

Fig leaf for 'naked' cartel

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Introduction
Cartel Court
Decision
Appeal

Introduction

A recently published decision by the Cartel Court demonstrates how a long-term relationship turned into an equally lengthy disagreement, which came to a decisive turning point in the courts. (1) An Austrian company, active since 1824 in the rubber and plastic industry (Semperit), formed a joint venture in Thailand in 1989 with a group of Thai companies (STA) for the production of examination gloves made from natural rubber. While Semperit contributed industrial know-how, STA had local facilities and access to a supply of natural rubber. Together with the joint venture, separate distribution agreements were concluded, which basically reserved exclusive distribution of the products in Europe and the Middle East for Semperit. From 2015, STA also tried to sell the products outside Thailand, including in Europe. This led to several disputes in and out of the courts commenced by Semperit in an attempt to prevent STA from selling the products, including arbitral proceedings before the International Chamber of Commerce.

Cartel Court

In 2016 the Competition Authority filed an application with the Cartel Court to cease and desist and to be fined for illegal activities. In the proceedings STA acted as a leniency applicant and a witness for the prosecution.

The defence raised by Semperit included the following:

- The exclusive distribution agreement was basically a side agreement (an 'ancillary restraint') closely related to the joint venture and not an intentional restriction of competition. To support this, Semperit argued that it provided know-how, a distribution network, intellectual property and customer connections to the joint venture, while STA provided access to local authorities, raw materials and a cheap means of production.
- Exclusive distribution was exempted under the EU Vertical Block Exemption Regulation.
- The exemption of Article 101(3) of the Treaty of the Functioning of the European Union applied to the distribution arrangements.

Decision

The Cartel Court rejected Semperit's defence and found that the distribution agreements were not ancillary restraints and were not necessary and indispensable for the joint venture. Confirming this decision, the Supreme Court reasoned that only an objective assessment was relevant, not the subjective assessments made by the parties. (2) Unlike the assessment under Article 101(3) of the Treaty on the Functioning of the European Union, it is not sufficient to assess whether the ancillary restraints are necessary to support the success of the business in the relevant market, but it is necessary to ascertain whether the main agreement could have been implemented without the ancillary restraint. Consequently, the investments and contributions that the parties made to the joint venture were not evaluated by the court in great detail. Further, the Supreme Court found that

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the situation at the beginning of the joint venture was irrelevant and only the later situation was relevant.

Appeal

In an appeal to the Supreme Court, Semperit challenged the Cartel Court's reference to the European Court of Justice (ECJ) decisions in *Toshiba*(3) and *Siemens*(4) and emphasised that – unlike in *Toshiba* and *Siemens* – in *Semperit* there was no 'naked' market sharing (ie, within a contractual context), but the division of distribution territory was embedded within the agreement which established the joint venture. The Supreme Court rejected this argument, stating that the joint venture was created to manufacture and distribute the products in question and the markets were divided. In light of recent ECJ case law, the distribution agreement by its object and purpose was an intentional restriction of competition, which – considering the respective market share of the European market – was an illegal restriction of competition.

The final blow landed with a decision by the Federal Cartel Authority on 19 July 2018, in which STA acted as leniency applicant in a settlement procedure. The authority imposed a fine of €1.6 million against Semperit for violation of the Austrian Cartel Act and Article 101 of the Treaty on the Functioning of the European Union for a period of roughly 15 years.

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Endnotes

- (1) KartG 19/07/2018, 27 Kt 5/16m.
- (2) OGH 06/09/2017, 16 Ok 10/16f.
- (3) *Toshiba*, European Court of Justice, 20.1.2016, C-373/14p.
- (4) *Siemens*, European Court of Justice, 19.12.2013, C-239/11p.

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