

Alexander Italianer interview

In the first instalment of a two-part interview, the director general of DG Competition talks to Competition Law Insight

European Commission work programme 2013

Q: The Commission's initiative on antitrust damages actions was proposed for adoption for June 2012 (as per the 2012 roadmap) but no legislative proposal has been made yet. Commissioner Almunia has recently reiterated his commitment to proposing an initiative. When can we expect a proposal and what form is it likely to take? Will it address the issue of access to leniency materials? A related initiative – collective redress – was also mentioned in the Commission's work programme 2012 but no proposal has been put forward yet and the initiative is no longer mentioned in the Commission's 2013 work programme. What does this mean and is the proposal on antitrust damages actions linked to progress on the collective redress initiative?

A: A legislative proposal on antitrust damages actions will likely be put forward by Vice President Almunia in 2013. This proposal will have two key objectives: first, to regulate the interaction between public and private enforcement of EU antitrust rules, in particular access to documents contained in the competition authorities' files; and second, it will seek to ensure effective damages actions for breach of EU antitrust rules before national courts.

On the issue of access to leniency materials, and without going into the details, the general approach will be to protect the effectiveness of the Commission's leniency programme and of the leniency programmes of national competition authorities, without unduly restricting the right to civil damages.

Companies that have infringed competition rules, including leniency applicants, are responsible for compensating for the harm they caused. However, companies co-operating with the competition authorities under a leniency programme should – in a subsequent damages action – not be worse off as compared with a situation where they would not have co-operated. It is essential for the effectiveness of our leniency policy that there is appropriate protection of the information that co-operating undertakings are voluntarily giving to competition authorities.

On collective redress, the Commission continues to work on a follow-up to the Consultation on a coherent European approach to collective redress that took place in 2011.

Q: The review of the technology transfer block exemption regulation and its guidelines forms part of the Commission work programme 2013. After the consultation it carried out, does the Commission expect any reform? What action can we expect from the Commission in this respect?

A: The review of the technology transfer regime – ie the block exemption regulation for technology transfer agreements (the TTBER) and the accompanying guidelines – has been triggered by the fact that the current regime will expire in April 2014. We have therefore started the revision process in order to have final texts ready for adoption by the College beginning of 2014.

The TTBER determines how EU rules that prohibit cartels and restrictive business practices (article 101 TFEU) apply to



technology transfer agreements. It covers agreements where a licensor permits a licensee to exploit the licensed technology for the production of goods and services. The TTBER exempts certain agreements that are considered to be non-problematic for competition from scrutiny under article 101.

Licensing is vital for economic development and consumer welfare as it helps to disseminate innovation and allows companies to integrate and use complementary technologies.

However, licensing agreements can also have a stifling effect on competition. For instance, two competitors could use a license agreement to divide markets between them or an important licensor could exclude competing technologies from the market through certain conditions in licensing agreements. The licensing of intellectual property rights by right holders to other market players, and how this is done, is crucial for achieving the right balance between stimulating innovation and preserving a level playing field in the internal market.

It is too early to say anything definite about the outcome of the ongoing revision. However, in the first public consultation in the beginning of 2012, the stakeholders confirmed that overall the current framework works well. The non-confidential versions of their replies have been published on the DG Competition website. You can see that our stakeholders propose mainly incremental changes to the TTBER and guidelines (for example, to clarify the distinction between different block exemptions, clarifications and guidance on technology market definition and patent pools). It is therefore, at this stage, likely that the revision will be an evolution rather than a revolution.

The Commission is planning to launch another public consultation on a revised draft of the TTBER and guidelines, in the first half of 2013.

Our overall objective is that the future regime both reflects current market realities and facilitates the conclusion of technology transfer agreements that contribute to economic welfare without posing a risk for competition.

Financial services and competition law

Q: Following the General Court's judgment in *MasterCard*, what role can we expect DG Comp to play in 2013 in relation to mobile payments? What impact has the judgment had on DG Comp's future course of action?

A: Last May, the General Court rendered its judgment on MasterCard's appeal against the Commission's decision prohibiting MasterCard's multilateral interchange fees (MIFs) that apply to cross-border transactions with consumer cards.

We welcomed this judgment because it fully confirmed the Commission's assessment that MIFs have restrictive effects and that they lack justification in terms of benefits for merchants and consumers. This landmark judgment supported more than 20 years' work by the EU competition authorities on this issue.

