GCR
GLOBAL COMPETITION REVIEW

Cool, calm...and collecting fines

Monday, 6 December 2010

Emily Gray

FEATURED IN: DECEMBER 2010 (VOL. 13 ISS. 11)

As 2010 draws to a close, EU competition commissioner Joaquín Almunia meets with Emily Gray in Brussels to discuss his modus operandi, his vision for the future of competition enforcement and his response to criticism levelled at DG Comp

GCR interviews Commissioner Almunia

Twelve months ago, European Commission president José Manuel Barroso announced Joaquín Almunia as his pick to manage the influential competition portfolio in the second Barroso commission. The antitrust community reacted with cautious optimism. The Spaniard seemed a wise choice; he had proved effective in steering the European economic and monetary affairs directorate. While his predecessor Neelie Kroes had made headlines by handing out billion-euro fines, Almunia appeared to be cast in the same mould as Mario Monti, competition commissioner from 1999 to 2004. Monti was highly regarded for his expertise in macroeconomics, and Almunia – another economist – was also thought to be reflective and analyitcal. Many hoped that Almunia's cerebral approach would translate into more conservative cartel fines from 2010. There are those in the Brussels competition bar who feel the administrative penalties handed down by DG Comp have become excessive, raising serious questions about the rights of defence afforded to those implicated in antitrust violations. Almunia offers his response to GCR, and reflects on his first 10 months as Europe's top competition enforcer.

You led the Spanish Socialist Workers' Party (PSOE) from 1997 to 2000. What made you then decide to enter European politics?

European affairs are not new to me. I started my professional career working as an economist here in Brussels, dealing with European affairs. In political terms, all my political life I've been in contact with EU institutions and EU policies. In 2004, when [José Luis Rodríguez] Zapatero won the elections in Spain, he appointed Pedro Solbes minister for finance and vice president of the government, then commissioner for economic and monetary affairs. Then he asked me if I wanted to succeed Solbes as commissioner (for monetary affairs). I accepted and I came here in April 2004, and the rest is history.

What qualities do you need to do your job effectively?

The commissioner should think in terms of European interests. If a commissioner tries to adhere too closely to the views of the permanent representative of his or her country, he will be completely out of the real work of the commission. The commission represents general European interests, and the commissioners need to think in terms of general European interests. We need to have political instincts, because the commission is a political institution and to be commissioner is a political job. You have to have political instincts to deal with your own services, to establish priorities and define policies and to give guidance to the services, as well as participating in a collegial way in discussions at commission level. We are not only in charge of our own portfolio but we have to share collective priorities policies. And it's very important, in my experience, to establish an adequate relationship with the EU parliament and the council. These are also very important EU institutions in legislative terms. They have the final word, but we have the right of initiative. Cooperation should be established between the commissioners and the council and parliament; it's extremely important for the successful development of our work.

How has your business and industry background affected your views on competition issues at the commission? Do you think you are more sympathetic to business people than others who have held your post?

My responsibility is not to be sympathetic. My responsibility is to have clear views, clear guidelines, clear positions, to be objective, to deal with everybody, to preserve the level playing field, to enforce the rules, and not to have particular friendships or negative views. Every week we are adopting decisions: antitrust, state aid cases, mergers, and we need to be consistent with the facts and figures that are in the file of every particular case. At the same time, we must preserve coherence with other decisions and not give different treatment to different people without explaining why. So it's not a question of being closer or not to business people; it's a question of understanding why competition is a key policy of the internal market, essential to the good functioning of the economic and monetary union.

Is that an argument you still have to make? How high is the profile of competition in the EU now?

Well I think competition has always been very high on the list of commission priorities, for many reasons. One of the reasons is the fact that here in competition, we have the final word. We don't just have the right of initiative, though from time to time we do present some legal initiatives for discussion by the council or parliament. But every day or every week, the commission or myself are presenting decisions that can only be contested before the courts. This is not the rule; this is an exception in the way the commission works. In most other areas, the commission has the right of initiative and their responsibility is to adopt decisions that have been taken by the legislative powers.

