

Interview with Mr Marín Quemada, President of the Spanish Comisión Nacional de los Mercados y la Competencia (CNMC) with the Occasion of Hosting in Madrid the ICN Cartel Workshop on 3 to 5 October 2016

1. José Rivas: It must have been an honour and a testament to the Comisión Nacional de los Mercados y la Competencia (CNMC)'s relentless work in the battle against cartels to have been selected as the host of the 2016 ICN Cartel Workshop. In your opinion, what has been the key to the CNMC's success in the battle against cartels in the last three years?

José María Marín Quemada: Absolutely – it has been an honour and a real pleasure to host the 2016 ICN Cartel Workshop. Let me say that organizing it took us some time and extra resources but it is being immensely rewarding. We had the unique opportunity to welcome and hear experiences from delegates from all over the world, including competition enforcers, lawyers, consultants ... Despite national differences, I think it is fair to say that we all agreed on the enormous relevance of the fight against cartels.

In this regard, the CNMC can be proud of what we have achieved in recent years in the battle against cartels. For example, between 2009 and 2015 more than fifty-five cartels were detected and sanctioned with total fines amounting EUR 1.200 million.

There are various reasons for such success.

First, the institutional framework has been a total success. The introduction of the leniency program in 2008, together with reinforced investigatory powers, marked a turning point in our enforcement activity: we have uncovered and fined almost twice as many cartels thanks to the leniency program alone since 2008 than in the previous 20 years.

Second, we invest in our people. We have experienced lawyers, economists, and other specialists that are proud of their work and of the benefits for the public interest of it. We promote their specific training and skill development and we encourage working groups with specialists from the competition and the

regulation areas to work together in cases which can highly benefit from this mix of skills. And obviously we try to favour a good working environment, which we believe is essential to be more effective.

And third, we count on broad support from and interaction with our civil society. The promotion of a culture of competition is key to prevent cartelization, but external communication not only works one-way. We listen to the public's needs and benefit from continuous interaction with our national antitrust community, competition lawyers and consultants in Spain, which are highly qualified and help us improve our work.

2. José Rivas: *From an international perspective, is there room for improvement in the cooperation mechanisms that competition authorities use in the fight against cartels? How could we increase the cooperation in multi-jurisdictional cartel investigations?*

José María Marín Quemada: Yes, I believe there is ample room for enhancing international cooperation in the fight against cartels. In our view, competition authorities are collectively less effective when it comes to multi-jurisdictional cartel investigations. Among other factors, we have different investigative powers and we are subject to different procedural rules, like prescription periods.

We play an active role in the most established inter-jurisdictional cooperation networks, like the European Competition Network (ECN) or the International Competition Network (ICN). Apart from these, we have reinforced cooperation with our neighbouring countries, where it is more likely that a multi-jurisdictional cartel might appear. We have instituted annual bilateral meetings with the competition authorities of France and Portugal, where we exchange experiences and information in an informal manner and foster further cooperation.

Finally we would like to enhance our cooperation with Iberoamerica considering that we share not only a common language but similar proceedings and a common legal culture that is so important in the fight against cartels and other antitrust proceedings of a sanctioning nature. This has become apparent at the BOS in Spanish that have been held at the ICN work shop in Madrid.

3. José Rivas: *National Competition Authorities (NCAs) are faced with increasingly complex and sophisticated cartel investigations. How important is IT forensics at the CNMC and how do you envisage the development of IT forensics in cartel investigations in the future?*

José María Marín Quemada: IT forensics has played a key role in the successful cartel enforcement of the CNMC in recent years. The CNMC is equipped with state-of-the-art technological tools for cartel detection and investigation. As a result we often receive training requests from other authorities. But as far as technology in cartel investigations is concerned, one cannot relax. In the last few

years we have seen an incredible sophistication in the way companies conceal illegal conduct, and I am sure we will see more in the years to come. So we need to develop even better tools in order to keep up being effective. Besides, the development of new technologies also offers us new possibilities and we are using now these developments to detect bid rigging through screening techniques.

4. José Rivas: *Do you believe that the CNMC's current toolbox is adequate to prevent cartels? Would you advocate for additional measures such as the recent reform of Spanish public procurement law which bans cartel members from participating in public procurement bids? What is the impact that you expect from this measure?*

José María Marín Quemada: Our current toolbox has proved excellent to detect and investigate cartels. Nonetheless we have to keep seeking ways to improve it.

In this regard we have been working in two directions; on one hand we are improving the tools at our disposal and on the other thinking on the introduction of new tools in the future.

As for the improvement of existing tools we have refined the system for fine setting since the Supreme Court's judgement of January 2015 annulled the communication on fines and forced us to rethink the whole system to adapt it to the new situation. In this regard a new methodology on fine setting has been developed in accordance to the jurisprudence, and we hope that it will become increasingly clear to companies and at the same time will allow the fines to be sufficiently deterrent.

