The (Ab)use of Soft Law in Shaping EU Competition Law: Undermining the Effectiveness of Leniency Programmes

by

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Abstract

One of the defining features of EU competition provisions is that they are enforceable and applicable by the authorities and courts of the European Union and those of its Member States. The European Commission and national competition authorities participate in the application of EU competition law to differing degrees. Different legal mechanisms are adopted to apply Article 101 TFEU, including leniency programmes aimed at pursuing cartels, considered to be the greatest risk to free competition in the European Union. These programmes are implemented using non-binding mechanisms of soft law, which has generated a number of issues for the European Commission and the administrative competition authorities of the Member States when applying European and national competition laws.

Resumé

Un des traits caractéristiques des dispositions communautaires en matière de concurrence est qu'elles sont exécutoires et applicables par les autorités et les tribunaux de l'Union européenne et ceux de ses États membres. La Commission européenne et les autorités nationales de la concurrence participent à l'application du droit européen de la concurrence à différents degrés. Plusieurs mécanismes juridiques sont adoptés pour appliquer l'article 101 du TFUE, y compris des programmes de clémence visant à poursuivre les cartels, considérés comme le plus grand risque pour la libre concurrence dans l'Union européenne. Ces programmes sont mis en œuvre en utilisant des mécanismes non contraignants de *soft law*, ce qui a généré un certain nombre de problèmes pour la Commission européenne et les autorités administratives de la concurrence des États membres lors de l'application des lois européennes et nationales sur la concurrence.

Key words: EU competition law; leniency programmes; cartels; competition authorities; cooperation; soft law; legal ramifications.

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I. Introduction

One of the defining features of EU competition provisions is that they are enforceable and applicable by the authorities and courts of the European Union and those of its Member States. The European Commission and national competition authorities participate in the application of EU competition law to different degrees. The system is decentralised pursuant to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU, which designs a system in which both the European Commission and national competition authorities (administrative and courts) have competence to apply Articles 101 and 102 TFEU directly; those articles are the points of reference for the EU's competition policies. On that basis, the Commission and the competition authorities of the respective Member States, must apply European Union Competition Law *in close collaboration*, as established by Article 11 of Regulation 1/2003, although paragraph 6 of that same provision gives priority to the Commission over the Member States by establishing that 'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 101 and 102 of the Treaty'.

It is therefore clear that the effective decentralised application of Articles 101 and 102 TFEU requires coordination between the Commission and the competition authorities of the Member States responsible for applying Competition Law. The European Competition Network (hereinafter: ECN) was set up for that very purpose, a body composed of the national competition authorities and the EU Commission with the aim of establishing a forum of cooperation and debate to apply EU competition policies.

That is the framework that has been established by European Union legislation to put its competition policies into practice. Some of its most significant measures, especially when it comes to applying Article 101 TFEU, are leniency programmes aimed at pursuing cartels, considered to be the most detrimental factor to free competition in the European market. Leniency programmes have been developed and implemented by soft law, which is non-binding. As such, this has led to a number of issues as to the scope of those programmes and their application by the Commission and the national competition authorities, which has come to be known as the public enforcement of Competition Law.

The jurisprudence of the Court of Justice (hereinafter: CJ) has helped to define the scope and effectiveness of leniency programmes implemented by the competition authorities of the Member States, and the EU's competence

developed by the ECN, as well as the relationship between them.[1] However, the non-binding nature of leniency programmes has given rise to a number of issues when attempting to apply Article 101 TFEU effectively, which has had the knock-on effect of generating a feeling of legal insecurity among operators in the EU.

This article examines the relationship among the different competition authorities – both national and at a European Union level – responsible for implementing leniency programmes in the EU, looking at issues that have emerged when applying those programmes and arguing the need for provisions to regulate them within the EU.

II. The problems of implementing and applying leniency programmes. The complex interaction between the Commission and national competition authorities in the public application of competition law

1. Brief overview of leniency programmes

The purpose of leniency programmes is to make it easier to detect cartels or to investigate those that have already been detected; they offer support to investigations conducted by competition authorities and bolster their ability to establish the investigated facts and conduct, in compliance with the levels of evidence required by law. On that basis, only undertakings or individuals who voluntarily cooperate with the competition authorities, and that decisively contribute to clarifying the facts surrounding the potential existence of a cartel, can benefit from a leniency programme.

As such, leniency programmes actively enhance the effective application of competition law aimed at detecting and dismantling cartels, anti-competitive practices that are most detrimental to the proper functioning of the market economy. Cartels are among the gravest offences in competition law due to their detrimental impact on competition, and it is clear that both the European Commission and the competition authorities of the Member States play a significant part in the implementation of Article 101 TFEU with regard to illegal cartels (Wish and Bailey, 2018).[2] However, given the secrecy

[1] CJ judgment of 20.01.2016, Case C-428/14 *DHL Express (Italy) S.r.l. and Others v Autorità Garante della Concorrenza e del Mercato and Others*, ECLI:EU:C:2016:27.

