PARALLEL LENIENCY APPLICATIONS BETWEEN ROME AND BRUSSELS: THE COURT OF JUSTICE RULES ON THE DHL CASE

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1. INTRODUCTION

On 20 January 2016, the Court of Justice of the European Union (“CJEU”) issued a seminal judgement on the relationship between the 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 DHL judgement followed a request for a preliminary ruling by the highest Italian administrative court (Consiglio di Stato or “referring judge”), regarding an appeal filed by DHL Express Italy and DHL Global Forwarding (Italy) (together, “DHL”) against the Italian Competition Authority (“ICA”) decision no. 22521 of 15 June 20113 imposing fines on DHL for participating in a cartel in the sector of international road freight forwarding to and from Italy, in breach of Article 101 TFEU (‘the decision at issue’).4

As for the factual background, in 2007 DHL applied for immunity – which it was consequently granted by the Commission - with reference to fines concerning several infringements of the EU competition law in the sector of international freight forwarding. Its immunity covered maritime, air and road

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1 Italian Competition Authority. The author wishes to thank Mr. Gianluca Sepe for his valuable comments on the first draft of this article.
2 At national level, undertakings applying for immunity to the European Commission (“Commission”) are allowed to submit a “summary application” to the National Competition Authorities (NCAs) which might be well placed to investigate the same infringement. By filing a summary application, the applicant protects its position under the NCA’s leniency programme concerned for the alleged cartel for which it has submitted, or is in the process of submitting, a leniency application to the Commission (see paragraph 42 of the ECN Model Leniency Programme).
3 Decision no. 22521 of 15 June 2011.
4 ICA Resolution no. 22521 of 15 June 2011.
transit in the international forwarding sector. However, the summary application submitted by DHL to the ICA on 12 July 2007 under the national leniency programme only referred to the international sea and air freight transport sectors. In fact, it did not provide any information concerning unlawful conducts in the road transport sector.\(^5\)

In the meantime, on 12 December 2007, the ICA received from Deutsche Bahn AG – also on behalf of its subsidiaries, including Schenker – a summary leniency application, pursuant to article 16 of the Italian leniency programme,\(^6\) referring to certain conducts contrary to Article 101 TFEU in the field of international road freight forwarding.

Following this application, on 18 November 2009, the ICA opened administrative proceedings concerning possible infringements of Article 101 TFEU in the international road freight transport sector.

On 15 June 2011, the ICA adopted the final decision at issue, concluding that several undertakings, including DHL and Schenker, had taken part in a cartel in the international road freight forwarding sector affecting operations to and from Italy in breach of Article 101 TFEU.

Importantly, in this decision, the ICA acknowledged that Schenker was the first company to have applied for immunity from fines in Italy for road freight forwarding. Therefore, under the national leniency programme, no fine was imposed on that company. Instead, DHL was ordered to pay fines - which were subsequently reduced by 49% - since it could not qualify for immunity, but only for reduction of fines. The ICA also considered that, in its application of 12 July 2007, DHL had requested immunity from fines only for air freight and sea freight forwarding, having filed the application with reference to road freight forwarding only on 23 June 2008 (see footnote 5).

\(^5\) As clearly stated by the judgement (under paragraph 18), a dispute arose between DHL and the ICA concerning the scope of this summary application. In fact, in DHL’s view the summary application concerned illegal conducts occurring in the entire international freight forwarding and transport sectors, though no specific examples of conducts in relation to road freight forwarding were provided. On 23 June 2008, DHL supplemented its summary application for immunity to the ICA, in order to explicitly extend the application to the international road freight forwarding sector. On that occasion, DHL stated that “the present declaration merely constitutes, for all purposes and effects, a supplement to the application submitted on 12 July 2007, in so far as the additional conduct to which it relates does not amount to a separate infringement not covered by the original declaration and is nothing more than a new manifestation of infringements already reported and, as such, the Commission took account of them for the purposes of the leniency granted to the undertaking.”

\(^6\) Pursuant to Article 15(2 bis) of Law n. 287/1990 (“Competition Act”), on 15 February 2007, the ICA adopted a Notice on the non-imposition or reduction of penalties (Communicaazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell’articolo 15 della legge 10 ottobre 1990, n. 287), which constitutes the Italian leniency programme.

\(^7\) In the meanwhile, on 5 November 2007 and 19 November 2007, Deutsche Bahn AG applied for leniency to the Commission – on its own behalf and on behalf, in particular, of Schenker – respectively for sea and road freight forwarding.
DHL brought an action for partial annulment of the decision at issue before the Regional Administrative Court for Lazio (Tribunale amministrativo regionale per il Lazio) on the grounds that it should have been given the first place in queue for the national leniency programme and therefore immunity from fines. According to DHL, the principles of the EU law require for a national authority to assess the summary leniency application received, taking into account the main application for immunity submitted to the Commission by the company. However, the Regional Administrative Court rejected DHL’s action on the basis that, as a matter of principle, the different leniency programmes and the applications to those programmes were autonomous and independent.\(^8\)

DHL lodged an appeal before the Consiglio di Stato against the first instance judgment, alleging that the decision at issue does not respect the principles set out, inter alia, in the Notice on Cooperation and in the ECN Model Leniency Programme. According to DHL, the ECN’s rules and instruments are binding on the ICA.

