

Access and Cartel Cases: Ensuring Effective Competition Law Enforcement

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1. Introduction

It is nothing new nor should it come as a surprise that competition law is the stage *par excellence* for the verification of situations of conflict or collision between competing rights and interests. In particular, and as the author puts it, the “inherent tension between a number of competing interests” (p. 1) makes the question of access to the European Commission’s cartel case files a difficult one¹. Now, if one considers that access is “key to ensuring effective private enforcement” (p. 4) while at the same time acknowledging that transparency, in particular vis-à-vis the leniency applicant and its behaviour, may not only face resistance from companies, but also lead to a decline in leniency applications, the root of a “downward spiral” (p. 269), a genetic ambivalence between the private and the public enforcement of European Union (‘EU’) competition law becomes clear. Indeed, while it is true that the former seeks and, to a certain extent, actually contributes to the effectiveness of the latter, one needs to ensure that a desire to secure the different interests and ends pursued by both does not end up undermining their effectiveness.

Through a clear and thorough analysis of one of the most important topics in anti-competitive infringement proceedings – access to the

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¹ The same applies to other national competition authorities’ files. These, hereinafter referred to as ‘NCAs’.

Commission's files –, this book provides a comprehensive roadmap, containing not only the relevant legislative framework, but also the decision-making practice and the case law from which the results of a difficult balancing exercise between conflicting rights and interests of NCAs, parties, complainants and third parties can be drawn. The book closes with a suitable proposal to alleviate the tension between private enforcement and the leniency system, which solves the former's problem of information asymmetry, while also ensuring the latter's survival.

2. Description and structure

In light of the need to achieve an answer that ensures “both public and private enforcement while at the same time respecting the fundamental rights of parties and third parties” (p. 257), the book is structured in five parts. It begins with an overview of the rules governing access to the Commission's files and the protection of fundamental rights in the EU (Part I) and then proceeds with an analysis of the problem from the different perspectives of national competition authorities (Part II), parties and complainants (Part III) and third parties (Part IV). As to Part IV, it is used as a bridge to address the relationship between the problem of third parties' access to the process and the role of the leniency system. The book closes with a single-chapter Part V, containing a summary of the main conclusions and a proposal titled “The Way Forward”.

As regards the order in which each part and respective chapters are presented, we are particularly pleased with the decision to open with the legislative framework, which is the basis for the subsequent parts. This introductory analysis actually allows the reader to understand some of the complexities of the decision-making practice and the case law on the matter. Also worthy of mention is the ending of each topic with a set of concluding remarks, providing the reader with a more fluid transition between the different “perspectives” under analysis.

Thus, as far as the organisation and formal structure of the book are concerned, our general assessment is positive. In this respect if there is any less meritorious option to point out, it refers to the adoption of single chapters (in Parts II and V), introducing an additional division that, in our view, could perhaps have been dispensed with.

Part I. The Legislative Framework

The first part is divided into two chapters, one addressing the rules governing access to the Commission's cartel case files and the other focusing on the EU protection of fundamental rights. Besides the broader and more general legislative pieces, including the Treaties, the EU Charter of Fundamental Rights ('CFR') and the Transparency Regulation, the author addresses two Antitrust Regulations in particular (Regulations 1/2003 and 773/2004), along with other soft law instruments, also important for the subject matter. The Damages Directive, which is dealt with more fully in Part IV, is also of relevance.

As for the Chapter two in particular, besides giving colour to the author's introductory remarks on the Charter serving "both as a sword and a shield" (p. 6) in the quest for the protection of evidence held by the Commission, the author examines the nature of competition law proceedings in light of the European Court of Justice ('ECJ') case law. In this respect given that the "obligation to observe the standards of fundamental rights protection that flow from ECHR has [now] a constitutional status in the EU" (p. 35), and in order to understand the scope of companies' rights not only to access the case files, but also to prevent them from being accessed by NCAs, complainants, third parties, and other targeted companies, the chapter provides the reader with the main conclusions to be drawn from the criminal law nature of competition law procedures², in particular in what concerns the standard of protection and the procedural guarantees arising from such consideration.

This two-fold background allows that, following a concise historical excursus through the events and reasons behind the upgrading of transparency and the right of access "from a right at the mere discretion of public officials to a fundamental right protected by the Charter and Treaty provisions" (p. 19), the different rights and interests that may come into play when someone is seeking access to the Commission's files (and that justify the exceptions or limitations to the disclosure provided for in the applicable rules) are presented.

Part II. National Competition Authorities

Part II departs from the recognition of multinational cartels' specific features, whose prosecution calls for strict cooperation among competition

² Based on Articles 101 and 102 of the Treaty on the Functioning of European Union cases.

authorities. Now, since a “valuable component in the cooperation between competition authorities is information exchange” (p. 47), it is important to safeguard targeted companies and their employees’ fundamental rights to defence and privacy, as well as the effectiveness of the leniency system. Before proceeding with her binary analysis of *i)* cooperation reaching outside the EU and *ii)* information exchange within the ECN, the author advances that, in light of a fundamental rights approach, “any exchange of information between competition authorities must be (i) surrounded by clear rules, (ii) challengeable before the EU Courts, and (iii) not allowed unless it can be guaranteed that the third country authority has reason to suspect the company of an infringement of its own competition rules, and only uses the information for the purpose of its own investigation against that company” (p. 60).