[2] From 1990 to 2017 the European Commission imposed fines totalling €27.6 billion on 835 companies for their involvement in cartels. The Commission's enforcement statistics related to cartels are available on its website: https://ec.europa.eu/competition-policy/cartels/statistics_en.

surrounding cartels prohibited by Article 101 TFEU, the Commission and the national competition authorities have found it very difficult to detect and effectively investigate – as well as prohibit and punish – them.[3]

With the approval in 1996 of its Notice on the non-imposition or reduction of fines in cartel cases, the Commission implemented a leniency programme with which it rewarded – by exempting them from, or reducing their fines – those cartel members that cooperated with the Commission in a way which would result in those cartels being detected and punished. Subsequently, in its 2006 Leniency Notice, the Commission unequivocally understood that the interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those cartel members that cooperate enabling the Commission to detect and prohibit such practices. The Commission therefore establishes as a key part of its leniency programmes the cooperation of an undertaking in the discovery of a cartel, which has undoubted intrinsic value. Thus, the advantages afforded by programmes of this kind extend beyond the mere detection and punishment of specific infringements, as it generates an overall climate among future members that can effectively reduce the formation of cartels.

One of the keys to the potential success of leniency programmes is that they provide clear and transparent rules and procedures that allow leniency applicants to predict the treatment they will receive from competition authorities. This transparency and predictability is necessary for leniency programmes to function properly, as uncertainty as to how they might be treated by competition authorities could deter potential applicants. Therefore, how information obtained in the context of a leniency programme is or might be used by competition authorities is a key part of their success, especially in connection with certain confidential information that the leniency applicant might provide.

It should be pointed out that the 2006 Leniency Notice is a typical non-binding mechanism of soft law, which is often used by the European Commission to enforce competition law. It is important to note that Regulation 1/2003 and Regulation 773/2004 on the implementation of the Commission's procedures under Articles 101 and 102 TFEU, which are genuine binding rules, do not

[3] As the European Commission points out in its 2006 Leniency Notice, 'by their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices'.

allow for the Commission applying leniency programmes, which has had certain legal consequences on EU case law regarding cartels.[4] Indeed, the declared objective of the model implemented by the Leniency Programme is to encourage national competition authorities (hereinafter: NCAs) to take it into account if, and when they adopt and implement a national leniency programme, without thereby being obliged to comply with it. In other words, the 2006 Leniency Programme is intended to promote, by soft-law means, the voluntary alignment of any Member States' leniency programmes relating to competition.[5]

2. The lack of harmonisation in the European Union legal regime on leniency programmes: coexistence of national and EU programmes

Regulation 1/2003 established a system of coexisting competences in which the Commission and the national competition authorities of the Member States can apply Article 101 TFEU indistinctly. This has created a scheme of public authorities that perform their activities in the service of general public interest and that cooperate closely to protect effective competition in the European market. This can be inferred from Article 11.1 of Regulation 1/2003 which establishes that 'the Commission and the competition authorities of the Member States shall apply Community competition rules in close cooperation'.

Nevertheless, in a legal framework of parallel competences between the Commission and the NCAs that lacks a European Union-wide system of fully harmonised leniency programmes, an application for leniency to one authority is not to be considered as an application for leniency to another.[6] It follows

[4] CJ judgment of 14.06.2011, Case C-360/09 *Pfleiderer AG v. Bundeskartellamt,* ECLI:EU:C:2011:389.

[5] The CJ has held that the 2006 ECN Model Leniency Programme was not binding *on the courts and tribunals of the Member States.* The Court also confirmed that, whilst Commission communications concerning, first, cooperation within the ECN and, second, immunity from fines and the reduction of fines in cartel cases were liable to have an impact on the practice of the NCA, neither the provisions of the TFEU regarding competition law nor Regulation 1/2003 provided for common leniency rules; Case C-360/09 *Pfleiderer* and Case C-428/14 *DHL*.

[6] In the Commission's Notice on Cooperation within the European Competition Network issued in 2004, point 38, it stated that 'In the absence of 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. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article 81 of the Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question (15). In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with the relevant

that there is no 'one-stop shop' under EU competition law for processing leniency applications, or even an automatic exchange of such applications between the NCAs and the Commission.

