Kluwer Competition Law Blog

Manifestation of Trucks' Manufacturer's Collusion in their Conduct – The Scania Decision (Case T?799/17)

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The long-awaited judgement of the General Court in the price-fixing case against a world-leading provider of transport solutions, Scania, is out. On February 2, 2022, in a hybrid settlement case, the General Court dismissed the appeal filed by Scania. It upheld the decision of the Commission, which imposed a fine of € 880.5 million for entering into price-fixing agreements with other manufacturers between 1997 and 2011.

The judgement is remarkable to the extent that it adds to the discourse and gives guidance on hybrid settlements, a bifurcated procedure involving a settlement procedure for the settling parties and a standard procedure for parties that have opted out of the settlement. The judgement confirms the importance of clear articulation of a description of the events and their legal qualification for the settling parties in a settlement decision. At the same time, this should not amount to a restriction on the Commission to directly or indirectly refer to the non-settling party. The General Court has gone into minute details of the collusive contacts of Scania and the settling parties concerning future prices, gross price increases and the timing and passing on of costs relating to the introduction of emission technologies.

Facts of the case

The Scania group (Scania AB, Scania CV AB and Scania Deutschland GmbH) operate in the production and sales of heavy trucks used for long-haulage transport, distribution, construction haulage and specialised purposes. Scania was alleged to be responsible for entering into collusive arrangements with their competitors (DAF Trucks N.V, Daimler, Iveco, MAN, Renault) on pricing and gross price increases in the EEA for medium and heavy trucks, thereby infringing Article 101 of the Treaty and Article 53 of the EEA Agreement during the period of January 1997 to January 2011.

In a hybrid procedure, Scania initially entered into settlement discussions but subsequently withdrew from these proceedings. The settlement decision with the mentioned competitors of the Commission brought the investigation to an end in that regard, but it did not terminate the investigation against Scania (a non-settling undertaking). By its decision dated September 27, 2017, the European Commission imposed a fine of € 880.5 million on Scania. Scania appealed to the General Court by raising the plea that the Commission did not proceed impartially and without

irreparably infringing Scania's right to be heard and the presumption of its innocence.

General Courts decision

On February 2, 2022, the General Court dismissed the appeal in its entirety by noting that the Commission had not breached the presumption of innocence by using the 'hybrid' procedure; the Commission had established to the requisite legal standard the existence of a single and continuous infringement of Article 101 TEFU; and its findings that the information exchanges of concern amounted to infringements which were restrictive by object.

Presumption of innocence and Principle of impartiality

The Court stressed that the settlement decisions did not implicitly refer to Scania's liability. The Court then analysed each reference made to Scania, even within the terms 'amongst others' or other references concerning their exact purpose in the context of the settlement decision and stated that this did not amount to a clear declaration or a final finding of liability of Scania (judgement, para 121 to 125). The Court also relied on the judgement of CJEU in Pometon to clarify that acceptance of infringement by a settling party does not automatically transform *de facto and de jure* the references to the non-settling party (judgement, para 127). The Commission's settlement decision is not a sort of 'verdict under a veil' concerning Scania's liability.

For a detailed discussion of Pometon, see my previous blog with Dr Lena Hornkohl here. The blog post points out that when a reference to the conduct of a non-settling party / third party is crucial to establish the circumstances of the case as a whole or established the guilt of the accused party, then the Commission is justified in doing so. However, this must not amount to a finding of guilt of the third party.

The General Court also has made references to several cases, including Karaman, and Icap, to establish the importance of the careful choice of words and the particular circumstance in which they are expressed (judgement, para 111-113). Additionally, the Court noted the importance of protecting human rights and fundamental freedoms while referring to the European Court of Human Rights (ECtHR) judgment in Navalnyy. The Court pointed out that in complex proceedings where different accused cannot be tried together, the trial courts are obliged to confine themselves to provide only that information which is necessary for the assessment of the legal responsibility of the accused. It must be done as accurately and precisely as possible without including a potential prejudgment about the guilt of the third parties, thereby jeopardising the fair examination of third parties in separate proceedings. Thus, the General Court and the ECtHR have repeatedly confirmed that the Commission must take a cautious approach while drafting the settlement decision.