Despite these general pre-conditions, the development of the matters dealt with in Part II reveals a “clear dividing line between the cooperation that takes place between the Commission and the NCAs and the cooperation that takes place between the Commission and authorities outside the EU” (p. 72). While the latter is seen as unproblematic, the fact that Article 28 of Regulation 1/2003 limits the use of information collected by the Commission during its cartel investigations to the purpose for which it was acquired, alongside the Charter’s binding force and the general principles of EU law, supports the author’s conclusion that “the Commission should be prevented from transmitting any information from its case files to third country authorities, at least unless such transmission was already foreseen in the request for information or the inspection decision” (p. 73). In order to substantiate such a conclusion, and after a brief consideration of the status of International Agreements within the EU legal order, the author analyses two bilateral cooperation agreements in more detail: the US Agreement and the Swiss Agreement. The subsequent analysis of the rules surrounding information exchange within the ECN and the “unique experience” (p. 72) provided for ECN closes the loop, making the need for different answers clearer in this respect.

Part III. Parties and Complainants

Part III is organised into two chapters, each aimed at the targeted companies, on the one hand, and at a special group of third parties – including the complainants and the interveners in annulment actions before the General Court –, on the other.

Chapter four deals with the right of the targeted companies to access the file and presents, in addition to a more specific examination of the relevant rules in this respect, a clear analytical framework on the questions of who is given access, when should access be granted, and which documents should be given access to. In this respect, the author's critical note regarding the distinction between access to documents received before and after the Statement of Objections merits highlighting. In addition, the disclosure of confidential information (considered not to be accessible in general), when needed to assure companies' right(s) of defence, is also one of the subjects covered in this chapter. As for the consequences of *i*) the Commission's failure to grant access to the file as well as *ii*) the parties' misuse of information, they are also taken care of. As for the former, it follows from the Court's case law that, given that access to the file "is not an end in itself but intended to protect the rights of the defence" (p. 115), a Commission's infringement decision will only be annulled if the parties' defence rights have been infringed and "immediately and irreversibly affected" (p. 105). The chapter then ends with a relevant discussion on the application of Article 6 of the European Convention on Human Rights ('ECHR') to court proceedings. The conclusion is that, once the case reaches the General Court, any irregularities during the administrative phase shall be remedied, "as there may otherwise be a violation of the right to a fair trial" (p. 114).

Chapter five addresses both the (quasi-)right of complainants that, in the author's own words "seems to be designed, to a large extent, to primarily serve the purpose of the procedure and not the interests of the third parties concerned" (p. 119), and the condition of interveners in direct actions before the General Court. After a careful consideration of the relevant case law, the chapter finishes with an important conclusion on the different meaning or scope of protection of the targeted companies' right of access to the file vis-à-vis these third parties' rights. Such a conclusion does not undermine, however, the possibility for cartel victims to prove that they have a legitimate interest or that they may somehow assist the Commission in the investigation, therefore being granted access to information which may prove useful and be used in cartel damages proceedings.

Part IV. Third Parties and the Role of the Leniency Programme

Part IV is the most extensive division, with four chapters. It paves the way for the treatment of the tension between the problems faced by third parties when seeking access to the file and the need to avoid harming the interests of investigation and targeted companies' fundamental rights. In this respect, both access under the Transparency Regulation (Chapter six) and through national courts (Chapter seven) are considered.

Chapter six provides the reader with a summary and critical analysis of the case law on access under the Transparency Regulation, in which the refusal to provide third parties with access to the file is based on a general presumption of the application of the exceptions provided for in Article 4 of the Transparency Regulation. The distinction between administrative and legislative activity of EU institutions, the need for harmonization with the Antitrust Regulations, as well as the proportionality of the request, also play a role in creating an imbalance in favour of public enforcement.

As for access through national courts, dealt with in Chapter seven, the author notes that, while the principle of sincere cooperation "requires the Commission to assist national courts in their application of EU law" (p. 168), the Damages Directive comes as a "game changer" (p. 170), since it is now clear that not only are competition authorities to be considered a last resort for national courts when it comes to requesting documents, but there are also limitations as to what evidence may be sought from the Commission and when.

Chapter eight focuses on the Commission's most recent practice to adopt longer and more detailed public versions of its infringement decisions. While this may be a path that, at least, helps cartel victims limit their requests, thus allowing the Commission or national courts to grant access or order the disclosure of the relevant pieces of evidence, careful attention is to be paid to the need *i)* to safeguard confidential information and professional secrecy as well as *ii)* to respect the principle of presumption of innocence. As for the latter, references to undertakings which were not ultimately mentioned in the operative part of the infringement decision, are among the topics that deserve the most caution. This explains why the Hearing Officer's mandate and respective extension are not to be neglected in this respect. Finally, despite being – in theory – a friendly procedure towards private enforcement, targeted companies' reluctance to accept the extension of such decisions and associated litigation lead to the postponement of their publication, which ends up being detrimental to potential cartel victims.