It can be inferred from the above paragraph that several leniency programmes coexist within the European Union: on the one hand, the programme established by the European Commission and, on the other hand, those established by the Member States. This results in a system of co-existing competences in the application of competition law that could trigger a number of problems in their implementation;[7] this will require the establishment of appropriate coordination measures and mechanisms to guarantee legal certainty for economic operators performing business in the European Union.

However, the lack of harmonisation among the regulations applicable to leniency programmes within the EU has led to the emergence of a number of legal issues related to the implementation of leniency programmes that could ultimately undermine their effectiveness. The CJ judgment in the *Pfleiderer* case emphasised that '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 the national law of the Member State in question'.[8] This means that when

authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.'

[7] For example, Case C-428/14 *DHL*: DHL applied for leniency before the Commission and before the Italian competition authority (the Autorità Garante della Concorrenza e del Mercato (hereinafter: AGCM)) by means of a summary leniency application, not including in the application before the AGCM the road-freight forwarding in Italy covered in the Commission application. Although the Commission granted DHL full conditional immunity, the AGCM issued a decision concerning only the road freight-forwarding sector, which DHL had not included in its summary leniency application at first. The AGCM therefore granted full immunity to another company, reducing DHL's fine by 49 per cent. The CJ stated that leniency applications to the Commission and NCAs are independent, and that the ECN instruments are not binding on NCAs. It is the obligation of the leniency applicant to ensure that the scope of the summary application is correctly established.

[8] Case C-360/09 *Pfleiderer*. This significant ruling only raised the issue that the ECN's leniency programme was not binding on the courts of the Member States. Therefore, in this case, one of the parties questioned the possible extension of this case law to the authorities of the Member States. The CJ clarified that the uniform application of EU law in the Member States would be undermined as the latter are able to designate courts as NCAs. As a result, the binding effect of the ECN Model Leniency Programme would vary depending on the nature (judicial or administrative) of the respective NCAs. The Court already found that the Commission's leniency programme established through its Leniency Notice is not binding on Member States, which also applies to the ECN's model leniency programme. The Court therefore ruled that EU law, in particular Article 101 TFEU and Regulation 1/2003, must be interpreted as meaning that

each Member State applies Article 101 TFEU, which is particularly aimed at prosecuting cartels affecting the single market, it will apply national leniency programmes that might have a very different scope and nature depending on the peculiarities and legal specifics of each cartel. In practice, this will mean that undertakings may submit leniency applications in all those States in which they may have infringed Article 101 TFEU, as well as to the European Commission itself, where the European Commission is the authority which is best placed to hear the case in question.

This scenario can lead to highly complex situations due to the very nature of leniency programmes and how they function. For instance, under the ECN's Model Leniency Programme, ECN members undertake to use their best efforts, obviously within the confines of their competences, to adapt their respective programmes to the ECN's programme. However, this does not preclude a national competition authority being able to take a more favourable approach to undertakings applying for leniency under its own programme. Therefore, undertakings may conduct a preliminary study of the authority/ies before which it would prove more favourable to apply for leniency, although it would not necessarily be the most beneficial to protect the general public interest and the correct functioning of effective competition in the common market.

Another issue that ought to be taken into account is the ranking position that an undertaking will have when applying for leniency. In other words, whether or not that undertaking was the first applicant or, if, for example, it has applied for a complete immunity from a fine or has merely applied for a reduction of the fine.[9] Competition authorities are only able to grant an

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the instruments adopted in the context of the European Competition Network, in particular its Model Leniency Programme, are not binding on national competition authorities.

[9] Para. 22 of the 2006 ECN Model Leniency Programme also provides that, where an undertaking has filed or is in the process of filing an application for immunity with the Commission, it may file a summary application briefly setting out specified information with any NCA that the applicant considers might be 'well placed' to act. By filing a summary application, the applicant protects its position as the first in the queue with the NCA concerned for the alleged cartel. That programme does not, however, envisage any legal links between the application for immunity submitted to the Commission and the summary application submitted to a NCA. Consequently, as Advocate General Wathelet remarks in its Conclusions to Case C-428/14 *DHL*, 'if the information to be provided in the summary application in particular concerning the scope of the infringement in question is admittedly reduced, it must be sufficiently precise to ensure protection of the applicant and its place in the order of arrival of immunity applications in circumstances where, as in the main proceedings, the Commission decides not to take action on the basis of the application for immunity submitted to it. In that regard, it should be emphasised that if the scope of the cartel covered by the summary application is not precise enough, the applicant risks losing its place in the order of arrival of leniency applications to the ANC – which seems to be DHL's case according to the contested decision'.

undertaking total immunity from a fine imposed due to the infringement of Article 101 TFEU or a provision of national law on two grounds: 1) if it is the first to provide evidence that allows the competition authority to conduct a targeted inspection of the alleged cartel; or 2) if, when the application is filed, the competition authority lacks evidence to launch an inspection and/ or request a court warrant to inspect the alleged cartel. It is therefore very important for undertakings wishing to benefit from leniency programmes to be the first applicant; if they are the first to do so, they would be eligible to full immunity, whereas subsequent applicants would only be entitled to a reduction of a fine.

