Interview with Joaquín Almunia

The EU competition commissioner talks to CLI (part one)

Do competition lawyers do more harm than good by promoting low prices (which usually means big companies) over the value of small enterprises to local communities?

My job as EU commissioner for competition goes beyond promoting low prices. As the head of an enforcement authority, I have to apply the rules to ensure that firms compete fairly with each other, since it is precisely this healthy competition that can exert downward pressure on prices, stimulate innovation and lead to beneficial results for the society. By ensuring that competition is not distorted and that efficient competitors are not prevented access to the market, the European Commission helps widen consumer choice, and can lead to a better quality and more competitive prices for end consumers and for intermediary customers alike.

In doing so, we do not favour big companies over smaller ones. Such is not the spirit of competition law and we wouldn't have the instruments to do it anyway. In fact, often, competition rules have a positive effect on the smaller firms. By keeping competition undistorted, we ensure that even smaller firms have a chance in the single market, on equal footing as their bigger competitors.

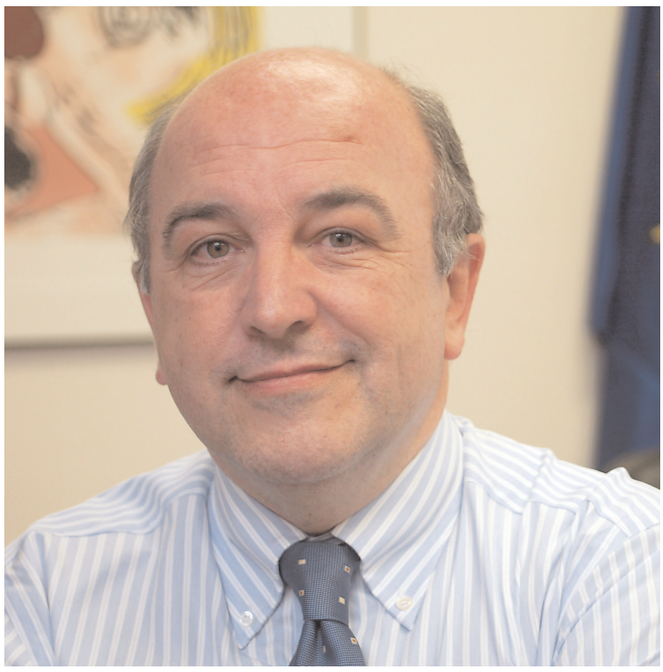
For instance, when we fine a firm for an abuse of dominance, we make it easier for smaller companies to come forward with innovative products and services, without the access to the market being blocked by the abuser. Similarly, when we put an end to a cartel, we ensure that intermediary customers – often SMEs – get better value for their money and more choice. And of course, as far as state aid control policy is concerned, small firms normally benefit from a more favourable treatment in terms of both procedural and substantive rules.

Take the large supermarkets, for example. A repeated criticism is that while they fight it out on price, all the small local shops in-between go to the wall. As a result, local communities are dying.

I'm not sure this is always the case. You have the bigger distribution chains, the bigger retailers, which are not the same all over Europe. Tesco, for example, is unknown in France or in Spain, and Carrefour is hardly known in Britain or Sweden. However, we have not yet opened a case against the bigger distribution chains or retailers here in Brussels in the last 10 years. We do not see big competition problems because of them. But we have asked the national competition authorities, what are you doing about them? Recently, we had a meeting with the NCAs and they have opened a lot of cases against them in many EU countries. So at the national level, you can find a lot of competition cases but none at the EU level. I have therefore asked the NCAs to see if some of the problems they are dealing with at their level can have some sort of treatment at our level.

What has been the high spot of your career to date?

I'm very glad that that I have been able to participate from the very beginning in the transition to democracy in my country, Spain. I'm also glad to have had the opportunity to be a member of the Spanish parliament – and at the moment that the Spanish



constitution was adopted. I'm very proud to have been a member of the first Socialist government in December 1982 for nine years or so. And here in Brussels, I'm very happy to have been the commissioner in two of the most attractive portfolios of the whole college, first in economic and monetary affairs and secondly in competition.

And the low spot?

I would like to be able to change the results of some of the decisions I've made – the way I conducted or decided to participate in a political campaign, for example, or where I've decided to occupy a particular political job at a particular moment. Certainly, I would like to change the result of the 2000 election for prime minister in Spain, when I was defeated. If I had the chance to compete again in such a campaign, I know some of the errors that I would not commit again. But of course this is not possible in reality.

You've always said that the crisis did not impact on competition policy and that it was business as usual. Can that really continue to be the case?

