## World Competition's Editor, José Rivas, interviews Mr Joaquín Almunia, Vice President of the European Commission, Commissioner for Competition.

As Editor of World Competition, I am pleased to begin the March 2011 issue by introducing an interview with Commissioner Almunia, who has agreed to answer some questions after his first year in office.

**José Rivas**: The issue of facilitating full compensation to the victims of infringements of competition rules remains an outstanding issue in the EU. During your confirmation hearing you identified this area as one of your top priorities and you said you would not exclude considering 'non-judicial' forms of compensation to the victims. More recently, you spoke about 'creating opportunities to resolve disputes either through settlements or using alternative systems'.

**Joaquín Almunia:** Let me start by saying that a well-functioning judicial redress system across the EU is the best way to ensure that those who have suffered harm because of infringements of antitrust rules receive the compensation which they are entitled to. Experience also shows that the existence of a credible system of judicial remedies is a key incentive for infringers to consider voluntary compensation or make use of alternative dispute resolution (ADR) to achieve fair out-of-court settlements of damages claims.

**José Rivas:** Would you consider a modulation of EU fines to cater for and encourage voluntary compensation of competition law victims?

**Joaquín Almunia:** In my view, public and private enforcement of EU competition rules are complementary instruments. The goal of public enforcement is to ensure, in the public interest, that competition in the internal market is not distorted. When the Commission finds that a company has infringed the rules, it imposes a fine. The fine aims to achieve both individual and general deterrence. It serves to sanction the undertaking for its illegal behaviour but also to deter other undertakings from conduct which is in breach of EU antitrust rules. The level of fines should therefore be determined by the objective to achieve a sufficient level of deterrence. In contrast to this, the goal of private enforcement is to protect in individual cases the interests of concrete victims, namely to enforce their right to full compensation for harm suffered as a result of a competition law infringement.

**José Rivas:** What are your plans in this crucial area of Competition policy?

**Joaquín Almunia:** My plan is to achieve a more effective system of private antitrust damages actions across the EU. Clearly, it is the task of the Commission to ensure effective enforcement of the EU competition rules for the whole of the EU. The right to full compensation for harm caused by infringements of antitrust rules is an important element of the enforcement system, as the EU Courts have repeatedly emphasized. The victims of competition law infringements – often small and medium sized firms and consumers – must be granted a meaningful and effective access to justice in order to finally make this right a reality. Damages actions in the competition field raise particular legal issues and practical difficulties. These challenges are best addressed by a combination of measures at both EU

and Member State level. EU legislation on antitrust damages actions would make an important contribution to enhancing legal certainty and ensuring, across all Member States, a minimum level of protection of the right to damages.

One specific issue the Commission will focus on, and which could be part of possible legislation on damages actions in the competition field, is collective civil redress. The Commission has just launched a public consultation on the topic. The purpose of the consultation is to gather stakeholders' views on a coherent European approach to collective redress and on common legal principles and safeguards that should guide any EU initiative in this field. The public consultation runs until the end of April 2011. Thereafter, the Commission will adopt a Communication on this issue.

Moreover, the Commission will draw up an overview of the methods and techniques that can be used by courts and parties to antitrust damages actions, when faced with the often complex task of quantifying damages.

**José Rivas:** You have made clear in your public speeches that fight against cartels remains a top priority for your mandate. Fines for antitrust infringements, notably cartels, have reached unprecedented levels in the EU. However, this ever increasing trend does not seem to result in sufficient deterrence. If criminalization is not an option at EU level, would you consider complimentary administrative measures that already exist in some Member States such as disqualification of directors, fines on individuals, disqualification of companies for EU funded public procurement, etc.? Wouldn't such measures align the incentives of companies and individuals within companies to comply with competition law?

**Joaquín Almunia:** As laid down in the Treaty and Regulation 1/2003, the EU antitrust enforcement system provides for pecuniary sanctions on undertakings only. As to the level of our sanctions, they match the gravity of the infringements we deal with and they are set at levels which aim to effectively promote deterrence.

While a number of EU Member States have introduced sanctions on individuals for competition infringements, the enforcement against undertakings remains the core principle at EU level. Custodial sanctions are not an option at EU level as this would not be feasible under the current legislative framework (e.g., there are no EU criminal courts).

