

CARTELS WORKSHOP : AN ADVANCED SEMINAR ON SUBSTANTIVE AND PROCEDURAL EU DEVELOPMENTS

2nd Cartels Workshop: An advanced seminar on substantive and procedural EU developments

Workshop I - Substantive Issues, Wednesday 20 January 2021

Interview with Maria Jaspers (DG COMP)

by Kyriakos Fountoukakos (Herbert Smith Freehills)



***Maria Jaspers** (Director of the Cartel Directorate, DG COMP) has been interviewed by **Kyriakos Fountoukakos** (Managing Partner, Herbert Smith Freehills) in anticipation of the **2nd Cartels Workshop**, to be held online with a series of 2 webinars on Wednesday, January 20th and Thursday, January 21st.*

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Kyriakos Fountoukakos: What impact has the Covid-19 pandemic had on the level and nature of cartel conduct being reported to the Commission? Has it led to any increase in complaints or leniency applications? Are parties raising the Covid-19 crisis as a defence? Will you recognise the crisis as a mitigating factor in future decisions?

Maria Jaspers: I am afraid that we have every reason to suspect that the pandemic and the economic crisis that has followed have increased incentives to collude, be it through more open so-called ‘crisis cartel’ schemes or through more classical hidden cartels. Experiences from previous crisis have shown that suspending or relaxing the competition rules as a short-term solution to support companies in distress will most likely delay recovery and create market conditions that would be difficult to reverse. The Commission clarified at the outset of the COVID-19 crisis that it would not tolerate companies using the crisis as an excuse or cover to enter into cartels or other illegal behaviour. We are closely monitoring certain sectors and following up on leads to be prepared to take action if needed.

I am not aware of any cartel case where a party has invoked a COVID-19 crisis defence. In light of the signals that the Commission and other competition enforcers have sent, this would also seem to be a very risky strategy to rely on for cartels that have not yet been detected or reported. Nor has the Commission in any of the cartel decisions adopted since the summer agreed to reduce the envisaged fines. Taking into account the current situation, the Commission has however agreed to extend the time period within which fines and penalty payments have to be paid (from three to six months).

In terms of procedure, what practical impact has Covid-19 had on the cartel enforcement work of DG Comp? To what extent has it curtailed your ability to carry out unannounced inspections? How are you overcoming these difficulties?

Although the fight against cartels remains as important as it was before the crisis, the lock-down has had an impact on the enforcement activities in two main respects. First, we recognised the exceptional difficulties that companies faced, notably in the early phases of the lock-down. We adjusted our priorities and reconsidered certain envisaged steps that would have triggered the need for immediate business reactions (such as requests for information or the notification of Statements of Objections), if and when warranted. Secondly, we had to find virtual alternatives to several procedural steps, including in the evidence gathering. We had already launched the eLeniency tool in 2019, enabling companies to submit statements with the same high level of protection as the oral procedure (that would have required a presence in the Commission’s premises). This, of course, turned out to be a very timely and useful investment and the tool has been used frequently for documents submitted in the context of leniency, cartel settlement or antitrust cooperation procedures. Various forms of meetings, that were in the early days of the lock-down simply postponed, were gradually replaced with virtual exchanges and we have now gathered positive experiences with e.g. Advisory Committee meetings and settlement meetings. We did, however, decide to refrain from carrying out planned inspections that would have required a longer presence in company premises in several Member States. We are confident that we have found solutions that would allow us to make full use of our evidence-gathering powers even during the remaining period of various degrees of confinement and sanitary rules.

In recent years we have seen a huge growth in follow-on damages claims against cartel participants. Is there an increasing risk that the prospect of facing such claims will deter potential whistle-blowers from disclosing cartels to the Commission in the first place, thereby undermining the effectiveness of your leniency programme? May this factor also make parties less willing to settle cases? Put simply, has the pendulum swung too far in favour of private enforcement?

We have indeed seen a huge growth in follow-on damages actions. This is in line with the overall goal of the 2014 Damages Directive, to promote private enforcement across the EU and ensure that victims are able to get full compensation for the harm caused to them by the cartelists. The Directive foresaw the tension between public and private enforcement and included safeguards that were meant to ensure that leniency programmes could continue to play an important role in the detection, prosecution and overall destabilisation of cartels. This included ensuring that self-incriminating leniency statements are never disclosable and that immunity applicants are, as a rule, only liable to their own customers (rather than being jointly and severally liable for the entire harm of the cartel). The question today is whether these safeguards are sufficient to ensure the ultimate interplay between private and public enforcement.

I think that the Commission leniency programme, which is transparent and predictable and is founded on strong enforcement and significant sanctions, remains attractive to applicants. However, I do recognise that there may nowadays be a shift in attitudes towards applying for leniency, with a range of external factors at play, some of which both the business community and we are only now gaining the experience to address. This includes the impact of damages claims, where companies know that they will likely be exposed to claims but they do not yet know what that means in terms of costs. In order to navigate this changing landscape, DG Comp is, however, already actively assessing ways to maintain the attractiveness of our leniency programme, engaging in discussions with the business community and with other competition authorities around the globe.

As for settlements, we haven't seen any indications that parties are less willing to pursue this procedure because of potential damages claims. On the contrary, many parties point to the fact that shorter decisions in settlement cases help minimise the exposure to private damages.

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