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Less co-operation, more challenge

A review of EU leniency trends and recent annulments of Commission fines

by **Elvira Aliende Rodriguez and Ruba Noorali**

This article considers two current challenges to the European Commission (Commission)'s cartel enforcement – first, EU leniency trends and second, multiple recent court annulments of Commission fines. In particular, although leniency policies play a fundamental role in detecting and deterring cartel activity, the effectiveness of the EU regime has increasingly been called into question. Separately, the Commission has seen a number of its fines relating to cartel violations annulled due to a lack of sufficient reasons. Together, these trends suggest the Commission may receive less co-operation from alleged cartelists and a greater willingness to challenge infringement decisions, particularly the level of fines imposed.

In order to re-activate the Commission's cartel enforcement, the Commission must be pro-active in addressing leniency concerns and ensure it provides sufficient reasoning when calculating its cartel fines.

EC leniency trends – is there a decline?

A decay in leniency applications to the Commission has been the focus of lively debate for a number of years. In particular, the introduction of the EU Damages Directive and the practical challenges of coordinating multi-jurisdictional leniency processes have been found to increasingly disincentivise parties from applying for leniency. The statistics of Commission leniency applications as pictured by private reports shed some light into the apparent decrease in the number of leniency applications in recent years – "from 46 in 2014, to 32 in 2015, to 24 in 2016, and to 18 in 2017" and 17 in 2018.[1]

At first glance, these numbers and trends demonstrate a marked fall in the number of leniency applications, which could be driven by two causes – first, the increasing number of private damages actions and, to a lesser extent, the often multi-jurisdictional nature of cartel investigations.

Increasing private damages actions

The introduction of the Damages Directive has opened the door for customers, purchasers or other parties affected by cartels to claim both direct and indirect losses incurred as a result. The increasing prevalence of such claims across multiple jurisdictions in the EU has had an arguably "chilling" effect on leniency applications in two main ways:

- *Financial exposure* – the financial exposure posed by private damages actions can far outweigh any reduction or potential immunity from a fine granted by the Commission through the leniency process. Banks against which there is a Commission decision in the *Forex* cartels, for example, are facing in the UK alone two opt-out collective actions (of which only one is likely to proceed) and a further damages claim brought by around 350 investors.[2] Pending the UK courts' confirmation of the scope of such claims, the damages potentially payable by the banks could run into the millions or even billions – no doubt a figure that would have otherwise significantly undermined the cost/benefit analysis of the banks' choice to apply for leniency in the first place.
- *Publicity and disclosure* – while the Damages Directive offers some protections to leniency applicants by protecting leniency statements (as well as settlement submissions) from disclosure, the underlying content of such statements remains at risk of such disclosure through: (i) the public version of the Commission's infringement decision (which often includes quotations or other content from leniency statements); or (ii) the issuance of detailed disclosure orders against defendants in national proceedings. However, the Commission's recent adoption of guidance on the protection of confidential information by national courts in private damages actions may at least give leniency applicants some comfort that, even if disclosed to some extent, the confidential information underpinning their leniency statements will be protected from unnecessarily broad disclosure.[3]

Multi-jurisdictional nature of cartel investigations

The multi-jurisdictional nature of cartel activity typically means that alleged cartelists are exposed to liability across several jurisdictions. The absence of a "one-stop shop" for leniency applications and an increasing number of converging

national leniency programmes often means alleged cartelists must apply for leniency in multiple jurisdictions worldwide in order to benefit from reduced fines. The increased legal costs and administrative burden involved in such concurrent applications may be a disincentive to file for leniency and could even expose parties to investigations in other jurisdictions.

For a number of years, most national competition authorities (NCAs) have based their national leniency programmes on the ECN Model Leniency Programme (the ECN Model), which had the purpose of "ensur[ing] that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN". Despite this, the ECN Model failed to address a number of issues that typically arise in a non-harmonised system of parallel competences – this was demonstrated clearly by the Court of Justice (ECJ)'s preliminary ruling in *DHL*.

In that case, DHL had received full immunity from the Commission as a subsidiary of Deutsche Post in the March 2012 *Freight Forwarding* cartel. In parallel to its leniency application to the Commission, DHL had made a summary application for leniency to the Italian Competition Authority (ICA), in line with the ECN Model. Whilst DHL claimed that it should have been granted a marker based on the date and time of its application to the ICA, the ICA considered that DHL's summary application did not include information regarding road freight forwarding services. As a result, the ICA granted a marker to another applicant that had provided such information, eventually giving this applicant full immunity and DHL only a 50 per cent fine reduction.

