

Court overturns Competition Authority fine for disclosure of incomplete information

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Introduction

CP Carga - Logística e Transportes Ferroviários de Mercadorias SA is the largest rail-based freight and logistics operator in Portugal. The company integrates logistic chains for all kinds of rail traffic, such as:

- containers;
- solid and liquid bulk cargo;
- foundry and building materials;
- forestry industry products;
- road vehicles and components; and
- fuel and chemical products.

In 2012 the company was the subject of an abuse of dominance complaint before the Competition Authority by Takargo (a competitor) based on alleged predatory pricing conduct (Case PRC/2013/3).

During the inquiry, CP Carga received a request for information from the Competition Authority. A section of the request regarded costs per type of cargo, including details of frequency, block-trains, individual wagons and containers. The company was informed that not providing the requested information or providing false, inaccurate or incomplete information would result in a fine of up to 1% of the company's annual turnover.

CP Carga informed the authority that it had no analytical accounts capable of determining the costs for each specific train route. Additional clarification was requested by the authority and in March 2014 a visit to the company's premises was agreed in which several company documents and computer files were accessed and reviewed by the case handlers. The material reviewed included simplex cost computer files, which were used to estimate the cost of CP Carga's services based on the type of transport, the origin and destination of cargo, the type of wagon and locomotive used and other cost variables. The simplex IT tool was used to provide internal cost estimates to CP Carga's commercial department when preparing proposals for third parties.

The Competition Authority considered simplex to be a fundamental tool for the detailed assessment of CP Carga's unit costs and respective allocation key, which in December 2014 resulted in the dismissal of Takargo's complaint of predatory pricing and abuse of dominance against CP Carga.

However, in July 2015 the authority imposed a €100,000 fine on CP Carga, as following its visit to the company's premises and access to the simplex files the authority decided that CP Carga had disclosed incomplete information regarding respective costs per train route. The authority's decision was subject to judicial appeal by CP Carga.

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Judicial proceedings

In its December 15 2015 decision (Case 276/15/9YUSTR) the Competition, Regulation and Supervision Court disagreed with the Competition Authority's findings and dismissed the €100,000 fine based on the alleged disclosure of incomplete information by CP Carga.⁽¹⁾

The court placed significance on the witnesses that CP Carga provided to the judicial oral hearing, who explained that the simplex IT tool was used to estimate budgets in accordance with requests made for the provision of specific services to third parties. Although the original files were contained in CP Carga's general accounts, this data was used to estimate average unit costs only and as such, the simplex files provided estimated costs and not the company's effective costs. The court further considered that the simplex files were grounded in a significant set of variables regarding the costs of each service, which can differ from those incurred by the company.

Based on the credibility of the testimonial evidence that CP Carga provided in the oral hearing, the court decided that simplex was a commercial tool with a commercial purpose and could not be regarded as an analytical accounting tool or management control system aimed at determining the effective cost of each service rendered by the company.

Further, the court decided that CP Carga did not have a management control system or an analytical accounting tool to determine the effective costs incurred per train route, as there were numerous variables to be taken into account in that regard.

According to the court, the fact that the Competition Authority had used data from the simplex IT tool to establish that CP Carga was not applying predatory prices did not mean that it was a management or analytical accounting tool. At most, this action signified that the authority had deemed the use of cost estimates to be sufficient to close the abuse of dominant position complaint relating to alleged predatory pricing behaviour.

The court ruled that CP Carga had not provided inaccurate or incomplete information to the Competition Authority, as it did not have the cost data requested. As a result, it cancelled the €100,000 fine.

Comment

The credibility of the testimonial evidence that CP Carga provided during the judicial proceedings was an important factor that resulted in the court cancelling the Competition Authority fine. The credibility of the company's witnesses was augmented by the testimony of the authority's case handlers, who confirmed the transparency and cooperation of the defendant's employees during the Competition Authority's visit to CP Carga's premises.

The court also highlighted that the authority's request for information was general and did not specify the type of costs that it wanted to access (ie, real or estimated costs). This generated an excessive burden on CP Carga, as the company would have had to identify and assess all potential interpretations of the requested data.

The court further added that the primary threshold of duty to cooperate with an investigation, if accepted, would no longer be cooperation by a defendant; rather, the authority would establish the information relevant for an antitrust investigation. Further, the ruling considered that the duty to cooperate does not impose on the defendant the burden to contact the authority to assess whether its interpretation of the request of information is correct, as during the course of an investigation and following access to the requested data, the authority must determine the type of information that is relevant and, if deemed necessary, address more detailed and specific requests for information to the defendant.

The ruling adopts a balanced and amenable approach between the duty of companies to provide information to the Competition Authority following a request for information in an antitrust inquiry and the authority's burden to be diligent, meticulous and precise in requests for information addressed to defendants.

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Endnotes

(1) The Competition, Regulation and Supervision Court ruling is available [here](#).

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