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EU and national leniency applications independent rules ECJ

On the 20 January 2016, the European Court of Justice (ECJ) handed down its ruling on a preliminary reference made by the Italian Council of State on the relationship between EU and national member state leniency applications for cartel activity.

The matter involved the air freight forwarding cartel, and the legal matters in dispute date back to actions taken in 2007-2008. In June 2007, a member of that cartel, approached both the Italian Competition Authority and the European Commission, seeking a leniency application and immunity from fines. The crucial fact in this matter is that the European Commission accepted the cartel member's full leniency application and granted them immunity, whilst the Italian Competition Authority considered the application incomplete due to the fact that it only requested leniency for air and shipping freight, but not for road. For this reason, in Italy, the authority did not accept a full application until June 2008, when an additional summary application was made by the company.

All would have been well for the cartel member concerned if they had received full immunity from both the European Commission and the Italian authority. However, another member of the same cartel filed a summary leniency application with the Italian Authority in December 2007. The Authority

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considered it as the first full application in 2011 when it concluded its investigation. The end result of this was that whilst the first cartel member was granted its full immunity from the European Commission, it only received a 50% reduction in its fine from the Italian authority, and thus no grant of full immunity.

In Italy, full immunity went instead to the second cartel member who had the good fortune of submitting an application which the Authority considered was full and complete, even though in reality it was the second through the door.

The first cartel member therefore appealed their 50% liability for damages in Italy to the Italian Council of State who submitted the matter to the ECJ. The Council asked the ECJ whether the EU's leniency programme is binding on the national member state competition authorities? In short, the ECJ considered that the national and EU leniency applications were separate and held that one did not bind the other. This was based on paragraph 38 of the EU Commission's Network Notice which states that a leniency application for one authority is not binding or considered an application to any other authority. Therefore they are separate and independent. It is perfectly permissible under law for the EU to grant full immunity and a member state to only grant a partial reduction in the overall fine.

Therefore when a cartel member is coming clean, they should make sure they should apply for leniency in every jurisdiction where their anti-competitive actions had effect. The case also shows the importance of expert legal advice in every jurisdiction where leniency is sought. Making the exact same application across the EU will not bind all the competition authorities and the EU to reach the same decision as to the status of the application.

French Competition Authority issues its highest-ever single fine

By a decision dated 17 December 2015, the French Competition Authority ("FCA") fined telecommunications giant Orange EUR 350 Million for the abuse of a dominant position relating to its offering to business clients. This is the largest fine ever issued to a single company by the FCA.

The fine was issued just two days after the FCA fined a group of package delivery companies EUR 670.9 Million for price-fixing (see our January 2016 edition of the Bulletin).

The Orange case arose in the context of the decade-long battle for survival among the three or four main players in the French telecoms sector. In the present case, Orange was found to have implemented several anti-competitive practices in both the fixed-line telephone and mobile telecoms markets between the early 2000s and 2015.

In the fixed-line telecoms sector, the FCA found Orange abused its dominant position resulting from its position as a former public monopoly operating under the name France Telecom, which has enabled Orange to own most of the national network to this day. According to the FCA, Orange withheld from the other telecoms operators crucial information regarding the access to the national network. As a result, Orange could come across as more efficient than other operators to the general public as it was in a better position to identify available telephone circuits.

The FCA issued an injunction to Orange to put an end to this distortion of competition and guarantee the same level of information to all the market players within 18 months of the decision.

In the mobile telecoms sector, the FCA found abuses by Orange relating to customer loyalty programs. Two commercial offerings were singled out by the FCA: (i) Orange offered to replace customer mobile phones for free in exchange for customers subscribing to twelve or twenty-four month plans, and (ii) Orange provided a 10% to 15% discount to subscription plans to customers who committed to an extension of the duration of their initial subscription by one to three years. These practices were found to act as deterrents to turn to other telecom operators, thereby driving competitors out.