In the same direction we started in 2015 the application of fines on individuals that was already a possibility in our competition law but that had not been applied until now.

We have not yet applied the disqualification for cartel members from participating in public procurement because it can only be used for cases initiated after October 2015, when the new Public procurement Law was passed. In any case it is a very powerful tool that should be used carefully and we are now working on the possibilities and consequences that it might bring about. The mere fact that this can now be part of our toolbox has triggered a public debate on the pros and cons of applying it, raising public awareness of the consequences of breaching the law, which is already a positive effect!

As for further additions to our toolkit, we are convinced that the introduction of a settlement procedure would be very useful for the effective enforcement of cartel bans. It allows companies to benefit from a reduction of the fine and the termination of the proceedings in exchange for the recognition of its participation in the cartel. This would save both the companies and the authorities a lot of resources, and we are looking at the different models that could better adapt to our system.

5. José Rivas: *Besides fines and public-procurement bans, the CNMC is eager to publish the names of cartel participants in addition to setting fines on individuals up to EUR 60,000. Do you believe that these measures are sufficiently dissuasive of cartels?*

José María Marín Quemada: The possibility of imposing fines on individuals was introduced in our Competition Act in 2007, but it was only in 2016 that we applied them for the first time, so we did it very carefully. Although we believe that the fine (a maximum of EUR 60,000) on individuals may not be dissuasive enough, its impact on the executives that can be subject to this kind of proceedings is quite big and we believe it can have a considerable deterrent effect on the formation of new cartels.

6. José Rivas: *In the European Union (EU), the network of NCAs and the Commission form the so-called 'ECN'. Some authors and companies refer to the ECN as the 'black box' because nobody knows its internal workings. Critics argue that Article 11(4) of Regulation 1/2003 on cooperation between NCAs and the Commission is defective because, for example, does not foresee the participation of the parties, does not require the involvement of the Commission in case NCAs adopt interim measures or decide that there are no grounds for action on their part (e.g. at times, the non-application of competition law may be as relevant as its application), etc.*

Are you of the opinion that, after 10 years of experience of the ECN, the rules on cooperation between NCAs and the Commission could be improved, notably, to guarantee the procedural rights of the companies which provide the input to the 'black box' and are the subject of its output without any knowledge of its internal workings?

José María Marín Quemada: The ECN is a framework for cooperation between national competition authorities and the European Commission, which has helped improving enforcement practices of all competition authorities within the EU. Its internal rules are not only public but are prominently displayed in the European Commission DG Competition's website, together with a number of documents produced by the network providing guidance, recommendations, priorities, etc. on procedural issues (e.g. the ECN Model Leniency Programme) or on substance (e.g. the ECN reports on the food sector).

Now, as regards communications between the European Commission and national competition authorities under Article 11(4) of Regulation 1/2003, it provides for an obligation on national competition authorities to inform the European Commission before adopting a decision concerning Articles 101 or 102 of the Treaty, after which the Commission may react or not to that communication. Essentially it is an instrument to guarantee coherence in the application of European competition law within the network and as such we do not think that the parties have to be consulted about it. Parties' rights are sufficiently safeguarded

in the national proceedings, at least in the case of Spain, and Article 11.4 is just a way for the Commission to check that Articles 101 and 102 are correctly applied.

As for the interim measures, this is an exceptional procedure that probably should be looked at in order to properly balance the urgency of the procedure itself with the proper legal assessment. Reinforcing coordination among ECN members to guarantee coherence could be necessary and the use of an early warning system among ECN members could be a solution for that.

7. José Rivas: *The European Commission has launched a public consultation on empowering the NCAs to be more effective enforcers of EU competition rules, the so-called ECN+. One of the four pillars of ECN+ is the requirement for NCAs to have adequate resources and to be sufficiently independent when enforcing EU competition rules. Moreover, on the 19th of October 2016, the European Court of Justice in a case regarding the CNMC handed down a judgement holding that EU law guarantees the independence of highly ranked officials in regulatory authorities. What do you think are the consequences of this judgement for the CNMC? Will Spain revert to the previous situation where the application of competition law was entrusted to an independent institution that does not carry out sector regulatory functions?*

José María Marín Quemada: Actually, the European Court of Justice did not issue a judgement but a prejudicial opinion requested by the Spanish Supreme Court, which has still to decide on the appeal of some board members of one of the regulatory authorities that were integrated into the CNMC. And in fact, while the opinion says that the early dismissal of these board members was unjustified, it also clearly asserts the legality of the new model.

