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Lobbying competition law & policy?

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Abstract

The antitrust community often debates whether or not there is a role for lobbying. Some lawyers are ardently against it, some are cautiously for it, some embrace it. This series of articles has been commissioned from a wide range of experienced people who understand the decision making process in competition cases and sets out to provide a balanced and reflective contribution to the debate from a number of angles.

Parmi les praticiens du droit de la concurrence, la question revient souvent de savoir si le lobbying a un vrai rôle à jouer dans cette matière. Certains praticiens sont farouchement contre, d'autres l'ont accepté avec prudence, d'autres encore l'ont adopté sans hésitation. Cette série d'articles présente différents points de vue d'avocats, conseils d'entreprises et journalistes, tous familiers des processus de décisions en matière de concurrence au niveau communautaire.

The views expressed here are strictly personal to the authors themselves.

Lobbying competition law & policy?

Lobbying for climate change in EU competition policy – Just don't talk about the weather

Philip Marsden
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1. When I was approached to write an article on lobbying in European competition cases, I thought I couldn't possibly comment. I'm neither involved in lobbying, nor in cases anymore, and I had always taken a rather dim view of attempts to link the two. What motivates me to get out of bed in the morning these days is the hope that in some small way a research institute like mine might be able to help make competition law in Europe more efficient, more effective and more rational.

2. That might sound a bit sad, but it's accurate at least. That is the aim of the Competition Law Forum that I direct, and it is what motivated Simon Bishop and I to launch the *European Competition Journal* a few years ago. Is this lobbying? Through both entities I've certainly been involved in making policy recommendations to government and to the European Commission, and this is presumably why the editors thought it interesting to take in my perspective. That said, my research institute itself focuses on promoting the rule of law, which attempts to ensure that the discretion that officials exercise on individual cases is applied objectively, transparently and in accordance with the law. Case-specific lobbying would appear therefore to be anathema to the rule of law. Nevertheless, in Europe in particular lobbying is an ever-increasing reality. Indeed, many officials at the European Commission welcome contact with special interest groups in order to benefit from their expertise, and to find out how Commission proposals may impact in the real world. As such, I applaud *Concurrences* for deciding to publish a series of articles on this very subject, which is a rather more important aspect of EU competition policy than is often realised. I also think that what some of the public affairs groups do in Brussels and elsewhere is very helpful, not only in assisting their clients to understand how 'Europe' works, and thus ensuring genuine compliance with the law, but also in helping both private and public actors improve the ways they interact. I didn't always have this view though.

I. An early and naive view of lobbying

3. My first exposure to lobbying wasn't a positive experience. I was in private practice and a colleague brought in a group of public affairs experts to make a presentation to the European competition group. The presenters' attitude was condescending and salesman-like. They skirted over the relevance of competition issues, and focused on the personalities of the agency heads, and the interactions among the Cabinets of the European Commission. As an example of lobbyists knowing their audience, it was a

disaster. Such a talk couldn't have been expected to go over well with lawyers who prided themselves on what they knew, rather than who they knew. We went back to our desks and thought that was the last we'd see of them.

4. My second experience was longer and more involved. A hostile transaction arose, and my colleague suggested that the client retain the lobbying firm, to 'harvest information' and 'influence those around the case team'. The idea, apparently, was that while we were meeting with the then-Merger Task Force, the public affairs team would be reporting on what was happening in 'capitals' and arranging briefing lunches with senior DG-COMP officials, including if possible the Commissioner, to 'get our message out'. Most of us either found this workstream to be of no interest, or an unnecessary distraction. I thought its second strand - that of influence or pressure - was dangerous, at best. The transaction itself was hard enough, the pressure from the client and my firm's corporate department intense, and the MTF were being very demanding. We were deluged by information requests and the case team seemed sceptical of every point we made. To add to our burdens, we were suddenly drawn into a whirlwind of daily conference calls that the lobbyists had set up, from which they would produce slide decks and summaries. We had to review these, and I was glad that we did, since they seemed to focus on areas that weren't central to the case, and the legal and economic arguments seemed only to come up, if at all, at the end.

5. Then, at a critical point in the negotiations with the MTF, one of our senior lawyers was persuaded to accompany the public affairs advisors on a week long trip around Europe, meeting with national ministers to tell them about the wonders of the deal. I thought back to my time as a competition official, and wondered how the MTF would view these machinations 'behind their backs'. Or perhaps they expected it? Or more likely, they were too busy themselves and couldn't have cared less, since they – after all – felt they had all the power and only needed to worry about convincing their Commissioner, and the Legal Service.

6. In the end, both sides got what they wanted. The MTF extracted the undertakings they needed and we got the deal cleared in Phase I. Strictly speaking, the undertakings were over-reaching, in my mind, and probably ended up chilling competition in the market. The undertakings also rested on some fundamental assumptions about market definition that were questionable to say the least. But the client wanted a quick clearance and so accepted the immediate pain, and the follow-on suffering of how the market definition point in particular would come back to haunt them in future acquisitions. The public affairs team felt that point was minor, though, compared to the advantage of explaining the deal to top decision-makers in national governments, and thus building support for the client throughout Europe.

7. The client got what it wanted primarily because it agreed to what the MTF required for a Phase I clearance. I don't know to what extent the lobbying of Member States influenced matters. To be fair, I don't know how much our legal advice mattered either. It is always tempting to consider your own contribution the most important aspect of any work product, particularly if you've worked flat out for weeks. But those who have been in the game a while know that this is far from being true. I well-remember one head of our competition group making a retirement speech in which he noted that for thirty years he had been advising on deals that made the front page of the *Financial Times*. It was only towards the end of his career that he realised that none of them were actually his. They were the clients' and he was but one of many cogs in a rather large wheel. It was a poignant wake-up call; though I'm not sure all of the young thrusting lawyers in the group heard it. Yes, he had documented a number of deals and helped get many of them cleared by the authorities, but it was a learning experience to hear this titan of competition law put his value-add in the appropriate perspective.

8. Competition law is just one regulatory hurdle for a company, or one means by which a complainant can attack an arrangement of a rival. Law itself is simply one means of many. A lot more than that goes into European policy-making. So it is from this perspective that I will try to examine the contribution of lobbying in competition cases, and more broadly, in policy development as a whole.

II. The value of public affairs

9. In the hostile deal mentioned above, I was staggered to learn that the external public affairs team's bill exceeded that of my firm's competition group. And it was paid a lot more quickly too. Apparently the client's head of government affairs was thrilled with their work. He enjoyed traveling around capitals with them, even if it meant being accompanied by a lawyer as well. He got to meet all the regulatory heads, ministry officials and decision-makers who had been on his list for years. Indeed, the hostile takeover made them *want* to talk to him. They may not have had any control over the case, but it was the biggest thing to happen in their markets for a while, and they naturally had to be seen to have an opinion. He in turn wanted to nurture relations with them for a range of reasons, all across his regulatory responsibilities. So that was one insight: lobbying in competition cases is part of an iterative process in which a company engages with government, and not just with respect to competition law.

10. A company and its government affairs team, if it has one, will monitor immediate share price fluctuations, and be subject to the discipline of quarterly statements and annual reports, and a particular deal may end up receiving more scrutiny than usual. But they inhabit a regulatory environment, and want it to be as conducive to their business, and as clear to forecast as possible. Anything that they can do to prepare to make this climate more receptive to their business model is all to the good… even though they may not be able to control the weather on a particular day. And when a stormy day comes, they want to be able to manage expectations or at least massage the way the news comes out – 'spin' if you must call it that – and there are few lawyers I'd want to have doing that.

11. To understand the regulatory climate, companies want to understand what affects the weather patterns first of all. They have to retain experts not just in the legal system, but also in the political process, and in how the institutions interact. Who really pulls the various levers, and what buttons can you press and when? This is the bread and butter of public affairs experts. At the same time, though they have to be humble. Lobbying is often compared to advertising: even if as much as half of what they do works, they'll never be able to figure out which half. Even so, it is a brave and foolish company that operates in Europe without public affairs advice, Brussels has thousands of lobbyists: most of whom represent special interests, and hope to influence directives and regulations and other initiatives. They are there because the EU isn't as transparent as it could be, and because the decisions of its institutions affect businesses and consumers in varying and often differing ways. Thus we see trade associations, consumer groups and larger firms with their own government affairs teams, all trying to find information and gain access to the decision-makers or those who influence them. The way they do this is crucial. If they are too direct, their pressure can backfire. Too subtle and they just look Machiavellian.

12. It is a dangerous game going anywhere near the case team though. Leave that to the lawyers. It isn't a particularly good idea to try to influence anyone who might put pressure on the case-handlers either. Discussion of 'the weather' – that is, any particular case – is best left to official channels.

13. In contrast, with respect to the regulatory climate itself, and policy proposals to alter it, there is no risk from full and frank discussion. Indeed, such would likely be appreciated by the officials at least. Many of them are inveterate lunchers. An EU Parliamentary report noted that most EU civil servants welcome contact with special interest groups.[1] Officials in Brussels, for the most part, recognise that they live in a regulatory bubble. Most of them have never worked in industry. They have come straight out of the masters programmes of the various European universities, and into a well-paid job for life. There is not yet much of a revolving door, and they are cut off from the real world. As a result, they are starved of external information, and look for opportunities to identify how their proposed policy stances might be received. I doubt they learn very much of substance from any outreach, as they tend to have mulled over almost every possible angle themselves in their own deliberations. But they will often hear an anecdote that supports one of the points they are considering, and this may be of some use. In particular, they will better appreciate the real-world effect of their actions. The officials need this legitimacy because the EU is not like other international organisations. The WTO, for example, strives towards commitments of the lowest common denominator (which is hard enough to attain as it is). It doesn't have the kind of mandate by Treaty to integrate a common market. In contrast, the European Commission is an agent for real change, and has to be a 'leader' of sorts if anything is to happen. To have the confidence to lead, and to make difficult policy decisions, including decisions on cases, the officials need to be confident that their approach is the correct one. Consultations, informal soundings and continuous refinements can assist in this regard. Inevitably though, the Commission has to take a position and move on. All the more reason for companies and their public affairs advisors to get in early and often, if they want to have any effect on policy advances.