The competition portfolio has a very wide remit. What sort of manager are you? Are you involved in cases from the early stages, sitting in on meetings and discussions with the parties? Or do you prefer to delegate responsibility to those in your team?

We have a good system of work that was established before I arrived here. I haven't changed the pillars of that system. The work starts with the analysis and preparation of the investigation by the services, by the DG. Every time that the services think that they need a political decision or political guidance, they come to see me and present the case. I have direct contacts with the case team – not just with the director or the director general – and I give guidance or I adopt decisions. I think this is a very good system.

The starting point is not a political one, it's an ex-officio opening of a case, or the analysis of a complaint and this decision belongs to the services. I will not decide what kind of cases we open – the first responsibility belongs to the services. Once they have analysed the situation, they bring me the proposals. I listen to them, I read their analyses, I discuss [cases] with them and I adopt decisions, or I ask the college of commissioners to adopt a decision. I think we have a very good internal mechanism and division of labour. We don't only have case teams or managers and the officials of the DG. Within the DG, we also have our chief economist team. They provide their own views, from the point of view of economic analysis, and I listen to them and check if the economic analysis has been adequately integrated in the work of the DG. And outside the DG, but before I adopt decisions, I listen very carefully to the legal service, which is not integrated in the DG, but is an independent body here in the commission. And if needed, a hearing takes place, and the hearing officers chair those procedures and present their report to me. They look in principle at procedural issues – ensuring that due process has been protected. But from time to time, they can also give me, on a personal basis, their opinions on the substance of the case. I have several pairs of eyes looking at the way the cases have been investigated and managed and, in the end, I have to adopt a decision or present a decision to the courts.

The European Commission's decision to appoint Wouter Wils as its second hearing officer for competition cases drew wide approval. Are there any other plans afoot to increase the level of independent oversight of commission decisions or otherwise improve due process procedures?

Wouter Wils has outstanding experience in competition enforcement both inside and outside the commission. His appointment underlines the importance that the commission attaches to procedural fairness. The hearing officers guarantee companies' rights of defence. If the commission disagrees with the hearing officers on procedural issues regarding companies, it has to state its grounds, which can be challenged before the EU courts.

But let me stress that we are constantly striving to improve on due process within the framework laid down by the EU treaties. To that end, we published in January a set of "best practices" aimed at rendering antitrust proceedings, the role of the hearing officers and the submission of economic evidence, more efficient and transparent.

The best practices that we adopted for mergers some years ago have worked very well, bringing about an important change in the way commission case-teams, companies and their legal advisers interact, and establishing a sense of openness that is beneficial to all sides. The antitrust best practices are intended to do the same: they complement the companies' rights of defence with additional measures, in the interest of maximising procedural fairness. They detail the A-Z of our proceedings, starting with how the commission decides upon giving priority to a case and ending with the adoption of a decision. They also introduce some novelties, such as state-of-play meetings and explaining how new instruments – including the commitment procedure – work in practice.

The best practices package has already been provisionally applied since January. We are currently assessing the answers received in response to our public consultation before finalising them.

Of course, I remain open to suggestions on how we could further enhance the role and effectiveness of hearings and other aspects of our processes within the framework of the EU treaties.

The level [of oversight] is very high. If it's possible to increase it further, then okay. I've said several times – in public – that if changes to our procedures can improve the rights of the parties to be heard, or can improve our transparency and so on and so forth, then I will seriously take into consideration these improvements. Having said this, I repeat again that I am fully in agreement with our administrative system. There are some voices – very Anglo-Saxon, too Anglo-Saxon – that say you have to change, you cannot be at the same time prosecutor, judge, jury. Well I have analysed the other systems, I respect fully the other systems, but I am convinced, working every day with our procedures, that our system is very good. It's not the only one that's very good, but our system is very, very good. I don't have the feeling that the parties involved in our procedures have less rights of defence than in other systems.