To alleviate somewhat the need for undertakings to 'win pole position' – if you allow me a motor-racing metaphor – should they wish to benefit from a leniency programme, in particular when applications are to be filed with the Commission and the national competition authorities, the ECN Model Programme states in para. 24: ' In cases where the Commission is 'particularly well placed' to deal with a case (…), the applicant that has or is in the process of filing a leniency application, either for immunity or for reduction of a fine, with the Commission may file summary applications with any NCAs which the applicant considers might be 'well placed' to act under the Network Notice'. In these cases, a potential issue could arise where the content of the applications – for immunity and summary applications – is not exactly the same, which could in turn affect the applicant's position in the process. Thus, if the national competition authority to which the summary application has been submitted takes the view that the summary application does not meet the established requirements, it may request additional information so as to satisfy the evidence requirements for that authority to conduct an inspection. If so, the authority must determine the time limit available to the undertaking to provide that information, whereby if that obligation is met the information will be understood to have been provided on the day on which the summary application was received, and the undertaking will not lose its leniency application position. The essential aim of this provision is to overcome the problems caused by multiple applications being submitted at the same time, allowing undertakings to predict with greater accuracy what the outcome of an application will be, thus reducing the burden of multiple applications on undertakings and the competition authorities.

Therefore, the lack of harmonisation of leniency programmes in the European Union has led to the coexistence of national and EU programmes, triggering divergence in the development and implementation of an effective EU competition policy, which may in certain cases have the opposite effect to the aim sought by Regulation 1/2003, that is, the consistent application of EU competition rules in the Member States.

3. An attempt at harmonising leniency programmes by using soft law: A patch due to the legislator's inaction?

3.1. The use and abuse of soft law in competition law

The adoption by NCAs and the Commission of various different programmes and notices to develop European competition policy, in particular through the use of soft law mechanisms, has an impact on both public authorities and individuals operating in the market. The scope is therefore two-pronged and, from that perspective, soft law, in its various guises, has considerable legal weight in the context of competition law.

On the one hand, competition authorities have adopted soft law to constrain their own conduct and thus provide legal certainty to parties that have legal relationships with them (for example, the subject of the Guidelines on the Quantification of Fines).

On the other hand, it can have an impact on economic operators – public or private – from the perspective of the interpretation of provisions – legal or regulatory. It is therefore a question of imposing a 'quasi-obligation' on those who have the power to interpret and apply competition law, and to do so, taking into account the content of the soft law applicable to the matter in question.[10]

Two aspects are relevant in examining the impact of soft law on competition provisions. On the one hand, legal or regulatory rules – hard law – may contain express rules on the effects that soft law should have. Competition law is not usually an area in relation to which legal or regulatory rules contain soft law referrals of this kind. However, in Spain for example, the Third Additional Provision of the Spanish Competition Law 15/2007 (LDC) appears to establish this referral formula by requiring that 'The National Markets and Competition Commission may publish Notices clarifying the principles underlying its actions in application of this Law. In particular, Notices relating to Articles 1 to 3 of this Law shall be published after being referred to the Competition Council'.

In this regard, the Spanish competition authority – the National Markets and Competition Commission (hereinafter: CNMC) – has approved a number of Notices such as the Leniency Programme Notice, the Notice on the Quantification of Fines, or the Notice on Conventional Termination of Disciplinary Records, all of which constitute soft law and the essential purpose of which is to establish general guidelines to guide the actions of the CNMC

[10] ECJ judgment of 13.12.1989, Case C-322/88 *Salvatore Grimaldi v. Fonds des maladies professionnelles (Occupational Diseases Fund)*, ECLI:EU:C:1989:646.

and to contribute to increasing legal certainty for economic operators that operate in the markets.

On the other hand, it is also entirely possible that hard law does not determine the effects that soft law ought to have, in which case two factors must be distinguished to determine the possible impact of those instruments (Sarmiento, 2008; Petit and Rato, 2009).

Firstly, there is an *annulment factor*, where soft law does not constitute a parameter by which to prosecute general provisions or administrative acts. Although, in this case, the competition authorities may depart from the provisions of its own soft law, there is a duty to justify their decision to do so. On that basis, there is an attempt to afford legal certainty to economic operators that are subject to competition provisions.

