

Ansökan om forskningsmedel

Datum

2016.01.29

Observera att ansökan med bilagor endast ska skickas elektroniskt till konkurrensverket@kkv.se

1 Sökande (huvudansvarig för projektet)

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3 Projektbeskrivning

Projekttitel För att radbryta texten, använd Alt + Enter

Access to the European Commission's Files in Cartel Cases - Promoting or Preventing Effective Enforcement of the European Competition Rules?

Projektet avses starta, datum

2017.01.01

Projektet beräknas vara slutfört, datum

2019.12.31

Sammanfattning av projektets syfte, betydelse och genomförande (högst 1400 tecken).

För att radbryta texten, använd Alt + Enter

Projektet skall kartlägga vilka olika regler som styr Europeiska kommissionens utlämnande av handlingar i kartellärenden. Syftet är att fastställa om gällande ordning på bästa sätt säkerställer en effektiv kartellbekämpning och samtidigt respekterar gällande regler kring handlingars offentlighet och enskildas grundläggande rättigheter.

På senare år har det skett en stark utveckling inom flera av EU:s rättsområden. Inom konkurrensrätten har både den offentliga och den privata tillämpningen skärpts. Samtidigt har såväl reglerna kring handlingars offentlighet som skyddet för enskildas rättigheter stärkts. Det finns idag ett stort antal aktörer, där bland nationella konkurrensmyndigheter och enskilda skadelidande, som har ett intresse av att ta del av Kommissionens handlingar i kartellärenden. Utgivandet kan i många fall gagna en effektiv kartellbekämpning, men riskerar också att ha motsatt effekt om det leder till ett minskat antal leniencyansökningar, en minskad samarbetsvilja hos företagen, eller tvingar kommissionen att lämna ut handlingar som kan skada en pågående utredning. Samtidigt föreligger risk att enskildas rättigheter inte alltid tillvaratas. Idag regleras utgivandet av handlingar av ett stort antal regelverk. Mycket talar för att de olika reglerna inte harmonierar och därmed heller inte garanterar en balans mellan olika intressen.

Projektet kommer att inledas med en systematisk genomgång av gällande regler och riktlinjer utifrån ett rättsdogmatiskt perspektiv. Därefter kommer de olika regelverken att ställas mot varandra för en analys av hurvida gällande ordning är konsistent och säkerställer en effektiv kartellbekämpning.

Bifoga en utförligare projektbeskrivning (max 10 A4-sidor).

4a Redovisning övriga kostnader

	År 1	År 2	År 3
Material och utrustning			
Resor			
Övriga kostnader			
Summa	0	0	0

5 Kostnadssammanfattning (anges i kronor) för nu sökt anslag

Total projektkostnad

1 834 164

Därav söks från

Tidigare erhållna anslag från

Konkurrensverket 100%	Annan anslagsgivare *	Konkurrensverket	Annan anslagsgivare **
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*Anslagsgivarens namn

Ansökan inlämnad, datum

Sökt belopp

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**Anslagsgivarens namn

Ansökan beviljad, datum

Beviljat belopp

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6 Övriga projekt som samtidigt kommer att ledas av huvudansvarig

Projekttitel För att radbryta texten, använd Alt + Enter

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Namn och institution på personer som beviljas forskningsbidrag kommer att publiceras på Konkurrensverkets webbplats.

Access to the European Commission's Files in Cartel Cases
– Promoting or Preventing Effective Enforcement of the European Competition Rules?

Project Description

1. *Introduction*

The European Union is founded on a number of *values* such as democracy, the rule of law and the respect for human rights. It also promotes a number of *objectives* including those of creating an internal market and ensuring a highly competitive social market. These values and objectives form the basis of the European Union, and EU legislation should reflect and promote them. However, sometimes when legislation is enacted to promote one objective, it has the effect of preventing or hampering the realization of another.

One such example is the legal framework surrounding access to the European Commission's ("the Commission") files in cartel cases. In recent years, there has been a rapid development in a number of areas affecting the Commission's disclosure of documents:

1. Today, *openness and transparency* are promoted throughout the EU, and the right of public access to documents is considered both a fundamental right of individuals and an institutional principle, guaranteed by primary and secondary EU law.
2. The *fundamental rights* of individuals have been strengthened. Through the Lisbon Treaty, which entered into force in 2009, the European Charter of Fundamental Rights ("the Charter") has been made legally binding and now has the status of primary law.
3. *Private enforcement* of the European competition rules is nowadays considered an important and necessary complement to public enforcement. In November 2014, Directive 2014/104/EU ("the Private Enforcement Directive") was adopted. One of the most prominent features of the directive are the provisions governing access to evidence, requiring of national courts to order disclosure of evidence held by defendants or competition authorities.
4. In today's global economy, cartels often cross the boundaries of jurisdictions, creating a greater focus on *international cartel enforcement*. Competition authorities around the world cooperate in their fight against cartels, and key to successful cartel enforcement is the sharing of information between the authorities.

