

Competition - Cyprus

Supreme Court issues landmark judgment upholding commission interim order

Contributed by **L Papaphilippou & Co LLC**

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On November 30 2012 the Supreme Court of Cyprus issued its judgment⁽¹⁾ on the applicable criteria for granting an interim order to supply, as issued by the Commission for the Protection of Competition under the Protection of Competition Law 2008.

Facts

The Pancyprian Organisation of Cattle Farmers (POCF) Ltd was established in 2004 by a group of milk producers from across Cyprus. It is registered as a group of producers within the ambit of the relevant EU legislation and represents approximately 80% of the cow's milk producers in Cyprus, supplying the overwhelming majority of the milk industry active within the Cypriot market.

On May 8 2012 the interested party in the proceedings (a milk industry player) filed a complaint before the commission claiming, among other things, that the POCF had abused its dominant position in the wholesale distribution of fresh cow's milk and had unjustifiably refused to supply milk. The interested party alleged that the POCF had ceased (without prior notice or justification) to provide it with milk and left it with no possibility of an equivalent solution, as it was economically dependent on the POCF.

On June 20 2012 the commission issued an interim order, on the basis of Section 28 of the law, ordering the POCF to supply the interested party with a certain quantity of fresh milk on a daily basis, on the condition that the latter would render payment by a certain date and provide a relevant bank guarantee. Section 28(1) provides that the commission may order the taking of interim measures and impose such terms as it deems necessary under the circumstances. Such measures, whether mandatory or prohibitory, must be of a temporary and conservative nature, and their extent must not exceed what is absolutely necessary under the circumstances.

The POCF, as applicant, argued before the Supreme Court that the interim order was blatantly illegal. To that effect, it alleged that Article 28 of the Constitution had been infringed, as the arrangement constituted an unjustifiable violation of the right to enter into contracts freely, by obliging the POCF to enter into a contract for the supply of milk to the interested party under onerous terms.

The POCF further alleged that the interim order was the result of an insufficient search, characterised by an erroneous perception of the facts and a lack of sufficient or legal reasoning, and as such was an excessive measure that infringed the principle of proportionality.

In turn, the commission argued that Section 28 of the law enables it to impose interim measures, provided that:

- the conditions of *prima facie* violation of Sections 3 and/or 6 of the law or Articles 101 and 102 of the Treaty on the Functioning of the European Union are met;
- an element of urgency is present; and
- there is a real danger of irreparable damage being inflicted on either:
 - the interests of the person that files the application for interim measures; or
 - the public interest.

Section 3 of the law prohibits:

- all agreements between undertakings or associations of undertakings;
- all decisions by associations of undertakings; and

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- any concerted practices that have as their object or effect the elimination, restriction or distortion of competition within Cyprus (subject to the provisions of Sections 4 and 5).

Section 6 of the law prohibits the abuse of a dominant position by one or more undertakings.

Decision

After considering the arguments filed by all parties, Justice Nathanael found that the commission had provided full reasoning through its interim order, offering a model of structure and drafting that is rarely present in administrative law decisions.

The court further noted that Article 26 of the Constitution contains provisions that justify the limitation of the right to enter into contracts freely. To that effect, Article 26(1) expressly provides for the possibility of a law that will prevent exploitation by persons that command economic power. Furthermore, Article 26 must be seen and interpreted in the light of EU law and, in general, within the ambit of achieving the goals set out by the European Union. Hence, it is within these parameters that the commission's intervention must be viewed and evaluated.

The court stated that it would not rule on either the merits or the underpinning reasoning of the interim order, as that would not fall within its role as a reviewing court (numerous judgments have held that the reviewing court cannot substitute decisions of the administration with its own).

The counsel for the POCF had accepted during the proceedings before the court that it had indeed held a dominant position in the market. On this basis, the court accepted that the interim order had been justifiably issued as, on the basis of all information set before the commission, the non-supply of milk by the POCF to the interested party was to the detriment of consumers (as end recipients). This not only enhanced the POCF's dominant position, but also gave rise to the possibility of manipulating circumstances, as the POCF had its own mechanism for distributing milk and producing milk products, thereby placing it in competition with the interested party.

The court held that the POCF had used its dominant position abusively against the interested party, as the POCF provided the milk that it refused to sell to the interested party to third companies, which in turn sold it back to the interested party. The court reiterated the commission's observation that, as an indication of the POCF's abuse of dominant position, the interested party's competitor (which was owned by the POCF) had received a greatly increased quantity of milk from the POCF.

In addition, the court stressed that the imposition of interim measures is based not only on the conditions set by Section 28, but also on the appreciation, in a particular set of circumstances, that the actions of the dominant undertaking could cause damage to consumers, by analogy to *La Cing SA v Commission of the European Communities*.⁽²⁾

The court therefore rejected the POCF's recourse against the commission and upheld the interim order.

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Endnotes

(1) *Pancyprian Organisation of Cattle Farmers Ltd v the Commission for the Protection of Competition*, Judgment 1023/2012, Justice Nathanael.

(2) T-44/90, paragraphs 3 and 62.

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