PaRR Special Report

Live Coverage of the Georgetown Law School Global
Antitrust Enforcement Symposium

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Damages actions and converging fining principles key future developments

- Private damages directive to be formally adopted in coming weeks
- Fining principles in EU member states need to be aligned, says Almunia

Implementing the EU damages directive and further convergence on how breaches of competition rules are sanctioned within Europe are two key developments EU Competition Commissioner Joaquin Almunia expects to see, going forward.

Almunia said he expected “two major developments in the future” when speaking about the European Commission’s (EC) fining policy for antitrust infringements at the Global Antitrust Enforcement Symposium, Georgetown Law today (10 September).

On the EC’s directive on antitrust damages actions, the commissioner said he predicted more actions to be brought before European courts once the initiative becomes law. The directive will be formally adopted in the coming weeks, Almunia said.

The European Parliament (EP) and the EU Council of Ministers reached a political agreement on the text before the summer, he noted. The directive, which is to help cartel victims bring damages claims before national courts, received the go-ahead from the EP in April.

The second major development will be further convergence on fining principles within the EU, anticipated Almunia.

National competition authorities still apply national guidelines for fines, he continued, even though the basic principles of enforcing EU competition rules should be the same.

Almunia said he has previously called for more convergence on antitrust enforcement - aligning the fining principles but also ensuring that all national competition authorities have sufficient resources. Notably on parental liability that is needed, he noted. "Parental liability has evolved in my decisions over the last few years," said Almunia. "However, in some EU countries parent companies cannot be held liable."

"Also, the turnover used to determine the maximum amount may vary in some countries. Differences of this type can lead to situations where the threat of fines in some Member States does not achieve the desired deterrent effect," the commissioner highlighted.

But it will be up to the next EC "to decide on the most appropriate initiatives to be taken", Almunia concluded.
The merger between cement makers Holcim and Lafarge is likely to be reviewed by Joaquin Almunia’s successor, the EU Competition Commissioner said today.

The timing of the review will of course depend on when the parties will file, the commissioner said on the margins of the Global Antitrust Enforcement Symposium in Washington DC.

Responding to a question on whether the case will need to go through an in-depth Phase II investigation, the commissioner said: “I have the impression that the parties are preparing the remedies before filing.”

Parties can come up with the remedies during the EC’s formal investigation or suggest them before the merger review clock starts, Almunia explained.

He would not comment directly on whether the case is a candidate for a Phase II investigation. “It depends on the review,” he said.

The EC’s Phase I investigation lasts a standard 25 days. The parties expect to file with the Brussels regulator soon, as previously reported by this news service.

Margrethe Vestager, Denmark’s former economy minister, is set to become the EC’s next competition commissioner. The new commissioner will need endorsement from the European parliament in the coming weeks.

by Francesca Micheletti in Washington DC
DoJ antitrust chief says leniency program requires intensive commitment to cooperate

- Attorneys underestimate amount of assistance needed
- Price-fxers “face a real live prisoner’s dilemma

Companies and their attorneys often underestimate how much cooperation the Department of Justice (DoJ) demands from applicants to its antitrust corporate leniency program, William Baer, chief of DoJ’s Antitrust Division, said on 10 November.

In remarks prepared for Georgetown University Law Center’s Global Antitrust Enforcement Symposium, Baer said, “Companies that have engaged in antitrust crimes and decide to apply for antitrust leniency must recognize that the policy requires far more than a quick phone call to the division and a promise to cooperate.”

Under the leniency program, established in 1993, the DoJ will not prosecute the first company to report a specific cartel.

Baer said companies must be prepared to make a significant investment of time and resources to qualify for leniency. “We expect leniency applicants to make those investments, including conducting a thorough internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews,” Baer said.

Baer said that employees also can qualify for the leniency program, but only if they agree to provide information about every market involved in cartel activity—even if they do not qualify for leniency in that market.

He also warned that companies that qualify for the Antitrust Division leniency program are not insulated from prosecution for other crimes.

Baer said that in some cases, companies have expressed a desire to retain senior executives who do not qualify for leniency and may face prosecution for their activities. Under those circumstances, Baer said, “we will have serious doubts about that company’s commitment to implementing a new compliance program or invigorating an existing one.”