It should now be clear that fees established in the same way as MasterCard's cross-border fees are forbidden unless the schemes and their members can demonstrate they are justified on the basis of efficiencies under article 101(3) TFEU. MasterCard, Visa, national payment card schemes and, of course, banks should comply quickly and proactively with competition law and bring their fees and scheme rules into line with the judgment. To the extent that mobile payments are based on four party cards networks, they are therefore also affected by this judgment.

In addition, the green paper adopted by the Commission in January assesses the current landscape of cards, internet and mobile payments in the EU and identifies the gaps between the current situation and the vision of a fully integrated payments market. This is a key element of the Europe 2020 growth strategy and a flagship project of the Digital Agenda.

One of the obstacles identified by the green paper was the fact that the current variety of domestic MIFs hinders the development of an internal payments market in cards. This also stands in the way of market entry of innovative payment services, including internet and mobile payments.

In October last year, the Commission adopted the Single Market Act II. Some of the key actions adopted measures to improve European payments markets in the revised Payment Services Directive. These measures seek to address insufficient harmonisation, ineffective competition in certain areas of card and internet payments, and lack of incentives for technical standardisation, for example in the area of mobile payments. In addition, the Commission will make a proposal on multilateral interchange fees. We intend to present these proposals in the second quarter of 2013.

The Commission is now working on impact assessments. It is therefore too early to say in which way exactly electronic and mobile payments would be covered under these regulatory initiatives.

On your specific question of mobile payments, I also wanted to refer to the clearance under the Merger Regulation of the m-commerce joint venture in the UK in September 2012.

Under this joint venture, the three largest UK mobile telecom operators will develop a mobile commerce platform

including a mobile wallet for payments. As this is a nascent market, the analysis was not easy and we carried out a detailed assessment of the proposed merger. Our investigation revealed that a number of alternatives for mobile payments already existed and the joint venture was unlikely to hinder the emergence of others in the near future. There seemed to be adequate competitive pressure on the newly created joint venture and we cleared the merger without conditions.

Q: The Commission has had a very busy year in this area (LIBOR, credit default swaps and mobile payments, for example). Can we expect another busy year in 2013 for DG Comp in relation to financial services?

A: The Commission is investigating cases related to benchmark rates including Libor, Euribor and Tibor (the Tokyo rate) in several currencies. We are looking at the alleged collusive conduct of certain undertakings, banks and also brokers active in interest rate derivative products, which form part of the group of financial derivatives linked to these benchmark rates.

These investigations are a top priority for the Commission, and will represent a significant part of our work in 2013.

If our concerns are confirmed, we will take necessary action to punish the participating companies under EU competition rules and, by doing so, hopefully prompt a change of culture in the banking sector.

In the credit default swaps (CDS sector), the Commission opened two proceedings in April 2011. First, the CDS clearing case was opened against several investment banks and ICE Clear Europe, a clearing house. In 2013, we will continue to monitor market developments to ensure non-discriminatory access to clearing houses. Second, the CDS information case was opened against several investment banks and Markit, a financial data service provider. In this case, the Commission is investigating whether the establishment of CDS trading platforms has been hampered. This is also a priority case and the investigation will continue in 2013.

State aid

Q: How will the state aid modernisation package streamline the decision-making process for state aid decisions?

A: In order to streamline state aid procedures, the Commission is currently identifying the most appropriate way to deal with the various categories of state aid measures, depending on their relevance for the functioning of the internal market.

To achieve this objective, the Commission is currently preparing a reform of the state aid procedural regulation to ensure that the Commission gets all the information it needs in good time to adopt decisions within an appropriate timeframe. It will examine the possibility of streamlining the state aid complaints-handling by introducing admissibility filters as in antitrust (compulsory complaints forms and the requirement to show an interest to act). It is also envisaged to introduce "market information tools" for complex cases to formalise the possibility of the Commission seeking targeted information directly from concerned market players, if the information at our disposal is not sufficient. This would allow the Commission to obtain timely, reliable and factually correct information directly from the market.

The Commission will also propose amendments to the enabling regulation, to extend the categories of measures that may be exempt from notification. These categories will include, for example, aid for culture and heritage conservation or aid to compensate damages caused by natural disasters.

