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C-39/18P, *Commission v. Icap Management Services*: The Rights of Defense in a Dissuasive Fining System

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Summary

On July 10, 2019, the European Court of Justice ("CJEU") dismissed the Commission's appeal and confirmed the General Court's approach as to the insufficient reasoning for calculating the fine imposed on the facilitator of the cartel on the Japanese Yen interest rate derivatives market.[2] Many other issues have been raised in this case, as the "by object" nature of the infringement, the liability weighing on cartel facilitators, the duration of the infringement, and the breach of the presumption of Icap's innocence. This article focuses on the impact of the Commission's lack of transparency in calculating the amount of the fine.

Facts of the Case

In the Yen Interest Rate Derivatives ("YIRD") sector, the Commission uncovered seven distinct bilateral infringements which lasted between one and ten months in the period between 2007 and 2010. The anticompetitive conduct concerned discussions among traders of the participating banks on certain Japanese Yen ("JPY") LIBOR submissions. The implicated traders also exchanged commercially sensitive information related either to trading positions or to future JPY LIBOR submissions.

The Commission's investigation uncovered that Icap facilitated six of the seven cartels in the YIRD sector through various actions that contributed to the anticompetitive objectives pursued by the cartelists, and in particular, by (i) disseminating misleading information to certain JPY LIBOR panel banks via the so-called "Run Thrus," which were veiled as "predictions" or "expectations" of where the JPY LIBOR rates would be set;[3] (ii) using its contacts with several JPY labor banks with the aim of influencing their JPY LIBOR submissions;[4] (iii) and serving as a communications channel between a trader of Citigroup and a trader of RBS and thereby enabling the anticompetitive practices between them.[5]

The Commission Decision

As a result of this anticompetitive conduct, the European Commission fined the UK-based broker Icap 14,960,000 Euros for having breached EU antitrust rules by facilitating several cartels in the YIRD sector. Among the condemned banks, only the Icap broker waived the right to claim the benefit of the transaction.

The General Court Judgment

On November 10, 2017, the General Court partially overturned the decision against Icap. With particular regard to the calculation of the fine, the General Court noted that the Commission did not state in its decision the methodology used to determine the amounts of the fines and therefore annulled, on the ground of insufficient reasoning, the part of the decision setting the fines.[6]

The Judgment of the European Court of Justice

The European Commission appealed against this decision and asked the Court to set aside the judgment of the European Union Tribunal. In July 2019, the European Court of Justice confirmed the General Court's approach.[7]

Critical Analysis of the Decision

The Perverse Effects of Strengthening Competition Law Predictability

To set the amount of the fines, the Commission was subjected to the following problem: Icap was not active on the YIRD market. It was acting as a facilitator for the cartel, and the 2006 Guidelines provide only limited guidance on the calculation of the fine for facilitators.[8] Hence, the inclusion of the value of sales, i.e. the brokerage fees collected, would not have reflected the seriousness of the infringements. The Commission, therefore, applied paragraph 37 of the 2006 Guidelines, which allows deviating from the methodology set out in the Guidelines.

The General Court noted that the use of the paragraph 37 does not allow the Commission to dispense with the need to apply an alternative methodology for setting fines. The Commission thus had to provide a fuller account of its reasoning and not be satisfied with a general statement saying that basic amounts imposed on the companies reflect the gravity, duration, and nature of their participation in the infringements.

The Commission's main argument to justify its methodology is related to the objective of deterrence. Indeed, it underlined paragraph 37 of the 2006 Guidelines which states that "*although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology*."[9] The argument is an implicit reminder of the dual nature of deterrence which opposes and combines so-called "specific" and "general deterrence."[10]

Specific deterrence aims to punish the offender and convince him/her that the breach provides a benefit lower than its cost while general deterrence consists in sending a clear signal to all economic agents in the market to create a climate of fear that discourages recidivism.[11] While specific deterrence would have justified the implementation of a clear method of calculating the fine, conversely, general deterrence implies the application of an adequate and proportionate fine to the seriousness of the offense without indicating all the figures and calculations made to determine the amount of the fine.

In essence, general deterrence targets rational economic agents, considering that the choice of whether or not to comply with the law depends mainly on a cost-benefit calculation derived from the breach.[12] In the present case, the Commission's choice to not explain its methodology for setting fines reflects the desire to neutralize companies' rational predictions on the amount of penalties. The Court's rejection of the Commission's justification is somehow surprising concerning the famous *Pioneer* case, in which it considered:

> *The undertakings cannot require the Commission to indicate to them, in the course of the administrative procedure, the criteria on the basis of which it intends to calculate the fines. To give indications as regards to the level of fines forecasted, before the undertakings have been given an opportunity to submit their observations on the allegations against them,* ***would be to anticipate the Commission's decision and would thus be inappropriate.***[13]

The Court justified the lack of transparency in the method of setting fines regarding the deterrence objective, considering the need to counteract the rational expectations of rational economic agents by making the fine level unpredictable. This approach is not devoid of logic if we recall Damgaard's study, which showed a causal link between knowledge of the law and incitement to break it.[14] It highlights the perverse effect of strengthening the predictability of competition law. According to the study, people with a better knowledge of the law are more likely to participate in a cartel than those with a weak competitive culture. Consequently, according to the "bad man theory,"[15] it could be assumed that the more economic agents know about the technical method of calculating fines, the better they are at measuring it and thus at making predictions about the legal risk of the infringement.