The possibility that there might be a cooperating corporation in an antitrust investigation has “changed the calculus” for the other corporate co-conspirators when an investigation becomes public, Baer said.

Similar programs have been “enacted and embraced around the world and now literally scores of enforcement agencies have comparable programs,” he added.

Price-fixers “face a real live prisoner’s dilemma” when the division serves them with a grand jury subpoena or executes a search warrant, he said, because their lawyers must consider whether there is a cooperating company—a corporate leniency applicant.
“The rational fear—the fear that someone is already cooperating—provides a strong motivation to conduct a prompt internal investigation and make an assessment of the company’s criminal exposure if there is a problem,” Baer said.

“Companies need to assume, because of our leniency programs, that the division probably already knows about it and as a result, we are seeing companies approach the division at earlier and earlier stages of our cartel investigations, seeking to own up to the wrongdoing in order to mitigate the consequences,” Baer said.

by Peter Geier and David Baumann in Washington DC
Almunia likely to hand over Google case to successor

- EC won’t adopt decision ‘at any cost’
- Gazprom probe timing hinges on Ukraine situation

EU competition chief Joaquín Almunia is likely to hand over files on Google to his successor, the commissioner said today at an event in Washington DC.

Almunia said he did not expect to close the Google case before the end of his mandate on 31 October. “I do not want to adopt a decision [on the Google case] at any cost,” Almunia said at the Global Antitrust Enforcement Symposium. “I’m interested in rigorous and good decisions.”

There are no deadlines – legal or political – for European Commission (EC) antitrust investigations, the commissioner noted, and the EC needs to work hard not to postpone decisions.

The EU competition chief told the US search company last week that the third set of commitments still needed improvements if a commitments-based decision was still to be an option.

The commissioner reached this opinion after the EC examined concerns from complainants over the past months. “I have reached the conclusion that some aspects of the Google proposal should be modified to respond to serious empirical arguments given by complainants”, Almunia said.

The EC is currently waiting for Google’s response to its request. “Google said that they would reply as soon as possible, although we do not know how long this means”, Almunia noted. "Once we receive comments and considerations – and possibly proposals – from Google we will see if this is enough or not. But timing will mean that I will probably hand over the case to my successor."

He commented, "I don’t know to which extent we are close to a decision. If Google does not want to make any changes we will need to go through the prohibition route and issue a statement of objections."

Gazprom

The EC’s investigation into Gazprom’s alleged abuse of dominance is also likely to land on the new commissioner’s desk, depending upon how the situation in Ukraine evolves.

Conversations between the EC and Gazprom and Russian authorities have stalled since the beginning of the Ukrainian crisis, Almunia said later today, Wednesday, during a panel discussion at the Georgetown antitrust symposium.

"Before the start of the crisis we were exploring commitments with Gazprom and the Russian minister for energy," Almunia said. "But since the start of the crisis late last year this has not been possible."

The commissioner labelled the Gazprom investigation as "important" and "sensitive" due to the high dependency of some EU member states on Russian gas.
The EC thinks that certain conditions set by the Russian gas company are not in line with the EU’s internal market principles. For example, barriers to re-exporting imported gas, gas delivery points that can create foreclosure, and indexation mechanisms that can lead to possible predatory prices.

The EC has been investigating for three years whether Gazprom potentially abused a dominant position by setting prices for customers in Central and Eastern Europe, and whether the company restricts gas sales and the diversification of gas supply.

by Francesca Micheletti in Washington DC
Federal Trade Commission (FTC) Chairwoman Edith Ramirez voiced concern today about the way in which Chinese antitrust authorities may be regulating the licensing of standard essential patents (SEPs).

“I’m seriously concerned by these [media] reports which suggest an enforcement policy focused on reducing royalty payments from local implementers as a matter of industrial policy rather than protecting competition and long-run consumer welfare,” she said.

Ramirez was speaking 10 September at Georgetown University Law Center’s Annual Global Antitrust Enforcement Symposium in Washington, DC. She focused her remarks on the intersection of antitrust and intellectual property rights, particularly the licensing of SEPs.

