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DHL Italy: European Court issues key judgment on overlapping leniency procedures

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On January 20, 2016, the European Court of Justice (the Court) issued a seminal preliminary ruling on the relationship between EU and Member State leniency programmes in Case C?428/14, DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del Mercato (AGCM). The Court held that EU and Member State leniency programmes are fully independent, so that obtaining leniency or immunity in an EU cartel investigation does not entitle the leniency/immunity beneficiary to similar treatment in related national investigations.

The DHL judgment underscores the need for applicants to exercise great care in preparing leniency applications to the EU Commission and national authorities and the risks created by even apparently minor inconsistencies. The judgment is also likely to create momentum for an EU legislative initiative to improve the efficiency of the EU leniency regime, currently the subject of a consultation by the EU Commission's DG COMPETITION.

Background

The DHL case originated in a request by the Italian Supreme Court for a preliminary ruling in proceedings between DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA (DHL), and the Autorità Garante della Concorrenza e del Mercato (the AGCM), concerning the AGCM's decision to impose fines on DHL for participating in a cartel in the sector of international road freight forwarding to and from Italy.

The case arose from a race among several cartel particpants seeking leniency from the European Commission and the AGCM in connection with a cartel in the international freight forwarding sector and apparently minor discrepancies between the scope of those participants' applications. DHL was the first to submit an application for leniency with the European Commission, on 5 June 2007. The Commission granted DHL conditional immunity for the entire international forwarding sector, that is to say, as regards maritime, air and road transit, but the Commission decided to pursue only the part of the cartel concerning international air freight forwarding services, leaving the AGCM free to pursue infringements in relation to sea and road freight forwarding services.

In parallel, on 12 July 2007, DHL submitted to the AGCM a summary application for immunity, but the application did not specifically cover the road transport sector. DHL submitted an additional summary application for immunity covering the road transport sector on 23 June 2008, but meanwhile Deutsche Bahn AG had submitted (on its own behalf and on behalf of Schenker

Italiana SpA (Schenker)) leniency applications to the Commission and a summary application to the AGCM covering road freight forwarding in Italy.

In its decision, adopted on 15 June 2011, the AGCM recognised Schenker as the first company to have applied for immunity in Italy for road freight forwarding. The AGCM considered that in its prior filings, DHL had requested immunity from fines only for air freight and sea freight forwarding.

DHL brought an action for partial annulment of the decision before the Tribunale amministrativo regionale per il Lazio (the TAR) on the ground that it should have been accorded the first place in the queue for the national leniency programme and therefore immunity from fines. According to DHL, the principles of EU law require a national authority which receives a summary leniency application to assess it taking into account the "main" application for immunity submitted to the Commission. The TAR rejected DHL's appeal on the basis that the different leniency programmes and the applications in relation to those programmes were autonomous and independent.

DHL appealed the judgment at first instance to the Italian Consiglio di Stato (Council of State), which decided to stay the proceedings and referred the following questions (as paraphrased by the Court):

- Whether the instruments adopted in the context of the European Competition Network (the ECN), in particular the ECN Model Leniency Programme, are binding on national competition authorities.
- Whether (i) there is a legal link between the application for immunity to the Commission and the summary application submitted to a national competition authority in respect of the same cartel requiring that authority to assess the summary application in the light of the application for immunity, where the summary application accurately reflects the content of the application for immunity submitted to the Commission and, (ii) in the event that the summary application has a more limited scope than the application for immunity, the national competition authority is required to contact the Commission or the applicant to establish whether that applicant has found specific examples of unlawful conduct in the sector allegedly covered by the application for immunity, but which is not covered by the summary application.
- Where a first undertaking has submitted an application for immunity to the Commission, whether only that undertaking may submit a summary application to a national competition authority or if other undertakings, which had submitted an application for a reduction of the fine to the Commission, are also entitled to do so.

Judgment of the Court

The Court had no difficulty in rejecting DHL's arguments on all three questions referred to it by the Council of State.

