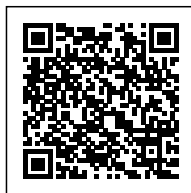


# BRUSSELS REPORT 2011: LOOKING BEHIND THE LETTER OF THE LAW

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## **Understanding the reasoning behind the application of EU competition law policy demands much more than mere legal insight**

Success in the European competition arena is not merely a question of knowing the law or understanding the limits of legal principles, it requires an awareness of prevailing European politics, and the nuances and interplay between national and European Commission (EC) regulatory authorities, say lawyers in Brussels.

The past year has seen EC decision-making steadily return to normality following the tremors caused by the financial crisis of 2007-08, say experts. There is a sense that the more flexible approach evident among the EC merger control and state aid decisions taken at the height of the crisis would likely not now be repeated. The new Competition Commissioner Joaquín Almunia has also begun to make his mark and is proving to be more reflective than his predecessor, Neelie Kroes

(now Digital Agenda Commissioner), and with much less concern for the media reaction to decisions. "The change of Commissioner is not responsible for any substantive changes in the way competition analysis is undertaken but an evident downside of a more considered approach is that decision-making does appear to be now slower than it was," says Javier Ruiz Calzado, a partner with Latham & Watkins in Brussels.

## Frustration

The pace of competition analysis undertaken by the EC is an area of constant frustration. It is now not uncommon for antitrust investigations to take years and final appeal decisions even longer, say lawyers. Last year saw the appointment of a new Hearing Officer within the Director-Generate for Competition (D-G Comp) but who to date has had no hearings to preside over. Apparently simple national merger clearances increasingly also now find their way before the EC.

The reasons for such delay are many and varied but it is not merely a question of the scale of the cases and investigations being undertaken, experts insist. Delays are inevitable given the complexity of EC institutions, while policy emphasis inevitably changes with each new Commissioner or senior appointment. Former Deputy Director General for Mergers Nadia Calviño has moved across to the Commission for Internal Markets and Services where she is a Deputy Director General with responsibility for financial services and financial institutions.

"The policy of regular mobility of the staff applied by the EC may sometimes create the wrong incentives and complicate the handling of the most complex and difficult cases by D-G Comp," says José Luis Buendía, a Brussels-based partner with Garrigues, who was previously with Legal Service in D-G Comp. "The EC obviously wants to challenge specific business practices but in doing so it usually faces very strong and very determined opposition."

The issue is not however the preserve of restrictive practices investigations. D-G Comp may not be adequately using the timing addressed for pre-notification discussions to the detriment of parties. Transactional lawyers report spending time in merger notification negotiations with D-G Comp (in Phase I) for them to still be referred to a full (Phase II) investigation. "It means significantly more expense, delay and legal uncertainty for the client and actually calls into question the merits of trying to engage with the Commission pre-notification," says Ramón García Gallardo, Head of EU at SJ Berwin in Brussels.



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Javier Ruiz Calzado, Latham & Watkins

But while the merger clearance process comes with an understood timetable, however long, there are no time limits in antitrust

investigations. Over 90 percent are now driven by leniency applications, say lawyers, and the onus is increasingly placed on the applicant to deliver the proof to uphold their request.

Lawyers note that managing the information load in pan-European cartel cases may be challenging, but with the requisite "will", shortened time limits could be enforced. Significant was the scale of issues facing D-G Comp in regulatory, merger and state aid questions at the height of the crisis, say some, but decisions were nonetheless made in days rather than months.

"The management of cases is one of the weapons in the EC's armoury. It can decide when to open a matter, what pace to take in investigations, and when to begin enforcement proceedings," says Andrés Font Galarza, a partner with Gibson Dunn in Brussels, and former Directorate General for Competition with the Commission.

## Momentum

An evident continuing trend is also the Commission's desire to devolve greater responsibility for competition issues to national authorities, and to publish deeper guidance on issues affecting the

financial services sector and in relation to state aid.

