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UK Competition Law Newsletter

Highlights

- Court of Appeal broadens scope of litigation privilege in ENRC v SFO
- CAT upholds infringement decision for online sales ban in Ping v CMA
- CMA refers Sainsbury/Asda to Phase 2
- CMA receives super complaint on excessive prices for disengaged consumers

Lead Article: *ENRC v SFO – Implications For Legal Professional Privilege In Antitrust Cases*

On 5 September 2018, the Court of Appeal (**CoA**) overturned a High Court judgment[1] concerning the scope of legal professional privilege in the context of an investigation by the Serious Fraud Office (**SFO**) into ENRC.[2] The CoA judgment broadens the application of litigation privilege, which can protect non-lawyer-client communications prepared in contemplation of "adversarial proceedings," to documents created by organizations carrying-out internal investigations in the context of regulatory enforcement. Following the CoA's judgment, litigation privilege may in certain circumstances apply even before a Statement of Objections (**SO**) has been issued in an antitrust matter by the Competition and Markets Authority (**CMA**). This article assesses the possible implications of the judgment for antitrust enforcement.

Background

The CoA judgment concerns the SFO's investigation into ENRC Ltd, part of a multinational group of companies operating in the mining and natural resources sector. The Timeline of Events (*right*) sets

[1] *Serious Fraud Office (**SFO**) v Eurasian Natural Resources Corporation Limited* [2017] EWHC 1017 (QB)

[2] *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation (**ENRC**) Limited* [2018] EWCA Civ 2006

TIMELINE OF EVENTS

20 December 2010
ENRC received an email from a whistle-blower alleging corruption and financial wrongdoing.

31 March 2011
General Counsel warns "*we are firmly on the [SFO's] radar and I expect an investigation in due course*".

8 April 2011
Media reports that the SFO might investigate ENRC and whether it had adequate procedures to prevent bribery.

17 April 2011
ENRC head of compliance predicts an "*[SFO] investigation*" and ENRC hires forensic accountants.

21 April 2011
External counsel advises that "*adversarial proceedings may occur out of the internal investigation*" and that "*both criminal and civil proceedings can be reasonably said to be in contemplation*".

10 August 2011
SFO writes to ENRC concerning the media allegations of corruption, but states that "*it was not carrying out a criminal investigation into ENRC at that stage*".

19 August 2011 – 28 March 2013
Settlement negotiations between ENRC and the SFO, which are ultimately unsuccessful.

25 April 2013
SFO opens a criminal investigation into ENRC.

out the facts leading up to the launch of the SFO investigation. During ENRC's internal investigation, it had instructed external counsel, employed forensic accountants, and engaged in settlement discussions with the SFO. On determining a lack of progress in ENRC's investigation and settlement discussions, the SFO opened a formal criminal investigation. The SFO issued a series of notices under section 2(3) of the Criminal Justice Act 1987 (**Act**), requesting documents from ENRC in order to investigate its conduct. Under the Act, ENRC was entitled to withhold documents that were protected by legal privilege. ENRC's assertion of legal privilege in relation to certain documents set the stage for the litigation in question.[3]

The disputed documents included: (i) notes of interviews conducted by ENRC's external legal counsel with current and former employees; and (ii) material generated by ENRC's external forensic accountants during their review of the whistle-blower allegations (together, the **Documents**). The question before the High Court, and later the CoA, was whether ENRC could withhold the Documents from the SFO on the grounds of legal privilege. ENRC asserted legal advice privilege over the interview notes, and litigation privilege over both the interview notes and the forensic accountant materials.

