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Crédit Agricole: rejection of attempt to (further) delay publication of Commission cartel decision

Miguel Sousa Ferro*  


One more challenge to the publication of a Commission infringement decision is rejected by the GCEU, in the provisional measures stage, based on absence of fumus boni juris.

But the delay effect is achieved. Successive appeals based on the repetition of an argument repeatedly rejected by the Court raises concerns about the balance of conflicting interests.

I. Legal context

By an Order of 25 October 2018 (‘T-419/18R’), the President of the General Court of the European Union (‘GCEU’) rejected an application for provisional measures by Crédit Agricole (‘CA’), sought against a decision of the Hearing Officer, adopted under article 8(2) of Decision 2011/695/EU, and ultimately aimed at preventing the publication of the European Commission’s (‘EC’) 2016 decision on the euro interest rate derivatives cartel before the elimination of certain information deemed by CA to be confidential.

II. Facts

On 7 December 2016, the EC adopted decision C(2016) 8530 final, in case AT.39914, imposing fines totalling EUR 485 million on CA, HSBC and JPMorgan Chase, for colluding on euro interest rate derivative pricing elements and exchanging sensitive information. The same practice had already been the target of a 2013 decision, relating to four other banks which, unlike these three, chose to reach a settlement with the EC. As concerns CA, the cartel was in place in the whole EEA, between October 2006 and March 2007.

According to the EC’s press release, the ‘importance of transactions in euro interest rate derivatives is enormous for banks and corporations. (...) [I]n June 2016, the worldwide gross market value of euro interest rate over-the-counter (OTC) derivatives represented US$ 6401 billion (currently around €5980 billion)’ (IP/16/4304).

CA appealed the Commission’s decision, and the case (T-113/17) is pending.

Almost two years later, the non-confidential version of the 2016 decision has not yet been divulged. The only official information available on it is the EC’s press release. As is standard practice, following the adoption of the decision, the EC entered into negotiations with the undertakings in question to prepare its public version, and no agreement was reached (although the EC complied with part of CA’s requests). CA referred the matter to the Hearing Officer.

On 27 April 2018, the Hearing Officer adopted Decision C(2018) 2743, dismissing CA’s arguments. CA appealed this decision to the GCEU, claiming that 60 paragraphs and 47 footnotes should be fully or partly omitted, and asked for provisional measures. It argued that:

(i) the decision wrongfully included allusions to infringing conduct by CA prior to the infringement period, that it cannot challenge, infringing the presumption of innocence;

(ii) publication of the decision before the Court rules on the appeal in case T-113/17 infringes the presumption of innocence and the principle of full and effective judicial review.

A parallel case is pending before the Court, regarding the same decision, but with additional legal grounds, initiated by JPMorgan Chase (T-420/18).

III. Analysis

Under article 278 TFEU, as a rule, appeals of EC decisions do not have suspensive effect (presumption of lawfulness). Only exceptionally may a suspension be granted by the Court.

To be successful in obtaining provisional measures in a case such as this one, an applicant must, firstly, show

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**fumus boni juris** relating to the confidential nature of the information in question (at first glance, it must appear plausible that the information is known by a limited number of persons and that its dissemination may cause significant damages to interests worthy of protection) (T-419/18R, 20–23 and 26).

After recalling that there are two differing branches of case-law relating to **fumus boni juris** (T-419/18R, 27–28; contrasting C 512/16P(R), 60, with C-278/13P (R), 68–69), the President of the GCEU concluded that no further discussion was required, as CA 'manifestly' failed to show **fumus boni juris** (T-419/18R, 29–30).

Argument (i) related simply to references to exchanges of information on 4 October 2006, 12 days before the beginning of the infringement period (T-419/18R, 61–62). It was set aside by recalling that it is up to the EC to assess the usefulness of the inclusion of information in the published decision, so as to describe the context of the infringement; that, since only non-confidential information can be published, it is pointless to debate whether the EC can publish information which is not 'essential' to the decision; and that information not relating to the infringement does not involve a declaration of infringement (T-419/18R, 37–38, 63 and 65). The Court distinguished case T-474/04, where the decision refusing omission of references to an infringement from the body of the decision was annulled (T-474/04, 74–80). This case was different because there the undertakings was not an addressee of the decision (due to time-barring), whereas here the applicant could and did challenge the decision, including the assertions in question (T-419/18R, 41–44, 64 and 66–67).

As for argument (ii), the Court stressed that, instead of showing the confidential nature of the elements in question (commercially sensitive information which could be used by other companies to their advantage in competition), CA argued predominantly that, as a matter of principle, the description of the alleged infringing behaviour should be deemed confidential, because of the presumption of innocence, which is clearly not what results from the law and case-law (T-419/18R, 33, 40, 46, 48, 60).

