CLIFFORD CHANCE PRAGUE: COMPETITION LAW UPDATE Q4 2017

In this competition law update, we point to two recent key decisions of the Court of Justice of the European Union ("**CJEU**"), the first examining the authority of the European Commission (the "**Commission**") in relation to assessing the legality of dawn raids conducted by national authorities, and the second looking at the effects of a commitment decision adopted by the Commission on consequent national-court proceedings. We also touch on a recent decision taken in the English courts on the arbitrability of claims for damages resulting from infringements of competition law.

LIABILITY FOR ILLEGAL DAWN RAIDS

In issuing a recent ruling[1], the CJEU refused to take into consideration the fact that evidence used during the Commission's investigation had been illegally obtained by a national authority. It concluded that only national authorities are competent to decide whether or not a dawn raid carried out by a local authority is compliant with national law and that any consequences should be determined by the national legal system only.

The case concerned a price fixing cartel comprising Pacific Fruit and Chiquita, which operated in Southern Europe from July 2004 to April 2005. In 2007, the Italian tax police carried out a dawn raid to seize information on possible tax fraud. The tax police in Italy also participate in competition law related dawn raids and, therefore, is vigilant in identifying documents that are relevant from a competition law perspective. During the dawn raid, the inspectors found notes describing a meeting of the cartel. This evidence was later sent to the Commission and included in the case file on the prospective cartel (without the knowledge of Pacific Fruit).

In 2011, the Commission fined Pacific Fruit for its participation in the cartel (Chiquita was granted immunity due to its cooperation with the Commission). Pacific Fruit appealed against this decision and argued that the notes should not be included in the case file because they had been obtained illegally by the Italian tax police after they had conducted a dawn raid in an entirely separate matter. The General Court and later, in 2017, the CJEU ruled that they were not competent to decide whether or not the dawn raid had been carried out legally or to determine any consequences resulting from this fact. Therefore, even if the dawn raid did breach Italian law in the case at hand, the decision of the Commission would stand.

The conclusion that the Commission can use evidence without being made to answer questions as to whether this evidence was obtained legally pursuant to national law seems rational, as any interpretation otherwise would lead to a situation whereby the EU courts would in fact have to rule on the national laws of 28 countries.

We are of the opinion that if the dawn raid is considered illegal by the Italian authorities and if Pacific Fruit has suffered harm as a consequence, then the only available remedy in the case at hand would be to follow the Francovich ruling (C-6/90) and claim damages against Italy.

It is also worth noting that the EU is currently in the process of acceding to the European Convention on Human Rights (the "**Convention**"). When this accession is finalised, the European Court of Human Rights will be entitled to decide whether or not the decisions of European institutions have violated the Convention. In theory, this could provide a second avenue for companies to procure the reversal of an unfavourable decision in the future.

[1] Judgement of the CJEU, Case C-469/15, *P - FSL and Others v Commission*.

NO LEGAL EFFECTS OF A COMMITMENT DECISION ADOPTED BY THE COMMISSION UPON DOMESTIC JUDICIAL PROCEEDINGS?

In September 2017, the Advocate General of the CJEU Juliane Kokott issued an opinion[2] stating that a commitment decision adopted by the Commission in relation to certain practice cannot preclude the national authorities from examining the conformity of such practice with competition rules and from declaring them to be invalid under Article 101(2) TFEU.

The case examines whether long-term exclusive purchasing agreements for fuel entered into between the oil and gas company Repsol and the Spanish tenants of its petrol station infringes Article 101 TFEU. After conducting an investigation, the Commission expressed its concerns over these agreements. In return, Repsol offered commitments whereby it indicated its intention to refrain from concluding such agreements in the future. Accordingly, these commitments became binding and the Commission brought an end to the proceedings against Repsol pursuant to Article 9(1) of Council Regulation No 1/2003 (the "**Regulation**").

Nevertheless, the tenants subsequently brought a claim against Repsol arguing that, in light of a breach of Article 101 TFEU, the agreements with Repsol had become invalid and unenforceable pursuant to Article 101(2) TFEU. Repsol countered this allegation by stating that no such conclusion could be arrived at by the national courts as the commitments had been accepted by the Commission. Therefore, the Spanish Supreme Court referred a preliminary question to the CJEU asking whether a commitment decision adopted by the Commission precludes a national court from declaring the agreements to which that decision applies are invalid. On 14 September 2017, Advocate General Kokott shed some light on this question. Firstly, pursuant to Article 6 of the Regulation, the national courts have the power to apply Article 101 TFEU. However, such decisions cannot run counter to a decision adopted by the Commission in the same matter. Nonetheless, as the commitment decision contains no binding findings on the lawfulness or otherwise of the relevant agreement, the Advocate General concluded that the national courts were entitled to apply Article 101 TFEU and to find, where appropriate, that an infringement has been committed. The companies cannot therefore escape their national obligations by entering into binding commitments within the proceedings of the Commission.

This conclusion is, however, yet to be confirmed by the CJEU, which will have the final say on the matter. Nevertheless, given the rational nature of this decision and the CJEU's practice of following the opinions of its Advocate Generals, the CJEU is highly unlikely to deviate from this decision. Such a conclusion would serve as clear confirmation that the commitments undertaken under Article 9(1) of the Regulation will not deprive the national competition authorities of the opportunity to further examine the conduct in question.

THE ARBITRABILITY OF COMPETITION LAW CLAIMS

According to recent English case-law[3], claims for damages resulting from infringements of competition law are considered arbitrable.

In the case referenced, an English court was asked to decide whether it had jurisdiction after a lithium-ion battery cartel including Sony, Panasonic, Samsung SDI and Sanyo was fined by the Commission in late 2016. Microsoft (as a purchaser of Nokia) filed an action for damages against Sony, with whom it had entered into a supply agreement. However, the supply agreement between Nokia and Sony contained an arbitration clause stipulating that "*Any disputes related to this Agreement or its enforcement shall be resolved and settled by arbitration…The arbitration shall be the exclusive remedy of the Parties to the dispute.*" In the end, the court decided that it did not have jurisdiction to hear the case and referred the parties to arbitration.

Therefore, when opting for the application of English law in an agreement that contains an arbitration clause, it should be borne in mind that any claims arising from a breach of competition law are likely to be submitted to arbitration.

[2] Opinion of the Advocate General in Case C-547/16, *Gasorba and Others*.

[3] Judgment [2017] EWHC 374 (Ch), *Microsoft Mobile Oy Ltd v Sony Europe Ltd*.

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