deciding on the duration of the ban to contract with the public administration. This procedure, which in my view is not sufficiently clarified, allows to choose between the CNMC being the authority imposing the duration and extension of the ban, or refer it to the mentioned *Junta*,

which waits until the CNMC's decision is final at which point it is able to impose an up-to-three years ban, besides the decision covers the ban to contract with the entire Spanish public administration. On the other hand, if it is the CNMC the authority imposing the ban, we can decide on the extension of it in terms of the products/services affected, the geographical scope etc. I believe that the CNMC is in a better position to decide the scope of the ban because we have analysed where the company infringed competition law and where the company has shown the unreliability that is behind the ban. I do not see this as a sanction but a preventive measure to protect the whole market from companies that are not reliable.

Furthermore, the CNMC is able to impose that ban immediately – of course, parties will have the possibly of appealing the ban and request interim measures to suspend the application of the ban. Companies can even propose a compliance programme to try to convince the CNMC that they acknowledge the infringement, but they have put in place all the necessary measures to prevent infringing again, and therefore proving that they are reliable. The CNMC will analyse the compliance programme and, if it believes that these measures and sufficient, it can exempt the company from the ban to contract with the public administration. In fact, what we are trying to do with this is two things: firstly, restrict the ban to what it is absolutely necessary in order to protect the market from the infringing companies; and secondly, impose the ban immediately so that the deterrence effect that this may have on the infringing company occurs straight away. Compare with the alternative, where one of our decision is confirmed by the *Audiencia Nacional* and then appealed before the Supreme Court. It may take six years after the CNMC's decision for the *Junta* to be able to impose the ban. Probably the people involved in the infringement will not be in the company anymore, the shareholders may be different etc. This state of affairs obviously waters down the deterrence effect of the measure.

That is why we believe that the CNMC deciding on the ban on contracting with the public administration will be more proportionate and will help companies understand better what we want from them. It will also provide companies with more certainty – you cannot imagine the number of situations in which we have international organizations coming to us saying 'look, this company has answered to one of our public tenders, but we have seen that the company is affected by one of your decisions regarding the exclusion from public tenders, what is the situation of this company?'. We can only reply that the decision is under appeal, but this does not mean that one day this company may not be banned by the *Junta* from contracting with the public administration. Therefore, we find ourselves in a situation where the company in question may be awarded a public contract, and in three years' time this company may be banned from contracting with the public administration. That is why we are trying to give certainty to all parties involved.

6. José Rivas: *Is the new system by which the CNMC can decide by itself on the ban already in force, or are you waiting for an additional approval?*

Cani Fernández: This is already the current situation. On 13 June 2023, we published Communication 1/2023, in which we specified the criteria which the CNMC will be applying. In fact, it is the interpretation of the law itself that allows for the two possibilities: either the procedure with the *Junta*, or the CNMC itself taking the decision. We were cautious at the beginning as we thought it was better for the *Junta* to apply the ban. But once we saw that time was going by and no prohibitions were imposed, we realized this was not really sufficient for increasing deterrence. Also, some regional competition authorities in Spain, such as the Catalan and the Galician, have applied the ban directly, so we believe that now we have sufficient experience to apply it ourselves. The message we want to send to the market with the publication of Communication 1/2023 is that we are transparent on the criteria that will guide our actions. These criteria only apply to cases opened after the publication of the Communication, that is, after 13 June 2023.

7. José Rivas: *Moving on to another topic. Standalone actions are few and far in between. How can national competition authorities help bringing successfully standalone actions? Is there a role or a possibility for competition authorities to help judges to undertake these type of cases?*

Cani Fernández: This is a very good question. We have been trying to support as much as we can private actions because I think that it is in everyone's interest to have more competition compliance in one way or another. The problem is that, with the means that we have, we simply cannot (even if we wanted to) help all judges. To give you an idea, in the trucks cartel there are over 1,200 cases still pending today before different courts all over Spain. Just imagine if we appeared in only 10% of those cases, we would not do anything but that and this is something we cannot afford.

We have made an effort to make it understandable and easy for judges to apply the criteria that the economists usually use to evaluate those damages, as well as the models and concepts that they use. We try to provide judges with the tools that will allow them to understand the experts' opinions that will be submitted to them. For that reason, on 11 July 2023, we issued a Guide on the calculation of damages as a result of competition infringements. We opened two public consultations on this guide, and we had many meetings with judges, economists, lawyers, companies, associations etc, because we wanted to take our time to do a useful document. Our aim was to do it in a more pedagogic and practical way than the guide issued by the European Commission. I am proud to say that we have received very positive feedback on this guide, so we are very happy with the outcome because this is the only way we can help on this matter.

8. José Rivas: *Let's move to the DMA, the DSA and big tech. My first question would be if you expect these to be useful tools as opposed to the time and difficulties of bringing cases in the digital sector.*

Cani Fernández: I think they will be useful tools indeed because the infringement is already defined in the law and the burden of proof is reversed. Therefore, only that is a huge saving of time.

You observe the behaviour in the market, and you detect that it may be contrary to Articles 5 or 6 of the DMA. From that moment on, we will have to start cooperating with the Commission to know what they want to do. If the Commission does not want to follow the case, we have the possibility of prosecuting it under Articles 101 or 102 TFEU, or our national equivalent. This is already useful because we have gone all the way in order to identify something which is contrary to the DMA or to competition law.