Legal Advice Privilege

Legal advice privilege protects confidential lawyer-client communications made for the purposes of giving or obtaining legal advice. The High Court held that ENRC could not claim legal advice privilege over the interview notes because the information contained in them was communicated to ENRC's external counsel by employees that were not authorised to give or receive legal advice on behalf of ENRC and were therefore not a 'client'. The leading English authority, *Three Rivers (No.5)*, limits legal advice privilege by narrowing the meaning of 'client': "*communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client*."[4]

The CoA declined to depart from *Three Rivers (No.5)*, despite seeing "*much force*" in ENRC's argument that 'client' was too narrowly construed, and held it was a matter to be determined by the Supreme Court. The CoA, however, recognised that the restrictive definition of 'client' puts large corporations and multi-nationals "*in a less advantageous position than a smaller entity*." For large corporations "*the information upon which legal advice is sought is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice*." The SFO has since announced that it will not be appealing to the Supreme Court. Companies must, therefore, continue to ensure that communications with lawyers are undertaken only by those individuals specifically authorised to receive legal advice if they want to claim legal advice privilege.

Litigation Privilege

Litigation privilege protects confidential documents created for the dominant purpose of litigation that is in reasonable contemplation. The High Court held that ENRC could not claim litigation privilege: legal proceedings against ENRC were not "*reasonably in contemplation*" at any stage before the Documents were created; and none of the Documents were brought into existence "*for the dominant purpose*" of resisting contemplated proceedings. The CoA, on the other hand, found that as a matter of fact ENRC was "*aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility*."

The CoA did not identify the first point at which litigation could be said to be reasonably in contemplation, but instead found that the threshold was satisfied when ENRC "i*nitiated its investigation in April 2011, and certainly by the time it received the SFO's August 2011 letter*".[5] The CoA took account of several considerations including: (i) a whistle-blower email prior to the commencement of the internal investigation; (ii) evidence that high level employees clearly believed ENRC

[3] See CGSH Alert Memorandum of 12 September 2018 for more detail, available here.

[4] *Three Rivers District Counsel and Others v Governor and Company of the Bank Of England (No. 5)* [2003] EWCA Civ 474.

[5] *Ibid*., paragraph 93

was likely to be a target for an SFO investigation; (iii) external counsel advice that "*criminal and civil proceedings can said to be in reasonable contemplation*"; and (iv) the "*whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement.*"[6] (See the Timeline of Events above for the relevant dates.)

The CoA further found that the Documents were created for the dominant purpose of litigation. In particular, it stated that "*where there is a clear threat of a criminal investigation … the reason for the investigation of whistle-blower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation.*"[7]

Antitrust Implications Of The Widened Scope Of Litigation Privilege

The *ENRC* case suggests that litigation privilege may apply at an early stage of criminal investigations. The widened scope of litigation privilege may also apply in antitrust cases, such that documents may be protected by litigation privilege at an earlier stage than suggested in the *Tesco* case,[8] in particular before the CMA has issued an SO. This represents sound policy given the need for companies under investigation to undertake internal investigations at an early stage to understand whether a breach of competition law has occurred. Given the limitations of legal advice privilege acknowledged by the CoA in the ENRC case, litigation privilege may be the only way for companies to withhold documents produced in internal investigations from competition authorities and future claimants.

There is no reason in principle for litigation privilege to be treated less favourably in civil proceedings than criminal. The CoA stated that a distinction between criminal and civil liability is "*illusory*." The underlying rationale of the privilege is that a company must be free to seek and obtain confidential advice in respect of actual or contemplated litigation. It is "*based on the idea that legal proceedings take the form of a contest in which each of the parties assembles his own body of evidence and uses it to try to defeat the other.*"[9] Without protection for this body of evidence, it is not possible properly to exercise the right of defence; the risk of disclosure would negate the benefit of legal advice, or an internal investigation. The High Court even suggested that litigation privilege would apply *earlier* in civil cases.[10]