14. I'll close by reversing the equation and examining one area where the Commission itself seems to have done some lobbying rather well. This is with respect to that part of the process of modernising European competition law known as the 'more economic approach'. Yes, economists and lawyers had been complaining about the Commission's formalistic approach for years. Yes, they'd called the block exemption system a strait-jacket and begged for some flexibility and actual analysis of economic harm before the Commission blacklisted or condemned certain practices. So, yes, the Commission can be said to have been lobbied to that end. I wouldn't say it was a concerted effort though, and so wouldn't characterise it as lobbying *per se*. I view that more as necessary learning, and growing maturity of the system. Once it realised that some change was needed, the Commission itself began a lobbying process. They harvested information from Member States, made soundings with national authorities, recruited some to their cause, held repeated consultations and participated in conferences, all gradually moving towards this elusive goal of a more flexible competition policy, ruled by reason and economic analysis, rather than law alone. The Commission could not have done this without knowing how national governments would react, and without influencing them in some regard. Of course many will say the Commission was pushed in that direction by forward-thinking national authorities too. There certainly are some 'barons of ordoliberalism' left in DG-COMP who resisted such changes, and still are with respect to reform of Article 82. That is only how it should be. Their approach to enforcement – intervening without awaiting definitive proof of harm to consumers – has a long history in one or two key Member States. Commission victories in cases that relied on such a formalistic approach have doubtless slowed down the gradual acceptance of a more economic approach. Nevertheless, it was firm leadership at DG-COMP, and repeated interactions with business and governments, that kept the Commission moving forwards to a significant change in regulatory climate.

15. And what will this 'more economic approach' mean for lobbying itself? The economists won't be the sole beneficiaries of such an approach. Firms will want an idea of how the Commission will be likely to analyse cases, and this will require more expertise than ever. This means more work for lawyers too. And inevitably, where there is room for differing opinions, and differing descriptions of how a practice, arrangement or Commission decision should be interpreted, there is more opportunity for expert public affairs advice!

16. In conclusion, while there are doubtless many ways of viewing how European competition policy is crafted and applied; and different points of emphasis and expertise along the way, it would be difficult to survive for long in Europe without capable legal, economic and public affairs advice. ■

1 European Parliament, Lobbying in the European Union, November 2007, http://www.ipolnet.ep.parl.union.eu/ipolnet/cms.

Lawyers and lobbyists, in competition?

Stephen Kinsella, OBE
Lawyer

1. Towards the end of last year I found myself on stage at a converted theatre in Brussels, about to hand out a prize for "consultant of the year" at the European Public Affairs Directory awards dinner. It was an extremely enjoyable occasion, greatly enhanced by the fact that neither the prize givers nor the recipients were permitted to make any speeches. But my presence there provoked a number of comments and questions from consultants in the audience about what a lawyer was doing at that event. I explained that I often work with consultants and have always been interested in how they operate. I had also been reflecting for some time on the differences between our professions, whether real or illusory, and how we can complement each other. Denied the opportunity to give vent to my views on that occasion, I therefore seized the opportunity presented by the invitation to write this article.

2. When I first began working in the competition field, some twenty five years ago, it was quite clear and uncontroversial that competition law issues would be handled almost exclusively by qualified lawyers. Over time that has changed quite dramatically. As cases grew more complex and as the stakes got higher, we first became accustomed to working frequently and then routinely with economic consultants and experts. And as antitrust took on greater significance to companies, it expanded beyond being a "mere" legal or economic issue to rank also as a matter of reputational and strategic importance. It was no longer enough just to defend the client before the regulator in written submissions and closed hearings: the public and shareholder perception of that case could have a significant impact on the company''s fortunes. To meet this need there emerged a new breed of "competition lobbyists". As I will explain it is not easy to provide a simple definition of that term because those who practice it may present themselves as specialist in one or more discreetdiscrete disciplines but it includes at least government relations, public affairs and communications.

3. As a result of this evolution many of us competition lawyers now find ourselves working, perhaps not routinely but certainly very frequently, with competition lobbyists. And to some extent the source of our work has also changed: whereas in the past our instructions came primarily from our client''s in-house legal department, we are increasingly communicating directly with and instructed by non-lawyers in our client''s government/public affairs department. What I would like to attempt to do here is to explain, from the point of the view of a lawyer, why you might actively seek out the opportunity to team up with a consultant and how that can work in practice. I might also attempt to dispel some of the more widely held myths and fears on this subject. In doing so I am drawing almost entirely on my experience of practice in Brussels, though I have little doubt that with some tinkering much of what I say could be equally applicable to the practice of antitrust law in many of the Member States.

I. Information

4. There are many reasons for engaging a consultancy to help with an antitrust case. I will deal with a few that seem most important to me.

5. Perhaps one of the more obvious advantages is that the well-connected consultants often have access to sources of information which are not readily available to lawyers. It seems to come as a surprise to some lawyers that non-lawyers don't always feel comfortable speaking to us. Indeed as one consultant friend very tactfully expressed it to me "*for policy-makers, lawyers mean problems, intransigence, rights, complaints and legal actions whereas lobbyists mean compromise, flexibility, practical understanding etc*". It could be that our approach is sometimes too direct. Alternatively it could just as equally be that we seem to feel the need to throw in so many caveats that it is not always entirely clear what we are looking for. Whatever the explanation, potential sources of information can clam up when confronted with a lawyer but may be ready to confide in others who can speak their language, both literally and figuratively. Also many lawyers simply do not have a wide enough range of contacts because they work in quite a specialised field. And such a narrow focus can be dangerous because if you are handling a case before the European Commission, there will normally be a large number of officials from different departments who have some knowledge of or insight into the case, well beyond the case team or the staff of the Competition Commissioner. These can include other Directorates General, the Legal Service, other Commission Cabinets and representatives of the National Competition Authorities. Any one of these might be able to give a signal that a case is about to take a surprising turn. To that list you could also add Brussels-based journalists and even other consultants who are following the case. Having a good and well-connected consultant on the team can assist greatly in picking up those warning signs. If involved as part of the team they can also provide useful guidance on how to interpret those messages, which can involve an understanding of wider policy issues, and even on how to run the case.

6. To give an example, a few years ago we were involved in discussion with DG Competition in a high profile matter which was clearly running into difficulty. We felt (but don''t we always?) that we had a strong case that was somehow not being heard. The DG Competition officials with whom we were in almost daily contact seemed sympathetic to our arguments but clearly felt unable to explain to us what was holding up progress. Early in the case we had recommended that our client consider engaging a consultancy to assist with handling press enquiries on the case and we asked them to do some discreet digging in the background. They were able through apparently unrelated contacts in DG Enterprise to establish which Service was manning the road-blocks and to help us identify the arguments which would help shift them. In the end it involved our client making a concession in relation to a quite separate part of their business that had nothing to do with our case. It is very possible that the matter would have been resolved based just on the antitrust arguments but almost certainly not as quickly as it was. Certainly it was a good illustration that the answer is not always to be found in the antitrust caselaw.

II. Communication

7. Another aspect of the Brussels landscape that has changed dramatically over the last several years is the size, expertise and hunger for news of the press. Not that long ago it would be relatively unusual to speak to a journalist, either about a specific case or about Commission policy in general. There were only 4 or 5 news organisations who paid much attention to what we were up to and even their interest was sporadic. The scenario today is very different. If you are working on a merger that is anything other than short form and routine, you can expect to field enquiries from Mlex, Bloomberg, Dow Jones, Reuters, The Deal, MergerMarkets, AFX and several others. If your transaction is seen as likely to raise issues you can add to that list the Financial Times, Wall Street Journal and others with active Brussels correspondents. Because most of our clients are not based in Brussels, indeed normally have no presence here, and because the identity of the law firms acting is often a matter of record, it is very common for us to be first port of call for such questions. That presents a challenge for lawyers, not only because dealing properly with those enquiries can be incredibly time-consuming but because it demands a skill-set that cannot be learned overnight. For instance we generally understand the implications of going "on" or "off" the record but do you want to be referred to as "a lawyer working on the case", "a lawyer with knowledge of the case" or not referred to at all however imprecisely? In this area it can be extremely helpful and reassuring to work with a press/communications specialist (again whether in-house or external) who can help sort out the ground rules, establish who are the journalists that it is appropriate to speak to, help draw up the key messages and effectively act as a filter.

8. There are a number of reasons that from my perspective have led to this increased focus on messaging and the need for, indeed the benefits of, dealing with the press. On the merger side there is no doubt that the increased activity of hedge funds and arbitrageurs has had a major impact and in turn has fuelled further investment in responding to their demand by the specialist wire services in particular. Their appetite for minute-by-minute reporting of every minor twist and turn in a merger filing is hard to exaggerate. Generally this relates to merger cases but some have expanded their scope and will now also track other major cases such as cartel investigations in the (admittedly at present relatively rare) event that they could have an impact on share price. Therefore every delay in filing of a Form CO, or even of a draft CO (see the recent Continental/Schaeffler saga), every request for information, stopping of the clock or extension to submit commitments gets analysed and speculated upon. There is often no shortage of interested parties willing to fill that void with a comment which forces the parties to consider their own communication strategy – or at least to have one in place. It is essential that the lawyers get involved in that process because much of it will be read by or could be forwarded to the case team, and could well have an impact on the quality of the communication with them. DG Competition has its own press team which it uses quite appropriately to explain what it is doing, within the limits of maintaining confidentiality but it is rarely a good idea to leave the responsibility entirely with them. Indeed the Commission will often try to deter the parties from speaking to the press and that is often good advice but on occasion it becomes more important to reassure the markets as to what is going on than it does to maintain radio silence.

9. Dealing with the press is not purely reactive. There are cases where lawyers and consultants actively seek out the press. A few years ago I was involved in seeking Commission clearance for a merger based on a hostile takeover bid. The target had decided it would rather merge with another company and had gone on record as saying that our client''s bid would face regulatory difficulties, or in the words often used in these contexts would be "less deliverable" than the rival bid. Although ultimately of course the duty of the target''s directors was simply to do what was needed to ensure that shareholders achieved the best price, there were interested third parties who did not need to pull their punches in seeking to have the bid blocked. It was described at the time as a battle for the "hearts and minds" of the shareholders. With so much turning on whether shareholders felt the deal could be cleared and with the client seriously constrained as to what it could say by Takeover Panel rules, it was inevitable that a large part of the shareholders'' assessment would be based on what was publicly available, including any press reporting of how the Commission viewed the deal. We came to the conclusion that if we wanted to keep shareholders reassured that the deal would be cleared, then constant discussion of the case in the press was likely to be unhelpful. We therefore adopted a strategy of trying to minimise coverage. Again with the help of a well-connected and trusted consultant, we were able to brief key journalists off the record, on the understanding that they would respect an appropriate embargo on publishing what we told them. In return we committed that we would always confirm whether any stories they were picking up were true, which effectively enabled us to kill off some of the misleading

accounts being manufactured by our opponents. Throughout this process our active involvement as lawyers was critical because the journalists, who knew their way very well around some of the more obscure areas of the Merger Regulation, wanted to hear from us directly whether one or other of the theories being floated were valid. The credibility of both the consultant and the lawyer on our team was fundamental to persuading the journalist that they should believe us and that on occasion they should refrain from running a story.

