

BRUSSELS: PART OF THE PROBLEM OR PART OF THE CURE - EUROPEAN COMMISSION

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Iberian lawyers in Brussels question the willingness of the European Commission to be flexible in the face of the continuing financial crisis.

There is little doubt that the economic and financial events of recent months have put pressure on European Union (EU) competition law principles as well as the regulators charged with enforcing them.

Some suggest that the current crisis demands a greater flexibility in the application of competition rules. It is a point of view acknowledged by regulators in Brussels, who nonetheless insist that competition law principles must be maintained in the face of, and even despite the difficulties that the current financial crisis may be presenting to many businesses.

'There are clear challenges in the policy landscape: there is a financial crisis which lead to systemic risks and is now turning also into a real economy recession. The European Commission has a significant role to play in the current economic environment but; we have to protect the short-term stability of markets while also keeping in mind the importance of a longterm perspective,' says Nadia Calviño, Deputy Director-General for mergers and antitrust of the Directorate-General for Competition at the European Commission (EC).

'I think that there is scope to achieve both objectives. We should not compromise the defence of consumer welfare and the competitiveness of European industry in the mid-run in order to avoid a systemic crisis in the short run,' she says.

Prior to joining the EC in 2006 Calviño was Director-General for Competition in Spain where she oversaw the development of the Competition Act 2007 that led to the formation of the Comision Nacional de la Competencia.

Mixed messages

A key area of concern among Iberia's competition community in Brussels, they say, is the potential for uncertainty and confusion over the enforcement of competition policy, highlighted by the state aid issues raised by governments loan, guarantee and recapitalisation programmes.

'We are getting mixed messages from the EC. They seem to be concerned that the crisis might be used as a tool to question the rules that have been built up over the last few years about enforcement, but all the while we have been seeing massive government interventions,' says Marcos Araujo, head of competition at Garrigues.

Such schemes have had a strong impact on some of Iberia's leading businesses. Banco Santander, some suggest, may have lost competitive advantage as a result of government intervention in some competitor European banks. The suggestion is that the EC has effectively abandoned its principle of equal treatment.

'There is a perception that the EC has tried to be flexible in its approach, but inevitably there are businesses that are unhappy with the level of assistance that some of their competitors have received,' says Edurne Navarro Varona, competition partner in the Brussels office of Uría Menéndez.

Others suggest that the state aid arena has always been a difficult one. 'I do not want to say that there has been a change in the rules but in reality state aid never has been a clear cut area of law,' says Ramón García-Gallardo, managing partner of SJ Berwin's Brussels office.

Calviño counters such claims, emphasising that the EC is maintaining its core principles and has established red lines that cannot be crossed. 'The EC believes its competition policy is a part of the solution and not part of the problem. We have published guidance on state aid to the financial sector and also to the real economy, all of which has been aimed at keeping to the substantive rules but being flexible with regards to proceedings.'

In any event, others suggest, businesses that feel aggrieved may have difficulties in proving that they have been disadvantaged.

'This is a unique situation and the EC is applying the state aid rules in an exceptional way, this has never been done or experienced before but it will inevitably have a negative impact on some. There is though a big difference between voicing dissent and launching a credible action,' says Javier Ruiz Calzado, competition partner at Latham & Watkins in Brussels.

Control

Calviño points to the merger control arena as another in which the EC has been able to demonstrate both the flexibility of the competition regime and its own thinking, without abandoning established principles. One of the instruments which give this flexibility is the derogation from the stand still obligation foreseen in the EC Merger Regulation.

'We of course have to take into account what may happen if a merger cannot be implemented immediately, and in particular if one of the parties may fail during the merger review process. But this does not mean that we should not do a proper substantive assessment of the potential anti-competitive effects and, if needed, find suitable remedies to solve them. We do not think that merger control should not be applied,' she says.

The 'failing firm defence' is one that has however previously proved difficult to apply in practice in a merger scenario, notes Francisco Enrique González Díaz, competition partner at Cleary Gottlieb Steen & Hamilton in Brussels.

'Despite the crisis M&A activity will continue and therefore we hope that the EC will take account of the current economic environment in situations where the 'failing firm defence' may apply. I am not suggesting that the rules should not be applied in the same way but rather that the Commission uses its margin of discretion flexibly to take account of present market conditions.'

The success of the EC's anti-cartel policy in recent years, and the relative enthusiasm for its leniency and whistle-blowing procedures, lawyers say, are also now producing issues. While none condone cartel behaviour, some ask whether in the current difficult economic climate the EC may use its discretion more in setting fines – which can be up to a maximum of 10% of a company's previous year turnover.

'Although the Commission is right to try to achieve the correct deterrent effect of its fining policy it should be sensitive to the fact that heavy fines may, at least in some cases, significantly affect the viability or investment policies of some companies,' says González Díaz.

Calviño does not share these views on the scale of fines being levied or the intensity with which it is continuing to search out cartel activity. 'We must learn from past experiences and there is general agreement that the relaxation of competition policy enforcement made the US depression in the 30s worse, and put back economic recovery for several years. I do not think that we should be more lenient with cartels or abuses of dominant positions merely because of the current economic crisis. If

we relax the competition rules, prices will rise and output will contract. Exactly the opposite of what the economy needs.'

Reinterpreting

Looking ahead some question where the focus of regulators will be as the year unfolds, and whether the interventionary tactics adopted by governments across Europe have proved sufficient to stem the danger of systemic failures. 'It will be interesting to see how the EC sees the coming months, where the emphasis may be and how it will likely respond to matters should the pressure again rise,' says Cani Fernandez, head of competition at Cuatrecasas.

What is clear is that despite the scale and severity of the issues already presented, none believe that the demand for competition law advice will diminish.

'The decisions made over the past few months will inevitably distort some major principles in force in these areas – in effect, many treaty principles will have to be reinterpreted again,' says Garcia-Gallardo.

The EC has in the past few weeks approved a Portuguese state aid scheme offering up to €500,000 for businesses in difficulties, and issued guidance on state aid for small and medium enterprises (SMEs).

Calviño is adamant that the role of the EC is not to put barriers in front of any potential recovery.

'The EC wants to be a very active player in fostering economic growth across the EU again, and has already put in place measures to support the economic recovery. Some suggest that exceptional times call for exceptional rules, but we are already doing exceptional things whilst trying not to compromise on the substance.'



She emphasises also however the unique position of the EC, and the breadth of its responsibility. The Commission necessarily has a pan-European view and has to take into account the interest of all 27 Member States, which may have different views and economies.

'I think that national solutions will not be enough to get us out of this crisis and that the European Commission must play a significant role in this process. Preserving a level playingfield within the EU is probably one of the main challenges ahead and the enforcement of competition policy is a key instrument in this scenario.'