Interview with **Cani Fernández**

Cani Fernández was appointed chairwoman of Spain's National Commission for Markets and Competition (CNMC) in June 2020. She has practiced EU Competition Law since 1989. She was référendaire at the Court of Justice of the European Union, and has litigated extensively before both the ECJ and the General Court. She earned her law degree from the University of Zaragoza. She was interviewed for the Antitrust Magazine Online by Terry Calvani on April 7, 2022.

ANTITRUST MAGAZINE ONLINE: For most of the past twenty-five years, you have moved from the private sector to government service. How did that transition go?

CANI FERNÁNDEZ: In fact, this is not my first time in public service. I was at the European Court of Justice for almost four years working as a référendaire.

However, when I took office, I met a highly talented group of people committed to public service, which I expected. What I didn't expect was their willingness and ability to adapt to the circumstances. I say this because I took office during the pandemic, and it took me a year before I was able to see my people face-to-face. The work they did from the very first day, going online and really continuing on as if nothing had happened, was the first thing that really amazed me.

From a more general perspective, I would say that my thirty years in private practice, plus the almost four years at the European Court of Justice, were, in fact, learning experiences that were naturally leading me to where I am now. By helping clients with cases and in defending the values of competition that I have always believed in through my clients, I was gaining the necessary preparation to understand how a culture promoting competition could be created from this side of the bar. Then going into public service provided me the view of how to better reach the general interest of the competition culture that I was seeking.

So yes, I would say that many of the things that I learned in private practice—how to manage teams, how to motivate people, how to abide by very tight deadlines, how to do the best with my team when we were working with many cases at a time and we didn't have the possibility of hiring more people at the firm, because that doesn't happen from one day to another, as you know—I think that trained me very well for the job I am now doing as a public servant.

ANTITRUST MAGAZINE ONLINE: Do you think your representation of clients in competition matters while in private practice is valuable to you now that you're on the other side of the fence?

CANI FERNÁNDEZ: Absolutely. First, because when you are assisting clients, you realize the impact of the enforcer´s actions and whether they could have acted differently. You also have a view on the impact of the enforcement actions themselves. So, when you are in public service, I think this allows you to better choose the less-restrictive means of action, taking into account all the problems that you are creating for the other side.

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At the same time, you have a better view of what kind of arguments the parties are putting forward that are completely useless or nonsense, and that is something that you have to bear in mind as well when you are answering requests for information or things like that.

So you have a combination of understanding the process but also being rigorous when you should be rigorous.

ANTITRUST MAGAZINE ONLINE: As I look at the competition world today, there are a number of countries—the United States being one, Australia, Germany, Spain, and there are others—that allocate competition competence to both the center and to regional governments. In the United States we have the federal government and the State Attorneys General.

In Spain I know that the regional competition authorities are active in many regions, and I'm curious which cases go to the center, and which cases go to the regional competition authorities. How does that actually work?

CANI FERNÁNDEZ: We have four regional authorities that investigate cases and then send them to us to decide, directly to the board of the CNMC. Eight of the regional authorities have both the investigative and legislative competence, and they are present or act on cases where the effects do not exceed the limits of the region, that is, the autonomous community. An allocation mechanism determines when a file falls on the CNMC roof. We have a mandate, detailed in the Coordination on Competition Act of 2002, that establishes the criteria for assignment, mainly based on the concept that the effects do not exceed the limit of the geographic autonomous communities, as we call them, the regions.

We have a panel that evaluates cases based on this criterion. So, when a case comes in—either through *ex officio* investigation, an informant, a complaint, leniency, or whatever—we first investigate whether it is for us or whether it is for an autonomous community. If it is the latter we send the case to them, and it also works the other way around.

The coordination mechanisms work well. There are very few cases of conflict. I think last year there was just one case. Over eighty or ninety cases are allocated every year.

There are certain things that are for us exclusively, like merger control and obligations under Articles 101 and 102. For everything else, our Competition Law Articles 1, 2, and 3, which are similar to the unfair methods of competition of Section 5 of the FTC Act, are also concurrent.

I think we work well together. We have done dawn raids together. We support them when they need IT professionals or other resources, and they do so when we are doing dawn raids in several regions. So I think it works quite well.

ANTITRUST MAGAZINE ONLINE: In Brussels the Modernization Regulation provides that the Commission always has a trump card: if there is a case that is vested in a regional or a Member State there that is of particular significance to the Commission, it can divest the Member State of jurisdiction and bring it to the center. Is there anything like that in Spain?