III. Persuasion

10. As I mentioned earlier, there are many voices that might have some influence on the conduct of a case. That is not true, of course, of the bulk of DG Comp'Competition's workload, where there is generally little controversy or at least where the matter is clearly and purely an antitrust one. However every so often we find ourselves with a case which is more complex, maybe more "political" or where the antitrust aspects are just one facet and where other parts of the Commission or of other agencies have a legitimate role to play. In a merger case, at least if it is likely to go into second phase, that could be the Commission Directorate that has responsibility for the underlying industry sector (transport say, or energy). In large mergers but also occasionally in cartel cases where a "national champion" could be facing a large fine, it may be that the Member State will want to express a view and seek to persuade DG CompetitionComp to exercise its margin of appreciation in one or other direction. Where matters of policy or consistency are touched upon, it is possible that the National Competition Authorities, through their rights of consultation and scrutiny, can be persuaded to speak up. There will even be cases where it can be helpful to have one or more Members of the European Parliament to take an interest and perhaps to table a question about the Commission''s handling of an investigation. Consultants who deal regularly with MEPs on a broad range of issues are far better placed to identify those who may have an interest in the subject and be willing to weigh in.

11. In a complex or high profile matter there is so much that could in theory be done, so many "stakeholders" one could speak to, but time and resources are constrained and there is the distraction of having to actually get on with the case itself. Nowadays the legal team can be fully engaged simply in responding to the Commission''s increasingly comprehensive information requests and keeping up the dialogue with the case team. I have found that consultants can be invaluable in helping put together a strategy and work out where some additional investment in time might pay off in influencing the outcome. They also benefit from having a healthy distance from the legal detail and can be a good reality-check on whether arguments that look unbeatable in a legal submission will actually carry weight with any other audience.

12. Another area where the consultants can help and where it is more difficult for the lawyers to tread, is in building up a coalition of support or a "fan club" for a particular case or initiative. As lawyers we are seriously and appropriately constrained by our professional duties. We cannot strictly "advise" a third party who we are seeking to enlist to support our client''s cause. On the other hand many of the larger consultancies have wide networks of clients who they are able to identify as having similar interests and who might be persuaded to come on board. Because nowadays the Commission (and national regulators like the UK''s Office of Fair Trading) feel increasingly pressured to justify their prioritisation of cases, demonstrating a wide base of support for a particular issue can be critical. A good recent example is the recently abandoned proposal by Google to conclude a revenue-sharing arrangement with Yahoo, where it appears that both the proponents and the opponents of the deal could be seen encouraging those who would be impacted by the deal, from publishers and advertisers to consumer groups, to express their concerns to the Commission.

IV. Making it work

13. I mentioned at the start of this piece how lawyers had learned to work closely with economists. In the early days whenever I did instruct an economist' the first thing he or she normally told me was that I really should have involved them earlier, and they were invariably right on that. The same is true of consultants – the relationship will only be truly effective if they are brought in early enough and are given access to all the information they need. The old adage that you can afford to treat your lawyer like a mushroom – keep him in the dark and sporadically cover him in manure – is no more apt when applied to consultants. It is obvious that such a relationship needs trust and that has perhaps been one of the greatest challenges for lawyers and consult ants learning to work together – a lack of understanding by each of the professionalism of the other and accordingly a reluctance to work together as true colleagues. To be blunt, some lawyers still seem distrustful of consultants, and are not prepared to treat them as fellow professionals who are just as capable of respecting confidentiality, recognising and dealing appropriately with conflicts of interest and delivering clear and practical advice.

14. Part of the success of such a collaboration depends on choosing the right firm in the first place, and in that respect a lawyer who is unaccustomed to dealing with consultants and has no sense of their strengths and weaknesses will be at a major disadvantage. Many large clients already have their own preferred advisers and simply direct us to work with them but there are still frequent occasions when we are asked to make recommendations. It pays then to understand the difference between the various disciplines of communication, crisis management and more classic lobbying and persuasion. Not all consultancies by any means are strong in all those areas. Many also have particular skills and networks in industries or sectors such as telecoms, environment, financial services etc. The good ones are those who are upfront about where they can be most effective and are ready to volunteer when it might be better to employ another firm to cover a particular angle.

Indeed it is very common now on major cases to work in a team with 2 or 3 consultancies, just as there may be 2 or 3 law firms brought in to handle different aspects.

15. This brings me to a related subject, which is the problem of the law firm or consultant that thinks it can handle everything. They tend to walk into the 3rd and most dangerous of Donald Rumsfeld''s three traps, that of the "unknown unknowns" or the things we don''t know that we don''t know. Most of us are wise enough to try to stick to what we are good at and welcome assistance from experts in other fields. However because in many ways law and lobbying are very similar, in that both are in large part the deployment of advocacy skills, there is a temptation for lawyers in particular to think that they can also handle all aspects of communication. Similarly we often encounter consultants who are tempted to stray into giving the legal advice also, not appreciating that regulations which seem clear on their face can be far more complex in practice. It seems to me there are a number of reasons why, even if the fused law/lobbying operation is effective in other centres such as Washington or Geneva, it tends not to work so well in Brussels. First off, there are all the reasons previously enumerated as to why lawyers in Europe are often not suited by either training or temperament to develop many of the skills required of consultants. Going beyond that, it is questionable whether their doing so is likely to be cost-effective for the client. Generally, and for very good reasons which stem from the different business models employed, the time of most lawyers tends to be more expensive than that of consultants of comparable experience other than the most senior. Law firms can of course choose to develop in-house consultancies in Brussels but the lack of scale of these operations presents a major barrier: there is the immediate challenge of how to persuade really talented consultants to work for a law firm and how to continue to guarantee them a steady stream of work that will be sufficiently challenging to help them develop. In many law firms unless they are legally qualified their career prospects can be limited. And finally a consultant working within a law firm is likely to run into more intractable conflict issues and might find that other law firms are curiously reluctant to see him included in the team.

16. In the end, the teaming of lawyer and consultant tends to work best when the client really knows what it wants and has a firm grip on the process, making it clear from the outset what the objectives are, what is expected of each firm and where the demarcation lines are. When it works well, the experience can be very enjoyable as well as productive: meetings with a few consultants involved just seem to be more fun, as both sets of professionals tend to enjoy winding each other up. But when there isn''t such a structure, and when the advisers spend time jockeying for position and starving each other of information, the outcome can be deeply frustrating for all concerned.

17. Finally, I would say that lobbying, at least in the antitrust arena in Brussels is still an underdeveloped market. I tried to find figures for the number of competition lawyers, of all nationalities, working in Brussels and that proved hard to track down but must run into several hundreds. On the other hand the number of consultants with real expertise in the competition field is probably still only in the dozens. Whenever any major issue blows up those of us seeking assistance, if we do not move quickly enough, soon find that the best firms have been snapped up. Meanwhile, even if there may be fewer mergers over the next couple of years the foreseeable growth in other aspects of competition law enforcement, including cartels, sectoral investigations and litigation, mean that the demand for skilled advice can only continue go grow. Therefore I would expect that we will see all of the larger Brussels consultancies seeking to expand their competition teams in the coming years. I am looking forward to the next awards dinner. ■

Brussels' hamstrung press corp and the dumbing down of news

Robert McLeod
Editor-in-Chief

1. Brussels boasts the largest permanent foreign press contingent in the world yet the quality of reporting about issues where the European Union's principal institutions wield actual power and influence – particularly competition, trade and the single market – is generally haphazard, poorly informed and open to manipulation. In order to examine why this is, it is necessary to look at the structure of, and the demands on, the press and how it interacts with national and international politics. While more clarity and transparency could go some way to improving the quality of reporting, traditional media will remain hamstrung by external constraints. With demand for accurate, reliable and informed intelligence increasing, specialist services will increasingly fill the void.

2. Europe's capital boasts the largest number of foreign correspondents of any place on earth.[2] Global news agencies and national broadcasters sit alongside regional newspapers, specialist magazines and itinerant freelancers. There are some 1402 journalists[3] in Brussels accredited to the European institutions, of which almost a fifth will rotate out of Brussels in any one year.

3. Manipulation of the media, while complex, benefits from the splintered nature of the 'lobby', its relative inexperience, a lack of specialist knowledge and an often parochial agenda. In order to understand how the press treats information, it is necessary to examine the constraints much of the media is working under, and the editorial decision making that sets the agenda.

I. International agencies

4. Most media, including the agencies and the specialist press, are under intense pressure to produce 'exclusives' which can, and do, sometimes lead to lapses in depth or precision. Agencies, and increasingly the internet offshoots of the established press, are also under additional time pressure to produce headlines directed specifically at trading desks in international financial markets.

5. With headlines being driven within seconds off press releases or over mobile phones from door-step briefings and huddles, insufficient thought and judgement is used in assessing what information to highlight when the pressure is on not to 'be naked', that is to say, not send out a headline that has been highlighted on rival news service. It little matters whether the information is important as much as whether it appears to be important, as the editors with ultimate responsibility for sending headlines have little or no understanding or knowledge of the topic and are as likely to be based in Wall Street or Canary Wharf as Brussels. Savvy lobbyists structure press releases with this in mind, providing ready-made headlines to the 'spot news' desks.

6. While these 'flashes' or headlines seldom make it into the mainstream press, they do tend to affect the structure of the resultant story which often needs to be shoe-horned into the earlier headlines.

7. Whether a reporter for an agency is writing for bond traders in New York, currency brokers in London or pension fund managers in Paris, there is pressure to flatten out the story – essentially stripping it down to its bare essentials – to make it understandable for the widest possible audience.

8. This 'dumbing down' of copy and the rush to print mean that reporters often fail to convey in appropriate detail the very issues that they are attempting to report, often because they are written for the broadest possible audience in the shortest possible time. This leaves little time for research and reflection and can often result in hurried and poorly informed reporting.

9. For the informed observer, including regulators, lawyers and corporate representatives, even the experienced media can sometimes appear to have missed the point on a story or issue.

10. News despatches from agencies tend to hit the editing desks of national newspapers well ahead of any of the publications own reporting, particularly as the agencies themselves are fighting for 'pick-up' space on the broadsheets. If equivalent topic coverage is required and not forthcoming, the publications correspondents in Brussels are commissioned to produce the necessary reportage.

II. National journalists

11. Typically, national journalists have even less understanding of the topics involved, be it of the background to the story, or even the implications of what they are reporting. This leads to

2 There are, arguably, more journalists in Washington, though the great majority of these are "national" journalists from different states of the US. Most journalists in Brussels, of course, come from the different "states" of the European Union.

3 As of November 1, 2008. The figure includes 268 technical support staff such as cameramen, sound technicians and photographers.

further simplifications and errors in articles while also opening up the reporter to lobbying efforts from those seeking to influence the agenda. When the often relative inexperience of the reporter involved is thrown into the mix, the capacity for slanted, opaque and confused copy, even amongst more respected titles, is accentuated.