As will be further discussed below, these developments have all affected the Commission's granting of access to documents in a number of ways. Today, there is a patchwork of legislative pieces, soft law instruments and court cases governing the Commission's actions, and which the Commission will have to consider when deciding on whether or not to disclose a document from its cartel case files. These rules are not necessarily promoting the same interests and are often pulling in different directions.

As a result, we now have an order where the disclosure of documents or information does neither ensure an optimal cartel enforcement nor a sufficiently transparent administrative system. One way of dealing with this problem is by taking an overall approach, balancing the different interests against each other in order to ensure that the system in place becomes coherent, and guarantees a proper balance between the interests of effective cartel

enforcement, transparency and the protection of fundamental rights. *Important to note is that, while such a study would focus on access to the Commission's files, most of the results would be general and thus applicable also to other legal systems, such as the Swedish.*

2. Research Question

Granting access to the Commission's files in cartel cases may serve a number of interests such as those of ensuring effective public and private cartel enforcement, transparency and the rule of law. However, disclosure of information requires careful maneuvering, as it may otherwise have the opposite effect and instead lead to the hampering of an effective cartel enforcement, or to violations of the fundamental rights of the companies under investigation.

The existing patchwork of rules and principles governing access to the Commission's files prevents such careful maneuvering. There is therefore a need to examine the rules more closely in order to determine whether they promote or prevent the values and objectives of the Treaties. As national systems may also struggle with these problems in their attempts to strike a balance between the diverging interests of ensuring effective cartel enforcement while upholding the values of any democratic society, research in this area will not only benefit the EU system, but will also be of value to national legal systems.

The proposed research project seeks to examine applicable rules and principles governing access to the Commission's cartel case files in order to establish whether the current order serves to protect and guarantee the interest of securing an effective application of European competition rules, while at the same time ensuring a level of transparency and fundamental rights protection necessary in a democratic society.

In order to answer this question, the project will focus on the following sub-questions:

1. Which are the rules and principles governing exchange of information between the Commission and other competition authorities inside and outside the EU, and how is such exchange carried out in practice?
2. Which possibilities do cartel victims or other third parties have to gain access to the Commission's files, either directly or through national courts or competition authorities?
3. Which rights do the companies under investigation have to access Commission files?
4. When can the handing over of a document to a national competition authority, court, cartel victim or other third party constitute a breach of fundamental rights?
5. Can, and if so, how may cartel enforcement be hampered by too much openness?

3. Method

The proposed research project will be carried out with the use of the doctrinal legal method. In a first step, the research will focus on mapping applicable legal rules and principles

governing access to the Commission cartel case files. This requires a close study of (i) statutory legislation, including Regulation 1/2003 on the enforcement of the EU competition rules¹, and Regulation 1049/2001 on access to documents held by the EU institutions,² (ii) soft law instruments such as the Commission's notice on the cooperation between competition authorities within the European Competition Network and the OECD's Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, and (iii) applicable case law from the EU Courts.

Second, the fundamental rights of those targeted by cartel investigations will have to be identified and examined. The European Convention on Human Rights and Fundamental Freedoms ("the ECHR") plays a significant role in EU fundamental rights law as the Charter establishes that EU protection must equal or exceed the level of protection afforded by the ECHR. Defining or interpreting EU law can therefore no longer be done without closely studying the ECHR. Common to both systems is the prominent role played by their respective courts in interpreting and determining the law. Although the EU and ECHR systems both stand on treaty or convention texts, it is the courts that give those texts life and meaning. Determining the extent of EU fundamental rights protection therefore requires not only a study of applicable legislative instruments, but also of the case law of the two courts.

The balancing act will be carried out in a final stage. Having established under what circumstances the Commission will or may hand over documents from its cartel case files, it will be necessary to examine whether the order in place serves to protect:

- a) the interests of *effective competition law enforcement* – will enforcement be served or hampered by the Commission handing out a certain type of document or information? Is there a conflict of interest between public and private enforcement? If yes, which interest should then be allowed to prevail?
- b) the rules on *transparency*. What do they require, and are they reconcilable with the interests in a)?
- c) the *fundamental rights of the companies under investigation*.

This requires a study not only of applicable rules, principles and jurisprudence, but also of relevant legal and economic doctrine. To the extent that the current system proves to be inconsistent, legislative changes will be proposed to obtain consistency and a proper balancing of the values and objectives of the Union.

