
The Complainant's Right of Access to the File in Competition Proceedings

Application Number 1/2011

The Honourable Joe Mizzi vs Enemalta Corporation and Water Services Corporation 27 February 2013, Competition and Consumer Appeals Tribunal

DR ANNALIES AZZOPARDI

On 27 February, 2013, the Competition and Consumer Appeals Tribunal ("Tribunal") handed down a decree during the ongoing litigation of *Mizzi vs Enemalta Corporation and Water Services Corporation*. This is the second decree handed down in these proceedings; the first dealt with the role of the Office for Competition ("OFC"), the national competition authority, in proceedings in front of the said Tribunal.¹ This decree deals with another important issue: the extent a complainant may require the OFC to exhibit its file during competition proceedings in front of the Tribunal, and therefore indirectly, the extent of the complainant's right to access the OFC file.

1. The facts

Mizzi lodged a complaint with the OFC regarding increases in utility tariffs by Enemalta Corporation², and the Water Services Corporation³. From court records it appears that the complainant is claiming *inter alia* that his right to a fair hearing was breached since the OFC never contacted him regarding the merits of his complaint after he lodged the aforementioned complaint.⁴

This decision, however, focuses solely on the right of a complainant to have access to the OFC's file, and in particular the complainant's right to demand that the OFC

¹ Applic. No. 1/2011 *Onor. Joe Mizzi vs Ufficju għall-Kompetizzjoni*, 21 March, 2012 (Competition and Consumer Appeals Tribunal). See Azzopardi (2012) 5 *Global Antitrust Review* 189 (note)

² The electrical power provider in Malta.

³ The water service provider in Malta.

⁴ *Vide* Court records (*verbal*) of the sitting on 24 April 2012

exhibit documents from the case file in court. It therefore does not go into the substantive merits of the case and makes no reference to the particular facts of the case. The issue arose after the OFC presented its case file in court but requested that it be exempt from presenting three sets of documents, which it claimed were not used when finding that there was no breach of the competition rules. The complainant opposed this request.

2. Legal bases

Act VI of 2011, by amending the Competition Act⁵ and enacting the Malta Competition and Consumer Affairs Act (“MCCAA Act”),⁶ amended the Maltese competition law regime, overhauling procedural competition law in Malta. However, neither the old nor the new competition law regime contain a provision on what should or can be exhibited in court from the OFC file. Neither do they contain a provision on access to the OFC file by the complainant. The case currently being analysed had already commenced when Act VI of 2011 came into force, and therefore, in terms of Article 70 of the MCCAA Act, the Competition Act prior to amendment applies.

In view of the fact that domestic legislation was and is silent on the issue of what can be exhibited from the OFC file after a complaint has been made, the Tribunal referred to Rule 13 of the First Schedule to the Competition Act, prior to amendment.⁷ A similar provision is now contained in Rule 9 of the Second Schedule of the MCCAA Act.

3. The merits of the decision

On the basis of Rule 13, the Tribunal concluded that since competition law is a special law, and since it does not specify any other method of interpretation, the relevant European sources apply as guidance for the correct interpretation of competition law. In so doing, the Tribunal referred to the following European sources:

a) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty;⁸

⁵ Chapter 379 of the Laws of Malta

⁶ Chapter 510 of the Laws of Malta

⁷ *In the interpretation of this Act, the Commission shall have recourse to its previous decisions, judgements of the Court of First Instance and the Court of Justice of the European Community. It shall also have recourse to relevant decisions and statements of the European Commission including interpretative notices on the relevant provisions of the EC Treaty and secondary legislation relative to competition.*

⁸ OJ[2004] L 123/18

- b) Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004;⁹
- c) Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty.¹⁰

The Tribunal also specified that since the European Commission has a near equivalent role to that of the OFC, the rules contained in these European measures applicable to the European Commission would be taken to apply in the same manner to the OFC.

Firstly, the Tribunal, citing Articles 15(1) and 8 of Regulation 773/04, noted that this Regulation makes a distinction between the rights of the complainant and the rights of the parties to whom a statement of objections is addressed, and that the latter is placed in a different position from the complainant in relation to access to the file. It cited two Court of Justice of the European Union (“CJEU”) judgments – *Atlantic Container Line and others v Commission*¹¹ and *Endemol v Commission*¹² – wherein the CJEU had underlined that the right of access to the file in competition cases is intended so that undertakings which are addressees of the statement of objections may express their views effectively on the Commission’s conclusions.

The Tribunal then referred to the Commission Notice on rules for access to the Commission file and noted that it applied only with regards to access given to addressees of the statement of objections, although the said Notice also indicated that a specific section applied with regards to complainants or third parties. The Tribunal quoted Articles 30 to 32 of the Notice.