12. This situation is exacerbated by the perceived profile the writer will attain from covering more global issues – such as the Commission's opinions on war in Asia or famine in Africa – despite the fact that these are areas where the Commission has little or no relevance. Conversely, the media is mostly silent where the Commission does hold power; where it can act independently of member states and impose its will on the world most powerful corporations. Matters of competition, antitrust, the single market and trade policy implementation are often simply not glamorous enough.

13. The second aspect to the journalistic conundrum in Brussels relates to the parochial or nationalist agenda, either driven by editorial decision or more simply national pride fed by national corporate political interests.

14. National editing desks are driven, by and large, by the domestic political agenda. In the 1990s it was fashionable in the UK press, particularly but not exclusively the populist tabloid press, to concoct articles on seemingly absurd Brussels dictates about the correct shape of a banana or the size of a loaf of bread. The tradition is in rude health and the Commission's press service even has a special site[4] for debunking some of these 'myths'. Often, however, these 'myths' turn out to be attempts by national governments to deflect criticism to Brussels over what is more likely a national measure. The press often happily goes along with the story.

15. The practice by governments to give selective briefings to national media is widespread and understandable. The media is reporting on what is or isn't happening in Brussels for a domestic audience and a government would be expected to seek the best coverage to enhance its political position.

16. Journalists, on the other hand, can strike a Faustian pact with the government, regardless of their own particular leanings. The Permanent Representations can offer briefings to selected journalists and anyone outside that loop will find themselves missing from the following day's papers while their competitors get the stories.[5]

17. In areas of interest to DG Competition, there have been a number of notable cases where national interests have been barely disguised.

4 http://ec.europa.eu/unitedkingdom/press/euromyths/index_en.htm.

5 Many European Commissioners have routinely carried out such briefings. Trade Commissioner Peter Mandelson and his predecessor Pascal Lamy routinely met with key national journals ahead of particularly difficult meetings to put forward their perspectives. The existence of such meetings was often flatly denied by spokespeople to reporters not invited to the meetings.

18. In 2005, in the case involving ABN AMRO's bid for Banca Antonveneta, European Commissioner Neelie Kroes sparred with Italy's then central bank chief, Antonio Fazio, over his commitment to the single market after the latter's attempts to derail the Dutch bid for the Italian bank in favour of a rival Italian bid. Sections of the domestic media, no doubt with encouragement from political sources, attempted to turn the nationalist table on Kroes by asserting she was somehow bound to favour a Dutch bank.

19. Commissioner Kroes had previously served in the Dutch government. Prior to taking up her position with the Commission she was required to resign from a number of corporate directorships – such as UK mobile phone operator O2 – which then limited her ability to handle specific cases. There were no particularly significant links to ABN Amro.

20. Nevertheless, the Italian press pack tried to tie Kroes with ABN-Amro in a bid to derail her moves to stifle the outright protectionism in Italy. They pressed officials as to whether the fact that Kroes may have had a personal bank account with ABN Amro, or whether her pension fund may have included ABN Amro stock wasn't sufficient reason to bar her from the case.

21. Other errors are introduced into copy by a simple lack of understanding of the processes, even as far as merger cases where the Section 1.2 of a Form CO – drafted by the company – is interpreted as a draft decision by the European Commission.[6] It should be noted that such flagrant errors have also passed through an editing process supposed to act as a quality control.

22. A lack of understanding or comprehension of competition law isn't the only issue when journalists reporting for the national press are fed by their own governments to do their bidding.

23. Similar situations have developed in relation to other more recent high-profile cases, including state aid to Polish shipyards – where there have been concerted efforts to paint the commission as intent on attacks on workers rather than addressing the issues of chronic industry overcapacity, inefficient yards and the effect on the European single market and global trade agreements.

24. The rescue of UK mortgage lender Northern Rock provoked similar sentiments and it took some months before the main Brussels press pack to even acknowledge that, indeed, the European Commission would be responsible for vetting the package and would likely attach considerable strings to any agreement.

25. So what does this mean? The bulk of the media, when it focuses on competition law at all, focuses on national irrelevancies, Most of the rest, and there are very few among the rest, depend on the good will of the Commission for an occasional exclusive. The thought that they could, and should, challenge the Commission is alien.

6 http://www.hemscott.com/news/static/tfn/item.do?newsId=52587579837785.

26. For all the complaints from the press and other media that the Commission processes are opaque and unnecessarily secretive, little is being done by the media themselves to force open the issue. Indeed, at the commencement of the José Manuel Barroso Presidency of the European Commission, hours of peak briefing time was spent by Italian journalists questioning why an Italian national spokesperson hadn't been appointed as quickly as other nationals. On the return of the Commission to the Berlaymont building, debate between the press and the commission was dominated for weeks about the ending of access to cheap staff canteen food for journalists.

27. What, then, can be done to improve the quality of reporting of the European Commission, in particular with regard to competition and antitrust? And why should we care?

28. The Commission itself could do more to explain its decision making. Greater access to officials who can speak "on the record" and better and more accessible background briefings would be a start. Better explained decisions for those that want them would also be a benefit.

29. The Commission, like any administration, will produce reams and reams of paper about subjects that cast it in a positive light, yet trickier subjects like decisions to drop investigations such as that into music CD prices can disappear into black holes. Negative court judgments are "studied carefully" until the press loses interest.

30. Difficult merger decisions, whether by accident or by chance, are delivered late in the day, precluding the chance for a public discussion of the case at a press conference. The news cycle for all but the rarest of cases won't last until the official briefing the following afternoon.

31. But, whether in merger reviews or antitrust probes, the level of secrecy stifles all debate. The Commission probably because it feels it isn't or doesn't need to be accountable to the public, confuses secrecy with confidentiality. Its argument that a Statement of Objections, effectively the charge sheet a company must face, is simply its working document about a case and shouldn't be made public misses a few key realities.

32. The Commission may require and demand more secrecy in a merger review, subject as it is to a tight time frame and intense lobbying from governments, competitors, customers and the company themselves. But without any summary or explanation of the Commission's decision-making process, the press is left subject to the same lobbying.

33. Secondly, statements of objections exist in confidential and non-confidential forms, and the Commission says the SO can't be made public so as to protect the confidentiality of the process. Yet it seems that once the non-confidential version is sent out, such niceties go out the window.

34. The Commission's decision to withhold the publication of non-confidential versions of SOs leaves an imbalance of information in the market and can't help objective reporting and commentary.

35. A non-confidential version of an SO has been redacted of business secrets. Anyone who could possibly have a direct business use for the information will no doubt be an 'interested third party in the proceedings, and as such will already have a copy. But others who may have a legal or financial interest in the process are left without.

36. If non-confidential versions of SOs are made public, investors (from hedge funds to pension funds to individuals) can be left to assess on their own the merits of the Commission's thinking on the case, the possible responses of the merging parties, and the inherent risks in the transaction.

37. If an investor reads an SO, makes an assumption of what it means, and takes a decision, then, well, it's a case of caveat emptor. Investors are familiar with the process, or they will be retaining advisors who are.

38. None of this would require any additional work by the Commission. The non-confidential versions are produced already. The Commission could refer all questions to the document.

39. Pretending the statement of objections – or at the very least its contents – doesn't make its way into the public domain leads to an information imbalance of the Commission's own making.

40. Just as merger cases could be open to more public disclosure, so could antitrust cases. Indeed, in antitrust, time constraints don't explain the need for secrecy that usually even involves the mere existence of an antitrust probe, even after dawn raids have taken place. It could even be conducive to the task of unearthing evidence to publicise the fact that an investigation was taking place. The Commission says that even admitting a cartel investigation amounts to tarring the company or companies involved as guilty and could taint "the process". Yet any rational observer understands that an investigation is just that.

41. While such statements of objections in antitrust cases rarely become public, there seems little point in keeping the basic details confidential, particularly in transatlantic cases, where the information is likely to be available through the courts in the US sometimes months or years before a commission decision.

42. There is a suspicion, in both merger cases and in antitrust cases, that the Commission is hiding behind the veil of confidentiality to protect its own interests.

III. Subject to lobbying

43. Again, the problem arises that much reporting is subject to intense lobbying and partial fact selection.

44. The role of an independent press is to shine a light on the administrative processes in Brussels. On one hand, this entails holding the officials and the institutions to account, and, in doing so, contributing to an effective and efficient administration. At the same time, the press should be able to expertly explain and contextualise the administration's processes and decisions.

45. To do this, the press needs to develop and maintain its own independence. And some of this depends on becoming less reliant on informal sources and semi-official leaks. To reach that point and to still be able to provide accurate and informed reporting, there would need to be a sea-change in the structure of the media and of the rules and practice that govern the transparency of the administrative process.

46. Traditional media organisations will continue to be under increasing pressure to cut costs – leading to fewer and less skilled journalists. The current financial crisis will put media budgets under even greater strain as traditional revenue bases such as advertising dry up. Agency articles for syndication will continue to seek the lowest common denominator effect for maximum pick-up across the press.

47. Nevertheless, the demand for accurate, reliable and informed intelligence will increase and specialist services will increasingly fill the void left by traditional media. ■

An US point of view: The need for "petitioning for redress of grievances"

Terry Haines
Lawyer, Consultant

"*I'm sorry that we have to have a Washington presence. We thrived during our first 16 years without any of this. I never made a political visit to Washington and we had no people here. It wasn't on our radar screen.*"

Bill Gates, circa 1998.

1. What a difference ten years makes. Once Microsoft, Google, and the entire high-tech sector derided the relevance of Washington policymakers to its enterprise or questioned its relevance to their businesses. Now, all these companies are closely involved in competition controversies of all kinds throughout Washington at the most senior levels of the company, indicating to policymakers the importance of the issues being decided. Its opponents just as vigorously defend and promote their own interests before the Government. Major competition policy issues are at stake, with the interests of the "high tech" industry at odds with those of traditional broadcasters and others. Many other unexpected voices are heard, and some are heeded. A century ago, pioneering "muckraker" Ida Tarbell crusaded against the Standard Oil monopoly, and was instrumental in its breakup. Today, music star Dolly Parton shares her opinion on the uses of television "white space" and its effects on wireless microphones with the Federal Communications Commission.

2. Is this high-stakes tug-of-war a new development? Hardly. It is as old as the American Republic, and, in doing so, the combatants are exercising their constitutional rights by making their cases before policymakers. Any survey of recent news articles on US competition issues shows all the components of modern American lobbying in competition policy cases: the role of the agency in question to decide competition issues; the direct petitioning by competing parties to the agency; and the role of Congress, at once keenly interested and respectful of the statutory role of the agency it created to make a decision, subject to Congressional oversight. See, e.g., "Google learns lessons in the ways of Washington", *The New York Times*, October 19, 2008.

