Patchwork or framework?

Vassili Moussis of Gibson Dunn & Crutcher LLP examines parallel competences in European cartel enforcement

The lack of a one-stop shop for leniency applicants in Europe, combined with the very rapid take up by national competition authorities of leniency programmes, is bringing to the fore some of the weaknesses of the so-called system of "parallel competences" in which the European Commission and competition authorities can jointly apply article 81 of the EC Treaty.

The regulatory framework for enforcement of cartels at European level

Currently, cartel enforcement activities in Europe are not subject to a strict division of competences between European enforcement agencies. Rather, the EC cartel rules are enforced jointly by the commission and the competition authorities. This situation is further complicated by the fact that, in most cases, competition authorities apply the EC cartel rules in parallel with their own national cartel regulations.

There is therefore a rather convoluted European cartel regulatory framework. At one level, the EC cartel rules are enforced in parallel by the commission and the competition authorities. At another level, the competition authorities have exclusive competence to enforce their own national cartel regulations. The two levels co-exist and are not mutually exclusive, although cooperation rules exist and a European Competition Network, which comprises the competition authorities and the commission, has been set up to ensure effectiveness and consistency of enforcement.

Because there are no strict work-sharing rules for public enforcement against cartels at the European level, each authority is responsible for its own investigation and leniency programme. One of the key consequences, and perhaps the main drawback of the system of parallel competences, is that an application for leniency to one authority is not equivalent to an application for leniency to any other European competition agency.

In relation to the enforcement of the EC cartel rules, the "network notice" provides that under the system of parallel competences, cases can be dealt with by a single competition authority, or several competition authorities acting in parallel, or by the commission. There are also cases where the commission will take the lead in one national market and leave other national markets to other competition authorities.

The network notice provides that an authority is well placed to deal with a case if there is a material link between the infringement in question and the territory of a member state. It adds that the commission is "particularly well placed" to deal with a case if an agreement has effects on competition in more than three member states, either because the market is considered to be cross-border or because the agreement actually affects three or more member states.

Although the network notice provides rules of case allocation, these rules are purely indicative in that no authority is obliged to act or prevented from acting on a given case. To ensure that the same agreement or practice involving the same infringement on the same relevant geographic and product markets will not be investigated by multiple competition authorities, article 13 of the implementing Regulation 1/2003 provides a legal basis for suspending proceedings on the grounds that another authority is dealing or has dealt with the case. Here as well, though, it is made clear that there is no obligation on a competition authority to suspend a proceeding. The system is purposefully designed so as to leave some margin of discretion to the authorities in deciding whether to examine a case.

There are, however, a number of mechanisms that have been put in place to ensure the coherent and consistent application of the cartel rules at European level (although these are not specific to cartels).

First, there is under Regulation 1/2003 EC a general obligation to apply community law whenever there is an effect on trade in a manner that ensures convergence between national and community law. Second, there is an obligation imposed upon competition authorities to inform the commission at the latest 30 calendar days before an envisaged decision. Third, the commission is able to intervene if there is a serious risk of incoherence either with established community law or between the envisaged decisions of one or more competition authority, by relieving them of their competence to act.

The drawbacks of the current system

Clearly, the main drawbacks of the current European cartel regulatory framework derive from weaknesses in the practical implementation of the system of parallel competences of EC cartel rules. Particularly in the case of cross-border cartels, concerns arise from the perceived discrepancies in the various national regimes which are governed by separate rules and procedures.

Faced with these issues, the idea of a pure European one-stop-shop system for the investigation of cartels appears to be a highly desirable objective for the business community and enforcers alike. For enforcers, it would mean that they could control the outcome of a case and ensure consistent, efficient and hopefully expedient enforcement of the antitrust rules. For the business community it would substantially increase the incentives to report a cartel, as a one-stop shop would be the best guarantee of a consistent review of cases and of a predictable outcome. Consistency and predictability are very desirable features of a leniency system.

As will be shown below in the review of some recent cases, the current European framework does not always guarantee consistency and predictability. Under the current system, even the identity of the authority that will ultimately review and decide the case is not clear from the outset. This often leads to immunity applicants filing in as many jurisdictions as may ultimately become competent to decide the case, to ensure that immunity will be secured in any event. Such a scattergun approach is often not practicable, both in terms of minimising the exposure against civil litigation liability and also in terms of the administrative, financial and management costs of preparing leniency applications in lots of member states.

It must be recognised there are a number of legal and practical considerations that still make the adoption of a European one-stop-shop system problematic. Faced with these difficulties, the commission has opted for the double objective of promoting legal consistency through the adoption of common leniency rules, and of streamlining the procedural rules by improving the handling of parallel leniency applications among European Competition Network members.