The crisis should not affect competition rules, in the sense that we will not change the rules or soften our line on law infringers merely because the economic conditions are allegedly difficult. What Europe needs more than ever are efficient, competitive and innovative firms that can generate growth, create jobs and offer consumers a better choice of products and services, at competitive prices.

This will not occur if we close our eyes on cartels, if we allow dominant companies to obstruct access to the market for their efficient rivals, or if we allow large amounts of state aid to be granted without any conditions attached. Our economy simply cannot afford such distortions of competition and there is no reason why our people should bear the costs of some companies

breaking the law. In times of crisis, the circumstances are different, and we need to take them into account. But the need to protect citizens and businesses from those who abuse their market power is more acute than ever.

We have seen very few settlement outcomes in cartel cases since the 2008 notice. Will we be seeing this change?

It is normal for a new procedure to need some time to take off but since I took office as competition commissioner, we have adopted five settlement decisions and there are a number of other cases in the pipeline. So I can safely say that the settlement tool is one of our recent successes. In 2010, we reached our first full settlement with 10 different producers of memory chips (or DRAMs) in a complex case; whereas in the animal feed case, a settlement was reached with five parties, while one of the parties decided not to settle. We thus had to apply the normal procedure to one party only. In April 2011, we adopted a full settlement decision in the consumer detergents case, where a fine of around €315m was imposed. Last October, we closed another investigation by a full settlement decision relating to a cartel in CRT glass used for the production of glass bulbs built into TV and computer monitors. And in December last year, we adopted another decision in the market for refrigerator compressors.

These cases prove that the expected efficiencies are real. Settlements follow a procedure which is far less onerous than the ordinary one. This can make an important difference in terms of efficiency for both companies and the Commission, particularly given the speed of approval of decisions and the expected absence of appeals against the settlement. We are satisfied with the outcomes reached so far and we're also experiencing an accrued interest for the settlement process from the legal and business communities. We expect companies to show a growing interest in the settlement alternative at earlier stages since they are gaining confidence in the instrument. Therefore, I consider this procedure to be an extremely important tool in the fight against cartels. But I can also assure you that we will continue adopting cartel decisions according to the normal procedure, whenever we deem that it is the appropriate solution.

Will the latest string of challenges to the non-disclosure of leniency documents have a chilling effect on EU/NCAs' leniency programmes?

The Commission will do whatever is necessary to protect the effectiveness of its leniency programme and those of the national competition authorities. I don't agree with those who believe that such protection is incompatible with the Commission's policy to enable victims of competition law infringements to obtain full compensation for the harm caused to them. It is perfectly possible to achieve both these objectives.

Applied to the disclosure of leniency documents, this implies that the Commission itself does not disclose documents that were created for the purpose of a leniency application, because we consider such documents crucial for the success of our leniency programme. When courts are asked to order the disclosure of leniency documents in the context of a damages action, the same principles led us to intervene in Europe and abroad, asking courts not to seek unnecessarily the disclosure of documents created for the purpose of a leniency application.

If evidence that is necessary to ensure full compensation can be found elsewhere, those other sources should be given preference. We've also regularly reminded foreign courts that documents in the Commission file (to which parties in private proceedings may have had access) can only be used for the purpose of applying EU competition rules. So far we've successfully prevented undue disclosure of leniency documents by national courts and I trust that these courts will continue guaranteeing a sound balance of the different interests at stake. To secure that position further, it's necessary to clarify the interaction between private and public enforcement in a legislative instrument on antitrust damages actions. This should be done in a way that gives an appropriate protection to leniency programmes, while at the same time ensuring an effective right to damages.

The Merger Regulation was meant to introduce certainty into the timetable for merger scrutiny by the Commission, yet increasingly transactions are facing imponderable levels of prenotification assessment. How does the Commission propose to reintroduce the originally intended levels of timing certainty?

Our merger control system is very clear: in a merger case, it is up to the parties to provide the Commission with a complete notification. The requirements for a complete notification are transparent. If a notification fulfils the legal requirements, it is entirely in the hands of the parties when to notify a merger. It is the parties that choose the timing.

Against this background, the prenotification dialogue is a service that the Commission offers. It is a possibility for the parties to make sure that their notification is complete. It gives them comfort that their notification will not be declared incomplete later and that they can rely on the short legal deadlines of EU merger control. This means, among other things, that if the prenotification periods were cut shorter, the likelihood of more Phase II cases – and even of more negative decisions – would be higher.

Finally, the Commission has spelled out in its best practices how it will conduct prenotification dialogues. In particular, we normally provide feedback, or ask questions, on draft notifications within five working days. Of course, we always strive to improve our procedures and welcome constructive feedback on the things that can be further improved.