Your predecessor, Commissioner Kroes, was very media savvy. Detractors claimed she was too hungry for headlines and would play out cases in the press, while supporters argued that her efforts were good advocacy, driving up the profile of competition. What role do you think the media should play in competition enforcement?

If the media can help with good advocacy, I'd be very pleased. But at the same time, the media will reflect the news, and sometimes the news cannot be only advocacy but will incorporate other elements. I want to have a good relationship with all media – the general media, newspapers and television – and the specialised media such as GCR. But what I want is to transmit accurate information to inform people in objective terms. The work of my spokesperson and her team is fantastic and very intense. If our decisions create headlines, then okay. If not, my first responsibility is to adopt the right decisions, to preserve good functioning in the markets and to protect competition. Protecting competition means protecting consumers – not competitors.

You have a reputation for being analytical and reflective. Were there any decisions that Commissioner Kroes took that you would have approached differently?

No. We work in a college. I was a member of the previous commission, but with a different portfolio. But I share all the decisions that Neelie Kroes adopted, because these were also my decisions as a member of the college. And now it is the same for Neelie, she shares my decisions as a member of the college.

Damien Neven, chief economist at DG Comp, is preparing to step down from the position. How close are you to finding a replacement? How do you fill senior positions at DG Comp, and are there any plans to reshuffle DG Comp's internal operations?

Damien's job has been publicly offered months ago, so a procedure is under way. We have [narrowed the field

down to] two candidates, but the procedures are not yet finished. Eventually, I'll have to select just one. Nadia [Calvino] has left DG Comp in the past few weeks. Now we have two deputy director-general jobs at the commission to be filled and we will do it in the coming couple of months.

Do you have a very clear idea of what you're looking for in filling these types of positions?

Yes indeed. The profile is very clear. There is an internal procedure that I don't manage myself. The first two steps are commission procedures, then afterwards they present to me and to the vice president for human resources their short list, and we interview [the candidates] and finally decide which candidate to propose to the college. The process takes two or three months. Nadia was outstanding and was fantastic during the years she occupied the job. But [director general] Alexander Italianer has tight control over all his responsibilities. So with the help of the directors, I can manage very well, for this period of two or three months [while waiting to fill the other roles]. We work by giving lots of responsibility to each case team and the case manager that organises the team. And they discuss things firstly with the director general and his team, and then with myself. This interim period of two or three months will not mean that the speed of our work or the intensity of our work will diminish.

You said earlier this month that the European Commission would consult on, and then propose, a framework for collective redress – a legal proceeding similar to a US class action. What sort of framework do you envisage?

We are not going to propose something "similar to a US class action". We are very conscious of the risks of abusive litigation, which certain systems of collective redress entail, and will do what is needed to avoid this is in Europe.

However, private damages actions are a necessary part of the enforcement of EU competition law. The commission and the national competition authorities conduct public enforcement, which is vital. But this cannot ensure that those who have suffered a loss from infringements of the competition rules receive the compensation they are entitled to under EU law. Collective redress mechanisms ensure that compensation is effectively available to victims of infringements, in particular SMEs. Because collective redress is an issue that may cut across different areas of EU law, the commission wants to ensure that a coordinated approach will be adopted. As a starting point, we need to identify common standards for collective actions in every member state and in all relevant EU policies.

Therefore, we will launch a public consultation to gather the views and concerns of stakeholders and civil society. Once this is done, and on this basis, the commission will agree on a general legal framework for collective redress in the spring of 2011. A common framework clearly does not mean a single legal instrument. Rather, the framework will identify common principles of a genuinely European approach to the issue of collective redress. Subsequently, this framework will be used to launch specific legislative initiatives in the different policy domains. I am ready to propose such an initiative on antitrust damages actions by the end of 2011.