DHL brought a claim against the ICA in the Italian courts arguing that its summary application should have been considered in conjunction with its Commission leniency application, and that it should have been granted a marker in the Italian leniency process having been the first party to approach the ICA. However, this claim was rejected by the ECJ in a preliminary ruling – specifically, the ECJ held that: (i) the ECN Model is not binding on NCAs; and (ii) there was "no legal link" between an immunity application to the Commission and a summary application to an NCA, so as to require such NCA to assess the summary application in light of the Commission application.

The now finalised ECN+ Directive (for which the transposition deadline is 4 February 2021) goes some way to addressing the issues raised in *DHL*, by seeking to harmonise leniency applicant protections and strengthen NCAs' enforcement powers. Although the Directive falls short of a "one-stop shop", it nonetheless introduces some notable improvements on the ECN Model which may allow for a harmonisation of leniency applications across the EU in future (and in turn potentially encourage more leniency applications). This includes obligations on member states to ensure NCAs: (i) allow parties to apply for markers in leniency applications; (ii) accept summary applications from applicants who have also applied to the Commission for leniency, with such applications becoming full applications from their original date of filing in the event that the Commission decides not to pursue the investigation; and (iii) protect current and former directors of applicants for immunity from individual civil or criminal sanction (provided such individuals actively co-operate with the investigation).

The future of leniency

Despite these challenges, the traditional incentives for leniency still apply – the possibility for immunity or significant fine reductions and a mitigation of reputational damage. Leniency programmes may therefore remain a key feature of the antitrust enforcement landscape in future. However, although all parties received leniency-based fine reductions in the Commission's last three cartel decisions,[4] the Commission reported in April 2020 that "over 25 per cent of [its] currently open cartel investigations have started ex officio".[5] This alone may evidence the long reported decay in leniency applications.

Therefore, antitrust enforcers should not be complacent as to the appeal of leniency programmes – former director-general of DG COMP Johannes Laitenberger, for instance, suggested that the link between private damages actions and reduced leniency applications is "purely speculative".[6] The reality of the situation and statistics outlined above speak for themselves – antitrust enforcers should at least be concerned by the changing perception of leniency and how this may influence companies' decisions on whether or not to apply for leniency in future.

The Commission and NCAs must be pro-active in addressing these issues by continuing to ensure harmonisation of leniency programmes across the ECN even after the transposition of the ECN+ Directive, as well as developing other investigative tools. The CMA has already taken certain steps on the latter, introducing new measures to make it easier to report cartels and incentivise whistleblowing (including financial rewards of up to £100,000).[7] Active market screening may also be a way for competition authorities to ensure detection of a broader range of cartel activity.

Fine calculations

In a recent string of judgments from the EU Courts, various fines imposed by the Commission in cartel cases have been annulled in full due to the Commission providing an insufficient level of reasoning on the calculation of such fines in its decisions. From the General Court (GC)'s judgment in *ICAP* in November 2017, later upheld by the ECJ on appeal in July 2019, this trend has been reaffirmed in subsequent cases.

Obligation to provide sufficient reasons – ordinary versus discretionary fine calculations

In its judgment in *ICAP*, the ECJ confirmed that the methodology of the Commission's fine calculation must "be disclosed to the interested parties, so that they can be put in a position to make their views known on the factors on which the Commission intends to based its decision". In particular, the Commission was found not to have given

sufficient information to allow ICAP to understand the justification for the fine calculation methodology favoured by the Commission, nor for the court to be able to verify such justification. The GC's annulment of the fine imposed on ICAP in full was therefore upheld.

In this particular case, ICAP was a "facilitator" rather than a direct cartel participant and the Commission had departed from its traditional fining calculation mechanism in accordance with paragraph 37 of the Fine Guidelines. Similarly, in its March 2019 judgment in the *Pometon* case, the GC also found the Commission to have failed to provide sufficient reasoning for the fine calculation in another instance where it had applied its discretion under paragraph 37 of the Fine Guidelines, specifically because it had failed to explain the different rate of percentage reductions applied to each of the participants. As a result, the GC increased the percentage reduction factor applied by the Commission to Pometon's fine on account of mitigating circumstances from 60 to 75 per cent (which resulted in a reduction of Pometon's fine of approximately 40 per cent). Advocate General Hogan's Opinion in Pometon's subsequent appeal to the ECJ proposed further reducing the fine by increasing the percentage reduction factor to 83 per cent.