In cartel cases, companies from certain jurisdictions (eg Japan) appear to figure more prominently than those from certain others (eg China, Russia, US). Are companies from these latter jurisdictions really less involved in cartel activity?

When we look at the cartel decisions that we've taken since 2000, we see that seven companies from Taiwan participating in three different cartels were fined over €400m, 37 US companies participating in 27 different cartels were fined over €1,400m and 55 Japanese companies participating in 21 different cartels were fined over €1,200m. Not a single Russian company was fined for a cartel infringement during this period. Even accepting that there may be differences among the different jurisdictions, it is impossible to say anything conclusive about the things that you have not found. For example, such cartels either do not exist or we have not discovered them yet.

However, I find it it very encouraging to see that more and more competition authorities are becoming operational around the globe, that they are increasingly successful in their fight against cartels and that, in a growing number of countries, cartels are considered as negative for the economy. The Commission continues to play an active role in stimulating the work of the International Competition Network. Last October, we hosted our latest cartel workshop in Bruges on the theme "Enhancing the effectiveness of the fight against cartels". It is in Europe's interest that all our major economic partners fight cartels vigorously so that global cartels can be detected more quickly.

Is DGComp proposing to take a tougher stance as regards potential abuses by IPR owners, particularly in the telecoms and digital economy sectors?

The Commission's stance on the application of competition law to potential abuses by IPR owners has not become any tougher or softer. We've always acted whenever it has become clear that the use of IPR could lead to less rather than more innovation, the raison d'être of IPR. Recently, we've witnessed an increasingly strategic use of IPR. Take, for example, the mobile communications industry. At the moment, it seems that virtually everybody is suing everybody else for alleged patent infringements, often with a view to blocking certain products from entering the market.

One of the reasons for this could be "patent thickets", which are prevalent in this industry as well as in a few others. This describes a situation where a company wishing to produce and sell certain products must make use of a large number of patents that are often very limited in scope and whose ownership is dispersed. One can wonder whether such patent thickets and the related strategic enforcement by IPR holders are good for innovation. We are therefore having a close look at this phenomenon and will not shy away from enforcement action where it becomes clear that the strategic use of IPR turns out to be anticompetitive.

Another issue we are currently pondering is the meaning of a FRAND commitment given by the holder of a standard-essential patent. Such a commitment means that an IPR holder has pledged to license its patent and will only ask for royalties that are fair, reasonable and non-discriminatory. It is therefore an interesting question what giving a FRAND commitment means for IPR holders' enforcement of standard-essential patents, and whether the competition rules impose certain limits in this regard.

There are also practices affecting Europe's digital ambitions, whether purely commercial or originating from member state action, that may unjustifiably restrict cross-border trade. In this respect, I note the European Court of Justice's recent judgment in the *Premier League* case regarding satellite television broadcasting. My services are examining its potential impact on antitrust enforcement in the digital economy. But this ruling should be good news for football lovers watching their favourite teams across Europe. Also, as regards ecommerce, the recent *Pierre Fabre* judgment confirms that the absolute refusal of a company to allow its distributors to sell its products on the internet is anticompetitive. Such rulings give us further support in ensuring that online sales are not unduly restricted.

You recently introduced a set of best practices to enhance rights of defence in antitrust enforcement. However, there is still no proper separation between the investigative and decision-making stages of the process. Is this system compatible with the ECHR?

Let me first say that I am strongly committed to ensuring that companies that are the subject of our antitrust investigations are able to defend themselves effectively during the proceedings before the Commission. It is essential for them and also for our institution, in order to take sound and fair decisions.

That is why, following my proposal, the Commission has recently adopted a package of measures that further strengthen the rights of parties during the administrative proceedings while bearing in mind the need for efficient procedures: revised terms of reference of the hearing officers, who ensure the safeguard of the parties' procedural rights; revised best practices for our antitrust procedures, so as to make the process more transparent; and revised best practices for the submission of economic evidence, in order to give the necessary guidance to parties. I'm confident these new changes will bring real benefits for parties to competition proceedings and will improve the interaction between them and my services during the investigation.

But I am also convinced that an administrative antitrust system such as ours is fully consistent with the European Convention on Human Rights since our decisions are subject to extensive review before the courts of the European Union.

According to long-established case law of the European Court of Human Rights, an administrative non-judicial body such as the Commission can impose penalties which fall within the non-traditional category of criminal law. This is compatible with article 6 ECHR on the right to a fair trial, provided (as explained in the 2003 *Janosevic v Sweden* case) that there is a possibility for an appeal "before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision".