CANI FERNÁNDEZ: No. The criteria are those that I was mentioning. It is a very clear cut jurisdictional approach. If it is only in the territory of one of the autonomous communities, it is for them to decide.

ANTITRUST MAGAZINE ONLINE: I was looking at some press reports, and it seems that there has been a pretty dramatic increase in Phase II merger investigations in Spain. I have two questions:

first, is that correct; and then, secondly, why the big increase now? Is this a change in policy at the Commission or just a lot more merger cases?

CANI FERNÁNDEZ: You're absolutely right. 2021 has been a record year with over 100 merger cases cleared, some of them in the second phase and some of them in the second phase with conditions, as we have this possibility of authorizing transactions with undertakings. We can either authorize Phase I, or even Phase II, with commitments or we can also impose conditions.

Not only have we had more than 100 cases overall, but we have had several Phase II, or more complex, cases. The phenomenon is twofold: more cases and more complex cases.

Why do I think this is the case? Well, everything was completely stopped for a year during the pandemic. I think the reactivation of the economy, with the shocks caused by increased demand, put into perspective the value of market restructuring after a crisis, or during an economic crisis that followed a sanitary crisis, where the need for consolidation in some industries arose. We have had cases with failing-company defense theories as well.

I think this coincided with another phenomenon, which is that companies were merging in areas in which the market was already concentrated or where there were regional monopolies, like for example in funeral services, which is one of the areas in which there were many merger cases. It´s no surprise the activity of these services increased enormously during the pandemic, which led it to become one of the sectors that we concentrated on and watched closely, especially because they are kind of essential services. That is one area.

Another area was cement, which was already very highly concentrated, as you know, with the usual suspects. Whenever there is anything there, they have to notify because we have the market share threshold. Any transaction that will increase the market share above 30 percent has to be notified, and there were many such transactions. But that has always been the case, so that is not the reason why we have an increase in merger cases. I think it is because after such a restriction in the market, where everything was stopped for a while, the economic reactivation is sending messages for investment and consolidation.

ANTITRUST MAGAZINE ONLINE: So, the increase in cases resulted, in part at least, from Covid-19 and everything being shut down for a while. So, it's not the result at all of any change in policy or deciding to be more enforcement-oriented?

CANI FERNÁNDEZ: No, although it is true that the complexity of the cases or the number of second phases cases that we have been doing, which is also a record, shows that the cases are more complex.

The trend is that everybody feels that merger control has been too lenient and that is why everybody now believes that there is a change in policy. I wouldn't say that is the case in Spain, because we have always had this market share threshold.

The data I'm going to give you is remarkable: 75 percent of the cases where we have imposed either remedies or conditions were notified because of the merger market share threshold. It has always been the case that we have captured mergers through this market share threshold, which I know everybody dislikes, but the numbers show that whenever there is a 30 percent market share there may be something. So we didn't need to change our policy because we were already capturing many of the transactions.

Because of the market share threshold, we were even able to capture killer acquisitions such as *Facebook/WhatsApp* and *Apple/Shazam*, which we referred to the European Commission. We also

identified other cases, for example in the life science sector where you have very narrow markets, like *Bayer/Monsanto.* These are cases that we captured because of our market share threshold.

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ANTITRUST MAGAZINE ONLINE: There are discussions, if not controversies, within Member States about the role of national champions in merger analysis. The press has reported disagreements among Member States on this issue.

What is your view toward national champions and the role that they should or should not play in merger analysis?

CANI FERNÁNDEZ: That's industrial policy, that's not competition, so it's not for us to either protect or defeat national champions. We will just analyze the market structure and the behaviors of companies.

ANTITRUST MAGAZINE ONLINE: And those issues are for some other organ of government?

CANI FERNÁNDEZ: Yes.

ANTITRUST MAGAZINE ONLINE: I would like to ask you about Article 22 of the European Merger Regulation, which provides that one or more Member States may request the Commission to examine any concentration that does not have a Community dimension but affects trade between Member States and threatens reduce competition within the Member State or States making the request. I understand that, despite its broad language, it was created to fill an enforcement gap occasioned by the fact that some Member States, such as the Netherlands, did not have a merger law at the time. It was often called "the Dutch clause" and widely thought not to be important and perhaps no longer needed. However, in 2021 the Commission issued Guidance recognizing that Article 22 could be very valuable in addressing so-called "killer acquisitions." Thus, the Article might be used by a Member State that has no merger jurisdiction over a matter to refer a matter to the Commission, which also has no merger jurisdiction over the matter.