3. This article discusses the many ways in which advocacy, or "lobbying", has been used in American federal competition controversies and cases, and how it has grown in sophistication and complexity. It discusses the facts that lobbying, or the petitioning of the federal government to redress grievances, is an American constitutional right; that Congress' constitutional control of competition policy permits and encourages those who are affected by its decisions (as well as the decisions of appointed policymakers exercising congressionally-derived powers) to lobby Congress and its policymakers to effectuate a particular result; and that lobbying in competition matters and cases are characterized both by independent decisionmaking and by oversight by constitutionally created bodies which are directly responsible to the electorate.

I. The First Amendment and "lobbying"

4. The First Amendment to the US Constitution is well known for guaranteeing freedom of speech and of the press. Less well known is that it also forms the foundation for what is colloquially referred to as "lobbying" in the United States, after the practice of representatives of individual interests congregating in hotel and Capitol lobbies to have the opportunity to discuss matters with elected representatives. This usage is thought by some to predate the United States, and to originate in the United Kingdom. Others pinpoint the use of the term in the United States to date from the Grant Administration (1869 – 1877), when President Grant frequently smoked cigars at the Willard Hotel near the White House, and those who sought to discuss policy with him began to congregate in the hotel's lobbies.

5. The First Amendment states in its entirety : "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the* right *of the people peaceably to assemble, and to petition the Government for a redress of grievances*".

6. So, the First Amendment is about more than just speech by "the people". The First Amendment prohibits Congress from making any law "*abridging […] the right of the people […] to petition the Government for a redress of grievances*." This explicitly establishes the right of US citizens to discuss with the government their "grievances" and to suggest ways of "redress[ing]" them. It also implicitly permits "the people" to employ persons who are expert in the ways of government and who can assist in getting their grievances redressed.

7. The Founders certainly were familiar with the practice of hiring attorneys to represent persons in legal disputes (many of them were attorneys themselves), and it is doubtful that they would have seen anything untoward about hiring similar professionals to assist in petitioning the government.

8. People in the United States whose profession includes the need to register as lobbyists are now usually referred to as "government relations professionals", and the activity they are

engaged in is referred to as "lobbying" the government for redress. This opportunity is seen to be a critically important right in the American system of government: without it, representatives of the people would not have the fullest amount of information necessary to make decisions, and the ability to discuss matters of public importance with elected representatives is one of the most fundamental rights of the governed.

9. For most of the Republic's history, lobbying was an unregulated activity, although periodic efforts were made to rein in excesses. The first comprehensive federal law to regulate lobbying was enacted in 1995. This law requires registration of anyone who lobbies the Congress or Executive Branch, periodic reports on the issues on which they lobby, and how much they are paid for their work. Further tightening reforms were made in 2007 in the wake of a series of lobbying-related scandals. Nevertheless, the constitutional protection of petitioning the government for redress of grievances guarantees both access to elected officials and (by extension) unelected policymakers appointed by the elected officials, as well as the ability of those who are "grieved" in some manner to seek assistance from legislative and governmental affairs experts in their quest for policy results that inure to their benefit.

II. Congressional oversight and regulation of commerce and competition

10. Just as the constitutional right to petition the government is enshrined in the Constitution, the *regulation* of commerce and competition is both constitutionally derived and statutorily established.

1. The commerce clause – foundation of power to regulate competition

11. The US Constitution, Article I, clause 8, confers upon Congress the "*power […] To regulate commerce with foreign nations, and among the several states*" (the "Commerce Clause"), and "*to make all laws which shall be necessary and proper for carrying into execution the foregoing powers*" (the "Necessary and Proper Clause").

12. For much of its history, the "Commerce Clause" was interpreted by courts and legislature alike narrowly, in a manner to distinguish between manufacturing and commerce, direct and indirect effects on commerce, and national and local activities. During the Great Depression of the 1930s, the sweeping, federalizing reforms of President Franklin Roosevelt's "New Deal" were enacted to respond to this economic distress. In response to these reforms, and an associated constitutional crisis pitting a Supreme Court that resisted the reforms against the Roosevelt Administration, the historic narrow judicial interpretation of the Commerce Clause was gradually replaced by a new one. This "new" Commerce Clause interpretation decided whether a federal constitutional issue existed by determining whether "commerce" within the meaning of the Clause was affected by aggregating the total effect the activity in question would have on actual economic interstate commerce - including activities that occurred entirely within one state.

13. In this way, a "federalizing" or unifying interpretation took hold, one that far more frequently found a federal question to exist. This interpretation soon was applied to all kinds of commercial activity, and even reached into ancillary matters like civil rights: racial segregation in commercial establishments was found to violate the commerce clause.

2. The Sherman Act – Congress regulates competition

14. Congress' first broad foray into the regulation of competition, utilizing its powers under the Commerce Clause, came in 1890 with the enactment of the Sherman Antitrust Act. (Other laws followed and expanded on the Sherman Act, but Sherman remains the original touchstone of American competition law.) As the foundation of United States antitrust or competition law, it is important to understand what the Sherman Act does, and does not, prohibit. US competition law does not forbid the monopolization or domination of a market or industry by one company, but does prohibit acts by those with market power undertaken specifically to preserve or enhance that dominance, including acts to create monopoly. As a result, the intent of the actor is highly important and frequently determinative of a violation. The Sherman Act and its amending statutes also are intended to prevent the restriction of trade or supply, and of the creation of artificially high prices, by those with market power, whether it is by a single company or by companies acting in concert.

III. Congressional exercise of its constitutional power over competition policy

15. Originally, power to decide and adjudicate competition cases was left by Congress entirely to the courts through individual lawsuits. This had the effect of eventually breaking up some monopolies (Standard Oil), but it also resulted in huge court backlogs as would-be competitors used the judicial system to hobble the operations of many companies for years with antitrust charges of varying credibility or provability.

16. Ultimately, Congress decided that an "independent" commission would be best suited to administering antitrust law, and in 1914 created the Federal Trade Commission. The FTC is a hybrid agency in constitutional terms: its five commissioners are required by law to be not more than three of the President's political party, are appointed on rotating five-year terms by the President with the advice and consent of

the Senate, but the agency exercises *congressional* power derived from the Commerce Clause. This derivation of agency power from the legislature led one prominent congressional policymaker to comment that "independent" commissions, including the FTC, the Securities and Exchange Commission (securities regulation) and the Federal Communications Commission (telecom and media regulation) are intended to be entirely independent from the *Executive Branch*, but not quite so from the Legislative Branch. Congress retains the right and power to set competition policy both through legislation and through oversight of the FTC, including the ability to set the agency's funding (which includes an ability to defund individual FTC rulemaking initiatives through the congressional appropriations process).

17. Other federal departments and agencies also have a great deal of authority over competition policy, ranging from the Justice Department, which can bring antitrust lawsuits and comment on proposals affecting competition before agencies, to other independent agencies like the Federal Communications Commission, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, which also have authority over decisions in their industry sectors that have competitive implications.

18. The constitutionality of independent agencies has been upheld by the Supreme Court, but some conservative constitutional commentators to this day believe these agencies to be unconstitutional due to their hybrid nature, with presidentially appointed overseers of legislatively derived powers.

IV. Lobbying and competition law

19. It is a truism – but an important one – to say that as long as there has been lobbying in the United States, lobbying has been used to try to affect the terms and conditions of competition.

20. How lobbying has been used in competition cases has varied over the years, and gradually has been regulated in a manner to balance the rights of petitioners and the ability of the government to reach a decision in an impartial manner. But throughout American history, the components of lobbying in competition cases have remained constant:

→ direct contact with lawmakers and policymakers by petitioners on both sides of the competition decision, providing facts, arguments, and political muscle;

→ use of the press ("free media" in today's parlance) by the special interest combatants to advance public policy arguments;

→ use of "paid media", including advertisements, to tout the benefits of a particular decision in a competition case;

→ use of third parties, unpaid or paid, independent of the combatants or controlled by them, to make public policy arguments that buttress, but are broader than, the narrow interests of the direct combatants; and

→ the individual political interests of the policymakers themselves, including the interests of their constituents and how a potential competition decision might affect their congressional district or state.

21. There are numerous rules of the road for this activity. Congress, and individual members, is proscribed from attempting to lobby the agencies themselves on individual adjudicatory matters. The Administrative Procedure Act imposes upon agencies *ex parte* time periods during which lobbying may not occur without full written disclosure of the contacts and content of the conversations. This period generally begins when formal public comment periods end on the matter in question. Also, after the agency's agenda for its next meeting is announced – usually one week in advance of the meeting – all lobbying activity ceases, with the notable exception of the agency's congressional overseers, who address issues from a public policy point of view rather than the interests of an individual company.

22. The following case histories will show that lobbying in competition matters or cases has always taken place in the United States. As information sources grow, more and more lobbying has taken place outside the walls of the Capitol or the agencies themselves. Today, both "free media" and paid third parties are used to attempt to create the most favorable policy and media environment surrounding a particular competition issue.

1. Bank of the United States

23. One of the most important constitutional crises of the early American Republic occurred over the question of whether there should be a national bank. Political positions on this issue formed a major part of the political platforms of the major political parties, and the issue was framed very much as a competition issue, both among banking interests and the commercial communities that they served.

24. Agrarian Southern interests feared that the national (and private) bank chartered by the Government was designed to create a money monopoly that inured to the benefit of the more commercial North and would result in higher interest rates and more difficult credit for farms and plantations. Other opponents – including competitor state-chartered banks – charged the bank with fraud and corruption in its commercial and political dealings, and of attempting to influence elections through huge contributions.

25. Supporters of the national bank, including merchants, reasoned that the national bank was an important and necessary tool to stem inflation and to finance the Government, particularly in time of war. The "free media" press was very much part of the debate, both substantively and politically, helping to raise the prominence of the decision as well as its political ramifications.

26. Political leaders representing "commercial" interests (and their newspapers), including Speaker of the House Henry Clay, a presidential nominee, and Senator Daniel Webster, who had done a substantial amount of legal work for the Bank, tended to support the renewal of the Bank's charter; Southern and western agrarian politicians (including President Andrew Jackson) were very much opposed to the Bank, and were supported by their opinion leaders in the newspaper industry.

27. Ultimately the charter of the Bank of the United States expired after President Jackson vetoed an extension of its charter, in which he sided with the Southern agrarian interests, and state-chartered banks, at the expense of the Northern "commercial" interests that favored a national bank and system. Jackson's veto became one of the most important issues of the election of 1832, and the bank's dissolution became assured after Jackson's reelection victory. (*NB*: The United States had no central bank until the creation of a national bank system during the Civil War, and ultimately the creation of the Federal Reserve System in 1913.)