Two recent judgments have confirmed the legitimacy of administrative systems subject to such reviews, a model followed by many EU competition agencies.

First, in its recent *Menarini* judgment, the European Court of Human Rights has applied these principles to a case in which the Italian competition authority had imposed a fine in an antitrust case. While every system has its particularities, the institutional setup in this case is very similar to ours. The court ruled that article 6 ECHR was complied with, particularly given the fact that (1) the decisions of the administrative competition authority were subject to judicial review in which it was assessed whether the competition authority had used its powers appropriately; and (2) with respect to fines, the court could verify the suitability of the sanction and had the power to change the amount imposed. Then, on 8 December last year, the European Court of Justice followed the very same analysis in the *KME* and *Chalkor* copper tubes cartel cases, this time with respect to our system. It essentially held that the judicial review carried out by the General Court in respect of Commission decisions imposing fines in competition cases was in line with the principle of effective judicial protection, set out both in article 6 of the ECHR and the Charter of Fundamental Rights of the EU. These judgments are therefore of great significance for the legitimacy of our administrative system.

Joaquín Almunia interview (2)

The concluding part of CLI's interview with the competition commissioner

Do you think that people still have confidence in regulators and administrators after the past banking and current financial crisis?

I certainly do, because the people realise that leaving it to the markets to solve the current problems would lead to even more difficult economic conditions. It is now the responsibility of public authorities – from international organisations to national governments – to bring finance back on track. More than ever, we need our banks to finance the recovery and help companies create jobs and better prospects for our people. As public authorities, we should therefore not shy away from intervening when market mechanisms turn out not to be efficient enough in the absence of rules and public interventions. In this context, it is clear that no European country is large or strong enough to go it alone. If we stand together, Europe will find the right solution – and I have no doubt that we will.

What would you say are the hallmarks of your incumbency as competition commissioner to date?

It is still too soon to answer this question. I would prefer to continue with my work and wait until the end of my tenure – in October 2014 – to look back and think about the answer. Having said this, it is clear that these first two years have been characterised by the challenge of enforcing competition law during the financial and economic crisis. For instance, we are using our state aid control mechanisms to prevent subsidy races between member states, and that aid to support ailing financial and non-financial entities comes with strings attached, such as restructuring obligations. In parallel, we have also continued with strong enforcement of competition rules to ensure that growth is not stalled by anticompetitive practices.

More specifically, I would refer to all the cases in which our action has had an impact on consumers, on people's livelihoods, at a time when so many are suffering because of the crisis. This has been the case, for example, with cartels such as bathroom fittings, bananas, and detergents, or with abuses such as Telekom Polska. It is easy to see that in the aftermath of decisions like these, we help people to have more choice, better quality products and services, and lower prices; and I think this is particularly important in this difficult period.

Economics is becoming a fact of life in every aspect of competition policy and enforcement. Is this practical from a business perspective as economic analysis becomes ever more complex and unpredictable? Is there a trade-off between legal certainty and economic legitimacy (especially in merger/article 102 cases)?

Our economic analysis is growing in sophistication and – if anything – this makes it more useful and predictable. The decisions we take greatly benefit from the study, say, of the effect of a merger or of anticompetitive behaviour carried out by our team of economists. This view is broadly shared by the business community. Similarly, there is no trade-off between legal certainty and economic "legitimacy", as you call it. Solid

economic analysis gives companies a precise explanation for why we do – or do not – intervene, based on the effects of the merger, agreement or behaviour under investigation.

For instance, economic analysis helps us to figure out whether companies merge or adopt a certain behaviour because they want to manufacture better products and become more efficient or because they want to make life difficult for competitors and thereby hinder competition. Looking into potentially anticompetitive business practices from an economic perspective gives us a better insight of the motivations that move business people and, at the same time, allows them to better understand what we are looking for. I am convinced that companies understand us far better and far more often than is reflected in the public statements that follow our decisions.

Is state aid analysis, following the banking crisis, becoming so totally unpredictable as to be meaningless?

Our assessment of aid to banks during the crisis has taken place in very specific circumstances. Legally speaking, we must remember that our decisions have been taken on the basis of article 107(3)(b) of the treaty, which allows us to approve aid to remedy a serious disturbance in the economy of a member state, rather than the ordinary legal base of article 107(3)(c).

Under the emergency regime introduced at the beginning of the crisis, we have taken restructuring aid decisions on 26 banks and have seen the orderly liquidation of 11 more. We have also ordered the recovery of the aid in the case of a small Portuguese bank as it was clearly not viable and in view of the low remuneration of the refinancing guarantee it had received from the state. And our work is not over. At present, we are working on restructuring plans for another 24 banks and – to respond to the latest stage of the crisis that is centred on

Europe's sovereign debt – I decided to extend the emergency regime to 2012, clarifying some of the rules and adapting them to the new market conditions.