However, there is also a second possibility: an *interpretative factor*. In this case, soft law is not a provision applicable in the resolution of disputes of public competition law; it is structured as a duty to interpret *hard law in accordance with soft law* (Sarmiento, 2008). It is therefore an expression of the regulatory will of the competition authorities, albeit expressed outside the confines of formal regulatory channels. As with the annulment factor, the question here is to guarantee legal certainty for undertakings that may act in one way or another guided by the guidelines issued by competition authorities. It should be noted that competition authorities, when approving and publishing (either in official bulletins or on their own website) instruments of soft law, generate what could be called *legislative expectation* among economic operators, setting criteria and establishing how the provisions of competition law (hard law) are to be interpreted.[11]

[11] Pursuant to Article 51(1) thereof, the provisions of the Charter of Fundamental Rights of the European Union address the Member States when they implement EU law. It follows that the Member States, including their NCAs, are bound by the provisions of the Charter and general Union principles when they implement Articles 101 TFEU and 102 TFEU. Consequently, when a NCA adopts a leniency programme, which is in principle likely to have legal effects, it must comply with the general principles of EU law, including those of non-discrimination, proportionality, legal certainty, protection of legitimate expectations and entitlement to sound administration.

In this sense, the CJ stated in its judgment of 13.12.2012, Case C-226/11 *Expedia Inc. v. Autorité de la concurrence and Others*, ECLI:EU:C:2012:795, para. 28, that: 'It is apparent from that paragraph, first, that the purpose of that notice is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU. Consequently, by the de minimis notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law, in particular the principles of equal treatment and the protection of legitimate expectations (…). Furthermore, it intends to give guidance to the courts and authorities of the Member States in their application of that article'.

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It is therefore clear that, when the competition authorities approve soft law that interprets competition law and its implementing provisions, a belief may be generated among undertakings subject to that law that those authorities will act in a certain way in line with that interpretation of hard law. The authorities are thus bound by their interpretation and if they were to apply a different interpretation without proper justification for doing so, this could affect the principle of legitimate expectations in administrative precedent, thus affecting the legal certainty of undertakings, thereby potentially rendering the administrative action null and void.[12]

In short, the approval of soft law by the competition authorities might generate a degree of certainty and belief among economic operators subject to European competition law as regards the interpretation of the latter. It should however be noted that the principle of legitimate expectations may also be affected not only by a competition authority's actions or precedent, but also by that of other administrative authorities that have no jurisdiction

[12] Thus, for example, in Spain, the CNMC has used the principle of legitimate expectations in the competition authority's preliminary action in Resolution of 14 April 2010, although it decided that in this case it should remain unaffected by pointing out that: '(…) the Council considers that there may be reasonable doubts that the regulatory measure imposed by the 2002 ACM to limit the duration of new contracts for the acquisition of audio-visual football rights to three years could be construed by non-dominant clubs and operators as evidence that longer durations could be incompatible with competition law. However, insofar as Football Report 11/6/2008 establishes clear determinations on the limitation of contracts for the exclusive acquisition of these rights (…) and on the prohibition of pre-emption and retrospective unwinding rights, the argument of legitimate expectations generated by the competition authorities' actions (…) is markedly undermined, and clearly cannot be successful from the date on which the DI notifies the parties of the first PCH (…)' (Case S/0006/07, *AVS, Mediapro, Sogecable y Clubs de Fútbol de 1ª y 2ª División*).

Similarly, the Spanish Supreme Court's judgment of 04.12.2009 also found that the competition authority's ruling interpreting antitrust soft law had breached the principle of legitimate expectations, pointing out that 'in this case, while it is true that there are interpretative doubts as to the application of Article 81 of the Treaty to contracts for the exclusive supply of fuels, covered by these complex contractual formulas, we cannot find that the appellants' actions have been surprised by the Competition Court's actions, on the basis of the Notice of 24 December 1962, which adopts criteria for determining the nature of the conduct of agents and commissioners, from the perspective of the application of article 85 above of the Treaties, in the Commission Decisions of 23 November 1973 and 19 December 1984 (…) and which can therefore be classified as predictable'.

Finally, another example is the judgment of the Audiencia Nacional of 06.05.1999, in Cartel de la Sidra, in which it argued that 'the application of this principle may imply the absence of disciplinary liability, where the party in question has acted on the basis of the confidence generated by the Authorities that it was acting correctly. But for that principle to display its full effects, the Authority that generates confidence with its actions must be the authority with competence in the matter in question; confidence cannot be generated by those who do not have competence for doing so.'

over antitrust law, for example procuring authorities when excluding an economic operator that has distorted competition from taking part in a public procurement procedure. This thesis has been criticised by some national competition authorities noting that the correct answer to the issue must, in general, be only the actions of the competition authority is able to constitute an external sign that is sufficiently conclusive to generate legitimate confidence in an undertaking that its anti-competitive conduct was lawful, thus exempting it from any culpability in the area of competition disciplinary law (Costas, 2013).[13]

