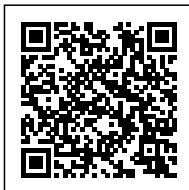


BRUSSELS REPORT 2010: STICKING TO PRINCIPLES

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The European Commission has played a vital role in helping mitigate the impact of the financial crisis, say lawyers in Brussels, but issues continue to emerge and procedural flexibility can only help so much

The European Commission (EC) has tried to deal with the competition issues that have arisen out of the financial crisis in a pragmatic way, with an emphasis on continuity and finding solutions, says Nadia Calviño, Deputy Director General for Mergers in the Directorate General for Competition of the EC.

'What has been important has been to keep to substantive principles, while of course being as flexible as we can in applying the rules. Ultimately the challenge throughout has been to preserve the same competition principles that have been applied for 40 years.'

Francisco-Enrique Gonzalez-Diaz, partner at Cleary Gottlieb Steen & Hamilton in Brussels, agrees that the past year has certainly been challenging. 'The banking crisis has demonstrated that you

need to be able to jump between practices and rely on the resources you already have in place – BNP-Fortis showed us that.'

Cleary Gottlieb advised French bank BNP Paribas on its acquisition of fatally weakened Benelux bank Fortis in 2009, in a deal that was initially approved by the European Commission in only 25 days, 10 days less than normally allowed under EC merger clearance rules.

Flexibility

Lawyers agree that such flexibility demonstrates the tremendous efforts of the EC to manage both the volume and unprecedented nature of the issues that have emerged out of the crisis. But some nonetheless suggest that the same speed of decision-making has prompted questions around the quality of analysis in some merger approvals.

If the BNP-Fortis merger was fasttracked, Banco Santander's acquisition of Bradford & Bingley through Abbey in the UK was done in record time. The merger was reportedly approved by the EC within 24 hours of notification.

'We have been amazed how quickly some decisions were made, particularly those with a strong state aid element, which has never previously been a quick issue to process. It seems that in some situations everything was possible if it meant saving the system,' says Javier Ruiz Calzado, the Brussels-based Co-Chair of Latham & Watkins Global Antitrust and Competition Practice.

Significant also has been the use of public interest overrides by governments to help force through otherwise problematic mergers, say some. Most notably the merger of Lloyds and Halifax Bank of Scotland in the UK – because of 'financial security' – and the merger of Alitalia and AirOne in Italy, approved nationally because the parties were 'in crisis' .

'The EC may not be able to take the public interest into account but national authorities clearly can and such tools have proved highly effective,' says José Luis Buendía, Head of EU and Competition at Garrigues in Brussels.

In the area of State aid control as regards financial institutions the EC has been placed in a difficult position during the first months of the crisis. It had to encourage member states to bring interventions for clearance but was clearly unable to impose immediate conditions in every instance, he adds 'It clearly however wanted its 'pound of flesh' for what was on offer.'

The EC may have adopted a more pragmatic procedural approach where state aid issues have been concerned, but Calviño denies it has been a challenge for the EC to maintain substantive consistency.

'The end of 2008 saw the potential for a systemic collapse and clearly the past year has to a degree seen cases of let's get the patient breathing and then apply the necessary remedies further down the line.

We have been careful to work with the national authorities but we have also been adamant that once the crisis is over companies will have to come back and the situation may need to be reassessed.'

Already however, some companies have begun to challenge the interpretation and validity of some of the merger conditions imposed on them. Dutch bank ING and the Dutch Government are now jointly appealing sanctions imposed on it following the €10 billion cash injection it received from the Dutch state in October 2008. Under the EC's approved bail-out terms ING has until 2013 to restructure, but it is now contesting a ruling that the early repayment terms offered by the Dutch Government counts as additional state aid.

Calviño disagrees however with the suggestion that companies such as ING are now being asked to do something unreasonable. 'We have been very upfront about what we wanted. The EC has not been inconsistent, we have not approved remedies and then six months later changed our minds.'

Edurne Navarro, partner with Uría Menéndez in Brussels, notes that in recent months there has clearly been much deeper analysis of notifications as the EC has expanded its team and capabilities. 'The EC itself has had to adapt, which has inevitably been a challenge, but clearly now their systems and processes are better established and able to cope – it has had to learn through a process of doing.'

Normality

The question lawyers now ask is when will there be a return to normality, both at an economic level and in the way the EC performs its functions?

With the economic crisis continuing, the competition authorities need to take a more flexible approach when applying their requirements; merger clearance rules are so well defined that some of the recent transactions filed to the EC on restructuring businesses do not necessarily benefit of the 'failing firm' defence and then, can make further integrations more difficult, says Ramón García Gallardo, Head of Competition at SJ Berwin in Brussels. 'In these cases, time is important, and competition authorities must be able to respond quicker and will also need to adapt their approach, especially, in relation to divestiture requirements and their respective timelines.'

Others say that the crisis may even have reinforced the hand of the European institutions. 'The role of the EC is to encourage a level playing field for business across the EU, the suggestion is that throughout the crisis there has been a hidden hand to promote integration,' says José Rivas Head of EU and Competition at Bird & Bird in Brussels.

There may have been few cross-border mergers at the start of the crisis, but the pace has clearly picked up significantly, say others.

'State Aid issues recur and it will inevitably be hard to disconnect the activity that is going on at a Government level from the system. It is a complicated situation and it remains hard to determine when such input will no longer be required,' says Buendía.

New faces

The appointment at the start of the year of a new Competition Commissioner, Joaquín Almunia (replacing Neelie Kroes, now Digital Agenda Commissioner) is significant but may not prompt any radical policy departures, believe competition lawyers. Albeit some suggest that decision-making may become more predictable and less headline driven.

'There is not much room to play with, the final word is always in the hands of the Commissioner but the legal frameworks and practice of DG Comp is well defined and there will not be too much scope for dramatic change,' says García Gallardo at SJ Berwin.

Nonetheless, lawyers note that there may now be a growing willingness to look into sectors such as financial services, which had avoided deep scrutiny because of the desire to keep banks functioning throughout the crisis.

Additionally, there may yet be greater emphasis on behavioural issues, including the promotion of private damages actions by those harmed by cartels.

'Almunia has committed himself to look at the issue of private damages claims from a broader perspective, involving other DGs of the Commission and the European Parliament. During his confirmation hearing he also said that he wants to avoid the excesses of US litigation in Europe and

that he is open to explore 'non-judicial' means in damages claims for anti-competitive behaviour,' notes Rivas at Bird & Bird.

Such a drive may be intended, in part, to help counter any rise in class actions within the EU, suggest some. While others note the potential growth of arbitration to adjudicate damages claims.

Undoubtedly some of the early issues the new Commissioner may face include a number emanating from Spain. Notably the new levy imposed by the Spanish Government on television and telecoms companies to help fund the public television and radio provider, RTVE.

Additionally, the Government's bank support fund FROB is being investigated, while there is also scrutiny of plans to force electricity generators to burn Spanish coal and bought at a regulated price.

The EC may not now be working at the same frantic pace as the start of last year but challenges clearly remain, adds Calviño. 'We see the coming year as likely to be very busy. Merger activity was already evidently up at the end of 2009, and while the number of notifications may be down their complexities are not however diminished.'