

BRUSSELS SPECIAL REPORT 2012: PUTTING A STAMP ON EU COMPETITION POLICY

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The measures introduced by the European Commission at the height of the crisis may still be in force but the Competition Commissioner is also beginning to leave his market

Among Iberian lawyers in Brussels there is a sense that the shocks emanating out of the global financial crisis, at least in the competition arena, are perhaps finally beginning to subside. There may not yet be a return to “normality” but the extraordinary measures taken to protect the financial sector, for example, seem to be beginning to work themselves out.

“We’re not seeing consistent financial recovery but the measures taken to protect those banks in the most trouble at the height of the crisis seem to have been a success – certain issues remain, but the restructuring and divestment processes demanded by the Commission for the state aid received are

being undertaken," says Ramón García-Gallardo, Managing Partner of SJ Berwin's Brussels office.

Issues surrounding European countries' sovereign and public debts, and the pressures on the European Commission (EC) and European Central Bank (ECB) to safeguard the euro, may yet lead financial institutions to face new financing concerns.

"The legal uncertainty surrounding European sovereign debt has been deeply unsettling for creditors, in particular European banks. Initially banks were told that they were senior to Governments, but a decision was taken that they should become junior creditors," says Salomé Císnal de Ugarte, Partner in the Brussels office of Mayer Brown. "If this is applied, it could be a form of state aid to non-banks. To be non-distortive from a competition point of view, the haircut would have to be applied to all private sector creditors and all public sector institutions that compete with them, for example State-owned banks."

Traditional activity

With a relative drop in "life support" work, at least for the time being, lawyers report an upturn in more traditional areas of competition and antitrust activity.

Europe's economic downturn, and a drop in transactional activity, may have led to a fall in merger control work but of the cases being analysed by the EC's Competition Authority (DG Comp), a deeper analysis does seem to be made with relatively more investigations entering Phase II.



Enric Olcina Sargatal

"As a consequence of the economic downturn, many business sectors are experiencing over-capacity and a need to restructure, which may see larger operators acquiring weaker ones. There will be attempts to use the 'failing firm' defence to force mergers through, however, the EC, with a very rigorous approach to any crisis defence, will continue applying merger rules strictly giving priority to competition rules," says García-Gallardo at SJ Berwin.

DG Comp seems also to have added more capacity to investigate matters, he suggests. "Where previously you may have had a case team of perhaps three lawyers now it is more likely to be two or three times that size, which means they are able to dig much deeper."

The most defining merger issue before DG Comp of the last year has been the proposed \$7bn takeover of NYSE Euronext by Deutsche Börse, say lawyers. The merger was approved by the US Department of Justice in December 2011 but rejected by the EC, which voiced concerns over its impact on the two biggest derivatives exchanges, NYSE's Liffe and Deutsche Börse's Eurex.

"The decision was a defining moment for the Administration of the Competition Commissioner Joaquín Almunia," says Javier Ruiz Calzado, a Partner in Latham & Watkins' Brussels office and Co-Chair of the Global Antitrust and Competition Practice Group. "The belief among many from the outset was that the EC would block it. Deals like these are supertankers. There is a lot of forethought required and it is highly unlikely that someone can step in at the last minute and impose a change of direction."

But the significance of the transaction has highlighted recurring concerns over the EC's merger control process and particularly the division of powers between those that define competition policy and those who analyse individual cases note others.

"There has been some very high profile criticism notably from the US over the relative inability to appeal the Commissioner's ruling in the event of a blocked merger," adds Javier Ruiz Calzado.

There are inferences of tensions emerging between the regulators in Brussels and the Judges of the European Court of Justice in Luxembourg, Europe's highest court. "Europe's Commissioners are

unlikely to willingly give up their powers unless obliged to do so by the Courts or the legislator," believes Andrés Font Galarza, a Partner with Gibson Dunn & Crutcher in Brussels.