Articles 28(2) and 30 of Regulation (EC) 1/2003 require the EC to publish the main content of its decisions and to omit only legitimately protected business secrets (T-419/18R, 34–35). It is settled case-law that, given the public and private interests served by the publication of a cartel decision, and considering the possibility of its judicial review, an undertaking does not have a legitimate interest in preventing the details of the infringement to be made known to the public. The Court made it a point to emphasise the need to protect injured parties’ right of access to the decision, and that stopping or delaying private enforcement is not a legitimate interest (T-419/18R, 36, 39, 51–54).

It is also settled that information at least 5 years old should be presumed to no longer be confidential. The information in question related to facts up to 2008, and appellant did not show why, despite the passage of time, it would still be relevant today (T-419/18R, 49–50).

Finally, it cannot be argued that the publication of EC cartel decisions while appeals are pending infringes the right to a full and effective judicial review (T-419/18R, 59).

All in all, this Order was predictable and straightforward, as will, expectably, also be the outcome of the judgment in the main case. Its importance is not so much for the legal issues directly raised (none are novel), but for its practical significance and for the debate it should generate as one more in a series of similar challenges that have come before the Court in recent years.

**IV. Practical significance**

Disputes such as this one may bring up conflicts of legitimate interests.

Undertakings accused of having infringed Arts. 101/102 TFEU must be given a chance to ensure that the EC does not divulge confidential information, potentially damaging to themselves or third parties. This can only be achieved if the EC holds off on publishing the decision while the Court is asked to review the confidentiality of the information in question.

But there is also a public interest in the publication of the decision, an indispensable ingredient in the recipe of competition policy. And direct and indirect clients/suppliers and competitors need to see the decision to understand the infringement in question and determine if they suffered damages as a result thereof.

Postponing publication means preferring the first interests over the latter. A reasonable outcome, perhaps. But only if the delay does not jeopardise the effectiveness of the protection of the latter interests. This may not always be the case, as far as private enforcement interests are concerned.

First, these situations may create uncertainty regarding time-barring. Thanks to the suspension resulting from Directive 2014/104/EU, this will generally not be a problem, in itself, if the infringement decision was also appealed. But if only the publication of confidential information is challenged, the decision may become *res judicata* many years before it is made public. Cartel
participants may try to argue that the press release provided enough information.

Second, typically, cartel decisions are adopted many years after the facts (herein, 10 years after beginning of infringement). We must then add the 5 years which, best case scenario, it takes for GCEU and CJEU appeals to be decided. As a result, by the time potentially injured parties have a decision which allows them to understand the behaviours in question, in detail, 15 years or more will have elapsed. Finding evidence of sales/purchases and other factual elements after such a long period of time may be nearly impossible.

This problem isn’t solved by Directive 2014/104/EU’s presumption of damages in cartel cases, because: (a) the injured parties must still prove causality, which is impossible without proof of purchase/sale of the products in question; (b) the injured parties must still somehow quantify damages or risk very low estimations by the Court; and (c) this presumption doesn’t apply to vertical agreements, decisions of associations of undertakings or Art. 102 cases.

Third, problems were also created here for solidary liability, but these are not specific to situations of challenges to the publication of the decision.

More importantly, there are disputes – and I believe this one is an example thereof – where there is no legitimate interest being put forward. The arguments concerning the (extremely old) information on exchanges a few days before the beginning of the infringement period were, in this case, manifestly irrelevant. All that remains is the argument that antitrust decisions shouldn’t be published while an appeal is pending. But the Court has already clarified this issue (see, e.g., C-162/15 P-R and C-517/15 P-R). It’s a mere formalism that allows undertakings to keep raising it.

Ideally, solutions should be sought during the administrative proceedings and written into the law. But there is much that the Court can do. It can, for example, start treating such actions as pure delay tactics, and punishing undertakings for litigating in bad faith. It may also clarify the obligation of the EC to grant access to its decisions – even to confidential information therein, and even while such appeals are pending –, based on a test of proportionality of the interests in conflict, and especially when faced with an order from a national court, in response to pre- or post-filing requests of access to documents. Finally, the Court should be mindful of the implications of this litigation for the uniformity of the enforcement of EU Competition Law, since the publication of decisions by NCAs is (or may be) subject to different rules and lead to asymmetrical protection of undertakings’ and injured parties’ rights.

In the meantime, CA’s delay strategy has been successful, and the decision has not yet been made public.

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