The courts' emphasis on the Commission's obligation to provide sufficient reasoning in its fine calculation is also applicable to other cases where the Commission applies its ordinary fine calculation procedure. Such finding was affirmed by the GC in its September 2019 *HSBC* judgment, where the Commission had indeed adopted such "ordinary" procedure. HSBC specifically took issue with the Commission's use of a "proxy" for the value of sales that would ordinarily be used as a starting point for the fine calculation – in that case, the nature of the cartelised "product" at issue (namely, euro interest rate derivatives or "EIRDs") was such that no "sales" were generated in the usual sense that could form the basis of a value of sales starting point. As a result, the Commission chose to use cash flows received by HSBC from its portfolio of EIRDs, applying a percentage reduction factor to such figure to account for the specific characteristics of the EIRD market (eg netting).

As well as reiterating the Commission's general obligation to state reasons when explaining its fine calculation (namely, the obligation to provide reasoning as to the amount of the fine and the method of its calculation, by indicating the factors enabling it to determine the gravity and duration of the infringement), the GC held that although the use of cash flows as a proxy for the value of sales in this case was not "inherently incorrect", the percentage reduction factor selected would have a substantial impact on such proxy amount. The Commission therefore had to provide sufficient reasoning for its selection of such factor – on the facts, it had failed to do so by dedicating only five recitals of its decision explaining this factor. Whether or not the Commission succeeds in challenging this finding in its appeal of the GC's judgment before the ECJ remains to be seen.

Settlement fines – not immune from challenge

Whilst both the fine calculation and substantive infringement-finding aspects of Commission cartel decisions are frequently challenged by addressees in EU Court proceedings, the inherently co-operative nature of settlement proceedings mean fine challenges in such contexts are rare. Challenges of substantive infringement findings are also in practice pre-empted by the settlement process, given that settling parties are required to acknowledge their liability for the infringement in their settlement submissions. By contrast, settling parties do not similarly "agree" to the specific fine imposed by the Commission, but instead receive a prospective fine range towards the end of the settlement procedure. In practice, therefore, the fine imposed is often the only aspect of a settlement decision that is challenged by settling parties.

Such challenges have occurred in a small number of previous settlement cases, including the *EIRD* case where one of the settling banks, Société Générale, sought to appeal the Commission's fine calculation before the courts. However, such appeal was withdrawn after the Commission issued an amended settlement decision reducing Société Générale's fine to just over half the original fine amount imposed (from €445 million to €227 million). In its press release reporting the amendment, the Commission attributed such reduction to a new calculation of Société Générale's value of sales.

Just recently in September 2020, Clariant, a settling party in the *Ethylene* purchasing cartel, appealed "certain aspects" of its €155.8 million fine which it claimed was disproportionate. Such action could potentially be resolved with a similar approach as in *EIRD* – ie the Commission could adopt an amendment decision updating Clariant's fine and avoid any more publicised discussion of its settlement fine calculation mechanism (which may otherwise discourage cartelists from making use of the Commission's settlement procedure). Alternatively, any substantive progress in this appeal could signal a continued challenge of Commission fines in all procedures, even those where fine parameters are set through the settlement process.

Conclusion

The Commission has a number of issues to remain aware of in its cartel enforcement agenda going forward.

The string of recent judgments annulling Commission fines due to a lack of sufficient reasoning, often in full, will no doubt put the Commission on notice as to the level of detailed explanation that is required when explaining its fine calculation methodology in cartel decisions. This trend may also encourage more firms to challenge the Commission's fines, even if imposed within the arguably more structured parameters of a settlement procedure. What is clear is that in all cases, the Commission will need to pay particular attention to its fine calculation reasoning if it wishes to avoid future annulments.

The decay in leniency applications may mean the Commission has less and less recourse to rely on the leniency procedure in future – the increasingly large

financial exposure through private damages actions may lead to a continued decay of leniency applications. Companies may start to consider that the cost of making one or more often burdensome leniency applications heavily outweighs any potential benefit in fine immunity or reduction, and may instead begin to move towards taking their chances and challenging Commission cartel allegations in full. Either way, the Commission may have to start looking to move away from the more traditional modes of defendant co-operation it has so heavily relied on in its cartel enforcement practices in recent years.

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Endnotes

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