Reconciling Disclosure of Confidential Information and Enforcement of Competition Law

Emeritus Professor Richard Whish QC (Hon)

Emeritus Professor Richard Whish, QC (Hon) delivered a lecture titled 'Reconciling Disclosure of Confidential Information and Enforcement of Competition Law' on 09 October 2019 at the seat of the IJLS. The course was aimed at legal practitioners who had the opportunity to get to grips with confidentiality rules in balancing the need to protect confidential information and the need for transparent enforcement of competition law. Members of the Competition Commission of Mauritius and the COMESA Competition were also present.

General principles

Prof Whish began his lecture by enumerating the general principles underlying competition law and the role of competition agencies. The crucial mission of any competition commission is to enhance market competition. There are 'three weapons in the armoury of competition enforcement authorities: (i) prohibition of restrictive agreements (cartels); (ii) Monopoly situations which are harmful to competition (abuse of dominance); and (iii) investigating whether certain mergers would substantially lessen competition.' The Competition Commission of Mauritius has various powers to end these types of anti-competitive behavior. While effective enforcement is essential for the achievement of the competition agency's mission, Prof Whish was of the view that 'you only educate society, corporate citizens, by adopting enforcement decisions.' Enterprises must comply with the law but their rights of defence must be complied with. The Mauritius Competition Act 2007 is explicit as to certain rights, for example legal professional privilege (section 54), the right to a hearing (section 56) but other rights are not explicitly specified in legislation. Presumably, according to Professor Whish, there is a role for the courts to address those rights.

How do competition authorities obtain information?

After this brief introduction to competition law, Prof Whish elaborated on the core subject of his presentation: how competition authorities obtain information. Competition authorities have their own 'intelligence units'. For instance, in the UK, the Competition Markets and Authority has a mergers intelligence unit as well as a cartels intelligence unit. Competition authorities also receive complaints, for instance from competitors and customers. Consumer bodies such as Citizens Advice Bureau and the BEUC may also refer matters to the Competition Markets and Authority. Enterprises themselves may 'self report' to competition authorities such as for examples merger notifications and requests for guidance. However, both Mauritius and the UK do not have a system of mandatory prenotification of mergers. Prof Whish prefers mandatory notification systems which is less substantially harmful to

competition. Under UK law, there is no duty to pre-inform the merger (mergers' intelligence unit to monitor whether and when a merger has taken place). Moreover, competition authorities may conduct dawn raids or request information. Enterprises may seek leniency or may provide information as part of settlement discussions. Prof Whish highlighted that parties to a cartel know that what they are doing is illegal as a consequence of which it is not easy to discover something that is shrouded in secrecy.

Government departments may also provide information. Moreover, information may also be provided by other competition authorities. Stakeholders generally will be invited to/may provide information during investigations. It is highly likely that competition authorities may end up with a large amount of information. Prof Whish then addressed particular topics in relation to confidential information and competition law.

Self-incrimination

Both EU and UK law recognise privilege against the provision of self-incriminating information. This does not entitle enterprises to withhold self-incriminating documents. There is a need to distinguish protections that are afforded to natural persons in criminal proceedings from the position of well-resourced and legally-advised legal persons involved in competition proceedings. However, the burden of proof is on the competition authority. Suppose A, B and C are in a cartel. Can the competition authority demand self-incriminating evidence from any one of them? No, because they cannot ask questions the answer of which will be self-incriminating. But the authority can say have you got any documents in your possession in relation for example to widgets. The distinction is between asking questions and requesting documents. The privilege against self-incrimination originates from sinister situations where authorities were unconstrained by human rights considerations. It follows that natural persons should not be forced to self-incriminate themselves inasmuch as they have a right to silence in these particular situations.

Legal professional privilege

EU law affords legal professional privilege to correspondence between external, EU, lawyers in contemplation of an actual infringement proceeding. UK law also recognises in-house privilege. Suppose A, M and S have a commission case on privilege. Advice must have been given in contemplation of an actual proceeding. In the EU, privilege attaches to external lawyer qualified in EU. On the other hand, section 54 Competition Act 2007 Mauritius does not say if it applies to in house lawyer or in contemplation of actual proceeding. It is important to note that a law firm in keeping its files may be well advised to distinguish files which are correspondence and other documents. If it is clear about disagreement on whether it is privileged or not: sealed by enforcement authority and judge will ultimately look at document and see whether privileged or not.