2. Standard Oil

28. John D. Rockefeller's Standard Oil trust, and its dissolution, was the first major test of the new competition policy regime heralded by the Sherman Act., and provides the second major example of pre-modern competition policy decisionmaking.

29. After establishing the business in the 1870s in Ohio, and rapidly becoming a dominant, monopolistic regional player through the absorption of competing firms, Standard set its sights on controlling the oil production, refining, and distributing businesses nationwide. At this time, prior to the Sherman Act, there was no national competition policy law that forbade Standard's attempt. Standard became the *de facto* oil monopoly in the United States by the time of enactment of the Sherman Act (1890). Standard achieved this largely through absorption of competitors and novel, innovative incorporation strategies that resulted in Standard being organized as a trust outside of the control or legal authority of states and their varying competition laws.

30. After enactment of the Sherman Act, Standard became the first target of the new law through a suit brought by the Ohio Attorney General (significantly, the sponsor of the Sherman Act was Senator John Sherman of Ohio, the brother of prominent Civil War general William Tecumseh Sherman). The suit was not successful in curbing the power of the Standard trust.

31. Concurrently, for the first time, independent journalism played a leading role in competition policy changes. Journalist Ida Tarbell, whose father's business had failed after attempting to compete with Standard, began a long investigation of Standard. She was helped in her work by interviews with many failed Standard competitors, as well as interviews with current and former Standard executives. After publishing her work in a series of magazine articles and a book, public opinion built significantly against Standard and other anticompetitive "trusts". President Theodore Roosevelt, an admirer of Tarbell's work, also had made eliminating trusts, or "trustbusting", a centerpiece of his administration. Roosevelt and his administration worked energetically to curb other trusts, but did not initially curb Standard.

32. The twin energies of Roosevelt within the government, and Tarbell outside the government, helped focus public outrage on Standard and other trusts. Ultimately, the US Attorney General filed suit against Standard in 1909, citing its anticompetitive behavior in every aspect of its business. The US Supreme Court in 1911 upheld lower court determinations finding that Standard indeed was an illegal monopoly under the Sherman Act, and ordered Standard to be broken up. Standard ultimately was split into 34 different companies, and most of today's oil industry competitors have Standard lineage.

33. The over two decades between passage of the Sherman Act and the Standard breakup, and the slow passage of Standard-related competition cases through the courts, became powerful motivations for the passage of new competition legislation (1914's Clayton Act) and the establishment of the Federal Trade Commission for speedier resolution of competition controversies in the United States.

3. AT&T "Breakup" and related legislative battles

34. The American Telephone and Telegraph Company (AT&T) was the company formed by the inventor of the telephone, Alexander Graham Bell. It was merely one of thousands of telephone companies until its president Theodore Vail in 1907 began to use trust-like tactics to buy up other companies and quickly thereafter assumed monopolistic proportions. Importantly, Vail's amassing of market power was taking place during the time in which "trustbusting" was prominent, and AT&T was careful not to replicate many of the practices that focused public and policymaker ire on Standard and other trusts.

35. AT&T sought protection for its scheme to establish a dominant telephone company, arguing that the public interest required a large, powerful player as the driving force to create a ubiquitous and strong telephone system in the United States. Ultimately, it found that partnership with the federal government through an antitrust lawsuit. In a deal known as the "Kingsbury Commitment", reached as part of the settlement of the antitrust action, AT&T agreed not to engage in a number of anticompetitive practices in exchange for the understanding that it would be allowed to remain as the dominant company in the telephone market. With some minor changes through resolution of another antitrust suit in the 1950s, this arrangement remained intact until the 1970s, and the "Bell System" became the de facto national telephone company, offering both local and long distance service.

36. The federal government brought suit against AT&T in 1974, alleging a variety of anticompetitive actions, from excluding interconnection of competing "long distance" interexchange carriers (MCI, for example) to prohibiting competing makers of telephone equipment, including handsets, from connecting to the Bell network.

37. The antitrust suit filing brought with it a tumultuous period of two decades in which the shape of the competitive telecommunications marketplace was at the forefront of the policymaking agenda in both Congress and four presidential administrations. Legislation was introduced in Congress constantly throughout the 1970s to either preserve the existing Bell System and to break it up into constituent parts, as well as to set the terms for competition in particular submarkets like telecoms equipment. Much of this legislative effort was begun by the existing Bell System in an attempt to stave off a result in the antitrust case (which ultimately took eight years to resolve). At the same time the antitrust case was proceeding, Congress was not only observing it and reacting to it, but actively undertaking its competition policy role by considering legislation that (if successful) would make moot the antitrust case. At the same time, the Federal Communications Commission undertook a series of regulatory proceedings (secondary legislation in European parlance) designed to address many of the alleged Bell System abuses.

38. The effect of all this activity was to provide four forums for the Bell System, and its opponents, to defend or attack the status quo: Congress; the Executive Branch in two ways (first in its policy role, took positions on legislation before Congress; second, at the Justice Department, which was prosecuting the antitrust case); the federal courts; and the FCC, the administrative subcabinet level agency responsible for setting telecoms policy.

39. The Bell System reached a settlement of the antitrust lawsuit with the Government in 1982. The settlement divested the local exchange companies into seven "Baby Bells" operating regionally in the United States without service area overlaps. AT&T retained the long distance company and gained the freedom to move into other businesses, some related to telephony and some only tangentially related (computers).

40. The settlement did not end the competitive controversy; it merely changed the terms of debates over competition in the telecoms industry. Supporters of the antitrust settlement agreement hailed the newly competitive marketplace and promised lower prices and improved services for consumers. Critics, including the divested local telephone companies themselves, immediately began to attack the agreement as unusually restrictive and anticompetitive in its own right, since the strictures placed on the local telephone companies forbade them from offering many services related to basic voice telephony (for example, voicemail and cable television) to their own customers.

41. Soon after becoming independent companies in 1984, the "Baby Bells" began to lobby strongly in Congress against the court-imposed restrictions that forbade them to enter, among other things, long distance telephony. This campaign was resisted strongly by the "new" AT&T, MCI, Sprint, and other long distance providers. Both sides built up imposing teams of in-house and outside consultants to provide the policy and political muscle to move or stop legislative remedies to the court-imposed settlement. Both sides also made great use of "consumer advocates" and other third-party organizations in attempts to sway Congressional policymakers and make the case that only legislative relief would settle the competitive landscape. The legislative battle over the post-settlement competitive landscape was waged over ten years (five Congresses). All through this time, the judicially appointed overseer of the settlement, US District Court Judge Harold Greene, refused to lift the "Baby Bell" restrictions, adding additional fuel to the Bells' desire for legislative relief. Also, technological innovations were rapidly changing the nature of the telephone business, as computerized switching, digital transmission, and the nascent Internet heralded vastly expanded capabilities for local telephone companies to expand their service offerings.

42. After a decade of policy battles, the Telecommunications Act of 1996 was enacted to resolve the competitive landscape in American telephony. The Telecom Act was responsible for significantly changing the competitive landscape again. The Bells won freedoms to expand into other businesses, and took advantage of it in two ways. First, there was significant industry consolidation over the next decade, with the "Baby Bells" purchasing each other (as well as other local telephone companies) so that there are now three remaining. Second, the new freedoms resulted in the Bells absorbing the major long-distance companies – AT&T was bought by SBC (and the resulting combine renamed "AT&T"), Verizon purchasing MCI/WorldCom, for example. The overarching result was to overturn the judicially-mandated breakup model, and replace it with a different congressional consensus that allowed many of the Bell System "piece parts" to reassemble, albeit without the competitive abuses, which were dealt with through FCC regulation.

4. Microsoft

43. The final example of competition policy lobbying described in this article is the one most familiar to a European audience: the anticompetitive allegations made against Microsoft Corporation at a time when the Internet was first reaching public prominence, significantly led by a plethora of relatively small, aggressive companies like America Online and Netscape. Due to its familiarity, I will truncate the exposition of the issues.

44. Microsoft first came under competitive scrutiny in 1991, when the FTC launched an investigation to determine whether the company was abusing its market power in the operating system market. After the FTC deadlocked on the issue in 1993, its investigation was closed. However, the US Justice

Department independently investigated, and in 1994 secured a consent agreement with Microsoft in which the company was permitted to continue to integrate new features into its Windows operating system, but was not permitted to "tie" the sale of other Microsoft products to the sale of Windows.

45. After the Internet, and Internet-based companies, gained market prominence soon afterward, Microsoft began to "bundle", or integrate, its Windows operating system with its new Internet Explorer browser. In 1997, the US Justice Department asked a federal court to require Microsoft to stop this practice, alleging that it violated the 1994 consent decree. Microsoft countered that IE was a "feature" of Windows, and not a "product", and thus was in full compliance. Microsoft then released Windows 98, an operating system that more directly supported Internet applications – and, its detractors claimed, was designed in a manner so as to make applications competing with Microsoft's more difficult to use.

46. The Government's response was to sue Microsoft for anticompetitive behavior. An adverse initial federal court decision which found Microsoft guilty of monopolization, attempted monopolization, and illegal tying, and ordered the company broken into two parts. An appeals court then reversed this decision and remanded the case to the trial court level and a different judge. Ultimately, Microsoft and the federal government settled the case in the period 2001 – 04. The new Justice Department under President George W. Bush announced that it would not seek to break up Microsoft as a remedy in the case, and the remedies that were agreed to and accepted by the courts instead focused on making sure that products competing with Microsoft's had all the information necessary to ensure that they worked well with the operating system. The initial agreement was for five years, but Microsoft apparently has no objection to extending its terms through 2012.

47. Microsoft realized late that the anticompetitive practices of which it was accused also could be addressed through the public policy process by utilizing forums outside of the protracted judicial and agency processes in which it was ensnared. Microsoft's original attitude was not to engage with Washington at all, epitomized by Chairman Bill Gates' famous 1998 comments that "*I'm sorry that we have to have a Washington presence. We thrived during our first 16 years without [a Washington presence] […] I never made a political visit to Washington and we had no people here. It wasn't on our radar screen.*" At the time this comment was made, Microsoft had been under federal investigation, and already had agreed to one consent decree, for most of seven years and was about to be sued by the Justice Department.

48. Once Microsoft realized that it needed to engage with Washington policymakers in a bid to explain and gain understanding and support for its position, it moved quickly and decisively to do so. It quickly staffed a Washington office (now more than a dozen people); it hired myriad outside consultants to advise it on how to engage at every level of government; it began to aggressively work to gain favorable coverage from "free media", principally influential daily newspapers as well as specialized media such as those which cover technology issues and national politics; it began relationships with "think tanks" of every stripe, particularly ones that viewed with skepticism traditional antitrust regulation and were viewed favorably by the Republican congressional majority; and worked with pundits and columnists who covered the *Microsoft* case. Its work with Congress was focused on solicitations of support to get the Justice Department to modify or drop its case.