The *ENRC* case holds that courts must look at the facts that lead up to internal investigations in assessing whether litigation privilege has been triggered. It recognises that litigation may reasonably be in contemplation – and therefore litigation privilege may be triggered – when companies receive evidence suggesting an adversarial process is likely if the case is not settled. It also finds that documents created for the dominant purpose of preventing adversarial proceedings may be protected if there is a clear threat of an official investigation. In determining whether litigation privilege applies in an antitrust case, a court may, for example, take into account: a leniency application that has been considered or made, a dawn raid that has occurred, press speculation about specific conduct, internal communications on the state of affairs facing the company, and/or legal advice that the company has received. While the *ENRC* case signals a potentially wider application of litigation privilege, the facts of each individual case will determine whether (and when) litigation privilege applies. For example, the fact that ENRC was already on the SFO's radar for previous conduct and had self-reporting obligations (which would not apply in an antitrust case) may have impacted the CoA's assessment of whether adversarial proceedings were likely.

The CoA also recognized that litigation privilege being triggered earlier facilitates a greater compliance culture, saying that it is "*obviously in the public interest that companies should be prepared to investigate allegations from whistle-blowers or*

[6] *ENRC v SFO (CA)*, paragraph 101.

[7] *Ibid.*, paragraph 109.

[8] *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 6.

[9] *Three Rivers District Counsel and Others v Governor and Company of the Bank Of England (No.6)* [2004] UKHL 48, paragraph 52.

[10] *ENRC v SFO (HC)*, paragraph 160.

investigative journalists … without losing the benefit of legal professional privilege for the work product and consequences of their investigation."[11] This should apply with equal force to antitrust investigations. If companies cannot investigate possible antitrust violations without fear of providing arms to competition authorities and/or future claimants, independent compliance is undermined.

Conclusion

The circumstances in which legal privilege is available to organizations continues to be restricted. Unless individuals comes within the narrow definition of 'client', communications by these individuals with lawyers will not be covered by legal advice privilege and parties must rely instead on litigation privilege. The *Tesco* case holds that antitrust investigations may be sufficiently adversarial for litigation privilege to be triggered, at least when the CMA issues an SO. The *ENRC* case suggests that litigation privilege may in appropriate cases be triggered at an earlier stage. Whether it is triggered, however, will depend on the facts of each individual case, and how reasonable it is for companies to expect an adversarial process. These are matters that companies will need to assess carefully at the outset of an investigation.

Judgments, Decisions, and News

Court Judgments

iiyama (UK) Ltd and others v Samsung Electronics Co Ltd and others. On 11 September 2018, the Supreme Court announced that it had refused permission to appeal the Court of Appeal's decision to reject strike out/summary dismissal of the damages claims brought by iiyama and associated jurisdictional challenges. The Court of Appeal had held that the actions – arising out of two EC infringement decisions, relating to worldwide cartels in the supply of LCD panels and cathode ray-tubes (components in TVs and computer monitors) – should proceed to trial on the basis that the claimants had a reasonably arguable case on the territorial application of Article 101 TFEU. Despite the EC finding that the cartels were entered into by Asian companies in Asia, and evidence that the cartelised sales of the CRTs and LCDs in iiyama's televisions and monitors took place almost exclusively in Asia, the Court of Appeal could not exclude the possibility that iiyama might be able to show at trial that the claims fell within the scope of Article 101.

Ping Europe Limited v CMA. In August 2017, the CMA found that Ping had unlawfully prohibited two UK retailers from selling its golf clubs on their websites, and fined them £1.45 million. On 7 September, the CAT dismissed Ping's appeal. The CAT, however, reduced the fine by £200,000 because, on the facts of the case, the director-level involvement should not have been treated as an aggravating factor.

The CAT found the online selling ban was a "by object" infringement that could not be objectively justified or classed as an ancillary restraint. The ban was not essential for Ping to achieve its legitimate objective (*i.e.*, to promote custom-fitted golf clubs). Moreover, the ban did not qualify for exemption: although the enhanced quality offered by a custom-fitted product was a relevant efficiency, the CMA identified less restrictive ways of achieving the same efficiency. The CAT also held that Ping's rights to conduct a business under Article 16 of the EU Charter had not been infringed. The effect of the decision was not to force Ping to sell a product it does not sell (a non-custom-fit club), as Ping had argued, but to prevent a restriction on promoting custom-fit clubs through online sales channels.