3.2. The approval of leniency programmes with soft law. Non-binding effects

The ECN has no inherent legal personality, as I have already pointed out, which means that the decisions and notices that it adopts are not legally binding. As the CJ has pointed out in case *DHL Express v. Autorita Garante della Concorrenza e del Mercato*, which is the subject of our commentary: '(...) 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. In that respect, the Court has already held that neither the Commission Notice on Cooperation, nor the Commission Notice on immunity from fines and reduction of fines in cartel cases ('the Leniency Notice') is binding on Member States. (...) Moreover, the Notice on Cooperation and the Leniency Notice, adopted in the context of the ECN, were published in 2004 and 2006, respectively, in the 'C' series of the Official Journal of the European Union, which, by contrast with the 'L' series of the Official Journal, is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union. It follows that those notices are not capable of creating obligations on Member States.'[14]

[13] Article 57(4)(f) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94/65).

Another example, is established by the judgment of the Spanish Supreme Court of 23.02.2000 in *Anele*, in which it pointed out that 'in the present case there is no doubt that the recommendation made by ANELE to its associated publishing companies was a result of the recommendation made, in turn, by the Ministry of Education and Science, as is inferred from the admonishment for "the need for such increases to be limited". In other words, in compliance with the recommendation made by the Authorities, ANELE first, and subsequently the publishers, limited the unrestricted increase of prices in the legitimate expectation that they were acting correctly. It would be absurd to sanction conduct that the sanctioning authority itself advised.'

[14] C-428/14 *DHL*, paras. 33–35.

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Therefore, as the leniency programme approved by the ECN is not binding on either the national competition authorities or the Commission, it is limited in scope as it is dependent on the degree of genuine cooperation among the various competition authorities in the implementation of European competition policy. Nevertheless, the truth is that the leniency programmes implemented by NCAs often have features that are common with those approved by the ECN, which generates a certain degree of harmonisation through the use of soft law (Wish and Bailey, 2018). Similarly, the use of soft law affords greater flexibility when modifying or adapting the ECN leniency programme to the new challenges of competition law, a feature not available to binding rules that are subject to rigid approval procedures.

However, as regards the leniency framework from which undertakings that cooperate with the Commission or with national competition authorities can benefit in the EU for the purpose of detecting cartels, neither the provisions of the TFEU nor Regulation 1/2003 provide common rules on leniency. Therefore, as the CJ points out, '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 the national law of the Member State in question'.[15]

4. The CJ's interpretation of the scope and effectiveness of national and EU leniency programmes in European Competition Law. Problems arising from their practical application

The TFEU confers exclusive competence on the EU over European competition law, which has led to the adoption of EU Regulations for the purpose of delimiting the application of Articles 101 and 102 TFEU, which are the basic pillars of EU competition law. However, as has already been pointed out, from the perspective of the implementation of an EU-wide leniency programme, EU institutions have not chosen to legislate on this subject matter directly; instead they – particularly the Commission and the ECN – have approved a number of non-binding notices to develop them.[16]

[15] Ibidem, para. 36.

[16] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11/3), recognises that 'the differences between leniency programmes at Member State level also jeopardise the level playing field for undertakings operating in the internal market. It is therefore appropriate to increase legal certainty for undertakings in the internal market and to boost the attractiveness

In the *DHL Express v Autorita Garante della Concorrenza e del Mercato* judgment, the CJ had to issue a preliminary ruling on a matter brought by the Italian *Consioglio di Stato* concerning the interpretation and scope of the leniency programmes – EU and Italian – and the relationship between them. The main focus of the discussion in the CJ ruling revolves around the co-existence and autonomy between the EU leniency programme and the respective programmes of the Member States, which constitute the expression of the regime of co-existing competences of the Commission and the national competition authorities as provided for in Regulation 1/2003.

4.1. When the same leniency applications are submitted to the Commission and to a national competition authority: What are the legal ramifications, if any?

Firstly, it must be taken into account that leniency programmes are not binding, which means that no obligations can be generated in this regard for the Member States. As a result, as discussed above, national leniency programmes will coexist with the EU programme. Economic operators wishing to benefit from one of these programmes will have to submit a number of leniency applications to the NCAs and to the Commission. If an application for immunity is submitted to the Commission, the ECN leniency programme allows for a summary application being filed with a relevant national competition authority to enable the applicant to benefit from full immunity.

