

/ ECN Plus – facilitating a coherent enforcement in Europe?

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/ Agenda

- Leniency
 - Scope of national leniency programs
 - ECN Model Leniency Programme
 - Summary Applications at national level
 - The DHL Case
 - Challenges
- Imposing and calculating fines by NCAs
- Enforcement Toolbox
- Adequate financial and human resources

/ Leniency – Scope of national leniency programs

➤ Scope of leniency programs varies

- Secret cartel
- Restrictions of competition and concerted practices possible
- Vertical restrictions sometimes possible (e.g. RPM in AUT)

=> No incentive to apply for leniency for RPM in a distribution system covering GER and AUT

➤ Admission of liability (UK, Spain)

➤ Interaction with criminal enforcement problematic

/ Leniency – ECN Model Leniency Program

The ECN Model Leniency Program's objective

- Ensure convergence between NCAs' leniency programs
- National leniency remains an attractive option for undertakings facing multiple filings
- Covers secret cartels
- NCAs undertake best efforts to implement

Summary Applications

- Since 2012 possible for immunity and fine reductions
- Introduced a standard template for all NCAs

ECN Model Leniency Program is the right direction, but should be further developed

/ Leniency – Summary Applications

Uncertainty regarding scope of infringement and body of evidence require protection on EU and national level

- Unclear situation concerning the geographic scope of the infringement
- Product or geographic scope of the investigation changes over time
 - Lack of sufficient evidence
 - Policy decisions to allow NCAs to peruse a part of the alleged infringement

ECN Model Leniency Program provides only a guideline for “*uniform system of summary applications*”

- Provides a template for summary applications in English
- Model leaves a lot to the discretion of NCAs
 - Form and function
 - Procedure

/ Leniency – The DHL Case

In *DHL* (C-428/14), the ECJ held that EU and Member State leniency programs are fully independent
Commission granted DHL conditional immunity for international forwarding sector, including maritime, air and road

- Commission later decided to pursue only the part of the cartel concerning international air freight forwarding services
- Commission's limitation of scope allowed NCAs to pursue infringements for sea and road freight forwarding services
- DHL's summary application in Italy did not mention "road transport"
=> immunity from fines was only granted for the air and sea
- Schenker benefited from immunity for road transport and DHL had to pay a fine

=> Leniency in EU cartel proceedings does not entitle the beneficiary to similar treatment in national investigations

/ Leniency – Challenges with Summary Applications

Unnecessary divergences in the leniency race with NCAs

- Decisive event for summary application differs
 - Phone call (Germany)
 - Personal appearance (e.g. France)
- Individual Power of Attorneys for each NCA
 - Original Power of Attorneys naming specific NCA required
 - Power of Attorney in the respective language
- Submission in official language (e.g. Spain, Italy, France) required
 - => Unclear situation about filing requirements within NCAs
- Time-intensive discussion with NCAs despite reference to EU leniency application and case team in charge
- Oral Procedure sometimes complicated

=> All this is manageable, but formalities should not affect leniency race!

/ Leniency – Wish List

One-Stop-Shop

- Would ensure fair leniency race and improve incentives to decide for leniency
- Case allocation similar to Referral Procedure for merger cases conceivable
- Would free-up resources at NCAs and thus create efficiencies for the ECN, a key objective of Reg. 1/2003
- Seems less realistic in medium term

Further alignment of NCA's requirements for Summary Applications

- Language
 - => Excepting the Summary Application in English, but continue the investigation in the language of the Member State
- Form (e.g. Oral Procedure)

/ Coherent fining could benefit enforcement? (1)

Attribution of liability

- Legal entities v. natural persons
 - => more and more NCAs focus on individual liability, but no uniform approach
 - GER, AUT: criminal sanctions for bid rigging
 - FR: fines and imprisonment for individuals possible who have *“fraudulently taken a personal and decisive action in the conception, organization or implementation of cartel activities”*
 - UK: criminal sanctions for price fixing