The Commission wants markets to be more self-regulating but this is difficult in areas where policy decisions are not explained. Lawyers continue to criticise the lack of guidance in some areas of antitrust enforcement where it is needed, and automatism in cartel cases and entirely driven by the leniency program, where proof of guilt is not always forthcoming.

The result, say some, is companies adopting more prudent tactics and beginning to take a "wait and see" approach in cartel investigations. "The EC is putting too much emphasis on companies admitting their own guilt, and many often capitulate to do requests for information and end up applying for leniency when there is actually little evidence against them," says Ruiz Calzado. Notable has been the EC's investigation into the air freight sector where almost a dozen leniency applications were made, but few if any of the companies involved were presented with any hard evidence against them, say experts. Most of those prosecuted are also now appealing the scale of fines imposed.

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Fines may be reduced on appeal but cartel prosecutions are rarely overturned at the European level, in contrast to experiences at the national level where decisions have been annulled.

Related to admissions of guilt, antitrust damages claims are an area of emerging developments at the European level, say lawyers. The Commission has now begun a consultation process, entitled Towards a Coherent European Approach on Collective Redress. The success of such a process and the final exactment of a legal instrument however depends as much on being able to generate sufficient political momentum within the Commission as marrying different European legal traditions, suggests García Gallardo.

"The draft of the guidance has clearly been delayed as a result of the issues surrounding the ratification of the Lisbon Treaty but also because of the desire of D-G Comp to get the support of two other Commissioners, for Consumer Policy and Justice, to help build a consensus around the proposals so that they carry more weight in the European Parliament."

Looking ahead at the issues that will likely inform competition law policy over the next few years requires an analysis of the kind of legacy that Almunia wishes to leave at the end of his four-year term, say some.

"Neelie Kroes already set a very high standard in the area of cartels, and I think that Commissioner Almunia will continue in that direction. But we are also likely to see significant developments in the state aid or monopolies arenas, or in developing remedies for collective redress," suggests Salomé Císal de Ugarte, Counsel with Mayer Brown and formerly Director of European & Regulatory Affairs with Whirlpool Europe.

Almunia's economic background is significant, they say, in the way he looks at competition issues – less from a legal perspective and more from a market effect point of view. The crisis may have helped lessen national barriers in areas such as banking and financial services, but significant challenges remain including reducing the inequalities evident in the state aid sector and to take a harder line against the exemption requests of some of the largest member states. One of the final policy goals of the EC President José Manuel Barroso, now in his last term, is a desire to achieve a better balance and equal treatment between them.

### **Playing the game**

The ability therefore to understand the political implications and dimension of EC regulation and rule-making, and the public relations aspects of policy stands is therefore crucial in advising clients, but it also means that many competition issues automatically generate uncertainty.

An example is the "trade-off" often seen between the Commission and national competition authorities in assigning jurisdiction to cases, say some. This is an issue that is particularly apparent in

the merger arena despite the relative clarity of the rules that determine regulatory competence (see page 53, Understanding the drivers behind national and European merger referrals).

"The division between European and national merger control competence is outlined for a specific purpose, but it creates legal uncertainty if national authorities request the European Commission to examine deals which do not meet the national thresholds," says Edurne Navarro, a competition partner with Uría Menéndez in Brussels. "If the Authorities want to catch companies they should have the national merger thresholds amended. The referral system otherwise lends itself to misuse."

Such an issue is now more acute, say some, as many companies have built up cash reserves over the downturn and are ready to go on the acquisition trail. It also means that national authorities with a track record of contentious referrals may see businesses avoid otherwise attractive opportunities in their jurisdiction.

The issue is indicative of the need to look behind the letter of the law, to both see and understand what is happening behind the scenes, and why particular policy decision may be taken. "Ultimately this means that despite the clarity of the competition rules, there might be other elements that need to be taken into consideration and that can influence the regulators' decisions. You have to see the bigger picture, and factor in the possibility of extended timelines and budgets in case of referrals to the EC," says Císnal de Ugarte.

**[Article related: Understanding the drivers behind national and European merger referrals - Mayer Brown](#)**