

## **SUMMARY OF THE CONFERENCE: THE NEW LAW ON FAIR COMPETITION**

**19<sup>th</sup> November, 2007**

The new law regulating fair competition (LDC in Spanish) entered into effect this past September 1<sup>st</sup> and it is, without doubt, one of the most important legal events at the end of the current legislature.

Market regulations as a means to preserve and promote fair competition, on the one hand, and strategic decisions by companies to adequately position themselves in increasingly competitive markets, on the other, have garnered great notoriety for fair competition within Mercantile Law. The possibilities and limits of the Law as well as its most significant, novel aspects were analysed and discussed in the conference organised by the ESADE Law School (URL) on 19<sup>th</sup> November, attended by 58 participants and the presence of renowned specialists in the sector from both the Judiciary and Public Administration. "La Gaceta de los Negocios" also collaborated in this event.

**The conference was inaugurated and presented by Dr. Pedro Miroso**, Dean of the ESADE Law School (URL) who applauded Law 15/2007 dated 3 July, for adapting Spanish legislation to EU Community Law developed from 2004 on and which, in general terms, should be viewed positively. The conference was based on two roundtables followed by their respective discussions.

**The first roundtable was moderated by Dr. Miguel Trías**, Attorney and Director of the ESADE Law School (URL) Department of Private Law and included lectures by two prestigious speakers: Dr. Luis Franco, former Labour Councillor for the Government of Catalonia and current President of the Fair Competition Court of Catalonia, and Amadeu Abril, Lecturer at the ESADE Law School (URL).

**In his presentation "*The new law on fair competition*", Dr. Luis Franco** offered a general vision of the novel items introduced within the Law, relating his globally positive view of the Law's principles and objectives though certain doubts or reservations regarding specific points within the Law were bound to arise, something which occurred in the later discussion. Dr. Franco then turned to questions such as new items not included in the previous Law, elements such as restrictive behaviours, the control of market concentrations, and the control of the public sector and public aid. Worth highlighting are the broadening of market share to notify concentration operations (from 25% to 30% of market share) and the strengthened role of the Spanish National Competition Commission (CNC), now legitimated to directly challenge before the competent courts acts carried out by Public Administrations which represent obstacles to maintain effective fair competition within the markets subject to Administrative Law and the underlying articles within said Law (Article 12.3) or which attempt to limit concentrations.

There was also special interest in analysing the system of sanctions provided for, assessing that it had gained in clarity, though the speaker wondered up to

what point a regulation for the same infraction would impose sanctions of different amounts and that it must not lead to greater legal insecurity. In this sense, he recalled that Article 63 foresees fines representing up to 1%, 5%, and 10% of the total business volume in the immediately previous fiscal year of a company found in violation of the Law. These percentages would apply to minor, severe or very severe infractions, respectively. In addition, Dr. Franco alluded to the inclusion of clemency within the Law, one of the most important novel items in line with European and Anglo-Saxon traditions to exonerate payment of a fine for companies which, though forming part of a cartel, denounce its existence and offer evidence for the investigation and cease committing further infractions (Articles 65 and 66).

He also addressed the institutional ambit, emphasising the creation of the CNC as a single entity, independent of the Government, the establishment of a new system to name its President and Members of the Board, and the expansion of its areas of action, all of these measures serving to guarantee greater effectiveness. Also worth highlighting are the measures to guarantee the independence of the candidates, not just ideologically but also in terms of personal matters. Also laudable is the fact of favouring the transparency of CNC actions. Lastly, and also in the institutional ambit, Dr. Franco examined the Autonomous Community entities in accordance with Law 1/2002 regarding the co-ordination of State and Autonomous Community competencies regarding fair competition. Said Law, the result of a decision by the Supreme Court (208/1999) which declared Law 16/1989, dated 17 July, to be unconstitutional as it advocated a centralised system for fair competition (not contemplating the possibility of Autonomous Communities to establish their own bodies in this area), thus recognising the executive competence in this area to the Autonomous Communities and delimiting responsibilities between these and the Central Government. Dr. Franco summarised the activity carried out by fair competition entities in Galicia, the Basque Country, Aragon and Catalonia, and then signalled, after pointing out that the current law establishes new competencies and rights for the Autonomous Communities, that the new Law on fair competition had opted not to include Law 1/2002, which would have endowed it with greater legal security and clarity.