In relation to the *first question*, the court held that the ECN, being intended to encourage discussion and cooperation in the implementation of competition policy, does not have the power to adopt legally binding rules. Thus, in the absence of a centralised system at the EU level for the receipt and assessment of leniency applications in relation to infringements of Article 101 TFEU, the treatment of such applications sent to a national competition authority is determined by that authority under its national law. In any event, the Commission's Leniency Notice relates only to leniency programmes implemented by the Commission itself, and the ECN Model Leniency

Programme has no binding effect on the courts and tribunals of the Member States.

In relation to the *second question*, the Court noted again that, absent a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority, and the treatment of a leniency application is determined by the law of each Member State. National competition authorities are free to adopt leniency programmes, and each of those programmes is autonomous, not only in respect of other national programmes, but also in respect of the EU leniency programme.

That autonomy cannot, moreover, be affected by the fact that the various applications concern the same infringement of competition law. The autonomy of leniency programmes extends to the various applications for immunity submitted to the Commission and to the national competition authorities. The system is based on the principle that there is not, at the EU level, a single leniency application or a "main" application submitted in parallel to "secondary" applications, but rather applications for immunity submitted to the Commission and summary applications submitted to the national competition authorities, the assessment of which is the exclusive responsibility of the authority to which the application in question is addressed.

In any event, no provision of EU law in relation to cartels requires national authorities to interpret a summary application in the light of an application for immunity submitted to the Commission, irrespective of whether or not that summary application accurately reflects the content of the application submitted to the Commission.

As regards any obligation for the national competition authority to contact the Commission or an applicant, where the material scope of that summary application is more limited than that of the application for immunity, the Court noted that such an obligation could attenuate the duty of cooperation of leniency applicants, which is one of the pillars of any leniency programme.

It is therefore in the interest of an undertaking wishing to benefit from the leniency system to submit applications for immunity, not only to the Commission, but also to potentially competent national authorities. The applicant must ensure that any application which it submits is devoid of ambiguities as to its scope, especially as there is no obligation on the national competition authorities to assess a summary application in the light of an application for immunity submitted to the Commission.

As regards the *third question*, the Court noted that the ECN Model Leniency Programme indicated that the system of summary applications for immunity at the national level was open to the undertaking that had applied to the Commission for immunity from fines, whereas it was not clear whether that system was also open to undertakings that had applied to the Commission for a mere reduction of fines. This possibility was only expressly provided for after amendments made to that programme in 2012.

Nonetheless, the Court held that the fact that the ECN Model Leniency Programme, in the then-existing version, did not expressly refer to the possibility for the undertakings that had submitted an application for reduction of fines to lodge a summary application for immunity before the national competition authorities did not preclude authorities from accepting such an application. As the Court found in response to the first question, instruments adopted in the context of the ECN are not binding on national competition authorities.

As a result, Member States are not required to incorporate provisions of the ECN Model Leniency Programme in their leniency systems and, they are not precluded from adopting rules not present in that model programme or which diverge from it, in so far as that competence is exercised in compliance with EU law. In particular, Member States may not render the implementation of EU law impossible or excessively difficult and must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU. In that respect, the effective application of Article 101 TFEU does not preclude a national leniency system which allows the acceptance of a summary leniency application submitted by an undertaking which had not submitted an application for full immunity. On the contrary, that approach is in accordance with the underlying purpose and spirit of the establishment of the system of leniency applications, which should encourage the submission of such applications, not limit their number.

Conclusion

Under the system of parallel enforcement of EU competition law created by Regulation 1/2003, the operation of numerous leniency programmes at the EU and national levels creates challenges for undertakings applying for leniency or reductions from fines. Potential applicants must take great care to ensure that they file applications in all relevant jurisdictions and that these applications are consistent as regards the scope of conduct covered. The DHL judgment confirms that, in the event of inconsistencies, an applicant cannot rely on a broader scope in its EU application to protect it from fines by national authorities. The pitfalls created by the current system of parallel competences, and the absence of a centralized EU leniency programme, has long been recognized. These issues are currently being examined by DG COMPETITION, and it seems likely that the Commission will propose reforms to address these issues in the near to medium term.

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