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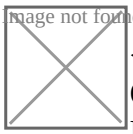

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Publisher:<!--BEGIN-OF-PUBLISHER-->Global Competition Review<!--END-OF-PUBLISHER--><!--END-OF-FILE-LIST--> Economic aspects seem to play a more important role lately in the defence of the companies under investigation before the Competition Council. The authority's legal assessment on facts is often exposed to criticism before the relevant courts on the ground that it does not take into consideration the economic justifications of the facts presented by the defendants. In cartel cases, in the absence of direct proofs and the application of leniency procedures so far, the council tends to rely on indirect or circumstantial evidence corroborating the existence of a cartel by way of deduction, common sense, economic analysis or logic operation. However, the use and evidential value of indirect proofs seem cautiously evaluated in court.

In a recent case, the High Court of Justice proved reluctant in accepting the Competition Council's evidentiary record, raising the standard of proof required to assess a cartel-type infringement. The competition authority has fined in 2005 three cement producers, namely Lafarge, Holcim and Carpatcement (part of the HeidelbergerCement group), which were found guilty of a price-fixing cartel (Competition Council decision number 94 of 26 May 2005). Following four years of investigation, the Competition Council established that during the period from 2000 to 2004, these three companies formed a cartel on the Romanian market of grey cement. The authority based its findings on a short note (identified under the inquiry as having been written by the country manager of Holcim) that sketched the prices evolution for Holcim and its two competitors. Although the parties argued that the increases anticipated by that note were only internal estimates and they had never actually been put in practice, the council connected such proof with other elements such as: the constant and symmetric market shares maintained by the three competitors during 2000 and 2004; a de facto price parallelism, which allegedly could not occur in the absence of sensitive price information among the three competitors; anti-competitive agreements between the groups involved in other jurisdictions (ie, Germany, EU – Cembureau case in 1990).

The High Court of Justice judged this case as a typical price parallelism case and consequently applied the standard of proof set at EU level by Ahlström Osakeyhtiö and CRAM jurisprudence. Those judgments establish that where the competition authority's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission (CRAM, paragraph 16; Ahlström Osakeyhtiö, especially at paragraphs 70, 126 and 127). It annulled the decision of the Competition Council, ruling that the authority had not taken into consideration the economic justifications determining the price increases (inflation rate, international cement prices, the seasonal nature of the cement industry).

The Competition Council should have proved the participation of the defendant in an express or tacit collusion, distinctively from the mere finding of price increases. In an oligopoly market, the players have the right to adapt themselves intelligently to the market conditions. It rests with the competition authority to substantiate, beyond any reasonable doubt, based on concluding and sufficient evidence, that concentration is the only plausible explanation for the price increases. To read the entire article, please download the .pdf attached.