You have announced that the digital arena is a priority area for DG Comp. How will you tackle new markets that have not yet been so well defined, in antitrust terms?

I believe that the principles of competition must be enforced in the digital economy in the same way as in the brick and mortar world. The definition of a market can indeed be tricky, including how to deal with the notion of potential competition from new technologies when the potential competition can only be envisaged at some point in the future. The only way to resolve these issues is in the context of individual, concrete cases. We cannot know the answers in the abstract, but if competition concerns are raised about particular conduct, we will subject that conduct to the same detailed investigation that we would apply to any other sector.

When handing down cartel fines, how do you balance the need to mete out sufficient punishment – particularly in high-profile cases like the air cargo cartel – with the need to ensure that struggling companies are not pushed into insolvency?

There is no question of high- and low-profile cases for the commission. Antitrust infringements are very profitable for companies and in the absence of deterrent sanctions, companies would have a "natural" incentive to engage in illegal practices. Deterrent fines also constitute a pre-requisite for an efficient leniency programme, the most important tool for detecting cartels. If fines are too low, companies have little or no incentive to come forward with information on cartels.

In 2006, the commission adopted new fining guidelines because the previous ones were generally regarded as under-deterrent and not sufficiently transparent. In any event, fines are limited to 10 per cent of a company's annual turnover. This ensures that no company is subjected to a fine that it would be unable to pay. This limit was reached in the Airfreight case, with the result that the fines on two of the companies were reduced to that level, even before considering any leniency reductions.

In addition, and mindful of the risk that a fine may push a company into insolvency – a risk that has increased during the economic and financial crisis – the commission carefully assesses any inability-to-pay claims. We recently refined our methodology for dealing with such claims and, of the around 50 applications received, we have accepted 10. The companies concerned are generally small. Our policy and methodology aims to ensure that no company goes bankrupt because of a fine imposed by the commission. In the Airfreight case, none of the five applications were accepted because our financial analysis concluded that all carriers were able to pay the fine.

DG Comp faced criticism for its handling of the pharmaceutical inquiry. Some felt the commission was overly aggressive, starting the probe with dawn raids and refusing the parties the right to claim privilege. How do you respond to this criticism, and do you judge the pharmaceutical sector inquiry a success?

The pharmaceutical competition sector inquiry was a success and it came at the right time. Member states need to address increasing health-care costs in the context of an ageing population and of the long-term costs of the economic and budgetary crisis. The sector inquiry unearthed interesting ideas, in particular how to make best use of cheaper generic medicines. As a follow up, the commission announced that it would revise the Transparency Directive governing pricing and reimbursement procedures.

The inquiry has led us to open two antitrust proceedings (against Servier and Lundbeck) on patent settlements. A

number of additional inspections took place in the course of this and last year. Moreover, it has led to an increased awareness of the competition rules. A report published in July this year on the monitoring of patent settlements showed the number of potentially problematic patent settlements decreasing, particularly settlements whereby a pharmaceutical company pays for the delay of generic medicines. This is good news. The pharmaceutical inquiry also provided further impetus for patent reform at EU level, which is key to the development of innovative medicines.

The inquiry was an intensive 18-month investigation of the functioning of the pharmaceutical sector. I know we asked a lot from companies, but ultimately it was worth the effort and will bear fruit over a number of years as other inquiries have demonstrated.

In which market will you conduct your next sector inquiry?

A sector inquiry is an efficient tool for making markets work better, both directly through case enforcement, and indirectly through input to regulatory changes and raising awareness of market problems.

However, it is also a tool that requires significant resources and it is not appropriate for every problem area. It is therefore very important to select the right sector for an inquiry. At this stage, I cannot tell you in which market I am likely to launch the next sector inquiry. I can just assure you that the choice will be well thought through and will be based on a good balance between identifying a sector that is important for European consumers and targeting a field where a sector inquiry is the best tool to achieve a better functioning market.

