

Newsletter, 6 December 2010

Policy developments in EU competition law

Recent key remarks of Competition Commissioner Almunia

Almost a year ago, in February 2010, Joaquín Almunia, former Commissioner for Economic and Monetary Affairs, started his tenure as Competition Commissioner replacing Neelie Kroes as head of the Directorate-General for Competition in Brussels. During the last weeks, Commissioner Almunia has given several speeches¹ on the state of play of competition policy and on intended developments in competition policy and enforcement. His statements show that he is as rigorous and consequent in enforcing competition law as his predecessor. The highlights are summarized in the following.²

Antitrust - Fining policy confirmed

The fight against cartels is of priority to Almunia. The continued emphasis on rigid cartel enforcement can be seen in his statements that companies will not receive a reduction of fine for operating a (failing) competition law compliance programme and that the inability-to-pay-argument will only be considered in exceptional circumstances.

No reward for compliance programmes

Almunia defends the existing practice of the Commission not to grant any reductions of fines or other preferential treatments to companies found to be involved in anti-competitive practices on the basis that they are operating a compliance programme. A "compliance programme that has failed" was not to be rewarded: *"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." Specific rewards, so the Commissioner, would furthermore result in "unequal treatment" between companies having the resources to set up a programme and companies that cannot afford it. Almunia nevertheless encourages compliance programmes as "worthwhile investments". The benefit of a compliance programme was a reduced risk of being involved in a cartel in the first place. *"That is where you earn your reward."*

Inability to pay

In his speeches, Almunia stresses that deterrence is the primary objective of antitrust enforcement and that the Commission will continue a deterrent level of fines, especially during a financial crisis when the temptation to cartelise is even stronger. The cost of non-compliance with competition rules, so the Commissioner, must be larger than what companies hope to gain from entering into price-fixing or other illegal behaviour. However, recognising the impact of the financial crisis on the liquidity of companies, Almunia states that the Commission "cannot ignore the fact that some companies are in financial difficulties and may be driven into bankruptcy as a consequence of our fines – with the corresponding social costs." In order to avoid the "unwanted side-effect" of driving companies out of business, the Commission was willing to grant reductions of fines "on an exceptional basis" and in "exceptional circumstances" only. The strict approach of the Commission to reduce the fines of companies claiming inability to pay was demonstrated in the recent *Airfreight* decision³ when the Commission refused five applications for inability to pay despite the difficulties in the airline industry.

¹ The cited speeches can be found at the Commissioner's website at http://ec.europa.eu/commission_2010-2014/almunia/headlines/speeches/index_en.htm.

² This Paper does not address developments in State aid policy, where several changes will be introduced in 2011.

³ Case COMP/39258 - *Airfreight*, decision of 9/11/2010.

Industry focus on digital technology markets

Commissioner Almunia continues the focus of the Commission's enforcement activity on the energy, telecom, information technology, financial services and transport sectors. The Commissioner announced that he especially carefully watches the digital technology markets for competition law infringements as digital developments promise to bring new impetus to the economy ("*innovation powerhouse*"). The Commissioner's willingness to intervene to enforce principles such as net-neutrality and the accessibility of digital platforms can be seen in the recent decision to open formal proceedings against Google following several complaints by competitors.

Based on the conducted sector inquiry, the Commissioner also announced to continue to enforce "*with determination*" competition rules in the pharmaceutical sector.

Private enforcement - Rules for collective redress in preparation

Basic principles

In his speeches, Almunia acknowledges the need for a coherent EU framework to strengthen collective redress across the Member States. All citizens should enjoy the right to obtain compensation for damages caused by a breach of EU law while avoiding the excesses of the US-style class-action model.

In October, the College of Commissioners discussed first proposals by Almunia and the Commissioners for Justice and Consumer Policy and agreed upon five basic principles for group damage claims across the Union:

- effective compensation for everyone who has suffered damages;
- strong safeguards against abusive litigation;
- consideration of settlements in addition to court proceedings;
- enforceability of collective judgements throughout the EU;
- fair access to justice by allowing adequate financing.

Directive to be expected in 2011

Following the currently running public consultation, the College will propose a general legal framework for collective redress in spring which will serve as basis for legislative initiatives in all relevant policy areas. Commissioner Almunia intends to present a draft Directive on antitrust damages actions in the second half of

2011 setting out common standards and minimum requirements for national systems of antitrust damages actions. Almunia already mentioned some safeguards in order to avoid abuses:

- victims will not obtain more than full compensation;
- only state bodies and certified non-profit organisation will be allowed to bring representative actions;
- the damages awarded will go entirely to the victims and not to the representative entity;
- opt-in and opt-out models are too simplistic and will be replaced by a more sophisticated, yet to be determined system.

Due process - Oral hearings to be improved

Almunia generally sees no need for structural reforms of the decision-making process and institutional structures. Due process in competition law enforcement was ensured by "*adequate checks and balances*". However, besides the finalisation of the package of Best Practices, the Commissioner announced to improve the way oral hearings take place - a step which has been requested by practitioners for a long time. On a conference, Almunia stated to look into the issues of "*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 decisions*".

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