Article 22 is today, I guess, the topic of the realm. I noted that Spain, along with Slovenia, maybe Germany, and one or two other countries, has said that they don't believe they refer matters to the Commission if they don't have jurisdiction in the first place. As I understand the Spanish response, that is a function of the Spanish legislation; you don't think you have the power to refer a matter where Spain does not have jurisdiction to investigate the matter. Do you think the new approach to Article 22 introduces uncertainty into whether the Commission or Member States will take mergers, or is this really not that important?

CANI FERNÁNDEZ: Let's go step by step. First, you are right that our law empowers us to refer to the Commission those cases where we have jurisdiction, full stop. So if we don't have jurisdiction, we cannot refer the case.

Whether the Article is compatible with European Union law or not, I think we will see once the *Illumina/GRAIL* case is decided. The reference in Article 22 to Member States that can refer cases or not can be applied to national competition authorities that normally do merger control in the territory or directly to Member States. If it is applied to Member States, the Member States can exert their power in telling us, the national competition authorities, that we are only going to be able to send a case when we have jurisdiction. Then, Member States—I don't know, the minister of economy or whoever—could use Article 22, but not us.

If on the contrary, *Illumina/GRAIL* says that it is for the authorities in merger control of the Member States to send the case and that the term "Member States" in Article 22 has to be interpreted as national competition authorities, then that Article in our law will be contrary to European Union law and therefore primacy will prevail and we will be able to send cases whether we have jurisdiction or not. That is the situation now.

Whether it creates legal uncertainty or not will depend on the interpretation of Article 22 by the Court. If the Court says that this is the legal basis arising from European Union law, then the parties will know that. It will then be for the parties to decide whether they want to notify, even where there is no jurisdiction in the first instance.

That is the case, for example, in Spain. If you have a company that only has to notify their transaction in Spain because of the market share threshold, maybe it is even better for those parties to have us refer the case directly to the European Commission because they will be settling the case once and for all, which is another way of providing legal certainty.

So I don't know. For us the situation is rather clear. For other Member States I don't know because it will depend on the interpretation of the European Court of Justice. If it has always been that there is a legal basis for Member States to send a case even when they don't have jurisdiction, then the parties should take that into account when they are developing their strategy to notify and close the deal.

ANTITRUST MAGAZINE ONLINE: I guess if the parties really want to avoid the problem and there are three States that have jurisdiction, you have a reference that exists already under the Merger Regulation.

CANI FERNÁNDEZ: Absolutely.

ANTITRUST MAGAZINE ONLINE: Focusing on cartels for a moment, I look at some of the cartel fines and remedies coming out of the Spanish courts. Would I be correct in saying that there seems to be a disconnect between the courts and the CNMC, where the courts seem hesitant to impose adequate fines?

CANI FERNÁNDEZ: Your view may be a little bit distorted because I am sure that you know that in 2015 there was a judgment from the Supreme Court—on the 29th of January, something like that—that declared our Notice on Calculation of Fines illegal. Therefore, every single cartel case that had been decided was annulled, but only because of the fines.

All the cases went up to the Supreme Court, all of them were annulled, and they came back to the Commission again. The Commission reimposed the fines, with some changes. The mono-product companies had smaller fines and multiproduct companies had higher fines, but that was the result of a change in the Notice, and now they are being confirmed.

But for a while every single case that the Commission adopted was successfully challenged in court, giving rise to the idea that the courts were against or didn´t understand what our function was. It was a mere question of how the calculation of the fines had been carried out, according to a methodology that was considered illegal by the Supreme Court.

The new wave of cases, in which the recalculation of the fines has been implemented since the start, are mostly confirmed, and the fines that have been imposed have mostly been confirmed. In that respect, I believe that we will now have better insight from the resolutions or judgments emitted by the court because they will now be focusing on subject matter. In that case, if we win, okay; if we lose, we learn.

If a cartel is minimally successful, you can expect an increase in price of at least ten percent every single year, so if you are only going to impose ten percent of turnover, it means that the cartelists are much better cartelizing than not, because it is cheaper for them.