One of the goals of the creation of the CNMC in 2013 was to reinforce the powers, independence and accountability of the national competition authority. The CNMC has a long history of independence which builds on its predecessor, the CNC, created in 2007 as an investigative and decision-making body independent from the Government. The 2013 reform strengthened the CNMC's independence. Today the CNMC has financial resources adequate to our tasks, the necessary powers to conduct effective investigations and to detect competition law infringements, clearer rules on the appointment and renewal of its board members, and is more transparent than ever before. With the integration of supervisory powers in regulated markets within the competition authority, we have also minimized the risk of interference in these sectors and increased the consistency of regulatory and competition intervention in all economic sectors.

The CNMC's successful enforcement record has enhanced its reputation and strengthened its de facto independence. But it is also true that the CNMC has often had to establish its credibility in opposition to big interest groups and to the government, and this is not an easy task as you can imagine.

However, this does not mean that we are totally satisfied with the situation. Our first priority would be to reinforce the CNMC's autonomy in the use of its budget without undue restrictions from the government, and this is especially crucial in the area of human resources. It would also be convenient to remove some legal constraints to the internal organization of the authority.

8. José Rivas: *A recent European Parliamentary question regarding ECN+ asked Commissioner Vestager whether, to guarantee a procedural levelled playing field across Europe, it would be a good idea to ask the NCAs to abide by the 'Notice on best practices for the conduct of proceedings' (DOUE C308/6 of 20 October 2011). What do you think about this suggestion?*

José María Marín Quemada: I absolutely agree that guaranteeing adequate procedural rights is of utmost importance for competition law enforcement. Harmonization of best practices is always a very desirable goal, even if one has to take into account that there are still important differences in national judicial regimes and legal cultures within the EU, which in some cases justify the adoption of divergent solutions.

Spain is, in many aspects, a model for other jurisdictions as regards procedural guarantees. For example, as compared with other jurisdictions, our regime sets-up very short time limits for competition proceedings, thus reducing uncertainty for the parties in an investigation. We have clear and effective rules on the separation between investigation and decision-making within the authority. We are fully transparent as regards our decisions in all proceedings, which are always accessible in our website. We grant access to the file to all interested parties from the very beginning of our investigations. So from the point of view of rights of defense and procedural guarantees we feel very comfortable and hope that other jurisdictions reach the same levels in the near future.

9. José Rivas: *Two aspects of competition law proceedings before the CNMC are often criticized: excessively short time limits and the ability of the CNMC to have access to potentially legally privileged documents. At EU level both issues fall within the function and terms of reference of the Hearing Officer. Would you favour a similar solution in Spain?*

José María Marín Quemada: Now your question comes as a surprise! We are very often told by lawyers and parties to our proceedings that our short time limits are one of the best features of our regime. A rapid solution of a case or a dispute – coupled with an effective investigation – works always in benefit of the parties.

It is also true that tight time limits (18 months for any antitrust procedure since formally opened) bring about some drawbacks too, especially in complex cases (with many parties involved and difficult economic questions at stake) where time

prevents us from a longer and deeper thought. In this case we have the legal possibility of extending deadlines although we have been very cautious in using it to avoid setbacks in the revision phase.

But even with this in mind we think that, as a whole, a system with deadlines for decision-making is always better than one without them, and the advantages are clear for both companies and for the well-functioning of markets.

The Hearing Officer works undoubtedly well for the European Commission, and we have learnt a lot from their best practice. But as regards procedural issues, what matters most is how these are shaped by the courts. The Hearing Officer seeks to comply with the case-law from the European Court of Justice. In Spain we are under tight control by the courts, and our enforcement practice is often challenged and reviewed. The *Audiencia Nacional* and the Supreme Court – respectively the first and final instances for appeals against our decisions – have ruled on access to documents and set clear limits on our action, and this is what really matters as regards procedural aspects. We try our best to separate relevant documents for the investigation from legally privileged documents that might be found during our inspections.

10. José Rivas: *The recent delay in forming a government has put Spain's legislative process under great pressure. Given that the deadline for the implementation of Directive 2014/104/EU on antitrust damages actions is looming ever closer, do you think that Spain will implement the Directive before its deadline of 27 December 2016? If not, what will be the consequences for antitrust damages litigation in Spain?*

José María Marín Quemada: The transposition of the directive is not under my direct responsibilities, so, unfortunately, I cannot tell when this will happen. I can only express my wish of having it implemented as soon as possible. The lack of transposition does not mean that today companies and individuals cannot institute proceedings to claim for damages – indeed, we are aware of such claims being examined by Spanish courts today. And some aspects of the directive, like the prescription period, seem to have an immediate effect. But we are sure that the framework can improve substantially with a new law that will undoubtedly bring a higher degree of legal certainty to the process. From the viewpoint of our remit, we are confident that the new law will reduce the incentives for companies and individuals to infringe the law.

José 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.*