The commission has a general power to conduct sector inquiries if there are indications that a market is not working as well as it should and there are concerns that infringements of article 101 or article 102 may be a cause. Past practice shows that the commission is more likely to launch inquiries into sectors that are regulated, where there are companies with significant market power and where the application of the competition rules raises complex issues. Moreover, the commission has focused its sector inquiries on markets which are important for economic efficiency and growth in Europe, and which also have a significant impact on consumer welfare. So far, the commission has conducted inquiries in the telecoms, energy, retail banking, business insurance and pharmaceuticals sectors.

In the context of the recent food crisis, some stakeholders from the agriculture community and the European parliament have suggested that the commission should undertake a sector inquiry in the food sector. As food markets are generally of national or regional scope, national competition authorities are particularly well placed to investigate possible anti-competitive behaviour affecting these markets and have given due priority to this issue. I note that a significant number of national authorities have already launched sector inquiries, which seems to be the most appropriate way forward.

The European Commission has firmly opposed pay-for-delay agreements in the pharmaceutical sector, in which a branded drug company pays a rival to delay the entry of their generic version of a drug to the market. In the US, the Federal Trade Commission has tried to prohibit these agreements but has suffered a string of losses before the courts. Why do you think these efforts have been more successful in the EU?

The pharmaceutical inquiry identified pay-for-delay settlements as a tool used by the industry to delay the entry of generic medicines. Such arrangements can be problematic if they deprive consumers of the opportunity for an early generic entry, which would translate into lower prices for consumers. I therefore have concerns about pay-for-delay settlements, but of course our view has not yet been tested in court. It is not for me to comment on the success of other authorities, but I would like to point out that the FTC is actively pursuing its efforts to bring a test case before the US Supreme Court.

You have implied that European state aid rules are ripe for overhaul, and that weaknesses in the area were particularly exposed by the financial crisis. Are there any such reforms on the horizon? Has the economic crisis highlighted any other areas that DG Comp would do well to reassess?

We are always looking at our rules to make sure that they are fit for purpose and to see if we can improve them.

Following the financial crisis, we have already adopted a bank restructuring communication that details the particular conditions that banks have to observe in the specific context of crisis-related state aid to financial institutions on the basis of Art. 107(3)(b) of the EU Treaty, which allows aid to remedy a serious disturbance in the economy of a member state.

In 2011, the commission will prepare guidelines on the rescue and restructuring of financial institutions, establishing a general regime for the financial sector that will integrate the lessons learnt during the crisis. We will also revise the state aid guidelines with regard to the EU emission trading system, the specific state aid rules applicable to the shipbuilding sector and the state aid guidelines for maritime transport. Last but not least, we will also revise the state aid rules applicable to services of general economic interest.

Do you wish that you had other enforcement tools at your disposal, such as criminal sanctions for lawbreakers, or director disqualification for chief executives who engage in cartels?

The penalties that you are talking about are generally imposed on individuals. I don't see how we could easily follow such a path, or even that it would be desirable, given our rules and our supranational administrative enforcement system.

The investigative powers of the commission and the rights of defence are designed for sanctions on companies. Some EU member states did go down this road. It is for national authorities to decide whether the appropriate level of enforcement and punishment is in place in these systems. Even where member states do have these powers, however, they are rarely used.

At the same time, to ensure effective enforcement in the EU, it is vital that the commission and national authorities work hand in hand. It is particularly important that criminalisation is accompanied by an efficient leniency programme, both for individuals and companies. In the absence of leniency, it is likely that competition authorities would not uncover certain infringements and this would lead to under-enforcement.

87 Lancaster Road, London, W11 1QQ, UK | Tel: +44 207 908 1188 / Fax: +44 207 229 6910
http://www.globalcompetitionreview.com | editorial@globalcompetitionreview.com