The level of the fine partly resulted from Orange's market size which represents 30% of the French market. Moreover, the fine is proportional to Orange's turnover (the FCA may not impose fines exceeding 10% of a company's turnover). The FCA has took into account the recurrence of anti-competitive practices in the telecoms sector. Orange has in fact been repeatedly fined for the abuse of its dominant position (as was the case of its competitor SFR, who was also fined recently on 30 November 2015 in respect of its overseas operations (see our January 2016 edition of the Bulletin).

Orange, which chose to cooperate with the FCA during the investigation, announced it will not challenge the decision before the Paris Court of Appeals.

CMA gives the cold shoulder to fridge and bathroom suppliers "MAP pricing"

The UK Competition and Markets Authority ("CMA") continues to focus its attention on resale price maintenance particularly where it relates to minimum advertised prices (MAP) on on-line sites. The CMA has a history of targeting this type of behaviour.

Minimum advertised prices are generally permitted under US Antitrust law. This case highlights how careful companies, particularly US companies, have to be in relation to their distribution strategies in Europe.

On 28 January 2016, issued Statements of Objections ("SOs") to bathroom fittings manufacturer 'Ultra Finishing Limited' and commercial refrigeration products supplier 'Foster Refrigerator', alleging that the two companies had, between 2012 and 2014, engaged in resale price maintenance in contravention of the Chapter I prohibition of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

Investigations into the suspected vertical price restraints in place between suppliers and resellers were opened by the CMA back in August 2014. The SOs now raise concerns that the two companies have been restricting competition in the online bathroom fittings and commercial catering equipment sectors by requiring distributors to adhere to minimum online resale prices and thereby introducing "a price floor".

Whilst the law generally entitles suppliers to impose maximum or recommended resale prices, fixed or minimum resale prices are prohibited on the grounds that they dampen competition among rival retailers who must be free to determine their online sales prices in order to compete to attract customers who are using the internet to shop around for the best deals.

The CMA's findings of anti-competitive behaviour are provisional and a final decision as to whether competition law has been infringed will be reached after the parties have had the opportunity to respond to the CMA's case.

Wrong number? ICA fines telecommunications cartel

On 23rd December 2015 the Italian Competition Authority (the "ICA") fined Telecom Italia S.p.A., the Italian telecoms incumbent operator, and other six companies (the "Companies") Euro 28 million, for the infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"); the prohibition of anti-competitive agreements or concerted practices.

The ICA found that in the period from 5th July 2012 to 1st February 2013 the Companies agreed to coordinate their economic offers and contractual terms in relation to:

i) The tenders for the selection of suppliers made by two Italian companies (Wind Telecomunicaizoni S.p.A. and Fastweb S.p.A.);

ii) Information regarding the supply of corrective maintenance services (also known as assurance services). In particular, this activity is essential to restore the normal telecommunication services in case of failures of the network, to which Telecom Italia S.p.A. gives access to the Other Licensed Operators ("OLOs").

The ICA held that the conducts were aimed at limiting competition in the relevant market and preventing competing operators from providing other ancillary technical services. Further, these behaviors were serious from a competition point of view as they were put in place during the starting period for these kind of services, causing the relevant market to become very concentrated.

During the investigation, it was proved that the Companies had numerous meetings in order to decide the offers to make for the abovementioned tenders and coordinate their contractual terms.

The ICA has recently increased its focus on the coordination of commercial policies among undertakings and investigations of such a kind are becoming much more common.

The high fine imposed on the Companies shows the increasing attention on the telecommunications market, in particular where a former State-owned company is in a dominant position (Telecom Italia S.p.A.).

German Federal Cartel Authority fines LEGO GmbH for resale price maintenance

In January 2016, the Bundeskartellamt (German Federal Cartel Authority) imposed a fine of € 130.000,00 on LEGO GmbH for infringement of competition regulations with regard to "highlight articles", specifically due to resale price maintenance.

Sales representatives of LEGO GmbH urged several LEGO retailers in Northern and Eastern Germany to raise the selling price for LEGOs' so called "highlight articles" throughout 2012 and 2013.