The question is therefore whether the provisions of EU law, namely Article 101 TFEU and Regulation 1/2003, must be construed as meaning that a legal link exists between the application for immunity from fines that an undertaking has submitted or is to submit to the Commission and a summary application submitted to a national competition authority (in this case, the *Authorita Garante della Concorrenza e del mercato*) in relation to the same cartel, which imposes an obligation on that authority to examine the summary application in the light of the application for immunity if the content of the application submitted to the Commission is the same.

In order to answer this question, the CJ looks at the principle of autonomy, and coexistence, of national leniency programmes together with the Commission's leniency programme. It finds that, if a cartel's effects extend to several Member States, both the national authorities and the Commission will have jurisdiction to hear the case, whereby the undertaking wishing to

of leniency programmes across the Union by reducing these differences by enabling all NCAs to grant immunity and reduction from fines and accept summary applications under the same conditions. Further efforts by the European Competition Network to align leniency programmes could be needed in the future', but leaves a wide margin of appreciation to Member States to implement the Directive using hard or soft law instruments.

benefit from leniency must submit applications for immunity not only to the Commission, but also to the national competition authorities of those Member States to which the effects of the cartel have extended. The CJ has stated in this regard that: 'The existence, as alleged, of a legal link between the application for immunity submitted to the Commission and the summary application submitted to the national competition authorities, obliging those authorities to assess the summary application in the light of the application for immunity, would call into question the autonomy of the various applications and, consequently, the rationale behind the system of summary applications. That 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'.[17]

While it is true that the EU level leniency regulations have been developed via soft law, and are therefore not binding on the Member States, the need to submit various leniency applications to the individual NCAs with jurisdiction over the matter, might generate a number of issues for the effective application of Article 101 TFEU. The problem is particularly relevant with regard to NCAs which do not have their own leniency programme and therefore could impose sanctions on the leniency applicant. Moreover, NCAs which operate a leniency programme are not precluded from imposing sanctions on the leniency applicant if the latter has not lodged, or not lodged in time, a leniency application in the relevant Member State, or if their own leniency programme does not provide for full immunity but only allows for a partial reduction in the fine. In fact, there is no EU-wide system of fully harmonized leniency programmes. Even though the existing leniency programmes have a number of common features, they still differ considerably in terms of both procedure and substance, and the divergences may seriously undermine the success of leniency programmes. Companies will weigh up the possible benefits and risks of a leniency application in a given situation. The practical difficulties associated with multiple applications and the incertitude about the ultimate playoff are likely to prevent them, in many cases, from opting out leniency (Brammer, 2009).

Indeed, when submitting an application for immunity to the European Commission, the purpose of submitting a summary application to a national authority – provided that the content of the two is identical and this is reflected faithfully in the applications – should be merely to notify the NCA of the

[17] C-428/14 *DHL*, para. 61.

application submitted to the Commission with the aim of triggering only one leniency programme: the Commission's.

However, this was not the view of the CJ, which, basing its arguments on the non-binding nature of the EU leniency programme, pointed out that 'no provision of EU law in relation to cartels requires national competition 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'.[18]

4.2. Differences between applications for immunity submitted to the Commission and the NCAs when defining the market affected by the infringement: Does this trigger an obligation to notify a national competition authority?

The second matter raised with this issue was aimed at ascertaining whether, if a summary application has a narrower scope than the application for immunity submitted at the EU level, the national competition authority is required to contact the Commission or the undertaking itself to determine whether that undertaking has found specific examples of unlawful conduct in the market allegedly covered by the application for immunity lodged with the Commission, but not in the summary application.

This second issue raises two matters for debate. First, if an undertaking wishes to apply for leniency, it is essential that it is the first to make the application for full immunity from the fine; if not, it would only be eligible to a fine reduction, or might even have to pay the full penalty imposed by the competition authority. With the aim of easing the burden that multiple applications represent for undertakings and the national competition authorities, the ECN leniency programme offers a uniform model of summary applications for undertakings that have submitted an immunity application to the Commission.[19] In addition, the undertaking submitting a summary application guarantees its place in the chronological order of applications to the NCA with jurisdiction over the alleged cartel. In order to secure that position, the undertaking must provide all the necessary information on the alleged cartel as well as all the information previously provided in its application for immunity to the Commission. As a result, this triggers a second issue: if, on the one hand, the national competition authority has a duty to notify the Commission to ascertain whether or not the applications have the same content; or, if it is the undertaking that bears the burden of proof to provide all the information on the market affected by the

[18] Ibidem, para. 62.

[19] Paras. 22–25 the ECN Model Leniency Programme; available at https://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (accessed on 14.07.2021).

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alleged cartel in order to secure its pole position in the leniency applications made to the national authority. In the opinion of the CJ, 'the onus is on the undertaking applying to the national competition authorities for leniency to ensure that any application it submits is uncertain as to its scope, especially where, as stated (…), the national competition authorities are not required to examine a summary application in the light of an application for immunity submitted to the Commission'.