Soft harmonisation through the ECN model leniency programme

The current trend among member states to introduce leniency programmes (there were only four such programmes in 2002, while today there are 24) compounds the problem – not only because of the different rules and procedures between authorities, but also because of potentially different outcomes for applicants in cross-border cases.

Faced with this flurry of new leniency regimes, the European Competition Network launched the model leniency programme in September 2006. It is aimed at improving the handling of parallel leniency applications among network members. Although the programme does not amount to a one-stop-shop leniency solution, it is a first step towards the harmonisation of the multiple leniency regimes that exist across the EU.

The programme sets out the principal elements network members believe should be common to all their leniency programmes. This includes substantive rules in the form of recommendations on the type of information an applicant should be prepared to provide to obtain immunity and a coherent set of termination and cooperation duties, as well as procedural rules in the form of a streamlined procedure for processing applications.

In addition, the programme introduces a new procedure for a uniform summary application system for cases concerning more than three EU member states. Under the summary application system, if a full immunity application has been made with the commission, competition authorities can accept temporarily to protect the applicant's position on the basis of a limited amount of information, which can be given orally. Should a competition authority wish to take action, it will grant the applicant additional time to complete its immunity application.

The way the system is meant to function is that the competition authority in question will not grant or deny immunity on the basis of a summary application. Instead, it will confirm the applicant is the first to file with that authority and will protect that applicant's place in the queue. So the summary application acts as a type of marker, albeit one of indefinite duration, in the sense that it will protect the applicant's position until the competition authority requests more information. It presents the clear advantage that it lifts the burden of detailed multiple filings in numerous member states.

Although the programme is not legally binding, the agreement of all competition authorities operating within the European Competition Network ensures they consider the principles established in the programme as common to all of them, and are committed to aligning their respective programmes with those principles.

Practical applications

Gas-insulated switchgear

In January 2007, the commission fined 11 European and Japanese groups of undertakings a total of over €750 million for participating in a cartel for gas-insulated switchgear (GIS) projects.

> The current European framework does not always guarantee consistency and predictability

In its decision, the commission took the view that the geographical scope of the GIS projects market is at least as wide as the European Economic Area. This is because the major suppliers sell GIS not only in their own home markets but also all over the world. It is presumably due to the cross-border nature of the markets in question that the commission was the primary investigating authority in Europe in this case.

Although the commission issued its decision in January, in April the Czech competition authority imposed fines totalling €33.4 million on a number of participants in the cartel that had been sanctioned by the commission, including all the Japanese participants in the EU case who did not have any sales in the EU. The Czech proceedings were initiated in late 2006 following an application for immunity by ABB (which applied for immunity both at EU and at relevant competition authority level).

The decision sets the highest ever fine imposed by the Czech competition authority and it breaks new ground as it is the first time that penalties have been imposed at the Czech level against an agreement not to conduct business in Czech territory (in this case, the Japanese companies had agreed to abstain from competing in the Czech GIS market).

The Czech competition authority appears to have investigated and sanctioned the same conduct relating to the same cartel as the commission. But it stated that its case only relates to the conduct of those companies from 2001 to 2004, which is before the Czech Republic acceded to the EU. This also means that the commission's investigation and calculation of the fine in the GIS case were in relation to the EEA territory before the accession of the new member states, including the Czech Republic. Indeed, the commission's decision states that the conduct being sanctioned ended in May 2004, which coincides with the month in which the Czech Republic acceded to the EU.

The Hungarian competition authority (GVH) also imposed fines in December 2005 (while the commission investigation was under way) for the same cartel, but made a clear statement on the reason for the fines:

> *The GVH could not apply community law since the infringement took place before the EU accession. On the other hand, the need for the GVH to initiate a proceeding under Hungarian law was not influenced by the fact that the commission was conducting its inquiry under community law. Although a worldwide cartel was discovered, the commission's proceeding covered only the territory of that time's European Union. So the commission did not examine the cartel's effect on the market of the subsequently accessed member states. Therefore in the present case, though based on different laws, the European Commission and the GVH examined the same infringement with respect to different territories. But this kind of parallel investigation cannot happen any more after Hungary's accession to the EU.*

If the same case had arisen after Hungary's accession to the EU, it is likely the commission's investigation would have also covered the territory of Hungary, so alleviating the need for separate Hungarian proceedings. The above three cases are useful precedents in the context of new member states joining the EU and of possible similar parallel investigations occurring at that time.

Lifts and escalators

In February 2007, the commission imposed its highest fine yet (€992 million) on Otis, Kone, Schindler and ThyssenKrupp for operating cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands.

The commission found the undertakings operated four distinct geographic cartels rather than one EEA-wide cartel. Each of the cartels in Belgium, Germany, Luxembourg and the Netherlands was treated separately,

and immunity and leniency applications were also treated on a country-by-country basis. This meant that Kone, for example, obtained immunity in Belgium and Luxembourg but was not awarded any reduction in the fine for the other two jurisdictions. The commission's decision to treat the conduct as four separate cartels may have been driven by the evidence uncovered, which seemed to be available on a country-by-country basis, even though the commission found the allocation of projects was similar in all four member states.