Furthermore, in the *AC-Treuhand* case, the Court did not reject the Commission's reasoning which had set as a lump sum the basic fine level imposed on the undertaking which had facilitated the cartel.[16] In the *AC-Treuhand* case, the General Court considered that there was only one single facilitator, which justified the imposition of a lump sum fine because the Commission did not have to take into account the risk of unequal treatment between facilitators.[17] This argument is questionable: Does this mean that in the case of a single facilitator, the Commission does not have an obligation to state reasons for the amount of the fines? The duty to justify the sanction by modeling the fining methodology should apply regardless of the number of facilitators. The observation that there are one or more facilitators does not change the fact that in both cases, the method of calculating fines was not precise. Realistically, there is undoubtedly, behind this decision, the judge's desire to limit the blur surrounding the fining methodology for competition law infringements along with reducing the discretion left to the Commission when it sets the sanctions.

The present decision seeks to achieve a better understanding of the fining policies. To ensure the consensus on the duty to state reasons for the fines imposed, the Court used a crucial argument, which is the need to protect the rights of defense.

The Beneficial Effects of Strengthening Competition Law Predictability

Recently, there have been many competition cases in which the respect for fundamental rights have been invoked in court and have had a significant impact on the outcome of the decision.[18] The criminal nature of the fines explains why fundamental rights are often invoked in court. In a sense, the decision is consistent because it is in line with recent cases such as the *UPS* case in which the General Court annulled the Commission's decision on the *UPS/TNT Express* merger, finding that the Commission

had infringed UPS's rights of defense in its use of an econometric model that had not been shown to UPS.[19]

The deterrence policy is weighed against the crucial protection of the rights of defense. The strict assessment of the respect of these rights is welcome for the following reasons:

First, it helps to ensure the right to a fair trial, which is consubstantially linked to the opportunity for the accused person to defend oneself. Living under the Damocles Sword of fines without having the possibility to be familiar with the legal and factual elements on which the sanction is based is deeply unfair. There are no equal fighting chances when a company is fined on the basis of incomprehensible reasoning that cannot be challenged, precisely because it does not understand it. The rights of defense and the transparency of the law are two sides of the same problem: To mitigate the asymmetry between the competition authority and the accused firms, we must strengthen the understanding of the rules to give them the opportunity to defend themselves better when in court.

Second, it helps to limit Type 1 errors. When companies are fined without justification, it is a "new sort" of Type 1 error.[20] The more the basic amount of the fine imposed is unclear, the more the uncertainty creates an over-enforcement error. This type of error generates a significant social cost: A risk of bankruptcy and opportunity costs when the resources usually allocated to research and development are mobilized to pay the fine. This can reduce innovation in the marketplace and have negative consequences for both the company and the consumers, who are deprived of new products.

Third, legal clarity could limit behavioral biases that would encourage law violations.[21] More accurately, ambiguity aversion biases define the human tendency to keep information that is easy to understand.[22] The increasing complexity of competition law forces individuals to consciously or unconsciously remove unclear rules. The clarification provided by case law makes it possible to restore the function of the law, which is to deliver a message that individuals can assimilate and memorize. Accordingly, in cases where companies would not understand the criteria on which the fines are imposed, it would create cognitive illusions that there is no logic or justice in the imposition of fines – this loss of confidence in legal rules would be a first step towards encouraging people to break the rules.

Fourth, from a more general point of view, the debate on the duty to state reasons must lead to profound thinking on the accessibility of competition law for the "average Joe." Usually, the question of the law accessibility falls into a debate on the access to evidence, which seems to be considered from a purely material point of view. Still, the expression "to have access" has a double meaning: On the one hand, it refers to the possibility of physically holding evidence to fulfill a complaint. The victim who does not have access to the evidence loses one's access to law: Without evidence, no right. On the other hand, it refers to what is accessible, not materially, but intellectually. Precisely, with regards to the absence of any clear explanation on the factors taken into account by the Commission in determining the level of fines, it is as if the rules are becoming intellectually inaccessible to companies subject to competition law, making it difficult to disseminate a culture of compliance in Europe. At the same time,

the competition law culture is affected by the lack of explanation in the Commission's sanction decisions.