Single and continuous infringement

Particularly noteworthy are the implications of the judgment on the concept of 'single and continuous infringement'. The Court noted that the awareness of the overall plan must be assessed at the level of the undertaking and not at the level of employees. The Court relied on the decisions

in Akzo Nobel and H & R ChemPharm to reaffirm that the employees act on behalf of the undertakings. Therefore, awareness of the existence of the overall plan must be assessed at the level of undertakings (judgement, para 476-477).

Further, three elements are necessary for categorising the infringement as a single and continuous infringement. They are i) an overall plan pursuing a common objective, ii) the intentional contribution of the undertaking to that plan, and iii) its awareness (proved or presumed) of the offending conduct of the other participants. The Court examined in detail the exchanges and noted that there was an overlap in the exchanges between the employees at the three levels lower, top and German. Even though the collusive contacts were interrupted after September 2004, the employees at the lower level were aware of the price lists and the content of the exchanges at the German level. The exchanges between these two levels amounted to the existence of an overall plan pursuing a common objective (judgment, para 237-238). The participation in the collusive contacts by employees amounts to the existence of the second element of intention and the third element of awareness. Finally, the Court upheld Commission's contention that Scania was aware or ought to have been aware that the collusive contacts concerned medium and heavy trucks, even though Scania only produced heavy trucks.

The geographical scope of the infringement

The General Court found that the Commission had correctly established the geographical scope by stating that single and continuous infringement extended to the territory of EEA and not just Germany as contended by the applicant Scania. While shedding light on the conduct of trucks manufacturers and their colluding practices, the Court elaborately discussed the exchanges between the distributors and the headquarter of Scania. It concluded that the scope of exchanges that took place at the German level went beyond the German market because the information consisted of competitors' pricing strategies at the European level. The distributor (Scania DE) is not independent of the headquarter since the prices developed at headquarter level impact the entire distribution chain. Therefore, the Commission was right in taking the view that information provided by Scania DE employees to competitors during exchanges at the German level reflected a pricing strategy established at Scania's headquarter level, thus the scope extending beyond the German market(judgement, para 432-442). It, therefore, led to a reduction of uncertainty regarding European prices of other manufacturers.

Fine – Proportionality and Equal treatment

Scania challenged the fine calculation method of the Commission along with the principles of proportionality and equal treatment. As already stated, the Court dismissed the argument that the employees could not have known that the information received from competitors could have a European scope and claimed that assuming Scania's employees had wished to undermine competition on the geographic market, they were only responsible for exchanges at German level.

The General Court also dismissed the claim that the Commission ignored the reality by disregarding the role of the other truck manufacturers in the infringement and thus discriminated against the applicant (judgement, para 560). The Commission can be rightly said to have exercised the balance between the discretion enjoyed by the Commission when enforcing EU competition

law against the principle of equality. As stated in Ziegler, there are two elements of the principle of equality, i.e. no differential treatment of a particular party, and in case of differential treatment, objective justification for the same (judgement, para 559). The Court pointed out that the Commission has fulfilled these elements, as there is no differential treatment. The other parties have already been dealt with in the settlement decision, which established their liability for their role in the cartel (judgement, para 560-561). It is concisely apparent from the chronology of events described by the Commission in para 6 of its decision.

Conclusion

The judgment provides the Commission with a blueprint to ensure it does not infringe fundamental rights when adopting hybrid settlement decisions. However, a cautious approach must be taken while handling such complex cases, as they pose a challenge to fundamental rights. Because of this, most of the time, applying fundamental rights correctly may require an appeal to the EU Courts. In this case, also, the applicant has an option of appeal, limited to points of law only, before the Court of Justice. However, a change in the outcome is most unlikely.

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