The result of the analysis will also be presented in the form of more general conclusions and guidelines that may serve as a basis for evaluation and possible amendment of the rules governing access to the case files of national competition authorities.

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 04.01.2003, pp. 1 -25.

² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, OJ L145, 31.05.2001, pp 43-48.

4. *The Value of the Proposed Research in Relation to Existing Legal Doctrine*

Much has been written on access to the Commission's case files. Writers such as *Groussot*³ discusses access to the Commission's cartel files from a private enforcement perspective. Others, such as *Alemanno*,⁴ *Preschal* and *De Leeuw*⁵ discuss access to files from an administrative law perspective, examining i.a. the application of the Transparency Regulation and the general principles governing transparency. Yet others, such as *Wils*⁶ and *Ehlermann*⁷ address the issue of information exchange between competition authorities in their works.

However, to the best of our knowledge, there is no writer taking an overall approach on access to the Commission's cartel files, examining whether the current system is consistent and ensures a proper balance between the interest of securing an effective application of the competition rules, a transparent administrative system, and an adequate protection of applicable fundamental rights. The lack of an overall analysis may be due to the rapid development within this area, but this fact only makes the need for legal research even more pressing as some of what is written within the separate fields may now be outdated. There is also an inherent risk that a one-sided approach, where only one interest is considered at a time, will lead to inconsistency and create or maintain a system which cannot guarantee optimal antitrust enforcement or the respect for the rule of law.

Furthermore, there is an additional value in taking an overall approach, as most national competition law systems will no doubt have encountered the same problems in recent times, and need to carry out the same balancing act. The rapid development in areas such as international cartel enforcement and private enforcement of the competition rules are not only affecting the work of the Commission, but of all competition authorities within the EU. In Sweden for example, a new legislative act, *Konkurrensskadelagen*, is now being prepared as a response to the Private Enforcement Directive.

5. *Implementation and Outreach*

The intention is to disseminate the research outcome through publication of articles in high profile Swedish and international journals and through active participation in international

³ Groussot and Pierce, *Transparency and Liability in Leniency Programmes: A Question of Balancing?* In Bergström, Iacovides and Strand, *Harmonising EU Competition Litigation; The New Directive and Beyond*, Hart Publishing 2016.

⁴ Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, European Law Review 2014

⁵ See e.g. Preschal and De Leeuw, *Transparency: A General Principle of EU Law?* in Bernitz, Nergelius and Cardner (eds), *General Principles of EC Law in a Process of Development*, Kluwer Law International, 2008.

⁶ Wils, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing 2008

⁷ Ehlermann, *The International Dimension of Competition Policy*, Fordham International Law Journal, 833, 1993-94.

conferences, seminars and workshops. Furthermore, we intend to publish a book with a leading international publication house such as Hart Publishing, Wolters Kluwer or Oxford University Press.

6. Further Background to the Problems Raised by the Research Question

As mentioned in the introduction, the EU is based on a number of values, such as democracy and the rule of law, and pursues a number of objectives including those of creating an internal market, and a highly competitive social market. Ideally, these values and objectives should all move in the same direction. However, in reality, they don't, which often requires a balancing between opposing interests or between the rights of individuals and the interests of the public. Thus, whereas the competition rules laid down in Articles 101 and 102 TFEU are mainly driven by efficiency concerns, their application needs generally be in conformity with and sometimes balanced against the interests of safeguarding the rule of law, human rights or democracy.

As will be discussed in the following, the question of whether or not the Commission should grant access to its cartel case files is complicated and affects a number of the values and objectives laid down in the Treaty of the European Union.

6.1 Cartel Enforcement

In 2011, representatives of the US Department of Justice published an article where they declared that cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition.⁸ The statement has become seminal and is presented as a truth that does not need any warrant. Indeed, although not everyone would go as far as they do, few would argue against the proposition that cartels cause harm to the economy. On the contrary, cartels are *presumed* to do so,⁹ and strict enforcement of laws against cartels is a public policy that is widely supported by economists and legal scholars of all stripes.¹⁰

The fundamental objective of any antitrust legislation is deterrence and detection where the former cannot be achieved unless the fear of detection is real and the consequences are severe. The issue of how to obtain deterrence has been addressed by many writers. One of them is *Baker* who points out that consistency and comprehensiveness in enforcement are crucial and that “enforcement must be frequent and highly visible”. Effective deterrence

⁸ Werden, Hammond and Barnett, *Deterrence and Detection of Cartels, Using All the Tools and Sanctions*, 56 Antitrust Bulletin 207(2011).