Taking into consideration the mentioned circumstances, the highest Italian administrative court decided to carry out the proceedings and refer to the CJEU with three detailed questions concerning the interpretation of Article 101 TFEU, Article 4(3) TEU and Article 11 of Regulation (EC) No 1/2003.

2. THE JUDGMENT OF THE COURT OF JUSTICE

As regards the first question, the referring court asked whether the EU law entails that the instruments adopted in the context of the ECN, in particular the ECN Model Leniency Programme, are binding on NCAs.

The CJEU’s answer was negative. In view of the nature of the cooperation mechanism between the Commission and the NCAs foreseen by Chapter IV of Regulation (EC) No 1/2003, establishing a “network of public authorities applying the EU competition rules in close cooperation,” the Court considered 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” (paragraphs 30, 31 and 32 of the judgment).

As regards, in particular, leniency programmes applicable across the EU to undertakings that cooperate with the Commission or the NCAs in order to uncover unlawful cartels, the Court reminded that neither the provisions of the TFEU on competition nor Regulation (EC) No 1/2003 lay down common rules on leniency (judgment in Pfleiderer, C-360/09, paragraph 20). Thus, in the Court’s view,

8 See Judgment no. 3034 of the Administrative First Instance Court (Tar del Lazio), 29 March 2012.
in the absence of a centralised system at the EU level for the receipt and assessment of leniency applications, such applications before an NCA are assessed under the national law of the Member State of reference (paragraph 36 of the judgment).

According to the Court, such finding is in line with its previous *Pfleiderer* case law, in which the Court had already held that the ECN Model Leniency Programme has no binding effect on national courts (C-360/09, paragraph 22). The Court dismissed DHL’s argument that the latter case law would only apply to courts and not NCAs. Moreover, it held that, since Article 35(1) of Regulation (EC) No 1/2003 provides for Member States to designate courts as NCAs, the uniform application of the EU law in the Member States would be undermined were the binding effect of the ECN Model Leniency Programme to vary depending on the NCA’s nature - judicial or administrative - in the various Member States.

Finally, the Court reinforced its reasoning stating that since: i) the Leniency Notice relates only to the leniency programme implemented by the Commission itself (*Pfleiderer* paragraph 21), ii) and the leniency programme established by the Commission is not binding on Member States (judgment in *Kone and Others*, C-557/12, paragraph 36), *a fortiori*, the same conclusion should also apply to the ECN Model Leniency Programme (paragraph 37 and 42 of the judgment).

As regards the second question, the Consiglio di Stato asked whether Article 101 TFEU and Regulation (EC) No 1/2003 establish a legal link between the application for immunity which an undertaking submits or is preparing to submit to the Commission and the summary application submitted to an NCA with reference to the same cartel.

Again, the answer of the Court was quite straightforward: there is no such legal link under the EU law, irrespective of whether the summary application accurately reflects the content of the application submitted to the Commission. Accordingly, the NCA is not required to assess the summary application in the light of the application for immunity that the undertaking has made or is about to make to the Commission; nor the national authority is required to contact the Commission or the undertaking itself, in order to establish whether the latter 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.

The reasoning of the Court moves from the recognition that the coexistence and autonomy between the EU leniency programme and those of the Member States are a reflection of the system of parallel competences between the Commission and NCAs established by Regulation (EC) No 1/2003. Hence, NCAs are free to adopt leniency programmes, and they are autonomous not only with reference to other national programmes, but also *vis à vis* the EU leniency programme.

In the Court’s view, it follows that, in line with paragraph 38 of the ECN Model Leniency Programme - where a cartel is likely to affect several Member States and may give rise to the intervention of various NCAs, as well as the Commission - it is 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 the national authorities potentially competent to apply Article 101 TFEU.⁹

Consequently, the autonomy of leniency programmes must necessarily extend to the various applications for immunity submitted to the Commission and to the NCAs, since they constitute an integral part of those programmes. Moreover, such autonomy cannot be affected by the fact that the various applications concern the same infringement of competition law.

If NCAs were imposed to assess summary applications in the light of applications for immunity submitted to the Commission, the autonomy of the various applications and the rationale behind the system of summary applications would be questioned. Consequently, if NCAs were obliged to contact the Commission or the undertakings from which they received summary applications in order to obtain further information - where the material scope of those applications is more limited than that of the applications for immunity submitted to the Commission - this would create a hierarchy among applications, in breach of the decentralised system laid down by Regulation (EC) No 1/2003.