49. Microsoft's efforts to change the playing field with respect to the antitrust case had limited success largely because they were undertaken after the Government began its case against Microsoft. Congress typically is loath to interfere or intervene legislatively to preempt the outcome of an ongoing court case. See, for example, the decade following the AT&T breakup, where the legislative response to the many problems caused by the breakup was complicated and frustrated by the ongoing judicial administration of the AT&T antitrust consent decree.

50. But the actions taken by Microsoft to engage policymakers may have had a significant mitigating impact, since the company ultimately was not broken up through government action. More broadly, Microsoft's decision to fully engage Washington helped transform the ways that technology companies did business with the federal government. During the second half of the 1990s (and even before Microsoft's decision), tech companies quickly adopted the lobbying models established by mature industries and began to work directly with policymakers at every level, anticipating problems and shaping the debates on them rather than letting others frame the debates and putting them on the defensive. Today, Microsoft, Google, their competitors, and their industry trade associations run large, sophisticated government relations organizations that operate proactively to further their companies' interests.

V. Conclusion

51. This survey of American lobbying in competition policy and competition cases explains that the right to petition the government for "redress of grievances" is a bedrock principle of the American republic, and has been used throughout its history to affect, and effect, fundamental changes. Throughout the years, the more "lobbying" has changed, the more it has stayed the same. There have been a number of constants:

→ The agencies and departments that have been entrusted with direct decisionmaking authority in competition cases are required to engage in open and public processes. This independence permits and encourages the maximum public interaction with policymakers through formal comments, informal presentations (subject to ex parte rules), and direct meetings at most points in the process, to ensure the maximum consideration of all views. (In fact, administrative agencies like the FTC are required to show that they have read and considered all comments, and must respond to them in their

final decision.) Before the 20th century, competition decisions rested more directly with elected policymakers who were directly responsive to competitive concerns.

→ Since US competition policy decisions reside with many different policymakers – both the many constituent departments and agencies of the Executive Branch as well as Congress, perfect consistency in competition policymaking is not possible. Agency action may be superseded by lawsuits and judicial action. Congressional policymaking can moot court decisions as well as agency precedents.

→ Direct public interaction with the overseers of the decisionmaking agencies – policymakers in Congress and presidential administrations – is an increasingly important part of the process, and is instrumental in achieving policy decisions on a broader basis than judicial or agency action permits. This also ensures that the decisionmaking agencies are subject to appropriate oversight from elected representatives and the president who has appointed them, and that those overseers understand and can act upon information so that.

→ Information flow to policymakers, and the ability to successfully characterize and prioritize that information flow, is greatly important in efforts to motivate policymakers to act (or refrain from acting) in competition cases. The "third party" cadre has grown exponentially in size and scope as the monetary and competitive stakes have grown, and the sophistication of technology makes it ever easier to access and share information of all kinds.

→ As the market stakes in competition cases have grown, so have the need for professional advisers to assist with both government and media coverage of their activities. American companies of all kinds commonly utilize a broad spectrum of advisers to assist them with public policy matters, including issues involving competition and antitrust.

→ As the market stakes in competition cases have grown, so has a new "third party" class of "public interest" organizations that attempt to address competition issues from a public policy perspective. These include think tanks large and small, both disinterested and funded by the combatants. ■

Lobbying for success: Lessons from the Brussels arena

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I. Introduction

1. Competition lobbying is the act of influencing decisions in the competition space in the broadest sense, comprising both specific competition cases and overall competition policy. It takes place and influences competition decisions whether people like it or not and fulfils a useful societal role by adding transparency and offering unconventional solutions to seemingly intractable problems. In the end, lobbying is also fundamentally democratic when it puts the greater European good ahead of national interests and acts as a check on the abuse of power.

2. The best lobbying is the result of applying a big-picture view to competition problems and *listening* as much as lobbying. It can complement many a legal strategy and often even accomplish more than a legal strategy could achieve on its own. But good competition lobbying also depends heavily on a long-term commitment and relationships that extend beyond the pressure of individual investigations and cases to the quieter times when regulators tend to be more receptive to external advice and criticism.

II. Definitions

3. Competition lobbying is the act of influencing decisions in the competition space, pure and simple. It can take place in public or behind closed doors. It can occur both under the pressure of a particular case and between cases. It can be direct – lobbying case handlers or others involved in the process in a particular matter – or indirect, such as influencing case handlers via the media and politics. It can be as simple and "harmless" as speaking at a conference or as sophisticated as a multi-country media and public affairs campaign targeting dozens of stakeholders. Competition lobbying also sometimes takes the long-term view, seeking to influence competition *policy* as opposed to a particular case.

4. Competition lobbying is a two-way street. The decisions to which the definition above applies can be both decisions on the part of the *regulators* – for example, to proceed with a case, raise or decrease a fine, drop a charge or send a supplementary statement of objections – and decisions on the part of *parties* to a case – for example, whether to drop an acquisition, settle a dominance case or make a concession that will get a deal through.

5. Almost anyone can engage in the act of competition lobbying: chief executive officers, in-house lawyers, communications directors, professional lobbyists, lawyers, trade associations, governments, non-governmental organisations, labour unions, individual politicians and even journalists. An ongoing debate over the transparency of lobbying in Brussels has demonstrated that the lines between legal work and lobbying are sometimes fine indeed: lobbyists were exempted from having to disclose work related to competition cases lest their business be taken over by law firms that can plead client-attorney privilege for work that is often identical.

6. Finally, for the purposes of this article we define success in relative terms, i.e. the successful achievement of a strategic goal. It is tempting to philosophise whether a short-term success is always conducive to success in the long term – we argue below that it is not – but for the sake of argument and to be able to distinguish between good lobbying and bad lobbying we have assumed that success is generally relative to the short-term goals which lobbyists were given or set themselves.

III. Part of the democratic process

7. It has become normal in Brussels and many national capitals to define lobbying in unflattering terms of "dirty business" or "influence peddling" or, as the organisers of the annual Worst EU Lobbying Awards put it, "securing privileged access to EU decision-makers." While such descriptions rarely have anything to do with competition cases, the principal complaint of lobbyists' critics – that corporate lobbyists use dirty tricks and ultimately undermine democratic decision-making – applies as much to competition lobbying as any other kind.

8. There are several problems with this definition of lobbying, starting with the fact that it is almost universally directed at companies and the lawyers and lobbyists that serve them. This is unfair because both non-governmental organisations and governments are arguably the most powerful and effective lobbies in European affairs and because both occasionally engage professional lobbyists themselves. Ah, the critics retort, but NGOs and governments serve the public good, whereas corporations serve only their owners. This argument is disingenuous. First, most Brussels-based NGOs are not as non-governmental as they seem, with the lion's share actually heavily subsidised by the European Commission, and sometimes used by one part of the Commission or another to advance particular agendas. This is not to say that their views are not legitimate, but rather that they are simply not as independent as they claim to be. Second and more importantly in a competition context, European governments mainly serve their own *national* public interests, not the greater *European* good, and when a national government lobbies heavily on behalf of state subsidies to a local employer it is not at all clear that this serves the general European interest or merely the short-term interest of a sitting government that wants to be re-elected.

9. Competition lobbying has taken place since the very beginning of the European Union because it is a natural part of the European decision-making process. Just consider the constant stream of state aid cases and how long it takes the Commission to bring some of them, including the highly political German savings banks case. It is perfectly natural for national governments to lobby to rescue embattled employers, as they are now doing to prevent flagship automakers and banks from failing – or falling into foreign hands. But to say that state aid is democratic is a stretch: France lobbied heavily to be allowed to bail out Air France in 1994 despite complaints by competitors of Air France that the rescue aid would distort competition within Europe. The European Court of Justice later rejected the Commission decision to authorise the aid. Likewise, Germany's subsidies to Volkswagen for the construction of new car factory in Zwickau, eastern Germany, was doubtless good for the local economy, but was rightly contested in a European context because of a chronic over-capacity in automotive manufacturing – an over-capacity due at least in part to previous subsidies. Recent rescue packages for embattled banks, meanwhile, had the perverse side effect that some banks which did not initially need rescuing because they had managed their businesses better than their embattled competitors suddenly found themselves with lower capital ratios than those that received rescue aid!

10. To the extent that lobbying prevents national governments from subsidising local employers to the detriment of the European public good, we argue that competition lobbying is profoundly democratic. Lobbying can also provide a degree of transparency to the competition decision-making process that otherwise would be absent. For example, briefing journalists about a competition case in order to elicit an official Commission statement can result in the release of information that otherwise might never be made public. When shareholder value is at risk as the result of a cartel investigation and growing numbers of Europeans are buying stakes in private companies, one can argue that informing shareholders of the existence of an investigation is more democratic than withholding that information.

11. It can even be argued that lobbying can add an extra dimension to a case – raising the standard and level of debate at the same time as focusing it firmly on the issues that really matter. Private-practice competition lawyers frequently complain that Commission case handlers are young, inexperienced, sloppy and sometimes just plain lazy – but they dare not say so publicly for fear of antagonising people with the power to make or break a deal. Talking to a journalist about such grievances can help encourage a critical perspective that is unfortunately not always the norm in coverage of Commission decisions. Critical coverage, in turn, forces the Commission to take such criticisms seriously and sets the stage for better-informed reporting if and when a court later agrees that the Commission had done a sloppy job.

IV. Two way street

12. Another reason for the existence of lobbying is its ability to help find solutions beyond the narrowly defined legal parameters of a case. Sometimes they can help identify a compromise that was not initially on the table, resulting in a win for both regulators and the parties to a competition probe.

13. For example, before EDF was privatised, it sought the European Commission's permission to buy a German power company. The French company, which envisaged a tough fight for approval, engaged two law firms to advise it, one of which wanted to fight the Commission and the other of which told the company that it needed to negotiate—but was still sceptical about the deal's prospects for approval. EDF sought a third opinion from a lobbyist, which also recommended to work with the Commission rather than against it. Their independent advice was to send the Commission three messages: 1) Although EDF was state-owned, it was not the French state; 2) EDF and the EC shared a common objective of promoting cross-border investment and competition; and 3) EDF would be privatised. At the time, it was anathema in Paris to talk of privatising EDF, but the promise to do so was enough to allow the Commission to approve the transaction. Later on, EDF was, in fact, privatised. "*The lawyers had not expected approval*", said one lobbyist involved in the case, "*but in this kind of market, competition is politics,*" not just the law.

14. In the *EMI-Time Warner* case, the European Commission initially had reservations about the implications for dominance in two markets, recorded music and music publishing. Successful lobbying by the EMI camp convinced a number of member-state competition authorities that the Commission's case against the recorded-music deal, which hinged on allegations of collective dominance, was weak. The national competition authorities forced the Commission to revisit its assumptions, with the result that the Commission dropped its

objections to the recorded-music deal. The deal still failed, but the successful lobbying in that case established principles that paved the way for future deals in the recorded-music space.