Antitrust arenas

Nonetheless, the general trend within the antitrust arena is one of a quiet return to "business as usual", say lawyers. The EC may have postponed the relaxation of the extraordinary measures introduced after the collapse of the financial sector in 2007-08, but more emphasis is now being seen in the cartel arena, with new investigations, sector analysis and enforcement proceedings.

The food sector is one that many expect to see a rising level of analysis. The creation by Almunia of a "Food Task Force" has put entire supply chains under analysis. There have also been a number of significant national investigations – including in Spain – and the EC is facing increased pressure to act from the European Parliament.

Such steps may in part be intended to battle inflationary pressures, but food suppliers and supermarket chains are facing increasing scrutiny, say experts. "There is no doubt that the Commission is hearing more vocal opinions but whether anything concrete will actually be done is another matter," says Ruiz Calzado at Latham & Watkins.

There is a sense that the EC does not want to assume jurisdiction unnecessarily over what have to date been largely vertical or national issues, agrees Miguel Troncoso Ferrer, Competition Partner with Gómez-Acebo & Pombo in Brussels. "In any event, we have seen investigations like that conducted in the UK by the Office of Fair Trading (OFT), which have been deep-rooted, but which ultimately produced little hard evidence of anti-competitive activity."

If a major investigation is launched it will most likely be because the EC wants to send out a policy message, believe others. "Either the EC will want to set a benchmark for investigations that the national authorities can then follow, or the matter will be so high profile that it has no choice but to intervene," says Font Galarza at Gibson Dunn.

Multi-jurisdictional filings

Recent years have seen a dramatic rise also in the degree of interaction between national and European Commission competition authorities, especially as regards merger control but this "joined-up" approach is also now extending to the US and across Latin America.

"As well as the behind the scenes sharing of data and information it is now not unusual for the authorities in Brussels to connect lawyers' calls direct to the Department of Justice in the US, as well as to case handlers elsewhere. We also now see Madrid increasingly referenced when it comes to Latin American issues," says Cissal de Ugarte at Mayer Brown.

Halfway through his remit, Joaquín Almunia has yet to fulfil his desire to modernise competition policy and protections but change will come, believe many. Self-assessment in merger cases has been proposed, while there is concern over the relative disparity between merger thresholds across national states. Likewise, certain issues – such as private damages, or criminal sanctions for antitrust and competition infringements – are only available at the national level.

Lawyers in Brussels seem certain that the continuing downturn will provide the catalyst for further change. Many are also confident that clients will increasingly look for more specialist expertise in key areas.

"The crisis has clearly raised the profile of competition issues but we are also seeing greater inter-connection with other practice areas – including litigation, administrative law, data protection and privacy," says Troncoso Ferrer at Gómez-Acebo & Pombo. "Increasingly we have to deal with the outcome of competition infringements not merely the causes."

The scale of fines for anti-competitive and cartel behaviour is also making companies look again at

their compliance needs. "There is a cynical suggestion that compliance programmes are intended to merely tick boxes, but that is a contradictory view – if a company has a programme and chooses to ignore it, the result will likely be heavier sanctions than if one did not exist at all," suggests García-Gallardo at SJ Berwin.

The issue of liability within groups of companies also raises questions, notably the extent to which a holding company can police the activities of perhaps hundreds of subsidiaries.

"Even in those cases where the fault is clearly from a 'rogue' employee, European competition law can only target the company and not the individual," says Cissal de Ugarte at Mayer Brown. "And if there is a clear parent-subsidiary relationship then the liability will pass up the chain."

Looking ahead, Brussels lawyers see new issues therefore arising out of the downturn, the sovereign debt crisis, and because of the raised awareness of competition issues within companies.

"Certain types of work will always be seen as lower cost, such as audits, training or the implementation of compliance programmes, but when matters get really serious and the EC is involved then the focus switches very quickly to getting the right people for the job," says García-Gallardo at SJ Berwin. "The challenge thus facing us is how to be on the client's panel for when those issues do arise."