That is what I intend to do now. I am trying to take all the lessons from the judgments of the Audiencia Nacional and the Tribunal Supremo in order to see whether I have to reinforce my Director for Competition legally, economically, or whatever. That is what I am mostly doing with the help of Marisa Tierno. As you know, she is now my Director-General for Competition. So that is one thing.

A different thing is that I personally believe our fines for cartels are not sufficiently deterrent, and the reason for this is because we have a ten percent of turnover maximum limit for fines. If you have a cartel that goes on for more than two or three years, this is already going to be insufficient. If a cartel is minimally successful, you can expect an increase in price of at least ten percent every single year, so if you are only going to impose ten percent of turnover, it means that the cartelists are much better cartelizing than not, because it is cheaper for them. I think we have a problem not only in the perception of the judges but also in the fundamentals of the law. I think the law is not sufficiently deterrent in what it is imposing as maximum fines.

That is why we are using other tools that we have, which I think are even more powerful than fines. One is, for example, the debarment of companies from participating in public procurement processes, something that is working quite well. Imagine, with all the EU Next Generation funds that are going to come to Spain, mostly through public procurement, the possibility of a company of not being able to participate in a public bid because they have been debarred as a consequence of antitrust infringement is much more of a deterrent than a fine that is going to be paid and then passed on to the consumers, because that is what companies do.

The second thing that we are trying to do, and for which we are trying to get support from our Congress, is to increase the individual fines for executives or other individuals that take part in a cartel. Currently, it is capped at €60,000, but we want it to be increased to €400,000, which is the same value as the penalty for distortion of the stock market by individuals. We believe that, at the end of the day, the one who has the possibility of not calling the competitor, not attending the meeting, or not setting the prices is that person.

We are trying to help with deterrence in that respect, and then we are trying to reinforce our cases as well before the courts. So I think it will work.

ANTITRUST MAGAZINE ONLINE: Some Member States have criminalized cartel conduct for individuals. Would you favor making that change in Spain?

CANI FERNÁNDEZ: In fact, I believe that we already have some potential criminal enforcement in Spain. I wrote an article many years ago trying to make people aware that there were two or three criminal conducts in our criminal code, and, in several cases, there could be public bids that could be criminalized. There were several attempts to bring criminal charges, although all of them were dismissed.

I think that is already a reality. I say this because I am trying to convince everyone that Article 23 of the ECN+ Directive is compelling in requiring extenuating conditions for the leniency applicant; otherwise, there will be self-incrimination in a criminal matter. So, that risk is already there.

For me, as I see it now, it is more of a risk than a benefit. As long as we don't protect leniency applicants from criminal indictment, we have a risk of seeing our leniency applications go down. That is my main concern at this moment. I hope that with implementation of ECN+, which has been almost completed in Spain, as our government has decided to carry out the implementation of the Whistleblower Directive together with Article 23 of the ECN+ given their similar content. So we will see. Once I have the leniency guys protected, then we can talk about criminal.

ANTITRUST MAGAZINE ONLINE: Focusing on what I think is maybe the question of the hour, in the United States there are enforcement officials who say that the consumer welfare model is outdated, represents forty years of disaster, and they would favor the introduction of populist objectives—labor dislocation, environmental, etc.—into the mix of considerations that competition authorities ought to consider. What is your view on consumer welfare and a variety of other objectives in the competition authority arsenal?

CANI FERNÁNDEZ: I think that consumer welfare is the standard, and it has to be, but I also believe that the interpretation that we are giving to consumer welfare is a very narrow one. For a consumer, welfare is not only better prices but is better quality, and it is also innovation. There are many other things that are in the consumer welfare area, not only prices.

Being restrictive in interpreting that idea of consumer welfare and considering only consider lower prices, we will miss other important benefits of competition, for instance better quality or more innovation.

ANTITRUST MAGAZINE ONLINE: Yes.

CANI FERNÁNDEZ: For example, we have used the hypothetical monopolist test with pseudo-price markets, checking whether the use of this or that platform, which is zero price, is going to provide you with a better or a worse service. It is the same logic. I say this because, for the consumer welfare standard, you have to use the same logic.

Whether you have to take into consideration all efficiencies, even very diffuse efficiencies, into the consumer welfare standard is up for discussion. If we believe that we have to include industrial policy objectives into competition, maybe we are not the best-placed Authority to do that.