⁹ See e.g. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, OJ/L/349/1.

¹⁰ Connor, *Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation 1996* (May 21, 2009). at p. 8.

requires that those who might be tempted to take illegal action believe that there is reasonable probability of being caught and that the consequences are then likely to be grave.¹¹

In today's global economy cartels often cross the boundaries of jurisdictions. These international cartels tend to be even more complex, broader in scope, larger in terms of affected volumes of commerce, and more harmful to consumers than their domestic counterparts.¹² Moreover, their participants often use sophisticated methods to conceal their activity, using code words, encrypted documents, dedicated email accounts and/or phones.

6.1.1 *Public Enforcement and Access to Documents*

The development towards “sophisticated and multinational” cartels has had a number of effects on public enforcement. Today, it is rare that the Commission finds a handwritten “smoking gun” during its inspections. Instead, it will have to lay a complex jigsaw puzzle fitting a huge number of different documents together in order to establish the infringement.

Furthermore, proving the case often requires cooperation with other competition authorities. A crucial component of such cooperation is *information exchange*. According to the Commission, the power of all the competition authorities to exchange and use information is a key element of the functioning of the European Competition Network. On a similar note, the OECD encourages its member countries to support information exchange between competition authorities. Also the ICN has manuals for information exchange.¹³

6.1.2 *Private Enforcement and Access to Documents*

The EU Member States are in agreement that full effectiveness of Articles 101 and 102 TFEU requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions.¹⁴ In order to ensure a well-functioning private enforcement system, the Private Enforcement Directive was adopted in November 2014. As recognised in the directive, accessing evidence is an important element for bringing damages actions.¹⁵ Competition law litigation is characterised by information asymmetry, and many claims never reach the courts due to lack of evidence. The Directive aims at creating a more level playing field, and to ensure that claimants gain access to relevant evidence which may be in the possession of the defendants and/or the relevant competition authorities.¹⁶

¹¹ Baker, *Punishment for Cartel Participation in the US: A Special Model?* In *Criminalising Cartels – Critical Studies of an International Movement*, Beaton- Wells and Ezrachi (eds), Hart Publishing 2011, at p. 35.

¹² <http://www.justice.gov/atr/speech/international-cartels-intersection-between-fcpa-violations-and-antitrust-violations>

¹³ *Cooperation Between Competition Agencies in Cartel Investigations*, Report to ICN Annual Conference 2007.

¹⁴ Preamble 3 to the Private Enforcement Directive.

¹⁵ Preambles 14 and 15 of the Private Enforcement Directive.

¹⁶ Chapter II of the Private Enforcement Directive.

6.1.3 *Granting Access – Always in the Interest of Effective Cartel Enforcement?*

Today, there is a wide-spread consensus that private enforcement is a necessary complement to the public enforcement of the competition rules, and that full effectiveness cannot be achieved unless there is a realistic possibility for those having suffered damage to seek and obtain compensation. Indeed, it was the Commission that, following the ECJ's ruling in *Courage*¹⁷ - where it established the right for anyone suffering loss from competition law infringements to get compensation in full - immediately launched a study on the possibilities of being compensated. Yet, as will be discussed in the following, the number of court cases where applicants have challenged the Commission's decision to refuse access to its files is growing by the minute. This indicates that although both private and public enforcement aim at ensuring effective cartel enforcement, they are not always in harmony, and that disclosure may not always be in the best interest of an effective competition law enforcement.

Leniency programmes and the active cooperation of cartel members have become cornerstones in the Commission's enforcement of the EU competition rules. The Private Enforcement Directive takes note of this fact and ensures that leniency statements are out of reach to cartel victims as they may not be used as evidence before national courts.¹⁸ However, the directive is of limited scope as it is addressed to national courts within the EU, and only deals with situations where an alleged cartel victim brings proceedings before a court. There are numerous other situations, including national cartel investigations, regular cartel proceedings before national courts, or requests by plaintiffs or courts outside the EU which are not regulated by the Private Enforcement Directive. Furthermore, protecting leniency statements is good, but may not be enough.

There is an apparent risk that if the Commission grants third parties access to its files, companies will be less inclined to cooperate as the price for cooperating may then be higher than the reduction in fine received. Furthermore, if the Commission is obliged to disclose certain documents before the highest court has finally decided on the case, this may weaken the Commission's case and thus have negative effects on public enforcement. One should therefore not presume that disclosure always works for the benefit of cartel enforcement.

6.2 *Democracy and Transparency*

After years of debate on the lack of transparency in the EU, the notion of openness has become not only one of the new guiding principles of the functioning of the EU machinery but also one of the foundations of democracy in the Union. Article 42 of the Charter grants

¹⁷ Case C-453/99, *Courage v. Crehan*, EU:C:2001:465.