The title of Chapter nine is self-explanatory, as it actually tries to remedy the tension between private enforcement and the effectiveness of the clemency system. For that, it begins with a brief presentation of the features that contribute to the effectiveness of a clemency system and how they are affected by private enforcement. In addition, the author presents a brief overview of the whistleblowing system, in order to test whether it could function as a substitute or alternative solution to the leniency policy. A negative answer to the question justifies a conclusion on the need to maintain the attractiveness of the leniency system, under which the tension with the private enforcement system and, in particular, with the content of the Damages Directive, needs to be resolved. According to the author, this could be done either by raising “the stakes for those participating in cartels by imposing higher fines and introducing individual sanctions” (p. 247) or by extending “the leniency system to cover immunity from damages” (p. 247). Given the insufficiency of the former, the later is to be considered. Indeed, while it is true that it may “seem immoral or unjust to let cartel offenders off the hook” (pp. 248-249), “if only one firm can escape liability, that would not only destabilise cartels but would also allow cartel victims to be compensated for the harm caused to them” (p. 249). In order to build on such option, the chapter closes with a quick overview of the US experience, in particular after the adoption of the Antitrust Criminal Penalty Enforcement and Reform Act in 2004.

Part V. Summing Up

Part V consists of a single chapter entitled “Joining the Dots”, in which the author summarises each of the chapters in a concise and reader-friendly style, paving the way for a final reflection entitled “The Way Forward”. Having considered the possible mechanisms or features that need to be assured, in order to keep the leniency system’s attractiveness, and once information asymmetry problems felt within the private enforcement system have been addressed, the author concludes with the suggestion that “the leniency programme is extended to also cover liability for damages” (p. 270). Despite the fact that this “will have to be a matter for the EU legislator, and thus a matter for the future” (p. 271), the chapter closes with a note of hope that the question is brought “within a foreseeable future, as the EU competition law enforcement system would otherwise risk losing much of its effectiveness” (p. 271).

3. Critical analysis

Access and cartel cases: Ensuring Effective Competition Law Enforcement should certainly figure in the libraries of all those who may find themselves in need of either accessing the European Commission's files, or preventing such access from others, in order to safeguard their legally protected rights and interests. From NCAs to targeted companies, to complainants, interveners and third parties, this book offers them all a comprehensive analysis of the problem, as well as the way it is understood by the Commission's decision-making practice and the CJEU's case law.

The use of simple (but no minimalist) words, along with the concluding remarks at the end of each point, provide the reader with a fluid and absorbing text, allowing one to immediately grasp the importance of each chapter without having to wait for a final conclusion. Apart from the exhaustive treatment of the legislative framework and the main precedents on the matter, the author provides us with her personal and unique analysis, which, as well as being detailed, seeks to ascertain the basis for the solutions provided for in the legislation and case law, while also, and when justified, presenting a well-founded criticism.

As to any less positive note to point out (if there is one), it refers to the slightly sparse treatment of the process of classification of confidentialities and the preparation of non-confidential versions of documents. While the author refers to a problem and actually analyses it, mainly in Chapter four, a more profuse treatment could be given to the conclusion that "Article 27(2) [of Regulation 1/2003] also makes it clear that nothing in the article shall prevent the Commission from disclosing and using information necessary to prove an infringement. This also means that confidentiality may have to give way to targeted companies' defence rights" (pp. 88-89). In particular, we consider that it would be of the utmost interest to analyse whether such a waiving of confidentiality is to be accepted as legitimate, when the Commission is in possession of non-confidential versions that only omit a few segments of information and whose substitute descriptions, combined with the possibility of consulting the respective confidential versions *i*) at the Commission's premises and *ii*) by a restricted set of persons (e.g., companies' lawyers), still allow the undertakings' rights of defence to be satisfied. Let us think, for instance, of non-confidential versions that merely omit personal data of individuals (collaborators or workers of the targeted companies). Under this same heading, while it is true that the author makes a brief allusion to the topic of personal data protection, when she

analyses the General Court's ruling in *Pilkington* and in *Evonik Degussa*, a more careful consideration could have been given to the need to reconcile the targeted companies' rights of defence with the protection of personal data in the EU. An option could be to add to Chapter three an autonomous analysis of the right of privacy from the point of view of the individuals whose personal data may be revealed during an inspection or as a consequence of a request for information.

Despite these minor criticisms, we believe Helene Andersson offers the reader a work that demonstrates the refinement and completeness of her object. Besides, the author's boldness to put forward solutions that, although rather demanding, are needed to properly provide answers to a latent problem in competition law – the need to address, balance and weigh conflicting rights and interests – also contributes to make this a must-read book. In this sense, *Access and cartel cases: Ensuring Effective Competition Law Enforcement* is, without doubt, to be considered a reference among competition law scholars, practitioners, and enforcers.