The CAT found that the CMA had made a legal error in its "by object" assessment, by undertaking a proportionality analysis on whether the ban had an adverse impact on competition. The analysis should have been carried out under the 101(3) framework. However, Ping's appeal on this ground was dismissed because the error was immaterial.

[11] *ENRC v SFO (CA)*, paragraph 116.

Antitrust / Market Studies

CMA Publishes Final Undertakings Following Cement and Ready-Mix Concrete Market Investigation. On 19 September 2018, the CMA announced that it has accepted final undertakings offered by the Global Cement and Concrete Association. The undertakings were required as a remedy to address concerns identified in the Competition Commission's Market Investigation into Aggregates, Ready Mix concrete and Cement. The remedy restricts the disclosure of cement production and sales volume data about the GB cement market.

CMA Announces Fines In Settling Airport Transport Facilities Investigation. On 18 September 2018, the CMA announced that it had agreed a fine of £1.6 million under a settlement agreement with Heathrow Airport, following an investigation into price-fixing at airport car parks. The investigation follows recent competition investigations into airport facilities, including the Civil Aviation Authority's decision in relation to the fixing of car parking prices at East Midlands International Airport. The CMA had been investigating Heathrow Airport's agreement with the Aurora Group in relation to the lease of Aurora's Sofitel Hotel. The lease included a clause restricting how parking prices should be set for non-hotel guests. The CMA investigated whether the clause prevented Aurora charging lower prices to these guests. Heathrow Airport agreed to pay the £1.6 million fine. Aurora was not fined due to immunity granted under the CMA leniency regime.

Ticket Vending Machines And Automatic Ticket Gates Market Study Update. On 13 September 2018, the Office of Rail and Road published an update paper in its market study, launched in March, into ticket vending machines and automatic ticket gates. The ORR noted a high concentration in the markets for automatic ticket gates, with one operator selling 97% of these systems in Great Britain.

Merger Developments

PHASE 2 INVESTIGATIONS

J Sainsbury Plc/Asda Group Ltd. On 19 September 2018, the CMA announced that it had referred the anticipated merger between J Sainsbury Plc and Asda Group Limited for a Phase 2 merger investigation, applying its fast-track procedure, as requested by the parties. The full text of the Phase 1 decision was published on 27 September 2018, in which the CMA notes that the parties' stores overlap in hundreds of local areas and that the CMA will therefore need to consider in detail whether the merger will lead to shoppers facing higher costs or a worse quality of service.

PHASE 1 CLEARANCE DECISIONS

Horizon Global Corporation / Brink International B.V. On 12 September 2018, Horizon Global Corporation and Brink International B.V. confirmed that they have abandoned their anticipated merger. Prior to this, the CMA had announced that the merger would be referred to Phase 2 unless suitable undertakings were offered.

Castle Water Holdings Limited/ Invicta Water Limited. On 12 September 2018, the CMA announced that it had cleared the acquisition by Castle Water Holdings Limited of Invicta Water Limited. Castle Water is an independent water retailer in England and Scotland, and Invicta provides water services to 50,000 business customers in the UK.

Hempel Holdings/ JW. Ostendorf merger inquiry. On 6 September 2018, the CMA announced that it had cleared the acquisition by Hempel Holdings of JW. Hempel supplies coatings to the decorative, protective, marine, container and yachts sectors. JW Ostendorf is a manufacturer of paint, coatings and glazes for retailers. The full text of the decision was published on 26 September 2018.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision due date
Stars UK / Sky Betting and Gaming	18 October
Post Office Limited / Payzone UK Limited	19 October
John Swire & Sons Limited / Simadan Group	26 October
Tradebe Environmental Services / Avanti Environmental Holdings	1 November
CME Group/NEX Group Merger	13 November
Nicholls' (Fuel Oils) Limited / DCC Energy Limited in Northern Ireland	14 November
Tayto Group Limited / The Real Pork Crackling Company Limited	15 November
Barry Callebaut AG / Burton's Foods	16 November
Cox Automotive UK Limited / Auto Trader Limited	21 November
PayPal Holdings, Inc / iZettle AB	26 November

