Reforming Competition and Consumer Policy: CCP Consultation Response by Andreas Stephan*

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

How to incentivise leniency applications

The question of why leniency applications are becoming less common in the UK (and across many other competition enforcement regimes) is difficult to answer conclusively. For example, it is possible that infringements are becoming less frequent due to the deterrent and educational effects of past CMA and OFT enforcement. It could also be that cartel infringements have become more sophisticated, in maintaining robust incentives to stop cartel members from reporting to the competition authority.[1] Nevertheless, there is growing anecdotal evidence from competition lawyers that two factors are having a 'chilling effect' on companies' willingness to report a possible infringement: the fear of follow-on actions for damages and, to a lesser extent, the danger of prosecution under the criminal cartel offence.

This seems counter-intuitive, as both private enforcement and the cartel offence are meant to enhance and not hamper the CMA's work. It is important that consumers and other businesses affected by anticompetitive behaviour can obtain appropriate compensation for the harm they have suffered.[2] It is also of great importance that individuals responsible for an infringement face some direct punishment, whether that is the cartel offence, an individual fine (not currently available to the CMA under the Competition Act 1998), or a competition disqualification order under the

* Professor of Competition Law, School of Law and Centre for Competition Policy, University of East Anglia. Email: [redacted]

[1] See C Argenton, D Geradin and A Stephan, *EU Cartel Law and Economics* (OUP 2020), Chapter 4.III.

[2] Ibid, Chapter 6.II.

Enterprise Act 2002.[3] In the absence of personal sanctions, those responsible bear very little direct risk from breaking competition law.

As the cartel offence is rarely prosecuted, it is the significant growth in private enforcement that has become the stronger of the two chilling factors. The main problem is that the protections currently offered to the successful immunity applicant appear to be inadequate. The attractiveness of immunity from a public fine is undermined where there is little to protect the firm from subsequent damage claims that could be of equal or greater magnitude to that fine. In essence, the growth in private enforcement has meant that immunity no longer amounts to immunity. Also, private enforcement procedures can be significantly more protracted than the CMA's investigation.

The proposed solution in the consultation is to strengthen the incentive to self-report by extending immunity from a public fine to protections from exposure to follow-on cases for damages. This measure is perfectly consistent with the economics literature on leniency and is justifiable if it incentivises leniency applications in connection with cartels that would not otherwise come to light.[4] The compensatory function of private enforcement is important, but the detection of cartels by the CMA is paramount, given that the vast majority of private enforcement in the UK appears to be *follow-on* actions (i.e. those that rely to some extent on a prior CMA infringement decision). The absence of US style cost and discovery rules, and treble damages, means that the incentive and capacity to bring *stand-alone* actions is limited (at least in relation to Chapter I infringements). It is these original actions that should be the priority when encouraging private enforcement, as they relate to infringements that are not discovered and brought to an end by public enforcement.

However, increasing the protections for the immune firm only, may serve to compound this chilling effect and fail to encourage more leniency applications. Effective leniency programmes provide a scale of incentives to cooperate. Typically, the first firm to step forward is granted immunity, the second perhaps a 50% discount in fine, the third 30% etc. This means that there is a strong incentive to come forward and cooperate, *even if the applicant is not confident they will be the first to approach the competition authority*. By contrast, protection for the first cooperating party only, in the context of private enforcement and 'no action' letters to employees with respect to the cartel offence, amount to a compelling offering, so long as the party can be sure they will be first to report. Additional protection with respect to private enforcement can compound this problem, as the non-immune firms will be joint and severally liable for all the cartel's harm. If the immune party happens to be the largest undertaking in the arrangement, then this can leave the others feeling particularly vulnerable. The absence of any scaled protections similar to those provided by the leniency programme in relation to public fines, may cause undertakings to be more cautious – especially in relation to Competition Act infringements that fall short of a 'hard-core' cartel. The preferred strategy will be to wait and see if an investigation is opened and only then cooperate in return for leniency.