**José Rivas:** In a situation where, for some observers, EU fines are reaching a quasi confiscatory level, the rights of the defence of those accused become ever more relevant. Commission proceedings are under heavy criticism by the private Bar and the companies affected. You have recently appointed an individual well respected within and outside the Commission, Wouter Wils, to join Michael Albers as Hearing Officer.

- Are you planning further measures to improve the procedural rights of the accused parties in Commission proceedings?

**Joaquín Almunia:** The two Hearing Officers, who report directly to me and to the College, 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. While we are overall happy with our system, we are constantly striving to improve on due process within what is possible under the EU Treaties. This is why in January 2010 we published a set of antitrust 'Best Practices'. This package has been provisionally applied since and we may further refine it, based on the comments we received from stakeholders.

The merger Best Practices adopted some years ago have worked very well, bringing an important change in the way Commission case-teams, companies and their legal advisors interact and establishing a cooperation culture that is beneficial for all sides.

The new antitrust Best Practices are intended to do the same: they complement the companies' rights of defence in order to maximize procedural fairness. They provide a lot of detail on 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 for example state of play meetings or explain how new instruments such as the commitment procedure work in practice.

Besides these initiatives, I will always remain open for 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.

**José Rivas:** One of Europe 2020 Strategy main objectives is to boost innovation, closely linked with Intellectual property rights, interoperability and standardization. How do you think Competition law should interplay with these issues?

**Joaquín Almunia:** Competition has a clear impact on the strategic incentives of market players and encourages their innovative activities: there is a tight link between competition and productivity growth – and hence an important one between competition and competitiveness. Competition policy enhances the competitiveness of industry and prompts European industry to constantly innovate.

Competition enforcement and intellectual property law are both designed to maximize the level of innovation in the market, which ultimately benefits consumers through more choice, better quality and lower prices.

Intellectual property rights (IPR) cannot be used to stifle competition, and by extension, innovation. When this happens, competition law enforcement has a role to play.

However, any intervention involving the disclosure of IP-protected information needs to strike a careful balance between the legitimate interests of the IPR holder and its incentive to innovate on the one hand, and the risk that competition on a particular market be eliminated on the other hand.

Ensuring interoperability is another area where antitrust enforcement has a role to play. The Commission's enforcement experience in the IT industry clearly demonstrates the benefits of interoperability in terms of preventing consumer lock-in and fostering innovation.

If a super-dominant player would not ensure the interoperability of its products with those of competitors, the latter may actually lose any incentive to innovate, as they know that regardless of the performance of their products, they cannot compete on the merits. Ultimately, in this scenario, even the dominant firm would innovate less. This may warrant

antitrust enforcement action, all the more if technologies that are essential for a next generation of innovation are involved.

Standards play a key role in ensuring interoperability and for product innovation. The existence of a stable and open standard specification provides incentives to develop and manufacture innovative products. Standards also allow the potential network effects in the market to play out to the benefit of consumers. The certainty of a standard protects against consumer stranding – in other words, a consumer can change to a rival product safe in the knowledge that his product will remain compatible with other products in the market.

However, standard-setting can restrict competition, for example by shutting out innovative technologies or hindering companies which do not have an effective access to a standard. There is also risk that a company that gains control of a standard acquires market power and can then misuse it. When everyone in the market produces according to a uniform specification, this may also result in limitations in product variety or reduce price competition.

This issue is addressed in the revised chapter on standardization in the recently published Horizontal Guidelines.

We give guidance on how to make the selection of industry standards a competitive process and that, once a standard is adopted, access is given on 'fair, reasonable and non-discriminatory' (FRAND) terms to interested users.

More transparency as regards IPR in the context of standard-setting is beneficial for the system as a whole because it will stimulate research.

With a view to facilitating innovation in Europe, the Commission has also considerably extended the scope of its Regulation exempting certain unproblematic categories of research & development (R&D) agreements from the general Treaty prohibition on restrictive business practices. The R&D Block Exemption Regulation (BER) will not only cover R&D activities carried out jointly by the parties in the strict sense of terms (i.e. every party does a bit of the work), but also so-called 'paid-for research' agreements, where one party merely finances the R&D activities carried out by another party. Such agreements are prevalent in many industries and now benefit from the additional legal certainty that a BER confers.