Consumers are best served when competition enforcement is based solely on sound economic analysis of competitive effects, she said, adding that doing otherwise risks damaging investment incentives that are critical to continued growth in many of today’s global technology markets.

Ramirez said that she and other FTC officials plan to continue to engage their counterparts in China and around the world in an effort to build consensus on policies that benefit competition and consumers globally.

The chairwoman also spoke about the FTC’s own approach to SEP licensing. She said the broad principles in the commission’s 2013 enforcement action against Google and its subsidiary Motorola Mobility (MMI) provides a roadmap to companies that want to avoid FTC scrutiny under similar circumstances. The FTC had charged Google and MMI with unfair competition by violating the FRAND commitments for some of MMI’s standard essential patents.

The commission’s order required Google to offer binding arbitration to potential licensees when negotiations over standard essential patents break down.

by Susan Mandel in Washington DC
DoJ antitrust official says wireless patent litigation wars may have peaked

- *Microsoft v. Motorola* opinion reduced USD 4bn royalty demand to USD 1.8m—DoJ panelist
- Need for empirical evidence to show what’s actually bad for consumer—FTC panelist

US regulators are seeing signs that the worst of the patent litigation wars in the wireless industry have passed, according to an official at the US Department of Justice’s (DoJ) Antitrust Division.

Recent opinions out of federal district courts seem to be restoring reasonable royalty rates and the Federal Trade Commission (FTC) and the Antitrust Division are watching these developments and the wireless industry conduct, said Renata Hesse, deputy assistant attorney general for criminal and civil operations at the Antitrust Division.

Hesse was one of five panelists who spoke on “IP, High-Tech and Antitrust” at Georgetown University Law Center’s annual Global Antitrust Enforcement Symposium in Washington DC on 10 September.

She noted in particular the May 2103 opinion in *Microsoft v. Motorola* by US District Judge James Robart in the Western District of Washington which set a “reasonable and nondiscriminatory” (RAND) royalty rate for patents essential to industry standards. In that case, Hesse pointed out that Robarts reduced the USD 4bn royalty originally demanded to USD 1.8m.

Hesse identified a series of trends that she said came together at the same time to create and drive the explosion of patent litigation between traditional handset manufacturers and late-comers such as Microsoft and Google which combined computers with telephones.

The industry as first configured was comprised of companies whose business models relied on selling handsets. The industry standards were based on the basic telephone components that were cross-licensed, and patent royalties were not a core part of their businesses. These standards were challenged by the introduction of the BlackBerry, iPhone and Android, by companies that combined computers with telephones and did not have large patent portfolios, Hesse said.

The combination of computers and telephones geometrically expanded the number of patents in telephones from several hundred to over 500,000, making it exponentially more difficult to calculate royalty rights. The issues became more complex as mobile telephony extended into other technologies, such as Wi-Fi and automobiles, she said.

Handset manufacturers losing market share sought independent revenue streams through patent royalties and the sale of patent portfolios. While industry newcomers acquired patent portfolios expecting to monetize their investments, non-practicing entities (NPE) also acquired patents and patent portfolios, Hesse said.

Finally, in the late 2000s, consumers started looking for ways to cut their costs. People once willing to spend money on technology started looking for low-cost options, she said.

At this point, there was no longer a consensus in the industry as to how to calculate royalty rates. This is why we saw an explosion in patent litigation, Hesse said.
However, Joshua D. Wright, an FTC commissioner who also spoke on the panel, said there needs to be more empirical evidence. There are a lot of strong views, lots of models, but very little in the way of empirical evidence to show what’s actually bad for consumers, he said.

by Peter Geier in Washington DC
Louisiana Pacific/Ainsworth review example of robust US/Canadian cooperation

- Regulators attended each others’ depositions
- Enforcers spoke regularly by phone

The recent failed merger between Louisiana Pacific and Ainsworth Lumber was a sign of the vigorous cooperation between US and Canadian antitrust authorities, a senior Canadian Competition Bureau (CB) official said 10 September.