Assuming this chilling effect holds true and there are many cartel infringements going undetected by either CMA investigations or stand-alone actions for damages, then priority setting is key. If we accept it is right to prioritise the uncovering of cartels through public enforcement, to bring them to an end and impose fines in the interests of deterrence, then a trade-off is needed. One possible solution is to use the *voluntary redress scheme* (discussed in this consultation on pp. 66-7) as the

[3] See A Stephan, 'Four Key Challenges to the Successful Criminalisation of Cartel Laws' (2014) *Journal of Antitrust Enforcement* 2(2), pp. 333-362.

[4] For a summary of the key literature see: A Stephan, 'An Empirical Assessment of the European Leniency Notice' (2009) *Journal of Competition Law & Economics* 5(3), pp. 537-561.

way to facilitate compensation for injured parties (in particular consumers), while providing a blanket protection from private enforcement as far as it relates to the subsequent awarding of damages. In the absence of pecuniary damages (which are generally not awarded in England and Wales for competition cases), private enforcement serves a purely compensatory role that can be served by the voluntary redress scheme. The possibility of essentially settling cartel liability in its entirety as part of the CMA's decision would provide a very strong incentive to come forward.

Protecting whistle-blowers

One key weakness of competition law enforcement globally, is an overreliance on leniency as a detection tool. Competition authorities do rely on other detection techniques, such as acting on complaints from customers and market monitoring methods, but cartels are inherently clandestine arrangements that are exceedingly difficult to observe. Whistle blowers provide a very promising alternative source of information to corporate leniency programmes and indeed their existence might even spur on the use of leniency and an undertaking's internal compliance efforts. The motivation for whistle-blowing is varied, but can include disgruntled former employees and those within an organisation who observe behaviour they feel is unethical or immoral and which the employer is failing to address internally.

The problem is that the act of whistleblowing can have very damaging effects on that individual because it is often seen as an act of betrayal or breach of confidence.[5] Indeed, research shows that the experience of the whistle blower can be far more miserable than that of the price fixer – especially as it relates to future employment prospects and possible legal action by the employer.[6] Those responsible for price fixing often escape the worst consequences of their actions within the firm by being relied upon to provide evidence of the infringement for the purposes of applying for leniency, to meet the requirement of continued and complete cooperation by the leniency applicant's current and former employees.[7]

There are therefore two characteristics that are very important to an effective whistle-blower programme. The first is ensuring the individual's anonymity. The idea that this might lead to spurious investigations or infringement decisions is largely unfounded, so long as the competition authority does not have to rely solely on the information provided by the whistle-blower to arrive at an infringement decision. It is therefore right that greater certainty be given over the handling of whistle-blowers' identity across the enforcement process. An absolute prohibition on the disclosure of a whistle-blower's identity unless the CMA relies on their evidence should be welcomed, but the whistle-blower should be given the opportunity to withdraw their evidence if the CMA cannot avoid using it as part of its investigation.

The second important element is an ample financial reward where the information leads to a successful investigation, to make the whistle-blowing procedure attractive, but also to reflect the level of risk taken by that individual in terms of jeopardising future employment prospects and risk

[5] See A Stephan, 'Is the Korean Innovation of Individual Informat Rewards a Viable Cartel Detection Tool?' in T Cheng, B Ong, and S Marco Colino (eds.), *Cartels in Asia* (Kluwer 2015). Also available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405933

[6] Ibid.

[7] See A Stephan, 'The Price Fixer: Compliance Perspectives from the Other Side' in A Riley, A Stephan, and A Tubbs (eds.), *Perspectives on Antitrust Compliance* (Concurrences, forthcoming 2021/2). Also available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3852073

of breaching non-disclosure agreements with current or former employers.[8] The CMA's current policy is to offer "financial rewards of up to £100,000 (in exceptional circumstances)".[9] It is suggested that the maximum reward should be closer to £1m, where that is appropriate to the value of the information provided (i.e. where a major cartel arrangement is exposed that would not otherwise have been detected) and the level of risk assumed by the whistle-blower.[10] A reward of this magnitude makes it more likely that an individual with some direct involvement in the cartel will come forward, although some would question the propriety of providing a financial reward to those with some responsibility for the cartel.

30 September 2021

[8] The CMA's experience of offering a whistle-blower reward is not shared publicly, but a review of such schemes around the world in 2015 suggested that very significant levels of reward were necessary for such a scheme to be successful. See footnote 5.

[9] CMA, *Rewards for Information about Cartels*.

[10] See Stephan, footnote 5.