Finally, the Tribunal made reference to the Commission Notice on the handling of complaints, more specifically Article 69 of the said Notice, and to the Antitrust Manual of Procedures.¹³

The Tribunal then proceeded to highlight the sharp distinction between what the complainant should be able to access and what the addressee of a statement of objections should be able to access by quoting Commission decisions and CJEU judgments, namely *Omnis/Microsoft*¹⁴ and *British-American Tobacco Company Ltd and*

9 OJ [2005] C325/7

10 OJ [2004] C101/65

11 Cases T-191/98, 213/98 and 214/98; [2003] ECR II-3275

12 Case T-221/95; [1999] ECR II-1299

13 European Commission, March 2012; p. 53

14 COMP/39.764

The Tribunal then applied these measures and decisions to the case at hand. It noted that the crux of the matter was the OFC's submission that it was not obliged to present the named documents since they were not used by the OFC in reaching its decision which was primarily based on points of law.

The Tribunal pointed out that the OFC is obliged to investigate a complaint; the OFC has no interest towards any party involved and its objective is to determine whether there is a breach of competition law. The powers of the OFC are wide, and once it investigates and gathers all the information, it should use that information which appears to it to be relevant for the purposes of that complaint.

The information which it considers relevant and which led it to its decision should be accessible to the complainant in the event that no infringement is found. Information which the OFC does not consider relevant, and which has not been utilised to lead the OFC to a decision, should not be used or brought in front of the Tribunal. This is because the complainant has no interest in the method by which the OFC undertook its investigation, who it contacted, and how, but can only attack the decision finding no infringement on that information the OFC has based itself upon. The method through which the OFC has gathered information, the contacts it could have or have made, which do not configure into how the OFC arrived at its decision, should not be reviewed. It is not lawful for a complainant to intrude on the mechanics of the OFC's investigation in order to discover information which could be irrelevant to the decision taken. Neither is lawful for a complaint to force the OFC to reveal investigative sources and procedures whose confidentiality in similar procedures is essential for the OFC to undertake its work and fulfil the serious legal burdens imposed upon it in serenity, in comfort and confidentially in the interests of the undertaking being investigated, which do not always coincide with the interests of third parties who may have different motives or agendas than that which appears *prima facie*.

The Tribunal held that it has some regard as to what the OFC decides to reveal since the Code of Organisation and Civil Procedure ("COCP") - a general law - gives the Tribunal powers in the interests of justice; however, this discretion has to be used in a very restricted manner and only where the particular circumstances clearly merit otherwise.

The Tribunal however refused to apply the provisions of the COCP exclusively in competition proceedings, as complainant had submitted. It stated that local procedural law should be a source of interpretation in competition law taken in its guidelines and general principles so that justice is done in the interests of the common good. The restrictions imposed by the Freedom of Information Act¹⁶ and the principles contained in the Administrative Justice Act¹⁷ should be understood in this sense as well. The provisions of these laws have to be considered within the measure and particular nature of competition proceedings and should not be applied *ad litteram* to the detriment of what is provided by European regulations and sources specifically relating to matters in front of the Tribunal.

The Tribunal therefore did not order the OFC to exhibit the documents which it had listed as irrelevant to the decision of non-infringement.

4. Commentary

In this decree, the Tribunal in reality took two decisions. Firstly, it confirmed that, by virtue of Rule 13 of the First Schedule of the Competition Act, and now Rule 9 of the Second Schedule of the MCCA Act, European Union (“EU”) rules and guidelines on competition procedures undertaken by the Commission apply to procedures undertaken by the OFC. This decree therefore clarifies that it is not just EU guidelines, rules, notices, decisions and judgments on the substantive aspects of EU competition law that should be applied in local competition proceedings. On the contrary, those measures and judgments relating to the procedural aspects of EU competition law should also be applied to purely local proceedings, in preference over any provisions of general law.

Secondly, the Tribunal’s decree clearly stated that the complainant’s right of access to the OFC file is limited to that information which was necessary for the OFC to arrive to its decision. In the absence of Maltese law or rules on the matter, the regime applied in the EU has been applied to Malta. The determining factor behind this decision – besides the interpretation of the Competition Act in line with EU rules – was the fact that the undertakings being investigated and the complainant are not in the same position procedurally. The former is interested in ensuring that the right to a fair hearing is respected in its regard; on the contrary, there is no risk of the complainant’s human rights being breached. However, it is arguable that the OFC is given too wide a discretion in determining which

16 Cap. 496 of the Laws of Malta

17 Cap. 490 of the Laws of Malta

documents it utilised when arriving at its decision, and that a complainant may, in certain circumstances, be unable to determine the facts on which the OFC reaches its decision. It would appear that such a complainant would have limited recourse to the Tribunal who would then review the OFC's discretion in this regard.

The Competition Act, prior to being amended, did not make provision for access to file by an undertaking being investigated by the OFC. Today's competition law regime, on the other hand, provides for access to file by such undertakings. Article 12A(5) of the Competition Act, as amended, provides that the parties notified with a statement of objections are entitled to have access to the file concerning their case following notification of the statement of objections, without prejudice to the non-disclosure of certain categories of documents.

As noted above, however, neither the Competition Act as amended nor any of the rules or regulations issued under it make provision for access to file by a complainant. As indicated in the Tribunal's decree, neither was there any such provision in the Competition Act prior to amendment. Therefore, the legal environment with respect to access to file by a complainant has not changed with the advent of Act VI of 2011. This means that the Tribunal's decree in *Mizzi vs Enemalta Corporation et* in relation to access to file should apply to both the old and the new competition law regimes.