In a word, we have carried out an enormous amount of work and we have what I regard as very good results to show for it. For instance, we have made sure that the public bailout of banks would be carried out on the same terms in every part of the EU, thus preventing the massive transfers of capital towards the more favourable jurisdictions and ensuring that sufficient levels of credit were available to the real economy even at the height of the crisis. Also, we have imposed conditions for the bailouts that entailed a fair burden sharing, thus addressing the moral-hazard issue. Finally, we have played the role of a de facto resolution authority at a time when there was no adequate EU-level instrument to that effect.

As to the part of your question where you inquire about the predictability of our control, we managed to make our policy predictable by striking a difficult balance between common principles and individual assessments. On the one hand, we have conducted all our analyses on a firm and clearly articulated set of principles; on the other, we have studied each case in its own terms. The banks that have come to us have shown a bewildering array of types of operations – retail and wholesale – in different sectors and geographical markets, and with different funding bases. For this reason, the right divestments and behavioural measures to limit distortions of competition could only be determined through a detailed, case-by-case analysis.

Following up on the judicial review debate, part of the problem is that judges at the court in Luxembourg are not specialists in competition law and therefore may be more deferential to the Commission. The procedure is also too slow. The court has recently suggested adding new judges to cope with the backlog of cases. Do you think we should use the new judges to create a specialist tribunal for competition cases like the CAT in the UK?

I fully support solutions to decrease the duration of cases in Luxembourg, especially at first instance. An option is an increase in the number of judges at the General Court, so that it can effectively deal with the increasing number of new cases. I think this may be a preferable solution to creating a specialist court in competition law. I do not agree that judges in Luxembourg are not well acquainted with competition law. Competition cases form a significant part of their workload and the Court goes to great length of analysis in competition matters. That being said, some subject-matter specialisation by several General Court chambers could ensure more efficient and rapid handling of cases. The very purpose of the creation of the General Court was to ensure a thorough review of facts and it is very important that it has the means available to continue to fulfil this crucial task.

Turning to the question of cartels, are there big differences or similarities in how competition authorities tackle the problem?

The systems are, of course, different in different countries. In the US, for instance there is a system based on criminal offences, whereas in other countries it's a more administrative system. But regardless of these differences, we have a good co-operation and we are more efficient because we co-operate. In some countries, there are some sectors that are exempted from the general regulation against cartels. In the transport sector, for instance, you can find some examples. And with the national competition authorities, we also co-operate very well. I don't see any differences here. I think that all of us consider that fighting against cartels is priority no 1 for competition authorities.

What I do see, though, in some sectors is that the collusive techniques are becoming more and more sophisticated and we have to be aware of this and modernise the way we fight against cartels, not only focusing on their collusive activities in the mature, the traditional, sectors – they, of course, are subject to a lot of investigations – but also on the more modern, new technology sectors. We are, for example, now working on investigations in the financial sector, the new technology sector, the IT sectors. And there, possible infringements of article 101 of the treaty are more sophisticated and in those cases you have the typical clandestine meetings in the hotel to discuss prices and the closure of markets.

By background, you're an economist and a lawyer. Do you see yourself more as one than the other?

First of all, I see myself as a person and it's important to stay as a person everywhere and at any time. And second I am a politician. I learnt a lot of things at the university but I learnt many more things after my university degree. So my condition as a politician is dominant over my knowledge and experience both as a lawyer and as an economist.

I had the chance to be appointed with both disciplines but I can't define myself as an expert in law or an expert in economics. A politician is not an expert - or not necessarily an expert. He or she should be able to learn every day and at every time from the experts and be able to get around him or her the best experts possible.

What do you do outside work?

I have a daughter who is 32 and a son who is 28. Now they are not living with my wife and myself – indeed, they are not even in Brussels. So how do I use my free time? I very much like listening to music, reading and going to the cinema. I like opera very much. I also like classical music, so I attend concerts here in Brussels. And I walk.

Just classical music?

Recently, I gave a radio interview to a Spanish radio station from here in Brussels. It was a live interview. They always start their interviews with music chosen by the person. On this occasion, I chose a song – Move Over – by Janis Joplin.

Is there anything else you do outside work – watching football, for instance?

I'm a very normal person, so of course I like football very much. Recently, I was talking to Michel Platini, the UEFA president, and we discussed competition. But over lunch he said the only two EU countries that not formally signed up to the financial fair play rules were England and Spain – in other words the two richest Premier League countries in the world are the only ones not to sign up so far.