**José Rivas:** You have devoted two of your most recent speeches to the digital economy (London in July and Madrid in October). Several National Competition Authorities and also the Commission are dealing with the first cases on these new markets. As Competition Commissioner what are your concerns in this key sector of our economy?

**Joaquín Almunia:**

Preserving opportunities for new firms to enter markets and challenge established players is essential to realize the full potential of the digital economy. As outlined in the Digital Agenda Communication, achieving a competitive digital single market based on high speed internet is key to delivering sustainable economic and social benefits to EU citizens. Through a series of antitrust investigations and ex-ante regulation, notably the recommendation on next generation access, we have built over time a strong legal environment that promotes both solid investment and competition in access to broadband.

We also need to promote internet supported services, an area where the EU has been lagging behind the US. For this, I believe the development of interoperable applications is the best way forward. But of course, any public intervention – be it an individual decision or a regulatory measure – will need to strike a careful balance between granting pro-competitive access and maintaining the incentive to invest and to innovate.

The increasing emergence of innovative online services has led to the creation of new markets and market leaders, some of which enjoy considerable market shares. As any market in the brick-and-mortar world, digital markets are not immune against abusive behaviour by companies holding a dominant position that may shut out rivals. We will therefore closely scrutinize developments in this area and take appropriate action, if need be. This task is particularly challenging in view of the complex dynamics and constant evolution of the digital landscape.

An important aspect of fostering the European digital economy is the need to establish once for all a European single market for content online. In this respect it is crucial to simplify cross-border copyright clearance and modernize rights management so that content supported digital services can easily grow to European scale.

The Digital Agenda Communication and the Single Market Act already announced regulatory initiatives aiming to facilitate cross-border licensing of online content and to increase the transparency and good governance of collective rights management. I will follow closely any proposals in this regard, to make sure that they are effective but also line with EU competition law principles.

**José Rivas:** Your predecessor Commissioner Neelie Kroes made a broad use of sector inquiries. Do you see sector inquiries as an important tool for the effective enforcement of competition law? If so, in your view, which sectors deserve particular attention?

**Joaquín Almunia:** Sector inquiries are indeed an efficient tool for making markets work better, both directly through case enforcement and indirectly through input to regulatory changes.

However, this tool 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.

Past practice shows that the Commission is more likely to launch inquiries into sectors that are highly regulated, where a relatively small number of companies have significant market power and where the application of the competition rules raises complex issues. The Commission has focused its sector inquiries in markets which are important for economic efficiency and growth in Europe, and 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.

**José Rivas:** In 2005 the Commission adopted the so-called Services of General Economic Interest Package. In September 2010 the Commission concluded a public consultation on the application of the SGEI Package.

- What are the Commission's next steps?
- The Telecom and Broadcasting Sectors were particularly critical of that application. How do you see these critics?

**Joaquín Almunia:** Soon, we will publish a report on the application of the EU State aid rules on Services of General Economic Interest (SGEI) and on the outcome of the public consultation. Overall, the consultation confirmed that the existing legal instruments were a necessary and appropriate response in the light of the EU Court of Justice ruling in the Altmark case. However, the consultation showed that there is some scope for improvement. In particular, there is a need for clearer, simpler and more effective instruments to ensure an easier application of the rules.

This will ensure a broad debate on the reform of the SGEI package among all stakeholders. In light of this feedback, we will then review the SGEI package, which could be adopted by the end of 2011.

Regarding the telecom and broadcasting sectors, we received only a limited number of replies to the consultation. It should be borne in mind that sector-specific rules apply in these sectors. In any event, we will examine criticism and suggestions very carefully.

**José Rivas:** The last few years have seen far-reaching reforms in all fields of EC competition law and policy: merger regulation and related guidelines, extensive reform of state aid rules, new leniency and fining notices, introduction of the settlement procedure in cartel cases, guidance on the application of Article 82 (now Article 102 Treaty of the Functioning of the European Union (TFEU)) and other important instruments, some of which are still to be finalized. Do you think these reforms have been successful?

**Joaquín Almunia:** I think our competition tools are very good and have been improved over the years. The Merger Regulation is well-rooted in economic thinking and has delivered very positive results for the benefit of European consumers in terms of lower prices, more choice and increased innovation.

