EU Competition Commissioner Discusses Enforcement And Future Policy Developments

By Vincent Brophy and Scott McInnes (Jones Day)

The EU Commissioner holds an impressive arsenal of powers to investigate and punish breaches of EU competition law. A change of Commissioner is therefore a potentially significant event for those interested or affected by EU competition policy and enforcement. The current Commissioner, Joaquin Almunia, was appointed at the beginning of 2010. We have followed his actions and significant speeches, which provide insights into how he intends to develop and apply EU competition policy and law.

We highlight key remarks Commissioner Almunia has made on the future direction of EU competition policy (1) Commissioner Almunia has confirmed the European Commission's ("EC") rigid position that no discount on fines will be granted on the basis that a company had a competition law compliance program in place. (2) The EC will not impose a fine on an undertaking that may result in this company being pushed into bankruptcy. (3) The EC will seek to make changes in the field of private enforcement, in particular on collective redress. (4) Commissioner Almunia acknowledges that the functioning of oral hearings should be improved.

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(1) No Discount On Fines For a Compliance Program

Commissioner Almunia confirmed the EC's existing practice (and precedent of the EU courts) that it would not reduce fines or offer other forms of preferential treatment to a company merely on the basis that it has a compliance program in place: "We reward cooperation in discovering the cartel, we reward cooperation during the proceedings before the Commission, we reward companies that have had a limited participation in the cartel, but that, I think is enough…. If we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed? The benefit of a compliance programme is that your company reduces the risk that it is involved in a cartel in the first place. That is where you earn your reward."

Despite this rigid position, robust competition law compliance programs obviously are important in prevent-

ing compliance issues arising in the first place: companies would be well advised to maintain them.

(2) The EC Will Not Impose a Fine That a Company Is Not Able to Pay

There are indications in EC precedent that, where a company has no assets or those assets have no value, a fine will not be imposed (see Calcium Carbide cartel). It is also Commission policy that where an entity is in financial difficulty and that the fines would lead to a similar result, leniency will be considered. In a recent speech, Commissioner Almunia confirmed that he is willing to consider such claims: "In no circumstance should the fines we impose push a troubled business off the cliff. When their financial difficulties are real, I will always take that into account and lower the fine. Competition policy is about promoting competition, not eliminating firms from the marketplace… However, these reductions are the exception and not the rule. We are seeing more of them in the current crisis, but even now they are the minority." (25 October 2010, Businesseurope & US Chamber of Commerce. Competition conference). This statement reinforced his previous comments when the Commissioner made reference to the "social costs" that may arise from bankruptcy (Competition Policy: State of Play and Future Outlook, European Competition Day, Brussels, 21 October 2010).

Indeed, according to the EC 2006 guidelines on the method of setting fines: "A reduction could be granted solely on the basis of objective evidence that imposition of the fine…would irretrievably jeopardize the economic viability of the undertaking concerned and cause its assets to lose all their value." The EC therefore verifies that these two cumulative conditions (irretrievable jeopardy of the economic viability of the entity and the loss of all value) are met and that that the fine that would ordinarily be imposed would be the cause.

These conditions were assessed in the 2009 Calcium Carbide EC decision. Although the parties argued about the effect of the 'prevailing economic crisis' and the 'poor financial position' of the companies involved, the EC concluded that most of the companies faced only a low risk of bankruptcy and none of the condemned companies submitted objective evidence showing that the two cumulative conditions were fulfilled.

(3) The EC is Proposing Changes to the Systems of Private Enforcement and Collective Redress

Enforcement in Europe tends to be public as opposed to private. Although reluctant to introduce the negative effects of class actions as found in the U.S., the Commission is seeking ways to stimulate private enforcement, including mechanisms of collective redress. The Commissioner has observed that "Today, only large companies can afford to go to court to seek compensation for damages caused to them by illegal practices. But when the victims are citizens or small businesses, they generally do not bring claims because when taken individually the losses are too small. This can only be addressed with effective collective redress rules across Europe."

Commissioner Almunia and other EU Commissioners have "agreed on the need for a coherent EU framework to strengthen collective redress across Europe that would draw on the different European national traditions. At the same time, we are committed to avoid the excesses and drawbacks of the U.S. system." Commissioner Almunia has announced that:

- The Commission will launch a public consultation in November 2010 until the end of February 2011.
- In light of the replies that the Commission receives, it will propose a framework for collective redress, which "would become the basis for possible legislative initiatives in several policy areas including competition, environment, consumer protection, and others."
- A draft Directive will be proposed on antitrust damages actions, in the second half of 2011, and that would need to be approved by the Council and the European Parliament.

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Clearly, the results of the consultation and in particular subsequent legislative proposals will be of direct interest to business, in particular entities that have been subjects of investigations or recent enforcement decisions.

(4) Commissioner Almunia Accepts That Oral Hearings Require Improvement

Following receipt of a "statement of objections" ("SO"), a company under investigation by the EC is given an opportunity to review the case team's file and to respond in writing to the SO. The company also is given the opportunity to have an "oral hearing", which is organized and chaired by the Hearing Officer. In September 2010, the EC announced that Wouter Wils had been appointed as Hearing Officer to replace Karen Williams (in addition to the incumbent Michael Albers).

However, the oral hearing is not like a court "hearing", in the sense that it is not a forum within which the "main parties" (the case team and the investigated parties) present their cases in front of an independent decisionmaker, where their respective cases can be "tested" in an open forum. Rather, during an oral hearing:

EU Competition, continued on page 12

EU Competition *(from page 11)*

- The EC essentially restates orally the arguments made in the SO (plus any additional evidence/arguments).
- The complainants and parties are admitted separately to attend the oral hearing to make oral statements in support of the EC.
- The investigated party essentially restates orally the arguments made in its written response to the SO (plus any additional evidence/arguments).
- National competition authorities are allowed to ask questions to the parties.

A system like this – in which the investigation, prosecution, and decision-making powers belong to one institution – can offer only limited due process to the party under investigation. The limitations on these protections are exacerbated by the fact that the oral hearings in particular are not chaired by an independent decisionmaker that can question the various participants.

The Commissioner seems to have recognized some of these concerns: "If I chose one issue which in my view will require particular effort to be improved, it is the way hearings take place, who is allowed to intervene and participate, how every participant is allowed to contribute, and how the conclusions of the hearing officer will be integrated into our decision."

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Reform of this aspect of Competition policy is something that many have been requesting for quite some time already. Businesses should closely watch what changes the Commissioner will be ready to propose to the functioning of oral hearings – and the EC's competition proceedings in general. ❑