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What to expect from the new Commission?

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In the EU, the New Year will bring a new Commission and significant changes in senior positions at DG Competition. The confirmation hearings for the new Commission start next week (with the Competition Commissioner designate Joaquín Almunia's hearing on Tuesday 12 January 2010). The Parliament is scheduled to vote on the new Commission on 26 January which will enable the new Commission to be in place by 1 February 2010. At the same time, current Director-General Philip Lowe will be replaced by the Dutch senior competition official Alexander Italianer who comes from a position as the Deputy Secretary General of the Commission. Also, the position of Director of the Cartel Directorate will need to be filled, with the current Director leaving to head the Cabinet of the French Commissioner.

It is hard to predict what these changes will mean for the future of antitrust enforcement in the EU. In the near future, the changes are unlikely to lead to any noticeable departure from current practices. After all, the vast majority of case-handlers will remain the same and no major legislative changes appear to be on the horizon. Furthermore, the written replies of Commissioner designate Almunia to the Parliament appear to contain an endorsement of the current Commission's policies as opposed to a signal of any wide-spread reform. As the only major area of reform, the written comments specify that Almunia considers that the financial crisis has demonstrated a need for an overhaul of the State Aid rules. In addition, before introducing any legislation opening up for more private damage actions in the EU in competition cases, Almunia has said that he will "*take soundings*" and that he will be "*bearing in mind the necessity of*

safeguards to prevent us from the kind of excessive litigation often experienced in the US".

All in all, Commissioner Kroes and Philip Lowe leave behind a DG Competition in good shape. The Commission as competition law enforcer is well-respected globally; it has tackled the largest cases in the world and generally has a very good track-record in Court in recent years. Commissioner Kroes faced a very tough hearing from the Parliament when she was originally nominated as it was feared that her former positions with private business would lead her to take a too friendly, too lenient stance vis-à-vis large corporations. She certainly showed those critics that they were wrong. In what we see as an endorsement of the current enforcement record, the in-coming commissioner has pledged to *"maintain the strong leadership of EU competition policy world-wide"* and has also indicated that he believes in the power of *"open and competitive markets"* supported by *"enforcing the competition rules in key areas like energy, information technology and transport"*.

One big challenge lies ahead for Almunia and Italianer: reigning in the Cartel directorate. In his written comments, Almunia says that he considered the *"Commission's institutional set-up and decision-making system for competition to be a strong one, with guarantees as regards effectiveness, fairness and due process"*. One should therefore not expect any major reform of the Commission's decision-making process (which in any event likely would require new changes to the Lisbon Treaty). However, we hope that Almunia or Italianer will realize that the one-sided pursuit of ever-higher fines has resulted in an unconstrained political support for the cartel directorate, which in turn feels invincible. The result is much like the Merger Task Force back in its heyday; that companies' rights and the interest in fair and objective proceedings have suffered. Not all infringements are hard-core price fixing cartels and instead of pushing every case to the boundary - and beyond - the Commission should make sure that it applies its procedures in a fair manner. Looking back at the problems faced when the Merger Task Force had unlimited political backing (and were referred to as the Ayatollah's of the Commission), it is clear that significant improvements can be made without fundamentally changing the institutional frame-work. Merger investigations today benefit from internal peer reviews and the high-profile abuse of dominance cases similar face a significant amount of internal scrutiny which clearly has an effect in those cases. However, most cartel cases do not appear to face this level of internal scrutiny and instead appear to be waved through the system.

The Commission has just published new draft Best Practice documents on how to conduct its investigations. The Commission launched the draft documents under the heading of *"improved transparency and predictability of proceedings"*. However, this improved transparency refers not to any major changes in the way the Commission will conduct its proceedings but from the fact that the documents explain in more detail the Commission's

current practices. While Best Practices are of course welcomed, the current draft does little, if anything, to deal with the issues defendants currently face across a large number of cartel investigations. The Parliament has already indicated that it will ask questions relating to the high fines imposed by the Commission and issues of due process. So maybe, like Kroes, Almunia will face a tough hearing.

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