The Merger Regulation has passed the acid test during recent times of economic downturn, allowing for swift and flexible action to ensure short-term financial stability on the one hand and undistorted competition in the medium to long term on the other.

The substantive test introduced in 2004 focuses on whether a proposed transaction would lead to a significant impediment of competition. It allows for a better targeted merger analysis and a greater focus on consumer welfare, because it endorses a more effects-based approach to merger control which reduces both false negatives and false positives.

Contrary to what we sometimes hear, EU merger control contributes to increasing the competiveness of our companies and of Europe without standing in the way of the

emergence of strong European players, as for example through the mergers of GdF/Suez and SAP/Sybase to name only a few recent cases.

Regarding antitrust policy, the implementation of the Guidance on the application of Article 102 of the EU Treaty, that prohibits the abuse of a dominant market position, is not an easy task we have imposed on ourselves, but a task to which we are committed.

In order to ensure that we only intervene where consumers may be harmed, we now systematically identify a robust theory of harm in our cases under Article 102 and investigate the likely and/or actual harm to competition and, if raised by the dominant firm, possible pro-competitive effects. However, it is early days to analyse the results of the guidelines.

The new Guidelines on fines and the improved leniency programme enable us, hopefully, to achieve more effective deterrence against cartels. At the same time, the introduction of a mechanism to settle cartel cases, first used in the dynamic random-access memories (DRAMs) chip cartel decided in May 2010, will allow us to process cases more rapidly and free up resources to pursue other cartels.

The State Aid Action Plan (SAAP) has largely fulfilled its objectives of cutting red tape and stepping up economic analysis in State aid assessment. Nevertheless, there is always scope for further modernization and improvement. The post-crisis environment brings about new challenges that could not have been foreseen when the SAAP was launched and lessons can also be learned from the experience gained during the crisis.

**José Rivas:** Are there any other areas of competition policy where, in your view, further reform or new instruments are needed?

**Joaquín Almunia:** During the past year, one of my main tasks has been the restructuring of the many banks that had to be rescued by national governments because of their imprudent behaviour during the boom years or because they were affected by the financial crisis and/or the ensuing economic recession. The consequences for the economy of the increase in national deficits and debts make it all the more urgent to finish the job of cleaning up the banks and restoring them to viability so they can finance the economic recovery. My aim is to go back to a normal State aid regime for banks as soon as possible, in principle by the end of the year. In this sense we are bringing forward the review of the Rescue and Restructuring guidelines.

I strongly believe a vigorous enforcement of competition policy will contribute to increasing Europe's economic growth and job creation by making our companies more innovative and competitive. European companies will not be able to compete globally if they cannot withstand the forces of a healthy and undistorted competition at home. I see the fight against cartels as a public service that is to the benefit of small and medium enterprises (SMEs) and the millions of jobs they create as well, as to the final consumer. Cartels, one should remember, often concern intermediate products that SMEs need as input for their own production. I also believe there is no basic problem with State aid when it is granted under clear, transparent and objective rules for purposes of general interest such as environmental protection, innovation and economic growth in general. But State

subsidies to rescue entities that are not viable not only distort competition but also represent a waste of taxpayers' money. I believe there is a role for this key policy area to increase Europe's competitiveness and growth potential which means more, not less competition. I don't think the competition tools need a dramatic reform, but increasing economic growth, competitiveness and job creation will be the guiding principle throughout my mandate and changes that will foster this goal will be considered.

**José Rivas:** What do you perceive to be the priority issues in DG Competition's relationships with its counterparts in other jurisdictions, notably US, China and India? Do you think it is necessary to achieve full convergence of competition policies internationally, or are differences unavoidable?

**Joaquín Almunia:** Globalization of the economy calls for more international cooperation in the area of competition policy. In times where cross-border business operations have become commonplace, one needs to be able to bring cases which involve companies and behaviours that cut across multiple jurisdictions. In the period 2008–2009 for instance, one-fourth of the more complex merger decisions[1] and of all cartel investigations involved international cooperation. The Commission remains therefore committed to promote a greater convergence of competition rules and facilitate the practical cooperation between agencies.

More convergence increases legal predictability by reducing the risk of incoherent interventions, reduces transaction costs and facilitates cross-border trade and investments for the benefit of national economies and ultimately the consumers.

