

## Unchained watchdog

*Businesses think Europe's trustbusters should be kept on a tighter leash.*



*Illustration by David Simonds*

It was probably with some relief that Joaquín Almunia took up his post as the European Union's competition commissioner earlier this month. One of his main tasks in his previous job, as commissioner for monetary affairs, was to police the public finances of the countries that use the euro. But he lacked any means to sanction the fiscally lax, such as Greece. That left a mess that his successor is now struggling to clean up.

In his new job Mr Almunia may have the opposite problem: too much power. He has the authority to block mergers, to force companies to sell assets and to fine heavily firms judged to have thwarted fair competition. There is only limited redress for businesses that feel they have been punished unfairly. All this has prompted a growing fuss about how his agency treats companies it accuses of taking part in cartels or of trying to maintain monopolies by freezing out smaller rivals. The commission, competition lawyers complain, acts as prosecutor, judge and jury.

Cases often start with a complaint, which is taken up by a "case team". After a long investigation the commission issues a "statement of objections"—an indictment, in effect. Companies are then entitled to a hearing at which they can dispute the charges. If the commission feels its case still stands up, it finds against the firm and determines a penalty.

The previous commissioner, Neelie Kroes, boasted about the fines she raised from miscreants, including Microsoft and Intel. Penalties have often been big enough to dent profits, even at mammoth corporations. Companies argue, reasonably, that there should be legal safeguards to match the punishments they face. They would prefer a court-like process in which they could question witnesses and introduce evidence. The issue has already stirred the Brussels bureaucracy. Before Mr Almunia's feet were under the desk, the commission had circulated draft proposals on ways to tighten up its procedures when investigating cartels and anti-competitive practices.

The soul-searching is part of the fallout from the EU's case against Intel. The commission fined the chipmaker a record €1.06 billion (\$1.5 billion) last May for using loyalty discounts to stop its main rival, AMD, from challenging its dominance. It soon emerged that the trustbusters had failed to keep a record of a meeting with an executive from Dell, a big computer-maker. For some, this oversight only confirmed suspicions that commission staff overlook potentially exculpatory evidence.

Moreover, trustbusters are as much settlers of disputes between rival firms as guardians of vibrant competition, and that dual role may encourage meretricious cases. Companies are well aware that a plausible complaint to the commission can be a way of tying rivals up in costly litigation. The EU's trustbusters routinely proclaim that they aim to protect competition not competitors. Yet big technology firms acknowledge that antitrust lawsuits have become just another weapon in the battle for markets.

Establishing the facts in such cases is far from straightforward. Loyalty discounts, for example, can benefit consumers in that they pave the way for lower prices, but can also make it hard for competitors to survive, which can lead to higher prices in the long run. Judgments may turn on motive, and there are fears that prosecutors convinced of their case may miss evidence at odds with it.

Companies complain that by the time hearings take place case teams are wedded to their version of events, even if they hear a convincing defence. It rankles that the commissioner, who in effect decides cases, does not always attend hearings. There is no cross-examination of witnesses. No independent arbiter judges the merits of opposing arguments. "It's just a bunch of lawyers showing PowerPoint slides," says one firm's legal counsel. Companies have the right to appeal against the commission's rulings but that can take two or three years. The courts do not retry cases or hear new evidence. They merely assess whether a verdict was plausible, and defer to the commission's reasoning on anything "complex".

Cartel cases may be more clear-cut but the calls for better safeguards are just as loud. The EU's trustbusters rely on amnesties to crack price-fixing rings: the first member of a ring to rat on its fellow price-fixers escapes prosecution. This tactic was imported from America, where cartel cases are tried in court. The fear is that the European system is open to abuse. Firms could seek to implicate innocent rivals, who would not then be able to defend themselves in court.

Another complaint is that the commission's big fines are of little use as a deterrent. Decisions to fix prices are often taken by rogue employees without the knowledge of boards or senior managers. Big fines, meanwhile, may harm some companies and thus hurt competition. It would be far better to target executives with criminal sanctions, says Karl Hofstetter, group general counsel to Schindler, an elevator-maker that shared in a 1 billion cartel fine.

How might Mr Almunia set about tackling these concerns? Shifting authority over antitrust from the commission to the courts would require a change in the treaty underpinning the EU, a tortuous process. The EU could try to mimic the Federal Trade Commission (FTC), one of America's two main competition agencies, which employs independent judges, separate from case teams, to hear "monopolisation" cases. Yet the populist FTC is hardly a model of restraint: "It could scarcely be more interventionist," complains a lawyer in Washington, DC.

The ideal would be to address Europe's procedural shortcomings, while avoiding the excesses of the American system, says Ian Forrester, a competition lawyer based in Brussels. He favours giving greater powers to the legal officers who preside over the commission's hearings. Their role now is to make sure the hearing goes smoothly. But Mr Forrester thinks they should also make an independent judgment on the factual and legal merits of the case, for the commission to accept or reject without alteration. It would also help, he adds, if the hearing itself were open to the public and the hearing officer's report published. Bureaucracies do not give up power readily, and Mr Almunia will probably be reluctant to tie his own hands. But if he does so, he may leave his successor less of a mess to deal with.

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