15. Of course, win-win is sometimes a relative term, depending on the party involved. A case in point is the *Microsoft-Telewest* deal, which the Commission opposed from the start. In fact, the acquisition of a minority stake by Microsoft in Telewest was also initially opposed by Telewest, which hired lobbyists to work with the Commission to impose conditions on the operation. While the Commission's arguments against the deal were almost universally considered to be weak, Telewest managed to engineer the conditions that it wanted by orchestrating media coverage – with the Commission's tacit approval – which made it sound like the Commission was poised to kill the deal. Microsoft, rather than allowing the Commission to forbid it to do the deal in a decision that could have had negative consequences for future acquisitions, acquiesced, and both Telewest and the Commission got what they wanted through non-legal channels.

V. The big picture

16. The examples above show that one of the hallmarks of good lobbying is the ability to step back from the nitty-gritty of a case and see the big picture.

17. Despite its legal defeat, Microsoft is arguably a company that has its priorities straight. Brad Smith, Microsoft's general counsel and the man who fought the company's corner in its landmark antitrust battle with the Commission, was fond of telling people that there were "two courts" to keep in mind – "*the court of law and the court of public opinion*" – and that you could lose in one but still win in the other. The company spared no effort to defend its case in court, but also spent heavily on lobbyists to buttress its overall reputation as an innovative company that provides products most consumers want, respects the law and cooperates with authorities on several levels. Media, think tanks, academics and other stakeholders at times sympathised with a company that often looked like it was being punished for legitimate market success. And while there is no question that Microsoft lost the legal battle – spectacularly so, in fact – it is also telling that the company emerged with its overall corporate reputation intact. It continues to figure high up in most rankings of the world's most respected companies. Its competitors, on the other hand, won the legal battle but often came away looking like sore losers, copycats and freeloaders. Unlike lawyers who are paid to win a case, lobbyists with a background in strategic communications are often more concerned about a company's overall corporate reputation, which leads to strategies that can complement the activities of a legal team during a case but often also extends beyond the case itself.

18. Another example of a case that was defined as much by media attention as legal considerations was the fight by Monte Carlo and Hamburg to avoid being downgraded by the ATP. Although the case was hard to win from a legal point of view, Monte Carlo's lawyers, together with the help of lobbyists, orchestrated a media campaign including court-side signs, press conferences by tennis pros and front-page coverage in the tournament newspaper. The campaign "*raised the pressure for a settlement*", said one person familiar with the case. And a settlement that maintained its slot in the tennis Masters tournament is just what Monte Carlo got.

19. Reaching out beyond the Form CO, complaint or case file can often bring unexpected results. For example, often a complaint appears to have stalled for no apparent reason – and the case team is sending mixed messages to the parties. The hold-up could be caused by concerns not directly related to the case and in a completely different DG. When lawyers express frustration with a case team's apparent intransigence on certain points, the key to understanding might be found in the EP or at a NCA. Not only can intervention bring results, it can bring them quickly and help smooth the process.

20. But the roots of such success lie in the knack of knowing your audience and not overdoing it. We often hear complaints around the corridors of DG COMP that "*Oh, such and such a company are lobbying like mad all over the Commission on this case.*" First, this does not go down well with the case team – who then have the spotlight on them. It also weakens the effect of the political arguments being put forward, and can ruin corporate goodwill with DG COMP. The pharmaceutical industry's (valid) argument that patent protection fosters innovation has been severely diluted by dint of repetition. Microsoft is a prime example of how spreading yourself too widely and thickly too often creates aversion – at least among regulators - to any of the (legitimate) arguments you are raising. An ex-regulator tells of how the mind-set of a case team could be irretrievably against one particular company and even one particular lawyer and lobbyist, resulting in phone calls being refused, and, worse, any argument being seen as wrong from the start.

21. Another example of the big picture trumping the minutiae was Alstom's 2004 fight for a rescue aid in the face of Commission opposition. The company hired a lobbying firm to help it understand the Commission's position, and was convinced that it needed to work *with* the Commission if it wanted the aid to be approved. First, the lobbying firm helped persuade the Commission that Alstom was not simply a bottomless pit and could in fact be rescued. Second, by working with the media in particular, it ensured that the case was perceived in a balanced manner and on its merits – a difficult task, given the range of problems between France and the EU institutions at the time. Thirdly, it convinced the Commission that such a rescue was, in fact, the lesser of two evils: a break-up of Alstom would lead to even bigger competition problems because the markets in which it operated were already highly concentrated. Siemens, meanwhile, was waiting in the wings, hoping to snap up several bits of Alstom that might have to be sold in a hurry. In the end, the Commission approved the aid, the company was turned around – and the French government sold its stake in Alstom for a huge profit before the deadline imposed by the Commission

for the State's withdrawal, ensuring that the French taxpayers got their money back. "*Without the media work and the lobbying the whole perception of Alstom would have been more negative*", said one former Commission official familiar with the case.

VI. Complementary skills

22. Lobbyists and lawyers complement one another. It is not a case of one being more effective or smarter. The point is that each has different strengths: the lawyers not only but primarily with legal arguments, and the lobbyists with the big picture and political pressure points.

23. At the simplest level, a law firm handling a case might hire a lobbyist to turn a legal or economic brief into a commentary piece to be published in a newspaper, or produce a lobbying document intended for non-legal audiences. Lawyers frequently also hire lobbyists to field press inquiries that can be answered within carefully defined guidelines.

24. For their part, lobbying firms are occasionally able to refer their clients to law firms with which they have had successful relationships. The law firm might file a competition complaint that was originally the idea of the lobbyists, for example, or propose legal tools to underpin a public affairs campaign. One example is Ryanair's rash of actions against the Commission for failure to act on subsidies to European airports. Whether or not Ryanair wins those complaints on the substance, it is a master of milking them for publicity in the service of its over-arching competitive and positioning strategies.

25. You could even say there is a symbiotic relationship between lawyers and public affairs professionals. A recent complaint referred to the Commission by a new member state's national competition authority was going nowhere. The lawyer persuaded the client to engage lobbyists. Working in tandem, with the lawyer concentrating on the case team and the lobbyist elsewhere in DG COMP, in the EP and with a carefully selected journalist, they raised the profile of the case and got it moving again.

26. Cartel investigations show how teaming lobbyist and lawyer (and client) can go a long way towards protecting corporate reputation – externally and within the Commission. By their very nature these cases tend to be long, hard fought and much is at stake. The lawyer has to focus on the case team and the legal arguments that will reduce his client's liability and eventual fine, especially if the client is a leniency applicant. Soft soundings, discreetly taken away from the case team but still within DG COMP, can test which arguments are most likely to persuade. They can also feed back perceived weaknesses in the defence.

27. In meetings between a company and the case team, with lawyers present, and notes being taken, all present are constrained by the formality of the setting and the need to follow the correct procedure. In a merger case where remedies are being discussed, the tendering of the package can be a testing time for all involved – it's a bit of a gamble. No party can afford to let its guard down. Lobbyists are able to intervene around the case team and carry messages back to the company. This has been known to help the negotiation process greatly since the company has a clear idea of the problem, and what fix will wash with the team.

VII. Relationships matter

28. The most successful lobbyists are those that are in for the long game. Clients and lawyers may come and go, cases be won and lost, but we keep our relationships going. They serve us in the lean as well as the fallow times. A relationship, once lost, can never be retrieved. The reason is simple: our success at the times when it matters is borne out of the relationships sustained in quieter times.

29. This principle often stands in stark contrast to the lobbying brought to bear by chief executive officers and prime ministers. Nothing blows a case more out of the water than a runaway chief executive. No one would doubt that it must be a CEO's absolute right to defend his company in whichever way he chooses. However, normally the exercise of that right is tempered by counsel from advisers. It is a foolhardy man who goes it alone – as happened in the recent *Ryanair* case, where it is said that remedies were submitted direct from head office without the approval of the team, or when Jack Welch famously announced General Electric's intention to acquire Honeywell without consulting lawyers or lobbyists in Brussels and then proceeded to try to bully the Commission into approving the deal.

30. Lawyers, also, sometimes go too far. A dozen people interviewed for this article said they thought that a large U.S. technology company was playing a very risky and dangerous game in ignoring a deadline to respond to the Commission's statement of objections in an ongoing antitrust case. "*It's the opposite of building positive political capital and makes it appear that they don't have a defense*", said one lobbyist familiar with the case. "*In the long run that will come back to bite them.*"

31. Of course, relationships work best when there is something in it for both parties. Lobbyists have to be careful not to take their contacts for granted, and not to be always asking for something. Giving something back – for example, forewarning of a new appointment or of a change of direction on a particular issue or contributing to thoughtful discussions between cases – strengthens the relationship. This is particularly important *outside* of the pressure cooker environment of an ongoing case.

32. "*You're most effective as a lobbyist when you develop expertise around large themes, operating more as a think shop than as a lobbyist,*" said one Commission official. Between investigations, DG Comp officials often participate in competition conferences in order to see how their actions are

interpreted by the legal community as a whole, and are much more receptive to criticism then that they have over-stretched or missed a trick than when a case is underway. "*You're influencing at the point where the regulator is susceptible to influence and open to solutions just over the horizon,*" the Commission official said.

33. One example of such soft lobbying was the analysis that followed the Commission's court loss in the *Airtours* case, which had focused on collective dominance. That analysis flowed into the Commission's analysis of the next potential collective dominance case, *Sony-Bertelsmann.* Lobbyists who participated in the collective soul-searching, meanwhile, were in a better position to advise clients on the current state of the Commission's thinking on collective dominance.

VIII. Conclusions

34. The moral of our story is that not just lawyers and lobbyists, but any company that expects to have to do business with the Commission or national competition authorities, should make a sustained effort to understand those authorities and contribute to policy debates that are likely to affect them. It just does not work – or at least is less likely to work – if you ignore Brussels between cases. GE learned this lesson following the Honeywell fiasco, moving its headquarters to Brussels and taking an office across the street from the European Commission's own Berlaymont building. Today, GE is widely regarded as an enlightened corporation that has learned how to play by Brussels rules. For every GE, unfortunately, there are plenty of companies that still see Brussels as the enemy and only engage when they have to – which is often too late.

35. The ability to see the big picture, putting all of the pieces of the competition case jigsaw in the right place and knowing the role that individuals at different levels of DG COMP have to play are all vital skills that lobbyists can bring to bear on an issue. No one would ever claim that lobbyists have a monopoly on such skills, but their large and growing numbers testify to the fact that many companies and governments recognise their added value both in the competition space and beyond it. ■

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