I do not expect much discussion on whether there will be *ne bis in idem* because when you have defined the infringements under Articles 5 or 6 DMA you have already elaborated on the basis of precedent. This new Regulation will be helpful. Of course, we are not going to limit our work to following Articles 5 and 6 DMA in our jurisdiction and simply pointing it out to the Commission. Until the moment we identify the infringement, we are free to use either the DMA or Articles 101 and 102 TFEU. And this is very good, honestly. Just imagine if instead of this possibility of following in our jurisdiction the infringements of Articles 5 or 6 DMA, the Commission would have retained exclusive jurisdiction. The incentive for us to identifying infringing behaviour would be zero. Now, we have an incentive, because it is either Articles 5 or 6 DMA, or competition law. I think this is already something worth noting, this kind of generosity of the Commission allowing national competition authorities to monitor is a win-win for everybody.

We are also extremely active in the application of Article 102 TFEU or Article 2 of the Spanish Competition Law in our jurisdiction – we had six abuse of dominance cases in 2022, not only in traditional markets, in particular pharmaceutical, which is one of our priorities, but also in the digital sector we have seen cases of abuse of dominance.

To sum up, I think the DMA will be another tool in our toolbox, so I believe it is going to work well.

9. José Rivas: *At the end of the day, the DMA had an element of harmonization of the national legislations. But we have seen that some jurisdictions (*e.g.*, Germany) have decided to expand their national competition legislation to cover this area. Is this likely to happen again, or, on the contrary, this is already solved, and the DMA will indeed harmonize the national legislations, removing any incentive for misalignment?*

Cani Fernández: I think we will have to wait and see because, at the end of the day, the future proving of the DMA will come from its application. In those

countries where you do not have an equivalent to Article 19A of the German competition law, for instance Spain, the only tool to tackle these problems is probably Article 102 TFEU or the national equivalent. Therefore, you will be applying competition rules to those infringements which may fall under the equivalent of the DMA in other Member States. So, in a way, we may end up having this harmonization by way of improving the list of infringement that we have in the DMA.

One way or another, if companies are infringing any provision in one Member State which is covered by competition law because it is not covered yet by the DMA, it may end up being added as another element to the DMA.

As I said, we will have to wait and see, but I expect that we will be learning from one and other in the application of the DMA.

10. José Rivas: *Within the EU we have adopted the DMA and the DSA, we have given ourselves the instruments to deal with these new challenges. But there is a bit of a gap in the rest of the world on this matter. In the past, the EU has led the way in terms of regulating privacy and data with the GDPR. Do you foresee that something similar could happen with the DMA and DSA? Could non-EU jurisdictions adopt similar instruments?*

Cani Fernández: Well of course that would be desirable, yes. We are trying to put some limits to the power of the big techs in situations where they are on the verge of a monopoly, and we are trying to be two steps ahead. If the DMA and the DSA work and prove to be useful tools, it is more likely that non-EU countries will copy them; and if they do not work, these countries will improve them, and we will all learn from it. But I believe it was important to start somewhere with this, and I think there was a conviction that competition law alone was not enough to face these challenges.

11. José Rivas: *For the last two questions, I would like to focus on public procurement. In the past, you have been vocal about public procurement being one of the CNMC's top priorities. What measures is the CNMC taking to improve ex officio detection in this area?*

Cani Fernández: Indeed, public procurement is one of our main concerns, as it represents approximately 11% of Spain's GDP. For starters, we have been updating and enriching the public procurement database since 2016. We now have our own database, which is more workable and that allows us to search, treat and experiment with our own algorithms.

In addition, we are now in the experimental phase of an algorithm that our people from the CNMC have developed in order to detect *ex officio* potential collusion in public procurement. For the moment, we are training the algorithm to distinguish a competitive bid from one that is not, and so far, the algorithm has reached approximately 90% accuracy. So, for now, we are not directly using it to detect *ex officio* collusion, but we are working hard so that one day the algorithm will be able to do it directly using our pool of data.

In parallel to that, we are also using our database together with tips that we receive from authorities. In Spain, Article 150 of the Public Procurement Law imposes on every public awarding authority an obligation to send the CNMC a warning communication when they believe an infringement could be going on in a public procurement case. Our Economic Intelligence Unit plays a crucial role here because they can detect patterns based on previous experiences, and they also receive encrypted information from informants. Therefore, we are trying to reinforce this Economic Intelligence Unit, especially in the area of public procurement, where we have the data, the people and the experience to do so.

12. José Rivas: *As a matter of a fact, you have answered the last question, which dealt with this new AI tool that the CNMC is developing for detecting collusive patterns in public procurement. If there is an area where the CNMC is being positively watched, I think it this one. Correct me if I am wrong, but I believe that you are leading this area, at least within the European Competition Network.*

Cani Fernández: Yes indeed. Of course, the AI tool is much more sophisticated that what I have just described, and my colleagues from the Economic Intelligence Unit of the CNMC could give you a much more detailed explanation of its functioning. But it is true that at the CNMC we are trying to lead the way in this field. For instance, we had a meeting with the US Department of Justice (DOJ), and they were astonished when they learnt that we were able to create an algorithm that can read PDFs, photos and other documents to then structure the bulk information we receive from bidders. From that moment onwards, we are able to follow the patterns of the bidders. What we are doing now is taking all those public bid cases which have been confirmed as collusive by the courts and classifying them as collusive so that the algorithm is capable of recognizing them in the future. My conclusion from our meeting with the DOJ was that the CNMC has an outstanding multidisciplinary team, which is a combination of lawyers, economist, mathematicians and engineers. And I think this is the secret of our success, despite the relatively small team we have working on this project.

José Rivas*: This has all been very enlightening, Cani, and I am sure there is a lot of interest to read about the CNMC's work within the ICN and beyond. Thank you very much.*

José Rivas
Editor of World Competition