¹⁸ Article 6.6 of the Private Enforcement Directive.

any EU citizen, and any natural or legal person residing or having its registered office in the EU, a right of access to European Parliament, Council and Commission documents.

The principle of transparency is also set out in Article 15(3) TFEU, and the modalities governing third parties' access to Commission files are laid down in the Transparency Regulation. Like Article 42 of the Charter, the regulation provides citizens and legal persons *of the Union* the right of access to the documents of the institutions. This right does not only cover documents that are drawn up by the institutions themselves, but also documents that fall into their possession. The right of access is not absolute. Article 4 of the Transparency Regulation provides for a number of exceptions, and the Commission has been prone to invoke these exceptions when receiving requests from third parties to access its files, be it requests to access the entire file or just the statement of contents.¹⁹ The General Court and the ECJ have taken opposing views on the matter, but the exceptions have eventually served to prevent private litigants from gaining access to the Commission's files. Interesting to note is that the ECJ appears to have taken different approaches depending on who receives the request, accepting blanket bans from the Commission, but requiring of national courts and competition authorities to make an individual assessment in each case.²⁰

The reluctance on the part of the Commission may be due to the fact that its case files may comprise tens of thousands of pages, placing an enormous burden on those carrying out a confidentiality check. However, that cannot be the only explanation, which suggests that it is not only the disclosure of leniency statements that may be detrimental to European cartel enforcement. The Commission's reluctance to hand out documents from its files calls for a closer examination of the transparency rules in order to determine to what extent these allow or should allow for exceptions without thereby unduly affecting the right of public access.

6.3 *The Fundamental Rights of Individuals*

Article 41 of the Charter grants everyone the right to access his or her file. This right is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence.

As international cooperation between competition authorities has intensified in recent years, and as the Commission has adopted a more aggressive approach towards cartel offenders, there is an even greater need for legislators and enforcers to ascertain and respect adequate procedural safeguards. The Charter, which has the status of primary EU law, provides the right to a fair trial, to effective legal remedies, as well as the right for everyone to have access

¹⁹ See e.g. Case T-437/08, *CDC Hydrogen Peroxide v. Commission*, EU:T:2011:752.

²⁰ See e.g. Case C-360/09, *Pfleiderer*, EU:C:2011:389.

to his or her file. The idea is that in order to be able to defend myself properly, I need to get access to the evidence held against me or speaking in the favour of my case.

Furthermore, also in order to protect the rights of the undertakings, Article 28 of Regulation 1/2003 stipulates that the Commission may only use the information collected for the purpose for which it was acquired or within the framework of exchange of information with national courts or competition authorities within the European Competition Network, and Article 339 of the TFEU requires of the EU institutions not to disclose certain documents or information.

As has been acknowledged by the ECJ there is an inconsistency between these provisions and those of the Transparency Regulation.²¹ Furthermore, the wording of Regulation 1/2003 suggests that any exchange with competition authorities or courts outside the EU would be prohibited. The question is of course whether such order is actually respected, but also whether it is necessary from a due process perspective or constitutes an unjustified hindrance to the Commission's application of the competition rules.

A further aspect when it comes to information exchange concerns the type of documents collected and shared between the authorities. Rules on confidentiality, legal professional privilege and professional secrecy vary between jurisdictions, and the question is whether there are or need to be safeguards to protect evidence that is privileged in one jurisdiction from being transmitted to a jurisdiction where such evidence is not protected. On a similar note is of course the issue of sanctions. Some jurisdictions may only impose pecuniary sanctions whereas others have powers to impose custodial sanctions. This issue is addressed in Article 12 of Regulation 1/2003, but the question is whether the order in place is adequate.

6.4 Granting Access or Not – Concluding Remarks

It is clear from the above not only that many have an interest in gaining access to the Commission's cartel case files, but also that these interests are diverging and not necessarily pulling in the same direction. Interestingly enough, certain interests, such as that of ensuring effective competition law enforcement, are at the same time served and disadvantaged by a greater openness on the Commission's side. At a first glance, disclosing evidence to other competition authorities or cartel victims appear to further an effective application of the competition rules. However, as too much openness may have a negative impact on companies' willingness to cooperate in competition investigations, it may also be counter-productive. A balance thus needs to be struck. To some extent, this problem is tackled by the Private Enforcement Directive, but due to its limited scope, some of the problems remain, calling for a review of the current order.

²¹ See e.g. Case C-365/12, *Commission v. EnBW*, EU:C:2014:112.

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