The Court also stated that any obligation for the NCA to contact the Commission or the undertaking which submitted a summary application in such cases would risk to reduce the duty of cooperation of leniency applicants, which is one of the pillars of any leniency programme.¹⁰ Consequently, the Court clarifies that it is up to the undertaking to apply to NCAs for leniency so as to avoid any ambiguity as regards the scope of its application. Therefore, there is no obligation on the NCAs to assess a summary application in the light of an application for immunity submitted to the Commission. The Court considered the latter “the only interpretation capable of ensuring respect for the autonomy of the various leniency systems” (paragraph 65).

The Consiglio di Stato also asked the CJEU whether the EU law implies that, where a first undertaking has submitted an application for immunity to the Commission, only that undertaking may submit a summary application to an NCA; or if other undertakings, which have submitted an application for a reduction of fine to the Commission, are also entitled to do so.

This third question stems from the previous formulation of the ECN Model Leniency Programme which did not clarify whether undertakings applying for a reduction of fines under the Commission leniency programme would be entitled to submit a summary leniency application before an NCA. Indeed, such possibility was explicitly foreseen only in 2012, when the ECN Model Leniency Programme was amended accordingly.

⁹ Paragraph 1 of the ECN Model Leniency Programme makes clear that the competition authorities competent to apply Article 101 TFEU in the territory which is affected by the infringement in question may be considered well placed to act against that infringement.

¹⁰ See in this respect, paragraph 78 of the Opinion of the Advocate General Wathelet delivered on 10 September 2015.
In the Court’s view, the 2006 wording of the ECN Model Leniency Programme cannot be interpreted as precluding NCAs from accepting a summary application from an undertaking which has applied for a reduction of fines to the Commission.

This conclusion flows directly from the reply to the first question according to which the instruments adopted in the context of the ECN - in particular the ECN Model Leniency Programme - are not binding on NCAs. Therefore, Member States are not required to incorporate provisions of the ECN Model Leniency Programme in their leniency systems. Moreover, they are also not precluded from adopting, at national level, rules which are not present in that model programme or which diverge from it, in so far as said competence is exercised in compliance with the EU law.

The Court provides further reasons supporting its conclusion. In its view, in fact, the proposed approach is “in accordance with the underlying purpose and spirit of the establishment of the system of leniency applications” inasmuch as that system is intended, inter alia, “to promote the uncovering of conduct contrary to Article 101 TFEU by encouraging participants in cartels to report them. It is therefore intended to encourage the submission of such applications, not to limit their number” (paragraph 81). Therefore, considering that the aim of the Leniency Notice is to create a climate of uncertainty within cartels, the Court highlights that uncertainty may also arise from the fact that only one cartel participant can obtain full immunity and that, at any moment, the Commission may, on its own initiative, detect the cartel. In such context, in the Court’s view, undertakings which are not the first to submit an application for immunity to the Commission and, consequently, are eligible only for a reduction of the fine, may be the first to inform an NCA of the existence of the cartel by lodging a summary application for immunity at national level. In such a situation, should the Commission not pursue its investigation concerning the same matters as reported to the national authority, the undertaking concerned could be granted full immunity under the national leniency programme.

3. CONCLUSION

In conclusion, the DHL judgment represents a significant development in the European antitrust law.

11 See in particular, paragraph 77 of the judgment referring to paragraph 44.

12 Building again on the Pfleiderer case law (paragraph 25) with regard to effectiveness of leniency programmes (considered “useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective”), the Court pointed out 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” to the Commission, as it was the case for Schenker which submitted to the ICA a summary application after applying to the Commission only for the reduction of fines.
Firstly, the CJEU’s answers to the three detailed questions referred by the Consiglio di Stato clearly affirm the principle of autonomy and coexistence between the EU and the Member States’ leniency programmes. The finding of full independence between European and national leniency programmes follows directly from the system of parallel competences between the Commission and NCAs established by Regulation (EC) No 1/2003.

Secondly, the Court acknowledges that the current system is based on the principle according to which, at EU level, there is no single leniency application or a ‘main’ application submitted in parallel to ‘secondary’ applications. Rather, there are applications for immunity submitted to the Commission and summary applications submitted to the NCAs. Hence, cartelists wishing to have their fines reduced are responsible for the completeness, timeliness and correctness of these summary applications, whose assessment is under the exclusive responsibility of the authority to which they are addressed.

Thirdly, far from creating implementation problems or jeopardising the effective application of Article 101 TFUE, such system is perfectly in line with the underlying purpose and spirit of a leniency regime, which is meant to “create a climate of uncertainty within cartels in order to encourage their report.”