HIGHLIGHT

DHL Express (Italy) v. Commission: Getting It Right Beats Being First

Cristina Volpin*

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On 20 January 2016, the Court of Justice of the European Union issued a preliminary ruling concerning the interpretation of Art. 101 TFEU, Art. 4, para. 3, TEU and Art. 11 of Regulation (EC) 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The request was made in proceedings involving DHL Express S.r.l. and DHL Global Forwarding S.p.A. (together DHL), on the one hand, and the Italian competition authority (hereinafter, the AGCM), on the other hand, 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.[1]

On 5 June 2007 DHL submitted a leniency application for full immunity to the European Commission in connection with cartel behaviour in the international freight forwarding sector, including maritime, air and road transit. In September 2007 the Commission granted DHL conditional immunity for its cartel behaviour in the international forwarding sector. In June 2008, the Commission decided to pursue "only the part of the cartel concerning international air freight forwarding services, leaving to the national competition authorities the possibility of pursuing the infringements in relation to the sea and road freight forwarding services".

* PhD, Research Fellow in Competition Law, Centre for Commercial Law Studies (CCLS), Queen Mary University of London and Fellow, Centre for Law, Economics and Society (CLES), University College London, c.volpin@qmul.ac.uk.

[1] Court of Justice, judgment of 20 January 2016, case C-428/14, *DHL Express (Italy) v. Autorità Garante della Concorrenza e del Mercato*.

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At the national level, in July 2007, DHL lodged with the AGCM a summary application for immunity under the national leniency programme.[2] According to the AGCM, the leniency application concerned the DHL's behaviour exclusively in the sea and air freight transport sector, and did not cover road freight forwarding services. In June 2008, DHL submitted an additional summary application for immunity to the AGCM so that it would also cover the road transit sector. Meanwhile, two other participants in the cartel, Schenker Italiana S.p.A. (Schenker) and Agility Logistics S.r.l. (Agility), had submitted a summary application for full immunity before the AGCM, providing information in respect of road freight forwarding services in Italy. Their requests were lodged with the AGCM in December 2007 and in May 2008 respectively, both before DHL submitted its second, supplementary request.

The AGCM identified the relevant market as the market for international road freight forwarding and, with its decision of 15 June 2011,[3] granted full immunity to Schenker as the first applicant, a 50 per cent reduction of the fine to Agility, and a 49 per cent reduction to DHL. DHL appealed this decision, requesting the partial annulment of the decision before the Tribunale Amministrativo Regionale (TAR) del Lazio and, on further appeal, before the Consiglio di Stato, on the ground that it was the first applicant in relation to the international road freight forwarding cartel, and thus that it was the applicant to which full immunity should have been granted.

With preliminary reference of 18 September 2014, the Consiglio di Stato considered it necessary to stay its proceedings and to seek a ruling from the Court as to i) the non-binding nature for a national competition authority (NCA) of the 2006 and 2012 ECN Leniency Model Programmes; ii) the existence of a legally relevant link between an application for immunity submitted to the Commission and a summary application submitted to an NCA; and iii) the legality of the AGCM's conduct, before the publication of the 2012 ECN Model Leniency Programme, to allow undertakings that had submitted an application to the Commission for the reduction of the fine to file summary applications for immunity.

Making reference to *Pfleiderer*,[4] under the first and the third referred questions, the Court stated that: i) neither the Leniency Notice nor the Commission Notice on Cooperation are binding on national competition authorities; and ii) that nothing pre-

[2] Art. 16 of the Italian leniency programme, AGCM decision 16472 of 15 February 2007, *Comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'Art. 15 della legge 10 ottobre 1990, n. 287*, provides for the possibility of filing a summary application before the AGCM, in those cases where the Commission is best placed to deal with a case. An undertaking which has submitted or is preparing to submit to the Commission an application for non-imposition of penalties may in addition submit to the AGCM an analogous application for leniency, drafted in short form, if it considers that the AGCM may also be in a position to take action in the matter.