The respective articles as well as specifically chosen retailers were recorded in regularly updated lists. When retailers would fail to meet the recommended resale price, retailers were threatened with a shortage of delivery quantity or even non-supply by LEGO. Additionally, in some cases the discount on the dealer purchase price was connected to meeting the formalized resale price. These methods constitute an infringement of competition regulations.

As reported by the German Federal Cartel Authority, in mitigation, LEGO GmbH started wide ranging internal investigations shortly after the procedures were initiated. Right from the start LEGO GmbH itself participated in the detection and uncovering of the given circumstances. Moreover, respective personnel consequences were drawn and organizational changes were made by LEGO GmbH following the investigations.

LEGOs' willingness to cooperate during the procedures and to support the mutual settlement of the case were regarded as extenuating factors in determining the amount of the fine.

LEGO GmbH can still appeal against the Bundeskartellamt's decision to the Düsseldorf Higher Regional Court. Thus, the decision is not yet legally binding.

Burger Monarch Returns

On 10 December 2015, the French Competition Authority ("FCA") cleared the acquisition of Quick - a subsidiary of the FrenchCaisse des dépôts et consignations - by Burger King France - a subsidiary of another French company, Groupe Bertrand - subject to commitments.

This acquisition represents a spectacular come-back for Burger King, which had left France in 1997 due to its poor performance there, especially compared to its main rivals McDonald's and Quick. Since 2012 however, the Burger King fast food chain had slowly begun to reinvest in the French market, operating 30 restaurants including 20 franchises at the date when the proposed acquisition was notified to the FCA on 4 November 2015.

When determining the relevant market, the FCA noted an "imperfect substitutability" between most low cost fast food restaurants and the more specific "Anglo-Saxon" type of fast food restaurants which it found to include brands such as Mc Donald's, KFC, Quick, Burger King and

Subway. In November 2015 Burger King had become a relatively new entrant on the French market with a mere 0.5% in market share. One could thus have anticipated a low risk of competition problems linked to this concentration, whereby 300 Quick restaurants were slated to switch to the Burger King brand in 4 years.

Yet the FCA found one geographic area, in Ajaccio Corsica, where the only two active Anglo-Saxon-type fast food brands were Burger King and Quick. The merger would thus result in an overlap which would lead to a monopoly in that area, since none of the usual competitors were also present. The FCA highlighted the difficulty of setting up such a business in this geographic area and deemed the risk of a long term monopoly serious enough to fear for consumers' lack of choice.

Burger King (quickly!) resolved the issue by committing to terminate its contractual relationship with the Quick franchisee in Ajaccio Corsica, which is due to expire shortly, and waiving its rights pursuant to its non-compete clause or any other clause which would prevent the franchisee from working with a competing brand. The FCA thus cleared the concentration on the condition that Burger King complies with the aforementioned commitment.

Concrete cartel comes unstuck

On 22nd December 2015, the Italian Competition Authority (the "ICA"), after a two-year investigation, fined seven Italian companies (the "Companies") approx. € 3 million cumulatively for infringements of Article 2 of Law No. 287 of 1990, the Italian provision against anti-competitive agreements.

The Companies were producers and distributors of concrete for commercial use and operated in the market of Veneto (a Region located in the North-East of Italy).

The ICA found two anti-competitive agreements, the first lasted from 2010 to 2013 and the second from 2013-2014, all aimed at fixing the prices and allocating customers among the participants.

According to the ICA the anti-competitive conducts were realized through the services provided by a consultancy firm (the "Consultant"). In particular, the Consultant gathered all the information regarding final prices, sale quotas and construction sites opened or to be opened. After that, this information was shared during meetings held among the Companies.

The coordination of commercial practices was designed to maintain the "historical" clients of each participating company to the anti-competitive agreement, so that the Companies could keep their 50% market share in the Region of Veneto.

The ICA held that such anti-competitive agreements permitted the Companies to sustain far lower costs which they would have borne by competing each other. Such higher costs caused damages to either the clients or other potential competitors.

As a consequence, the ICA found that the conducts raised serious potential issues regarding their compatibility with Article 2 of Law No. 287 of 1990. In fact, any agreement not to compete with competitors would fall within such provision which forbids price fixing and customer allocation.