The Commission participates actively in discussions in multilateral forums such as the International Competition Network, the Competition Committee of the Organisation for Economic Co-operation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organization. Discussions cover all fields of competition policy, including the more recent focus on unilateral conduct and state aid, so as to contribute to creating a level playing field between EU companies and foreign competitors.

The US Department of Justice (DoT) and Federal Trade Commission (FTC) are our most frequent bilateral cooperation partners, accounting for some 50% of cooperation cases in mergers and 30% in cartels. However, agencies from other jurisdictions, such as Canada, Japan, Switzerland, South Korea, Brazil, Mexico, South-Africa, etc., are increasingly involved. Our existing cooperation agreements do not allow agencies to exchange confidential information. One of our priorities will therefore be to develop solutions to overcome this significant obstacle to effective cooperation. Another of the Commission's priorities is to develop cooperation and capacity building with newer competition agencies in the EU's major trading partners, in particular with Brazil, Russia, India and China.

[1] Thirty-three per cent of Phase I merger decisions with involving remedies and 30% of Phase II merger decisions.

The Commission has recognized the need for more international cooperation and for greater convergence in the competition area in the 2006 'Global Europe' Communication,[2] and has been including stronger provisions on competition in the new generation of Free Trade Agreements. A good example in this respect is the new agreement signed between the EU and South Korea last year.[3]

Every competition authority operates in the context of its particular market conditions, competition laws and procedures. The parameters of international cooperation are defined by this fact. However, this should not stop our efforts in working towards common principles. In recent years for instance, increased cooperation between competition enforcement agencies and convergence in procedures has facilitated merger control and helped speed up the approval process for business. The same cooperation is warranted to improve the fight against global cartels, notably to preserve the effectiveness of leniency programmes.

**José Rivas:** Finally, what would you consider to be the highlight of your first year in office as EU Commissioner for Competition?

**Joaquín Almunia:** The Commission's main priority for 2010 was a successful exit from the crisis and the return to normal market functioning. Since the beginning, competition policy has played an important part in the Commission response to the crisis. Our state aid policy has contributed to maintaining a level-playing field and underpinning financial stability. We focused on ensuring that financial institutions and firms undertake the necessary restructuring measures to achieve long-term viability, and to initiate a progressive, controlled, phasing-out of exceptional support measures for banks and the real economy.

The Commission's antitrust or merger policies are also a key instrument in this regard: only open and competitive markets will take us beyond the crisis and make us ready to meet the many challenges we face (technological development, globalization, climate change, etc.). We have acted on many fronts, all important:

First, we up-dated some of our rules, of cross-sectoral application, that are particularly relevant to EU competitiveness. For example, the new rules on vertical agreements will further enhance the efficiency of EU supply and distribution by contributing to unleash e-commerce. The new rules on horizontal agreements will promote innovation by providing legal certainty and predictability for companies willing to work together – for example in a standardization context – to achieve synergies in a globalized market place.

Secondly, we brought a series of major enforcement cases in sectors which are vital for the competitiveness of the EU economy and make up a sizable portion of citizens' household expenditure. Take for example our decision in the Visa case: the reduction of the interbank fees for debit cards concerns several hundred million transactions every year,

[2] Global Europe: Competing in the world – A contribution to the EU's Growth and Jobs Strategy, Communication from the Commission of 4 Oct. 2006, COM(2006)567 final.

[3] Text available under <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en>.

worth between EUR 10 and EUR 20 billion. Take the energy market, which is vital for EU competitiveness, sustainability and security of supply: in 2010 we adopted four decisions making binding commitments offered by incumbents in France, Sweden, Germany and Italy to make sure that actual or future competitors are not closed out from access to those markets. Or take information and communication technologies (ICTs): efficient ICT products and services are a key contributor to smart growth, and we must preserve the opportunities for new firms to enter the market and challenge established players to realize the full potential of the digital economy. These objectives underpin our investigations as regards certain conducts of leading companies such as Apple, IBM or Google.

Our rule making and enforcement activities reinforce each other, and are complemented by a third, equally important activity, namely competition advocacy. These activities form 'a whole' which produces tangible consumer benefits and efficiency-driven growth.

**José Rivas**: on behalf of the readers of World Competition, I would like to thank you for your answers and wish you the best of luck in your highly influential role as European Commissioner for Competition.