- Liability of legal entity committing the infringement v. liability of the entire economic unit (e.g. GER v. EU)
 - Reliance on legal entity principle: GER fines exceeding EUR 100 million were considered not enforceable (“sausage gap”)
 - Lawyer’s duty to advise client on “loophole”
 - Reform of German law should suppose to close the “sausage gap”

/ Coherent fining could benefit enforcement? (2)

Fine calculation

- Many NCAs have own guidelines, often mirroring the Commission's Guidelines
- But significant divergences
 - Maximum fine in Belgium is limited to 10 % of the national turnover plus exports
 - German Federal Court ruled in 2013 that the 10%-rule is not a cap but the maximum fine
- Calculation of duration sometimes not consistent (e.g. period of inactivity)
- Relevant turnover not consistently applied
- No common standard for fines for individuals
 - No individual fines at EU level
 - Maximum fines vary dramatically, EUR 10.000 in Belgium and EUR 75.000 in France to EUR 1 million in Germany
- Differences regarding mitigating or aggravating circumstances
 - Pre-existence of compliance programs
 - Ring-leader, coercion

/ Wish List - Coherent standards for setting fines

- Attribution of liability
- Maximum fines
- Main building blocks of setting the fine should be consistent (duration and relevant turnover)
- Common standards for aggravating and mitigating circumstances
- Maximum fines should take into account fines in parallel investigations (Art. 23 as the “grand total”)

/ Enforcement Toolbox – Inspections

- Some of the NCAs require a court warrant for unannounced business inspections (“dawn raids”)
- Inspection of private premises possible in some Member States
- Electronic data review
 - Some NCAs search and recover the relevant data on site
 - Other NCAs copy complete server and hard discs and search for relevant data later
- Access to data stored in other Member States unclear
- Cooperation and support between NCAs

/ Enforcement Toolbox

- Different standards concerning the collection and use of evidence
 - National rules on the inadmissibility of evidence and assessment of evidence can yield differences in enforcement
 - Problem addressed for damage litigation: Art. 7 of the Cartel Damage Directive foresees special rules on the use of evidence in cartel damage litigation

- Example

General Court confirmed in September 2016 that the European Commission can rely on lawfully seized, but unlawfully made recordings of phone calls (T-54/14)

=> May be used as evidence in the Netherlands, but not in countries with stricter rules, e.g. France

/ Enforcement Toolbox – Wish List

- Minimum harmonization of rules for inspections
 - Access to electronic data stored outside the jurisdiction
 - Minimum standards for access to electronic data
- Minimum standards for evidences

/ Independence & Resources of NCAs (1)

- Differences regarding the independence of NCAs
 - Only a few NCA's independence is institutionally enshrined
 - In many cases, political influence is possible
 - The NCAs leading employees are directly appointed and dismissed by the government or parliament
 - The NCA forms a division of the supervising ministry
- Differences regarding the institutional set-up of NCAs
 - Some NCAs are structured as dualist system: Investigating and decision-making powers are separated (e.g. GB and Sweden)
 - Some NCAs investigate and fine infringements unitary (e.g. FR, GER)
 - Difficult to determine if this has an effect on enforcement: FR and GER are - according to the GCR 2016 Enforcement Rating - among the most efficient enforcers

/ Independence & Resources of NCAs (2)

Differences regarding the endowment with financial and human resources

- Significant differences between the NCAs number of staff (even considering differences in market-size)
- Differences concerning the qualification of the staff of the different NCAs
- Differences mirrored by duration of investigation, e.g. for 2016:

<i>Member State</i>	<i>Staff</i>	<i>Cartel decisions with fine</i>	<i>Average length of cartel decision</i>
France	194	4	1,5 years
Germany	347	11	2-3 years
Belgium	41	1	8,75 years
Romania	197	4	4,7 years

- Potential solution would be to streamline the NCA's efforts by
 - Introducing a one-stop shop for leniency
 - Reduce parallel investigations into the same conduct (also beneficial for coherent results)

/ Thank you for your attention!

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