Thus, there is an obligation for undertakings to inform NCAs where the actual scope of the cartel may be, or is, in fact, different from that which was submitted to those authorities or to the Commission. This guarantees the autonomy of the different leniency programmes. Otherwise, if the relevant national authority was under a duty to notify the Commission, and if the material scope of the application for immunity submitted to the NCA was more restricted than the immunity application submitted to the Commission, it could be understood that a hierarchical system exists between the applications, which would run counter to the decentralised system established by Regulation 1/2003, as stated by the CJ.

However, I do not agree with the CJ's assessment, as Regulation 1/2003 itself, to achieve a consistent and uniform application of Article 101 TFEU, establishes coordination mechanisms between the Commission and the NCAs in order to ensure the decentralised application of European competition law, thus establishing the Commission's hierarchically higher position to other authorities of the Member States, without this affecting the intended decentralisation. In addition, the aim of approving the Cooperation Notices, and creating the ECN, is for all authorities with the competence to implement Articles 101 and 102 TFEU, to act in a coordinated manner and to exchange information on actions taken in the implementation of competition law. Therefore, while it is true that undertakings must work closely with competition authorities to benefit from leniency programmes, it is also true that establishing a duty of cooperation when implementing leniency programmes will not have a detrimental impact on those programmes.

A very different question would arise if the undertaking whose immunity application occupies the pole position with the Commission – thus benefiting from immunity from a fine – submits a summary application to a national competition authority with a different material content, in which case it cannot be understood to be the first applicant at the level of the national authority. In that scenario, if another undertaking has submitted an application for immunity under the national leniency programme covering a particular market that had not been included in the summary applicant, the former would occupy the pole position, not the latter, with the legal consequences that would result from that circumstance.

4.3. The relationship between applications for immunity and fine reductions submitted to the Commission: Do they have any impact on a national authority?

Finally, there is also another question: when an undertaking has submitted an application for immunity with the Commission and is the first to do so, can only that undertaking submit a summary application for immunity to a relevant national authority or are other undertakings also permitted to do so, although they have only submitted an application to the Commission to have their fine reduced.

The CJ has examined the leniency programme approved by the ECN, which provided that an undertaking can use the system of summary applications for immunity before the national authorities if it has applied to the Commission for immunity; however, it is unclear whether a summary application could also be submitted by undertakings that had merely applied to the EU body to have their fine reduced.

Again, the CJ stresses that the instruments used in the context of the ECN are not binding – they are soft law – which means that they do not generate obligations for national competition authorities. Therefore, because they are not binding, Member States cannot be required to transpose the ECN leniency programme into their national systems, and they cannot be prohibited from adopting their own programmes, with their own specificities and features, subject to the only requirement that they observe EU law.

Accordingly, the CJ provides that '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.'[20]

In so doing, the CJ considers that the system of leniency programmes established by the ECN and the national competition authorities are suitable to effectively implement Article 101 TFEU, as it encourages undertakings that take part in a cartel to report it. In addition, in the CJ's view, the purpose of having various concurrent leniency programmes 'is to create a climate of uncertainty within cartels in order to encourage the reporting of them to the Commission', adding that in this context, 'it is possible that an undertaking which was not the first to submit an application for immunity to the Commission and which, consequently, is eligible only for a reduction of the fine may, by lodging a summary application for immunity, be the first to inform the national competition authority of the existence of the cartel concerned'.[21]

[20] C-428/14 *DHL*, para. 80.

[21] Ibidem, paras. 82–83.

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III. Conclusions

As we have seen, the competition authorities of the Member States and the European Commission have implemented and developed leniency programmes as the pillars for prosecuting cartels, which are considered the gravest infringements of Article 101 TFEU.

Despite the importance that implementing these programmes ought to have for the effective application of competition policy in the EU, soft law – a mechanism so frequently used within the EU when 'legislating' on competition law issues – has been the means chosen for approving them. The fact that soft law is not binding on EU and national authorities responsible for the implementation of Articles 101 and 102 TFEU jeopardises the uniform and consistent application of European competition policy.

Similarly, a number of general principles of European law, some already approved in the European Charter of Fundamental Rights – such as legal certainty, proportionality, legitimate expectations or the right to good administration – may be affected by this manner of 'legislating' leniency programmes.

EU institutions should take note of this fact and seriously consider that European Competition Law – over which, it must be said, the EU has exclusive legislative jurisdiction – adopts hard law rules to regulate EU leniency programmes and to establish the necessary legal measures to coordinate between the Commission and the national authorities of the Member States, thus affording greater legal certainty for operators, both public and private, engaged in business falling within the scope of competition law.

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