The Louisiana Pacific and Ainsworth Lumber case “is a prime example, I think, of the collaborative relationship between the bureau and US counterparts,” Lisa Campbell, senior deputy commissioner of competition of the mergers branch at the CB, said. Her agency worked very closely with the US Department of Justice (DoJ) throughout the review, she said.

She was speaking on a panel on mergers at Georgetown University Law Center’s Global Antitrust Enforcement Symposium.

The CB, the US Federal Trade Commission (FTC) and the DoJ’s Antitrust Division released best practices for cooperating on merger investigations in March to try to make things even more efficient, Campbell said, adding that the US and Canada already had a long-standing bilateral agreement.

US and Canadian antitrust regulators working on the review of the Louisiana Pacific/Ainsworth Lumber merger spoke regularly by phone, shared information provided by the two companies and others, compared theories of harm, attended each others’ depositions and coordinated their reviews of remedies, Campbell said, which resulted in a more efficient review.

The CB and the DoJ both came to the same conclusion—the merger would likely substantially reduce competition, and the companies decided to abandon the deal.

Phoebe Putney

Also on the panel with Campbell was Deborah Feinstein, director of the Bureau of Competition at the FTC, who discussed its decision last week to reject its own proposed consent agreement in the Phoebe Putney hospital merger case. The FTC had challenged the Albany, Georgia hospital’s takeover of its competitor, Palmyra Park Hospital, but antitrust regulators believed the state’s certificate of need laws covering health care facilities precluded a divestiture remedy.

But when the agency put its proposed settlement agreement out for public comment it found that the information on which it had made its decision was not accurate, Feinstein said, and that, in fact, there was a remedy and that there was an interested group of buyers. As a result, the commission rejected the consent agreement and the case is currently back in administrative litigation, she said.

by Susan Mandel in Washington DC
Almunia to meet successor over coming weeks

- Outgoing commissioner to help Vestager prepare for EP hearing
- New commissioner expected to shy away from 'emotional' decisions

EU competition chief Joaquin Almunia will meet his successor over the coming weeks, the commissioner told PaRR on the sidelines of a conference in Washington DC.

Denmark’s Margrethe Vestager was named new EU competition commissioner on 10 September.

“I have a very large file to hand over to Ms. Vestager’, Almunia said on the sidelines of the Georgetown University Law Center’s annual Global Antitrust Enforcement Symposium.

Almunia expects to hand over to his successor the files of the probe into Google; the merger review of the tie-up between cement makers Holcim and Lafarge will also fall for the new commissioner, as reported. An antitrust investigation into alleged abuse of dominance by Russian energy giant Gazprom also remains ongoing.

The commissioner added he would help the former Danish minister for economic and interior affairs to prepare for her hearing with the European Parliament (EP).

Members of the new European Commission (EC) chosen by president Jean-Claude Juncker need to be endorsed by the EP. Following hearings with each commissioner the EP will vote for the commission in a plenary sitting. The hearings are scheduled to be concluded in early October.

The paths of the two commissioners already crossed in the past. "I don’t know her very well, but we met when she was chairing the ECOFIN during the Danish EU presidency," Almunia said. ECOFIN is the meeting of EU finance ministers.

One Copenhagen-based lawyer described Vestager as "bright" and "business oriented".

This lawyer thought that it would be unlikely to see the former Danish economics minister take a strong and at times "emotional" stance on companies, as her predecessors Almunia and Neelie Kroes have done sometimes, he said.

Competition lawyers previously told PaRR they hope the new commissioner would be unemotional and thoughtful as commissioner Mario Monti was.

To give an idea of Vestager’s personality, the lawyer recalled that when she was named minister, she arrived to work on a bicycle.

“I expect to see Vestager do quite a bit of work on state aid’, a Danish academic commented.

The new commissioner has an economics rather than a competition background, and they had expected Denmark to gain a more economic portfolio. “it will take her some time to get up to speed’, the lawyer and the academic said.
Competition lawyers hoped the new competition commissioner would strike the right balance between being an enforcer and a politician, ideally have a background in economics, be decisive and a good listener, willing to work closely with all services at the EC, as reported.

Vestager comes from a small, liberal country, and this is a good start, an EC official commented.

by Francesca Micheletti in Washington DC
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