**Amadeu Abril**, ESADE Law School (URL) Lecturer and expert in Information Technology Law, is one of the fathers of the internet domain *.cat* and well-versed in the matter. He began his presentation ***“The new system for concentration operations”*** by defining what concentrations were and signalling that they could be the simple result of greater effectiveness, market expansion and the desire to offer better products at more competitive prices or that they could also be attempts to reduce competition, often reinforce positions of power or ease collusion and, as a result, offer fewer options and worse prices. This is why these operations should be subject to control because, after a certain point, these concentrations always benefit the most powerful companies, which thereby implies a structural impact. He then went on to remind the audience that the system to control business concentrations within the Law is peculiar, as it controls structures, not conduct; it is an *ex ante*, not *ex post* control, requiring notification and which contemplates a clear jurisdictional separation between the EU and EU member country entities. In terms of

applicable legislation, all European legislation regarding fair competition has been updated though, at the Spanish level, we still don't have a decree to apply the new law in terms of concentration – though currently in the process of being approved – thus implying that Royal Decree 1443/2001, dated 21 December, is still valid, a decree expanding on Law 16/1989, dated 17 July.

After identifying the types of concentrations subject to control, the speaker analysed the competent authorities to exert this control, an area where a clear division of competencies is established: EU-wide concentrations are controlled only by the European Commission, while member states, in our case, through the CNC, control non-EU-wide concentrations, setting their own thresholds. He then went on to discuss the Law on Fair Competition's criteria to evaluate and control concentrations and the criteria established by the Law in line with the European Commission guidelines and relevant legislation in the USA. A procedural matter worth highlighting, where we can appreciate a substantial change compared to the previous law, is that the new Law endows the CNC with the authority to carry out investigations and make determinations, though allowing the Ministry of the Treasury to possibly intervene; once the Minister has been advised, the latter has 15 days to raise the decision to the Council of Ministers which can intervene due to "general interest", including to "guarantee the adequate maintenance of the industry regulation objectives", an "undetermined legal concept" which will have to be specified by the Minister of the affected branch.

As a final comment, the speaker signalled that, though we increasingly confide in the market, we still reserve significant interventions for the State in terms of competition. This seems to indicate a certain "fear" to let the market develop on its own. This Law raises the old conflict between controlling concentrations and industrial policy. The question is if we want a competitive market or to be "National/European Champions". In other words, if we prefer to follow the British model or, contrarily, if we wish to adopt a French industrial policy.

**The second roundtable was moderated by Dr. Julio Añoveros**, Associate Professor of International Law and Director of the Jean Monet Chair in the ESADE School of Law (URL), and former Member of the European Parliament. The two exceptional speakers were José María Fernández Seijo, Mercantile Court Judge (3 in Barcelona) and Javier Fontcuberta, Lecturer in the ESADE School of Law (URL), Partner in Landwell-PwC and Conference Director.

**In his presentation "*Competency of Mercantile Courts and the system of sanctions*", José María Fernández Seijo** signalled that, in keeping with changes made within the EU (Council Regulation 1/2003 and 139/2004), the Law on Fair Competition allows for civil jurisdiction to decide in cases of conflict when applying competition norms. This implies that one of the Law's novelties and a qualitative change in regulating competencies is that it transfers to civil courts knowledge regarding matters which, up until the present, were subject to audits by administrative bodies and administrative appeals. He emphasised the transcendence not only in practice but also symbolically of this new regulation: mercantile judges thus become a fundamental axis in supervising how the markets function in terms of defending fair competition. This presents a

challenge: they will no longer become judges to preside over conflicts but, rather, judges to preside over the market.

