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The Spanish National Court exonerates Avis in the car rental cartel

The National Court impedes the CNMC from automatically concluding that attending one single meeting of a cartel without publicly distancing oneself constitutes an infringement and exonerates Avis of any responsibility. The National Court alignes itself with the Court of Justice of the European Union and requires, for an infringement to exist, that both attendance at the meeting and the anti-competitive intention behind its attendance, be duly proven.

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Background

Through its Judgment of 16 March 2016, which has since become final, Spain's National Court has considered it not proven that the Spanish subsidiary of Avis (Avis Alquile un Coche, S.A.) participated in a price fixing cartel existing between 2005 and 2011, formed by several companies in the short-term car rental sector. A series of meetings were held in this context, at which commercially sensitive information was exchanged and agreements were reached to coordinate the behaviour of competitors in the market. In the specific case of Avis, the sole grounds on which the now-defunct Spanish Competition Authority, the *Comisión Nacional de la Competencia* (CNC) (currently the *Comisión Nacional de los Mercados y de la Competencia* (CNMC) - the Spanish Markets and Competition Commission) based its decision to accuse it of taking part in the cartel – and subsequently fining it 1,469,907 euros – was its alleged attendance at a meeting of the cartel on 30 March 2011, during which sensitive information on pricing was exchanged and the degree of compliance with a former agreement on minimum prices for renting economy cars during low season was analysed.

The National Court acknowledges the possibility, as is established in the European Community case law on which it is inspired, that attending one single meeting of a cartel can be sufficient to prove that concerted practices exist, and therefore the company's involvement in a cartel. However, the Court specifies that it is necessary to prove both that: (i) the company

effectively attended the meeting in question, and that (ii) in light of the relevant circumstances, such attendance constitutes sufficient evidence of its participation in the cartel.

In this regard, the National Court refers in particular to section 47 of the judgment of the General Court of 30 November 2011, matter T-208/06 *Quin Barlo*, which states that: *"When attendance at such meetings has been proven, the burden falls to the company to sufficiently demonstrate that its participation at the meetings was in no way driven by anti-competitive intentions, by proving that it informed its competitors that it was taking part in the meetings with intentions different from theirs (…)*".

In the case at hand, once all circumstances were considered, as well as the fact that the file for the administrative proceedings contained only one supposedly incriminating document, the National Court concluded – not only that Avis' attendance at the meeting of 30 March 2011 cannot be deemed sufficiently proven – but also that its involvement in the cartel as a result of its supposed participation in said meeting cannot be proven either.

Analysis

Lack of sufficient proof of Avis' attendance at the meeting and of its involvement in the cartel

First of all, the National Court analysed whether or not Avis' attendance at the meeting of 30 March 2011 could be considered proven and, as a result, its involvement in the cartel. The sole piece of evidence on file which mentioned Avis was the minutes of said meeting, drafted by the company Goldcar, one of the companies forming part of the cartel. In the opinion of the Court, although it is true that even just a single document can be considered sufficient proof, this would only be possible if it can be clearly and convincingly derived from such document that the company is guilty of committing such practices.

However, the Court stated that, although the meeting minutes support the existence of a cartel and constitute incriminating evidence for the rest of the companies, Avis' implication in the cartel cannot be fully and firmly deduced from this, nor even the fact that it attended the meeting. Therefore, since this was the only piece of evidence for the charge brought by the CNC, the Court felt it had to be very thorough in its analysis and take into account all other circumstances of the case, in order to clarify whether or not Avis did indeed attend the meeting and if so, and as a result, it then formed part of the cartel.

Its analysis of such circumstances led the Court to conclude that sufficient value as evidence cannot be attributed to the meeting minutes in order to defend that Avis attended the meeting or was involved in the cartel. First, the Court considered that, unlike the rest of the cartel participants, there was no exchange of correspondence (e-mails) between Avis and the other companies, not even with Goldcar. This aspect is of particular importance, since the existence of some type of e-mail exchange would constitute relevant proof of the acknowledgement, by the rest of the companies, of Avis' involvement in the cartel, and its absence may therefore be construed as a sign that Avis did not form part of it.

Second, the Court found it surprising that, in the minutes of the meeting of 30 March 2011 drafted by Goldcar, no reference whatsoever was made to the inclusion of Avis in the cartel and to the relevance of such inclusion, above all because it was the only multinational company supposedly participating in the cartel. As the Court stated, had Avis actually joined the cartel, one would normally expect to find at least one specific mention regarding this.

Third, the Court highlights the fact that neither of the companies which reported the existence of the cartel (Sol Mar and Niza Cars) mentioned Avis as a participant in the cartel and that, nevertheless, the file contains statements by Goldcar regarding the impossibility of Avis forming part of the cartel, due to the fact that its prices were determined by its head office in the United Kingdom.

Fourth, the Court refers to the limited negotiating power and powers of representation of the person who apparently was present at the meeting as Avis' representative, since this person was the Manager of the Avis office at the Malaga airport, whose job consisted only of handing the delivery and receipt of the rental cars.

Lastly, the Court analysed Avis' lack of genuine interest in participating in the cartel, insofar as its activities focus on the corporate market and the high-end sector of the vacation market, and thus its objectives differ from those of the rest of the companies. Furthermore, as some companies acknowledged, the cartel was organised precisely with the aim of harming multinational companies such as Avis.

In short, the Court considered it fundamental that not one single document exists which ratifies Avis' attendance at the meeting, other than the minutes drafted by Goldcar.