Complainant's anonymity

Prof Whish highlighted the situation in which a complainant complains to the Commission Commission but insist on anonymity. In EU law, the evidence of an anonymous complainant does have probative value, but cannot be evidence in itself of an infringement without corroborating evidence (*Salzgitter v Commission*). In Mauritian law, section 52 of the act deals with the complainant's anonymity.

Access to the file

One of the rights of the defence is access to the file. Defendant will be given a number of weeks to have access to the files. In the EU, there is a commission notice on access to the file. While there is a right to be shown exculpatory documents, there is no right to be shown internal commission papers. Suppose the competition authority has evidence good for its case but also harmful to the case. The commission would not be able to keep inculpatory evidence and exclude exculpatory evidence.

Disclosure of leniency statements

Prof Whish noted that almost every cartel case in the EU originates in a leniency application (including immunity). Suppose A blew the whistle and it was X Y and Z who were dawn raided. A as the first through the door is the whistleblower asking 100% leniency. However, additional information from XYZ will lead to reduction in fine. Combatting cartels are not possible without the whistle blower. The system would not work without it. The system accordingly has to be efficient by giving certain rights and incentives to the whistle blower. However, nearly all major cartel cases in the EU lead to follow-on actions for damages. It is important that a leniency applicant is not put in a worse position than other cartel members when it comes to damages claims. This is why a leniency application in the form of oral statement is preferred to written statements. Leniency evidence can have probative value but leniency evidence cannot in and of itself be sufficient as evidence for the infringement. Professor Whish further asked the question whether CEOs can give evidence or can a defendant insist on a CEO being examined under oath. The answer is in the negative insofar as there is no cross examination of witnesses.

Disclosure of settlement submissions

There are some awkward cases in relation to the disclosure of settlement submissions. Suppose A B and C admit that they are in the cartel and reach a deal, and they admit to their liability in exchange of reduction of fine. The investigation is against A B and C. A and B admit and C does not. There is a hybrid settlement where some will and others will not settle. C sends the competition authority a settlement submission. A and B refuse to affirm that the cartel did exist. Are A and B entitled to access the settlement submission files? The answer is in the positive: A and B do have a right to access. The reason is clear: if so leniency applicants would be disincentivsed from blowing the whistle. As a result, leniency applicants in the EU can make an oral statement and this will not be disclosed in damages proceedings. However, there will still be a decision establishing an infringement of competition law, and

that will be published, subject to redaction (see below). Many cartel cases are now settled as a result of the admission of guilt in return for a reduced fine. Enterprises must make a 'settlement submission' which may contain important information about the cartel. The other members of the cartel are entitled to see an enterprise's settlement submission as part of access to the file but they must not disclose it to anyone else.

Redacted decisions

When decisions are published, the European Commission/CMA will exclude confidential information. This can take a considerable amount of time to establish, between the authority and the lawyers. There are many disputes; these sometimes go to the court for decision for which a balance has to be struck. A similar provision obtains in section 70 of the Mauritian act.

Confidentiality rings

A confidentiality ring is an agreement occasionally reached by parties to a litigation to reduce the risk of confidential documents being used outside the litigation. In the UK, confidentiality rings are used mostly in appeals against findings of infringement and in appeals against merger prohibitions and in damages claims. Breach of the terms of the ring would be a contempt of court and can thus deter any pernicious disclosure of information.

Conclusion

The lecture by Emeritus Professor Richard Whish QC (Hon) was a tremendous success insofar as it addressed the issue of striking the right balance in disclosing sensitive information in relation to proceedings in competition law enforcement. Members of the legal profession present were able to get a grasp on the competing objectives of transparency (to the parties under investigation about the evidence against them and more broadly in promoting public understanding of competition enforcement) and confidentiality protections (to information obtained by competition agencies during their investigations) as central features to promoting fair, informed, and predictable enforcement of competition law in Mauritius.