

GIANNI, ORIGONI, GRIPPO & PARTNERS

GCLC Lunch talk
Interplay between EC and
domestic leniency applications

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Substantive convergence

- Why substantive convergence increasingly matters when applying EU competition rules across the EU:
 - **Proliferation of similar cases** before NCAS having common origins
 - Cases stemming from EC leniency applications
 - In the past NCAs have been dealing mainly with **country specific cases**
 - To date NCAs increasingly deal with **very similar cases**, i.e. similar conducts (e.g. the cosmetic case)
 - Need for consistency is more compelling

Substantive convergence

ILLUSTRATIONS

A) Convergence of assessment criteria when applying EU competition rules to similar conducts

- **Italy - The cosmetic case** (Decision of 15 December 2010 available at www.agcm.it)
 - What the case is about
 - **Information exchange** between cosmetic suppliers in the context of the branded good association regarding contractual terms and conditions applied to retailing chains
 - Why is it interesting
 - It originates from an EC immunity application
 - It has generated a string of different national cases (IT, DE, SP, FR)

Substantive convergence

- **The information exchange**
 - General information on the planned sell-in **price increases expressed in ranges** (e.g. "+3-5%" or "-3%")
 - General discussion on the state of **negotiations between producers and distributors**
 - General information on possible level of **discounts and bonuses** awarded to distributors
 - Information on problems due to **market entry** of new competitors

Substantive convergence

- **The information exchange**

The leniency applicants put emphasis on the fact that the exchanged information



*"was generally **related to the sell-in price list on the whole** and single products were **not mentioned**"*

*"concerned aggregated/generic data **could not influence the commercial policy** of the applicant and its competitors"*

Substantive convergence

- **ICA Final decision**

The final decision: The ICA holds **all** the cosmetic producers members of Centromarca responsible of

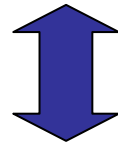
- *“**hard-core agreement** .. among all the cosmetic producers”*
- *“**continuous and extensive** information exchange”*
- *“**generalised alignment** of the price list increases”*

- **Total fines imposed**

- **MORE THAN 81 MILLION EUROS**

Substantive convergence

- **The Italian case v other cases in the EU**
- In IT exchange of information treated as a **hard-core restraint**



- In DE similar exchange of information involving the same cosmetic suppliers and displaying similar features treated as a **less serious infringement** (decision BKA 20 February 2008 and follow up)

Substantive convergence

B) Convergence of assessment criteria when applying the leniency toolkit

- **The notion of added value**
- What type of evidence is necessary in order to meet the requirement of “**significant added value**”?
 - See the Italian Cosmetic case
 - Third leniency applicant – corporate statement claiming a much longer duration of the anticompetitive conduct **not corroborated by any documentary evidence**

Summary applications

- **Practical illustrations of possible problems**
- **Scenario 1**
 - Company A files immunity application with the **EU Commission only** and
 - **no summary applications with NCAs**
 - **No protection** in case of NCAs taking jurisdiction

Summary applications

- **Scenario 2**
 - Company A files immunity application with the **EU Commission** and
 - **summary applications with NCAs**
 - Summary applications are drafted in a **concise manner**, per relationem to the EC application
 - **Risk of exposure** in case NCAs take jurisdiction on specific aspects which were **not explicitly mentioned** in the summary application

Summary applications

- **Scenario 3**

- Company A files immunity application with the **EU Commission** and
- **summary applications with NCAs**
 - Summary applications are drafted in a very **detailed manner** and provide an account of all the country specific aspects of the case
 - **Risk of incentivising** the NCAs to assert jurisdiction due to “country specific” aspects of the case

Scope of the investigations and last trends

- **Higher risks** for practices falling in **grey areas** to be investigated by the Commission and the NCAs due to
 - Recent **Guidelines on Horizontal Co-operation Agreements** qualifying information exchanges restrictive by object
 - **NCA past practice** (e.g. ICA tough stance vis-a-vis exchanges of information)