But I don't close the door on the possibility. For example, in our merger control legislation there is a third phase in which our government, the Council of Ministers, could authorize a transaction that we want to forbid or could exclude the conditions that we have imposed on the basis of general interest objectives. So it is really embedded in our competition law, but someone is better placed than us to deal with that.

First, the consumer welfare standard is not as narrow, so many of the things that are being claimed now as being outside I think are inside; but there is the limit of not implementing industrial policy through competition and that is something else that should be done elsewhere.

ANTITRUST MAGAZINE ONLINE: Public procurement is a top priority today for many competition authorities. Is it a priority in Spain?

When I see public procurement, it is like the red cape—well, not red because the toro doesn't see color.

CANI FERNÁNDEZ: We have touched on procurement, which is one of my greatest concerns—I am like a Spanish bull. I go straight there. When I see public procurement, it is like the red cape—well, not red because the *toro* doesn't see color.

I am really worried about public procurement since we found that many of the cartel files solved in 2021 were related to bid rigging. We have an Economic Intelligence Unit at the CNMC that is using a wonderful platform public procurement data. All winning bids are there, so you can work with Big Data, artificial intelligence techniques, and so forth. The problem is that you don't have the losing bids, and in order to really be sure that the pattern is telling you everything you need more than anything the losing bids to compare.

We have devised an algorithm that is able to restructure the information that is not put into information-specific cells directly so as to make it possible for searcher to find them. This has allowed our people in the Economic Intelligence Unit to create an algorithm that is able to understand what other information is there. Currently, the information on the losing bid is available but unstructured, in the form of an annex with a PDF or a photograph. This algorithm converts it into structured information. So now we are able to analyze this information with an accuracy of 99.9 percent, because you can't know for sure, and then the algorithm learns from the information.

We are now coordinating with the regional authorities to obtain their procurement data because they also have jurisdiction, so now we can integrate that information into our platform.

We have been collecting data for many years to have a searchable database, and I think we are now ready to detect things that are happening in the public procurement area very well. Of course, we will confirm these findings with other pieces of information or other kinds of direct evidence and things like that.

I want to clarify that we are not going for algorithmic investigation, full stop. We are not going to prove cases based on algorithms. This is simply another tool for us to detect and investigate, but I think it is working well.

ANTITRUST MAGAZINE ONLINE: That is interesting because also what you are using the Commission's resources to augment the resources of the regional governments.

CANI FERNÁNDEZ: Yes, we are trying to do a lot of advocacy there because we are trying to approach every single entity that helps define public procurement conditions and other elements. In Spain you have all the levels: the national government, the regional governments, and the municipalities, all of which are doing public procurement with all types of funds and with their own budgets. We are trying to create checklists and guidance for them to devise public procurement conditions in a competitive way, to detect when they believe that there is something weird going on. This way, there is an early warning that we can check on. We have also created a checklist to help them avoid situations which could be categorized as state aid.

So, through advocacy we are trying to approach them to help them. Another way of helping them is, "Give me the data, and I will give you the results of the analysis"

ANTITRUST MAGAZINE ONLINE: Finally, the Spanish and Portuguese authorities have been very active in trying to build the capacity of the Latin American countries with a shared language. Can you tell us a little bit more about what the CNMC is doing in this area?

CANI FERNÁNDEZ: We have something called the Escuela Ibero-Americana de Competencia (EIC), the Ibero-American School of Competition. We have been doing that for 17 years now.

For the last two years it has been done online. It used to be in-person in Madrid, and selected members of all different Latin American authorities would gather, and we would coach them and provide them with know-how.

We have also signed bilateral agreements with them to support ongoing training and things like that. We have also helped when they are working on a particular case, and they need some know-how or insights into how we have been dealing with a particular matter. There is a very, very fluid relationship with them.

But the competition school is really a wonderful place because it is a great forum for all of us to meet. You have not only theoretical lessons but also very practical cases and discussions there. It is working very, very well. I think it is a success story.

We do that also with our Portuguese colleagues in the Forum for Latin America and the Caribbean (FLAC) inside the OECD, for example. That is another thing that we do a lot.

We have many fora in which we can exchange information and views, and we have had some secondment experiences with several authorities as well. We have taken in people from COFECE. They also wanted us to send someone there, but then Covid-19 came. We are trying to maintain our good relationship with the Ibero-American authorities as much as we can.

ANTITRUST MAGAZINE ONLINE: Cani, thanks so much for taking time from your very busy calendar to visit with us. ●