Once the proposals for amendments to the procedural and enabling regulations are adopted, they will be discussed in Council and parliament this year.

A parallel revision of the general block exemption regulation is also envisaged and will further streamline the decision-making process, not only by extending the scope but also by reviewing key substantive criteria for block exemption, such as incentive effect.

Finally, the Commission will provide further clarification of the key concepts relating to the notion of aid so that it will be clearer for member states and outside stakeholders which measures are subject to the control of the Commission.

Q: Is there a greater role for member states to play under the state aid reform package? Will this lead to powers being conferred from the Commission to member states to enforce state aid law?

A: In order to achieve a proper balance in the state aid modernisation package, state aid priority setting and simplification should be accompanied by effective evaluation and control of compliance at national and EU level.

Clearly, this does not imply that the Commission would give up any of its exclusive state aid enforcement competencies.

The new state aid rules will be simpler and leave greater room for member states to put in place aid measures without prior notification to the Commission. But with that come greater responsibility and greater controls. We need to put more emphasis on the effective use of public money, especially in a time of tight budgets. This means more transparency when granting state aid and better accountability.

The Commission will enhance its monitoring of block exempted or approved aid schemes to evaluate the effectiveness and impact on the market of large and long schemes.

Food Task Force

Q: The European Commission's Food Task Force is reported not to have found any competition concerns in the EU food sector (at least as yet). Enforcement actions and reviews continue for the moment to take place at national level. Can we expect a food sector investigation at EU level in the near future? How do you see the role of the Food Task Force unfolding? What role is there for the Food Task Force beyond monitoring the sector for potential infringements? Are NCAs benefiting from the support and co-ordination provided by the Task Force?

A: The Commission has traditionally not dealt with many cases in the food sector because food markets have a predominantly national or even regional dimension. This explains why national competition authorities have been at the forefront of enforcement. Between 2004 and 2011, they carried out over 100 market-monitoring actions, reviewed about 1,300 mergers, and opened 180 antitrust cases – half of which were cartels. A summary of these actions was recently

presented in an ECN report, available online. This shows that the European competition authorities have swiftly addressed anticompetitive behaviour at all levels of the food supply chain, with many problems identified at the processing and manufacturing stage.

This work has benefited all market actors – from farmers to consumers – and it will continue.

Amid rising food prices and tensions in the food supply chain, stakeholders, and in particular the European parliament, called for a stronger involvement of DG Competition. We created a dedicated Food Task Force six months ago, in addition to the work we already carry out on food issues in the European Competition Network (food subgroup).

Based on the contacts of the Food Task Force with the main actors in the food-supply chain, we heard about complaints and anomalies in a series of markets, and we are currently assessing them, which you will understand takes time. If any further action is necessary, DG Competition will announce it in due course.

As for the further role of the Food Task Force, after a first comprehensive fact-based analysis of competition issues along the chain, we are continuing to work in several fields.

Take CAP reform, for instance. The Council and the European parliament are looking into the Commission's proposal for a new single common market organisation regulation. The parliament has proposed wide-ranging changes to the Commission proposal that would, in effect, remove large parts of the agricultural sector from the scope of the competition rules. The Food Task Force, in collaboration with other services of the Commission, is working on upholding the competition rules proposed by the Commission. European competition authorities in the ECN have clearly expressed their opposition to the growing calls for exemption from antitrust rules because such exemptions would undermine the competitiveness of the entire food sector.

Another example is unfair commercial practices. The Food Task Force is involved in many initiatives relating to unfair commercial practices because there are claims that they have negative impacts on consumers in terms of choice and innovation. We are involved in the high level forum for a better food supply chain and are ready to contribute to any follow-up, gathering and analysing of the relevant market facts.

As to the benefits of our work for the NCAs, I think NCAs have broadly welcomed the in-depth exchanges of information that have taken place in the ECN for many years now, with discussions on cases, competition issues arising in the food supply chain, and on regulatory developments such as the reform of the Common Agricultural Policy. This has certainly been one of the areas of most active co-operation within the ECN.

And lastly

Q: If you could make one change in competition regulation what would it be?

A: In the same way that we have a single antitrust area in the sense that the national competition authorities and European Commission apply the same law, you could make the same case for mergers. It's an idea that was proposed by Mario Monti in a report he wrote about the internal market and I've always considered it an interesting idea.