

The importance of State aid challenges

Competitor challenges play a vital role in ensuring that the European Commission (EC) maintains a level playing field across Europe, says Javier Ruiz Calzado, Co-Chair of Latham & Watkins' Global Antitrust and Competition Practice.



Javier Ruiz Calzado

"There is no doubt that the EC has played a titanic role in managing the unprecedented competition issues that have emerged from the financial crisis, and that it continues to work intensely. But an important part of the 'normalisation' process is a willingness of businesses to challenge those government interventions that they perceive give competitors an unfair advantage, and this has been lacking over the past year in the sectors affected by the bail-outs."

Much of the focus of the EC during the crisis has been towards ensuring substantive rather than procedural normality in the State aid arena, believes Ruiz Calzado.

"Competitor companies have been reluctant to highlight inconsistencies, or procedural slips, because of both the general acceptance of the need for urgency in providing structural support to specific markets, and perhaps a fear that they too may require governmental assistance in the near future."

A major challenge for the EC has been to maintain orthodoxy to the very rapid decisions that it has had to make, and the structural remedies that it has imposed, but post-decision evaluation has clearly not yet been an area of general emphasis, he believes.

"There were obvious concerns over the levels of substantive scrutiny given in some instances, yet there were no challenges offered to the schemes being approved by the EC, or how they were followed through. There was a total lack of controversy in the form of legal challenges."

In the financial arena, it may therefore have been some of Europe's already weakest banks that have benefited most from the crisis, in the form of state guarantees and support, he suggests.

But while to date an anticipated upturn in competitor challenges may not have happened there may now be signs that as the market upheavals begin to subside a slow return to normality is commencing.

"The EC has argued that some state interventions were justifiable because of the onerous nature of the approval remedies imposed on them. But there is arguably a real need of 'after the event' analysis occurring, which the EC is now starting. In this process a role may once again begin to fall to competitors to ensure that what was agreed is followed through."

He notes as significant, the decision of ING and the Dutch Government to jointly appeal sanctions imposed on the bank by the EC following its receipt of €10 billion from the Dutch state in October 2008. Under the approved terms of that injection it has been forced to restructure, which includes selling its insurance arm, Dutch mortgage businesses and online US bank.

ING is however now contesting how the EC calculated the amount of State aid it had received and argues that restrictions preventing it from offering best rates for savings, mortgages or company deposits in the EU were disproportionate.

It is now, says Ruiz Calzado, that the moment of truth begins for the EC.

"The Court of First Instance has to decide whether the EC was correct in utilising certain methodologies, in deciding what constitutes State aid and in imposing the conditions to apporise the bail-out measures. In the ING case, the issue focuses on the behavioural conditions imposed and what ING can or cannot do with the money it received."

The sanctions imposed on ING clearly demonstrate a tough line taken by the EC and ING has begun paying back the money it received. But the question now, he says, is at what point should the EC's decision-making process begin to return to normal?

"The fact that ING is launching this action is significant, it is an important test case because nobody has yet challenged the EC's position in State aid cases decided under the full effects of the crisis."

People may speak of economic green shoots, and the EC may also now be taking a more protracted analysis of cases but Ruiz Calzado is not yet sure if, substantively, things are back to normal.

"State aid is an area in which competitor intervention and monitoring play an important role in providing checks and balances. The question is, do businesses simply not see anything wrong in what is being approved, or are they still too uncertain of their own situations to challenge decisions?"

No hay duda de que la Comisión Europea ha jugado un papel crucial y sin precedentes en la gestión de los asuntos de competencia que han surgido de la crisis financiera y continúa trabajando intensamente. Pero una parte importante de la normalización es la disposición de las empresas a desafiar la intervención gubernamental cuando se percibe que se concede a los competidores una ventaja competitiva, dice Javier Ruiz Calzado de Latham & Watkins. El equilibrio de mercado juega un papel fundamental en asegurarse que la CE mantiene la igualdad para las empresas de toda Europa.