Other Developments

CMA Receives Super Complaint From Citizens Advice On Excessive Prices for Disengaged Consumers. On 28 September 2018, Citizens Advices published a super complaint to the CMA concerning what it considers to be price discrimination against disengaged and loyal customers in a number of markets. Citizens Advice believes that consumers who remain loyal to the same service supplier face higher charges than those who switch, resulting in firms charging excessive prices to disengaged consumers. It has pointed to five categories of service in the telecoms and financial services sectors, which it is calling on the CMA to investigate and where it believes direct intervention is needed. These are: savings accounts, mortgages, general insurance, mobile telephones, and broadband. The CMA has 90 days to consider the super complaint and decide what further action (if any) it intends to take.

Government Publishes Technical Paper On "No-Deal" Brexit. On 13 September 2018, the UK Government published a technical notice on the approach to a 'no deal' scenario. The Government emphasised that there is no plan to make any changes to the UK competition regime beyond those necessary to manage the UK's exit from the EU. It acknowledges the possibility that there will be no agreement between the UK and EU on jurisdiction over active EU merger and antitrust cases. The main implication for mergers will be that both the CMA and the EC will be able to review mergers that meet the thresholds in the UK and the EU. Claimants in follow-on damages claims will still be able to rely on EC decisions in UK courts, so long as the decision is made before the UK leaves the EU. The EU Withdrawal Act will preserve the EU Block Exemption Regulations (which currently apply in the UK as parallel exemptions to the UK competition prohibitions). The Government considers that companies "*should not be significantly affected by changes*" to the Block Exemptions.

LONDON TEAM

London Office
2 London Wall Place
London EC2Y 5AU

Maurits Dolmans
+44 20 7614 2343
mdolmans@cgsh.com

Nicholas Levy
+44 20 7614 2243
nlevy@cgsh.com

Romano Subiotto QC
+32 22872092
rsubiotto@cgsh.com

Paul Gilbert
+44 20 7614 2335
pgilbert@cgsh.com

David Little
+44 20 7614 2338
drlittle@cgsh.com

Richard Pepper
+32 22872181
rpepper@cgsh.com

Paul Stuart
+44 20 7614 2207
pstuart@cgsh.com

John Messent
+44 20 7614 2377
jmessent@cgsh.com

Esther Kelly
+32 22872054
ekelly@cgsh.com

Carlos Martínez Rico
+32 22872185
camartinez@cgsh.com

Ricardo Zimbron
+44 20 7614 2307
rzimbron@cgsh.com

Vass Karadakova
+44 20 7614 2221
vkaradakova@cgsh.com

Henry Mostyn
+44 20 7614 2241
hmostyn@cgsh.com

Romi Lepetska
+44 20 7614 2292
rlepetska@cgsh.com

Alexander Waksman
+44 20 7614 2333
awaksman@cgsh.com

Wanjie Lin
+44 20 7614 2359
wlin@cgsh.com

Alexandra Hackney
+44 20 7614 2371
ahackney@cgsh.com

John Kwan
+44 20 7614 2293
jkwan@cgsh.com

Shahrzad Sadjadi
+44 20 7614 2235
ssadjadi@cgsh.com

Nina Fischer
+44 20 7614 2244
nfischer@cgsh.com

Niccolò Torrigiani
+44 20 7614 2298
ntorrigiani@cgsh.com

Lanto Sheridan
+44 20 7614 2308
lsheridan@cgsh.com

Hayk Kupelyants
+44 20 7614 2228
hkupelyants@cgsh.com

Sienna Smallman
+44 20 7614 2299
ssmallman@cgsh.com

Emmett Saigal
+44 20 7614 2386
esaigal@cgsh.com

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