On top of the commission fine, in December 2007, the higher regional court in Vienna imposed fines totalling €75.4 million on five members of a national lift cartel, in the first-ever implementation of Austria's new leniency programme.

The press release states that ThyssenKrupp was the immunity applicant and that Otis applied for leniency and received a 50 per cent reduction of its fine. All four of the undertakings fined by the commission in its lifts and escalators decision were investigated and fined by the Austrian authority.

What is not clear from the press releases issued by the commission and the Austrian authority is why the case was not dealt with entirely by the commission – especially in light of the commission's statement by that the undertakings operated four distinct geographic cartels rather than one EEA-wide cartel and that it fined each cartel separately in each of the four member states. Although the commission recognised that this was not a single European cartel, it did consider that it was the best-placed authority to review the cartels in the Benelux countries and Germany, but not Austria.

We also know that the Austrian case was prompted by an application for immunity by ThyssenKrupp in February 2006, almost a year before the commission issued its decision, but clearly at a time when ThyssenKrupp could anticipate the outcome of the commission's proceedings, given that the statement of objections was notified to the parties in October 2005. Having been found to be a repeat offender, the commission increased ThyssenKrupp's fine by 50 per cent for a total fine of €479 million, but ThyssenKrupp, faced at the time with the prospect of a very significant fine, seems to have taken the initiative and applied for immunity in other member states prior to the commission's decision.

The Austrian decision makes an explicit reference to the commission decision of February 2007 as being one that concerned similar antitrust offences by the same undertakings in other member states, but no further explanation is given for why the Austrian market was not part of the commission's review.

An explanation for this division of work could be that the inter-agency consultation that should have taken place within the European Competition Network showed that the Austrian cartel should be considered separately from the Benelux and German cartels, possibly because the facts were somehow different.

This last explanation is made more plausible by the commission's statement in its decision that the four cartels it reviewed displayed "common elements" which justified that it addressed its objections to the four cartels in one statement of objections in the interest of "efficient administration", without any reference to Austria or the Austrian cartel.

The commission's efforts towards soft harmonisation should be seen as a positive first step

Once the decisions are published, the reason why the Austrian cartel was not included in the commission's review may become clearer. It would certainly have been more efficient for the commission to review the Austrian market as well. Such a review by a single European authority would have created a more predictable outcome with significant time and cost savings for the undertakings concerned.

Flat glass

In November 2007, the European Commission fined Asahi, Guardian, Pilkington and Saint-Gobain for coordinating price increases and other commercial conditions for deliveries of flat glass in the EEA, a total of more than €486 million.

Although the case is recent and the decision has not yet been published, the commission announced that the case began on it own initiative following help it received by member states' competition authorities, in the context of the European Competition Network. Raids were carried out in February and March 2005 in a number of European locations. As such, the commission claims that it is a clear demonstration of the benefits of enhanced cooperation between it and the competition authorities.

Certainly, this case demonstrates that a number of competition authorities cooperated within the European Competition Network to share information about the cartel and presumably to agree that the commission was "particularly well placed" to investigate and decide upon the case. In this regard, the commission's press release seems to imply that it took the view that the markets in question had an EEA-wide scope, presumably because flat glass is a generic product commonly used in large buildings but also in private dwellings across the EEA. Although this is not clear from the statement, it also appears that the case allocation occurred at an early stage of the procedure, thereby apparently doing away with any parallel investigations.

So the flat-glass case is a good example of cooperation within the European Competition Network which has led to efficient case allocation among its members.

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Although the discretion left to competition authorities in Europe in deciding whether to investigate a cartel case may ultimately help the authorities to ensure effective enforcement, it does create some issues for the applicant or prospective leniency applicant.

First, it means that applicants are often left with no other option than to file leniency applications with all possible relevant authorities, ideally at the same time. Second, an applicant may feel that the lack of compulsory case-allocation rules means that certain aspects of the case may be investigated by two or more authorities, leading to the possibility of contradictory results, increased legal costs, and quite possibly to higher total fines than would be the case should a single European authority have exclusive competence for the review of the case.

Nevertheless, the commission's efforts towards soft harmonisation should be seen as a positive first step towards achieving a higher level of consistency and predictability for companies being investigated and for prospective leniency applicants alike.

It is hoped that the commission, working within the European Competition Network, will further streamline the process, perhaps by agreeing a set of clear and predictable case-allocation rules which will serve as a procedural road map for companies wishing to apply for leniency at the European level. In the meantime, clearer statements about policy in individual cases as well as increased transparency of the European Competition Network would be greatly welcomed.