Means of refuting a company's involvement in a cartel, had it attended a cartel meeting

In addition to the analysis of the specific case of Avis, a set of guidelines can be inferred from the National Court's judgment, for cases in which – in contrast to the conclusion it reached regarding Avis – a company's attendance at one (or more) meetings of a cartel has been demonstrated. Even in those cases, the Court considers the possibility that companies may prove that they were in no way involved in concerted practices.

The National Court invokes EC case law (among others, matters C-8/08 *T-Mobile*, *Quin Barlo* already mentioned, and C-74/14 *Eturas UAB*), and acknowledges, first of all, how extremely rigorous such case law is, in terms of determining the relevance and consequences of attending cartel meetings at which commercially sensitive information is exchanged. Thus, when a company's attendance at the meeting has been proven – unlike in the Avis case – it falls to that company to demonstrate that, by attending the meeting, it was not actually participating in the concerted practice, and that it informed the rest of the companies that its attendance at the meeting was not driven by anti-competitive intentions. In other words, the company must *publicly distance itself* from the cartel, since, should it fail to do so, it would be leading them to understand that it consents to what is agreed at such meetings and that it will adapt its market behaviour as a result.

However, as the National Court indicates, citing recent judgments of the CJEU in matters C-634/13 *Total Marketing Services SA* and *Eturas UAB*, although *publicly distancing itself* can be the ideal means, it would not be the sole means of proving a company's non-involvement in a cartel, stating in this regard that if a company has not attended meetings during a significant period of time, the competition authorities must prove that such company continues to take part in the cartel. This could be understood to mean that the arguments and circumstances in Avis' specific case would in fact constitute alternative ways of demonstrating that, even if Avis had attended the meeting of 30 March 2011, and despite having not *publicly distanced itself*, its hypothetical participation in said single meeting was not driven by an intention to take part in the cartel.

In addition, it must be noted that, in some cases, concerted practices by companies is not done through meetings of cartel participants. Therefore, *publicly distancing oneself* must necessarily permit the inclusion of other forms, or else alternatives to *publicly distancing oneself* must be admitted as means of proving a company's non-participation in a cartel. In this regard, in the matter *Eturas UAB*, it was determined that concerted practices took place as a result of an e-mail sent by the operator of a computer application used by many travel agents, whereby the operator suggests to the travel agencies that they all set the same limit on the type of discount they offer their customers. In this case, the CJEU admitted that the refusal by the travel agencies to implement this suggested limit sufficed to prove the existence of such *public distancing*. Thus, the fact that the agencies continued to offer higher discounts than the limit suggested would sufficiently prove that they had distanced themselves from the possible concerted practices.

The Spanish Supreme Court issued a similar pronouncement in its judgment of 8 June 2015 (confirming that of the National Court of 8 July 2013) in the appeal brought by the company Colgate Palmolive (CP) against the Decision of the CNMC in matter S/0084/08 *Fabricantes de Gel*, in which the Supreme Court found that CP's attendance at the cartel meetings had not been proven (which the CNMC acknowledged), nor that it had indirectly benefitted from the cartel. The Supreme Court considered CP to have distanced itself effectively from the cartel; since, unlike the rest of the participants, it refused to reduce the size of its bath gels and also launched an advertising campaign with the slogan "*size does matter*", which, indirectly, clearly stated its intention to not take part in the cartel. For this reason it is noteworthy that both Spain's National Court and its Supreme Court have criticized the fact that the CNMC tends to automatically assume companies' participation in cartels.

Conclusion

The National Court confirms that, although attending one single meeting held in the context of an existing cartel can imply that a company may be involved in anti-competitive concerted practices, in order to reach this conclusion, it must first be sufficiently proven that such company attended the meeting, and that such attendance led to the company's involvement in the concerted practice. In this regard, when only one incriminating document exists, the information it contains must enable the authority to fully and firmly determine that the company is guilty of committing such practices.

This pronouncement by the National Court is of particular importance since it confirms that, even when attendance at a meeting has been proven, companies can provide proof, arguments and reasons regarding either their specific *public distancing* from the cartel, or regarding other circumstances which prove that they did not form part of the cartel.

Despite that the circumstances of the Avis case are quite particular and may not apply to other scenarios, it is possible to somehow systematise some of the relevant factors taken into account by the National Court in order to be able to raise them in similar cases, in an attempt to demonstrate that attending one meeting is not synonymous to participating in concerted practices:

- The existence or not of communications exchanged between the company attending the meeting and the rest of the participants, which confirm in some way the group's acknowledgement of the company's participation in the cartel;
- The existence or not of specific mentions of the fact that the company has joined the cartel, which seems to be a more important requirement, the larger the company;
- The existence or not of any additional document ratifying the company's attendance at the meeting (or its participation in the cartel), and the existence or not of any subsequent communications calling future meetings;
- The position held by the person attending the meeting as the company's representative, especially that person's negotiating power and powers of representation, a factor which the CNMC has systematically ignored in the past;
- The actual room for manoeuvre the company in question has, to put into practice the agreements reached with the cartel (whether this be price fixing or setting other commercial conditions); or
- The actual commercial interest the company may have in participating in the cartel, which may not be very clear, depending on the nature of the company and the specific market segment in which it is present.

CONTACT

Clifford Chance
Paseo de la Castellana, 110
28046 Madrid
Tel.: +34 91 590 75 00

Miguel Odriozola
Partner, Antitrust
E: miguel.odriozola@cliffordchance.com

Carlos Vergez
Senior Associate, Antitrust
E: carlos.vergez@cliffordchance.com

Belén Irisarry
Senior Associate, Antitrust
E: belen.irisarry@cliffordchance.com

Fernando Las Navas
Lawyer, Antitrust
E: fernando.lasnavas@cliffordchance.com