Conclusion

The judgment of the CJEU in Icap v Commission causes ambivalent feelings. It expresses the difficulty of harmonizing a dissuasive and unpredictable sanction policy with the rights of defense. Nevertheless, the reinforcement of the duty to state reasons is to be welcomed in view of the right to a fair trial. More broadly, the duty to state reasons, by clarifying vague legal method on behalf of which companies are fined, reduces the legal hazard and reinforces the general confidence toward competition law rules; and confidence in norms is the path to strengthen the consensus on pecuniary penalties for competition law infringements.

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[2] CJEU, *European Commission v. Icap and Other*, July 10, 2019, aff. C-39/18 P.

[3] European Commission, *Yen Interest Rate Derivatives*, Aff. AT.39861 C(2015) 432 final, p. 23 §79.

[4] OJEU, "Summary of Commission Decision of 4 February 2015 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement," 15/09/2017, C 305/10. §16.

[5] European Commission, *Yen Interest Rate Derivatives*, aff. AT.39861 C(2015) 432 final, p. 23 §79.

[6] TUE, "The EU General Court annuls in part the Commission's decision against the ICAP Group in the cartels relating to Yen interest rate derivatives," Icap e.a./Commission, Press release T-180/15.

[7] CJEU, *European Commission v. Icap and Other*, July 10, 2019, aff. C-39/18 P.

[8] TUE, *Icap v. European Commission*, November 10, 2017, aff. T-180/15, §19.

[9] OJUE, "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003," (2006/C 210/02)

[10] Id. §4.

[11] CA Paris, April 9, 2002, n° 2001/19855, Géodis Overseas France.

[12] Gary Becker, "Crime and Punishment: an economic approach," 169 (76) Journal of Political Economy (1968). – Steven Levitt & Stephen Dubner, "Freakonomics," ed Folio (2005) p. 45.

[13] CJCE, June 7, 1983, *SA Musique Diffusion française and others v. Commission of the European Communities*, aff. 100 to 103/80, Rec. 01825, §4.

[14] Mette Damgaard, et al. "The Impact of Competition Interventions on Compliance and Deterrence," Final Report, study for the Office of Fair Trading. (December 2011), p. 12 ("*The behavioural experiment also reveals that knowledge about competition law may not only be associated with greater compliance but may also be a sign of potential non-compliance, as respondents that reported being more knowledgeable about competition law were more likely to choose the riskier (cartel) option in the experiment, and required a lower possible pay-off for taking the risk*." The study shows that 47.5 percent of participants who are familiar with antitrust legislation choose the cartel compared to 17.9 percent who do not have this knowledge.

[15] Oliver Wendell Holmes, "The path of the law," 10 Harv. L. Rev. 457. (1897): "*If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict*." – Richard Posner, "Introduction to the essential Holmes: Selections From The Letters, Speeches, Judicial Opinions, And Other Writings Of Oliver Wendell Holmes," ed. University of Chicago Press (1992).

[16] CJEU, *AC-Treuhand v. Commission*, October 22, 2015, C-194/14 P, EU:C:2015:717.

[17]CJEU, Op. A.G. E. Tanchev, May, 2 2019, C-39/18 P, *Commission v. NEX International Limited*, ECLI:EU:C:2019:359, obs. Alain Ronzano, "Fines: Advocate General Tanchev asks the Court of Justice of the European Union to dismiss the Commission's appeal and confirm the General Court's approach to the insufficient reasoning for the calculation of the fine in the case of interest rate derivatives denominated in Yen (NEX International)," May 2, 2019, Concurrences Review N° 2-2019. – Alain Ronzano, "Fine: The Court of Justice confirms the General Court's approach to the insufficient reasoning for the calculation of the fine imposed on the facilitator of the cartel on interest rate derivatives denominated in yen (NEX International a.o.)", July 10, 2019, Concurrences Review N° 2-2019.

[18] Jeremy Jourdan, "Competition Law and Fondamental Rights," 9 (10) Journal of European Competition Law & Practice, 666–677 (December 2018). – Simon Holmes & Sir Marcus Smith QC, "Rights of defence and competition law: An overview of EU and national case law," 18 July 2019, e-Competitions Bulletin Rights of Defence, Art. N° 90706.

[19] Marjolein De Baker, "The European Court of Justice's Judgment in Case C-265/17 P, Commission v. United Parcel Service," Competition Policy International (February 2019).

[20] In theory, a Type 1 error refers to an undue conviction of a lawful or pro-competitive practice. In the present case, the Icap practices were unlawful, it is the amount of the fine that is questionable.

[21] Uri Gneezy & Aldo Rustichini, "A Fine is a Price" 29 (1) The Journal of Legal Studies 1-17 (2000). – John Neumann & Oskar Morgenstern, "Theory of games and economic behavior," ed. Princeton University Press, (1944).

[22] Mark Machina, "Ambiguity and Ambiguity Aversion," The Handbook of the Economics of Risk and Uncertainty, June 29 (2013).