The speaker also highlighted the more agile and effective procedural channels and warned about the serious unknown procedural factors raised by the new text as there is no legal articulated body which structures the competencies of mercantile courts in these matters, something which will require a complement to the general norms within the Law on Civil Procedure. He then focused on determining the objective competency of the mercantile courts in these matters and, among other questions, he examined behaviour which, according to the Law on Fair Competition, could be considered collusive, in addition to situations which suppose an abuse of a dominant position (Articles 1 and 2). He highlighted that, in this respect, the Law presented certain complexity for judges since it introduces economic concepts which have no support in any classic figure derived from Roman Law, a situation which could lead to problems of evidence. He considers the application by mercantile courts of the *minimis* principle (Article 5) to be logical, that is, the establishment of thresholds after which certain conduct is relevant. He then contemplated questions referring to the determination of territorial competency and applicable procedures as well as the CNC's legitimate interest to intervene in these procedures. From the civil procedure perspective, according to the new Law, the presence of the CNC will not depend on a judicial decision but on the entity's own initiative to take part in the orders, thus breaking with classical rules regarding the presence of parties in a civil process. The same can be said regarding the parallel organisations within the Autonomous Communities. At the same time, he noted that the new legislation has normalised the presence of the CNC as an *amicus curiae* and examined the characteristics of the system to impose sanctions.

Among other evaluations of the Law, José María Fernández Seijo referred to the danger in the courts interpreting economic recommendations in legal terms. He also indicated that favouring a more agile and effective system can imply risks if the interests in play are not weighed carefully, since an abuse of the judicial mechanisms to control the market can imply an interference in its correct functioning, thereby having a perverse effect with respect to the Law's objectives. He signalled that there are some gaps in the judicial process area which may impede the Law from being applied correctly and that there are loopholes within the text which may grant the Executive greater ability to intervene. He concluded that it is still too early to determine if mercantile judges will become market judges, though the path opened by the reform seems unstoppable.

The final intervention was by **Javier Fontcuberta, whose presentation "*Cartels, positions of dominance and unfair acts within the Law*"** focused on the topic of limiting behaviours from the Mercantile Law perspective. He began by reminding the audience that the Constitution, in Article 38, recognises the freedom to conduct business in a market economy but that, despite the existence of this principle, companies often negotiate agreements contrary to free enterprise; this is when the legislator regulates because the State must guarantee the public interest to maintain a free enterprise system and it must defend the consumers' general interest as well as the private interest of other

competitors. He then went on to discuss the framework of prohibited conducts included within the Law (collusive practices, abuse of market position and unfair competition by means of anti-competitive conduct).

One of the novelties introduced by the Law is the concept of self-evaluation: the companies themselves have to assess if their practices can interfere in the market. But this is difficult to do *a priori*, though there is a body of Law describing the aspects and conditions in which collusive acts are taken, etc., but we have to bear in mind that economic conditions are ever-changing and the contexts are different. At the same time, the speaker summarised the exceptions in terms of collusive practices and noted the inclusion of “legal exemptions” which are nothing more than opportune political questions. And, regarding exceptions in terms of collusive practices and specifically regarding “declarations of inapplicability due to their effect on the public interest”, he wondered if this would be evaluated according to political or economic opportunity. And with respect to the abuse of dominant position, he questioned what is understood as a situation of abuse and what a dominant position. These are two truly “indeterminate legal concepts”. We shall have to see if these criteria are applied with opportunism or not, given that they can be used abusively. He ended his presentation by analysing the system of sanctions, signalling that the concept of company used by the Law exceeds that of a legal entity as it refers to a “business decision”. He coincided with the other two speakers that the economic criteria introduced by the Law will require parties to have to demonstrate their allegations through very costly and complicated processes.