[3] AGCM, decision 22521, I722 of 15 June 2011, *Logistica Internazionale*, www.agcm.it.

[4] Court of Justice, judgment of 14 June 2011, case C-360/09, *Pfleiderer AG v. Bundeskartellamt*.

cludes an NCA from accepting a summary application for immunity from an undertaking which has submitted an application to the Commission for a reduction of its fine but has not submitted an application to the Commission for full immunity.

Under the second referred question, the Court was requested to decide

> "whether, in the event that the summary application [submitted to an NCA] has a more limited material scope than the application for immunity [made to the Commission], the national competition authority is required to contact the Commission or the undertaking itself, in order to establish whether that undertaking 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".

In other words: absent an EU-wide harmonised system of leniency, and given that an application for leniency to a given authority is not considered as an application to any other NCA,[5] what is the relationship between the leniency application for immunity made to the Commission and a summary application made to an NCA for the same cartel? And more specifically, if a summary application to an NCA does not accurately reflect the content of the application for immunity made to the Commission, can the applicant risk losing part or all of its leniency status at the national level?

According to the Court, which endorsed on this point the opinion of Advocate General Wathelet, there is indeed such a risk. When an application for leniency is made to an NCA, an insufficient description of the cartel in all its aspects leaves scope for other participants in the cartel to be the first to disclose to that NCA the relevant details. As the Court explained, this is the only interpretation that is in line with i) the principle of autonomy of leniency system in respect of other national programmes, but also in respect of the EU leniency programme;[6] and ii) the duty of cooperation of leniency applicants – i.e., one of the pillars of any leniency programme.[7] In the words of AG Wathelet, "any failure in that duty of cooperation is liable to affect the order of arrival recorded for leniency applications and consequently to cause damage to other applicants for leniency in respect of the same cartel – which would amount to a breach of the general principles of EU law, including the principles of non-discrimination, proportionality, legal

[5] Commission Notice 2004/C 101/03 on Cooperation with the Network of Competition Authorities, para. 38.

[6] *DHL Express (Italy) v. Autorità Garante della Concorrenza e del Mercato*, cit., para. 57.

[7] According to point 13 of the ECN Model Leniency Programme (as revised in November 2012), the applicant must cooperate genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure, by, *inter alia*, providing the Commission with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it.

certainty, protection of legitimate expectations and entitlement to sound administration".[8]

The first commentators noted that the judgment may create "uncertainty as, by definition, complete descriptions are very hard".[9] This is a fair point, but on the other hand, how is an NCA supposed to assess whether information regarding a significant part of the activity of the cartel (in this case, the one concerning road transport) was omitted maliciously or whether it was just an inattentive or unintentionally incomplete rendering of the description of the case? It is not obvious why the firm in question, which would normally be the one best placed to conduct an internal investigation, should not be required to do its due diligence and carry out such an investigation (admittedly under time pressure) before applying for leniency, rather than imposing such a burden on the NCA.

Undoubtedly, at the time when the first application is submitted, there may be some uncertainty as to certain details of the case. But if the Court had decided differently, this might have been akin to admitting that withholding crucial information when applying for leniency is a viable strategy. Within reason, an applicant should always be encouraged to submit more, rather than less information.[10] In the lack of a "one-stop shop" for the processing of leniency applications, the omission of certain information when filing for leniency should remain a risky choice for the undertaking in order to encourage the reporting of cartels to the NCAs.

[8] See also Opinion of Advocate General Wathelet delivered on 10 September 2015, *DHL Express v. AGCM*, cit., para. 78.

[9] C. Osti, *DHL Express (Italy) v Commission: Guidance on Parallel Immunity/Leniency Applications,* in *Journal of European Competition Law & Practice*, 29 April 2016, jeclap.oxfordjournals.org.

[10] T. Obersteiner, *International Antitrust Litigation: How to Manage Multijurisdictional Leniency Applications,* in *Journal of European Competition Law & Practice*, 2013, p. 21 *et seq*.