

PARENTAL, SUCCESSIVE AND PASSED-ON LIABILITY OF UNDERTAKINGS FOR ANTITRUST FINES

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Abstract in original language

A versenyjogi bírság célja, hogy elrettentő hatást fejtessen ki. A kellő visszatartó erő elérése érdekében e bírságokért való felelősség kiterjesztésre került. Egyrészt a leányvállalatok által elkövetett jogsértés miatt kiszabott versenyjogi bírságokért azon anyavállalatok (is) felelősek, melyek potenciálisan képesek befolyásolni leányvállalataik piaci magatartását, a befolyás tényleges gyakorlására tekintet nélkül. Másrészt a versenyjogi vállalkozás jogutódja felelős a versenyjogi bírságokért annak érdekében, hogy a vállalkozás ne kerülhesse el a felelősséget. Végül adódik a kérdés, hogy a vállalkozásoknak van-e lehetőségük arra, hogy áthárítsák a versenyjogi bírságot a nevükben eljáró vezető tisztségviselőkre, akik ténylegesen személyesen követték el a jogsértést. Ez a tanulmány a felelősség ilyen kiterjesztéséhez kapcsolódó kérdéseket vizsgálja.

Key words in original language

versenyjog – kartelljog – bírságok – bírságokért való felelősség – anyavállalatok felelőssége – jogutódok felelőssége – vezető tisztségviselők felelőssége

Abstract

The aim of an antitrust fine is to achieve a deterrent effect. In order to achieve a sufficient deterrent effect, the liability for these fines is extended. One extension is that the parent companies, having the potential to influence the business decisions of the subsidiaries, are also liable for the antitrust fines imposed because of the infringement committed by the subsidiary, irrespective of the actual exertion of influence. Another example is the liability of the legal successor of a company for the antitrust fines so the company committing the infringement may not escape liability. Finally, the question arises, whether companies can pass on the antitrust fine to executive officers acting on behalf of the company, actually committing the infringement personally. This paper examines the issues pertaining to these extensions of liability.

Key words

competition law – antitrust law – fines – liability for fines – liability of parent companies – liability of legal successors – liability of executive officers

1. INTRODUCTION

In accordance with the wording of Article 101 of the Treaty on the Functioning of the European Union (hereinafter: "TFEU"), the prohibition of anticompetitive agreements applies to undertakings. The concept of undertaking is genuine to competition law and European competition law is no exception. According to

Although, competition law is aimed at undertakings, the European Commission (hereinafter: "Commission") must identify legal entities (companies), which may be held responsible for the infringement, in order to be in a position to impose and enforceable antitrust fine. Article 299 TFEU, which provides for the enforceability of the decision of the European Commission imposing pecuniary obligations, mentions persons instead of undertakings. Furthermore, actual enforcement falls under the scope of the national law of the Member State, where enforcement shall be carried out and that requires the legal entity status for addressees.¹

Neither the TFEU, nor the Merger Regulation² contains a definition of undertaking. The definition has two facets: the core of the definition relates to economic activity, the boundaries of the definition relate to economic unit under a single control (decisive influence).³

The Enichem Anic judgment⁴ stated that an undertaking is a single economic entity that consists of: (i) unitary organisation of personal, tangible and intangible elements, (ii) which pursues a specific economic aim, (iii) on a long-term basis, and (iv) can contribute to the commission of an infringement.

The Viho judgment⁵ mentioned apart from holding 100 per cent of the shares several other elements - e.g. influence on sales, marketing, targets, gross margins, sales costs, cash flow and stocks - as indication for decisive influence.

¹ István Csongor NAGY, *Kartelljogi kézikönyv. A közösségi és a magyar kartelljog joggyakorlata*, Budapest, HVGORAC, 2008, p. 91

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1-22

³ Wouter P.J. WILS, *The undertaking as subject of E.C. competition law and the imputation of infringements to natural and legal persons*, *European Law Review* 25(2): 99-116, 2000, p. 100-101

⁴ Case T-6/89 *Enichem Anic v Commission* [1991] ECR II-1623, para 235

⁵ Case T-102/92 *Viho v Commission* [1995] ECR II-17, upheld by the ECJ in Case C-73/95 P [1996] ECR I-5457

2. PARENTAL LIABILITY

2.1 PREVIOUS CASE-LAW

Parent liability is a question that arises when with respect to enforcement or deterrence, imposing a fine on the subsidiary is not justified, either because the diminished liquidity of the subsidiary or the minority shareholders of the subsidiary. In these cases, if the parent company was in a position to exert decisive influence, it may be held responsible for the infringement either alone or jointly and severally. It is common practice of the Commission to impose the fine on the subsidiary with the joint and several liability of the parent company.⁶

The Commercial Solvents judgment⁷ established the general rule that companies belonging to the same undertakings have joint and several responsibility for the infringement. However, the ICI judgment⁸ clarified that it is within the discretion of the Commission to hold either the parent company or the subsidiary, or both, for liable for an antitrust infringement.

In the *Stora Kopparbergs* judgment⁹, the Court of Justice established a presumption, according to which in case of wholly-owned (100% shareholding) or nearly wholly-owned subsidiaries, the possibility to exercise decisive influence can be presumed by the Commission, however, the presumption can be rebutted by the company adducing sufficient evidence to prove the independence of the subsidiary on the market. Nevertheless, proving negative facts is complicated and the Commission and the General Court yet failed to give clear guidance what kind of evidence could be considered as sufficient.¹⁰

Also, it was called in question, whether the presumption may be applied in the absence of any further evidence, even if it is in the form of indicia.¹¹ According to the *AEG-Telefunken* judgment¹², not only the shareholding of

⁶ Richard WHISH, *Competition law*, Oxford: Oxford University Press, 2009, p 94

⁷ Joined cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* [1974] ECR 223, para 41

⁸ Case 48/69 *Imperial Chemical Industries Ltd. v Commission* [1972] ECR 619, para 131-137

⁹ Case T-71/03 *Tokai Carbon Co Ltd v Commission* [2005] ECR II-10, paras 59-60

¹⁰ Aitor MONTESA and Ángel GIVAJA, *When parents pay for their children's wrongs: Attribution of liability for EC antitrust infringements on parent-subsidiary scenarios*, *World Competition* 29(4): 555-574, 2006, p. 566

¹¹ Laura LA ROCCA, *The controversial issue of the parent-company liability for the violation of EC competition rules by the subsidiary*, *European Competition Law Review*, 32(2):68-76, 2011, p. 69

¹² Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, paras 47-53

the parent company must be examined, but further links, like the composition of the board of directors, the influence on commercial policy and the instructions given to the subsidiary.

In the *Aebe* judgment¹³, the General Court upheld the decision of the Commission, which established the liability of two parent companies having 50% shareholding in the subsidiary, therefore, a joint control may also lead to parental liability. However, if there is evidence that only one of the undertakings actually exerted decisive influence, the other parent company may be released of its liability.

Nevertheless, one must keep in mind that, it is irrelevant whether the parent company actually exercised its decisive influence, since its decision not to intervene is an act of grace and the parent company always retains the ultimate power.¹⁴

Irrespective of whether it is joint and several or stand-alone liability of the parent company, establishing the liability of the parent company and addressing the prohibition decision to the parent company has several implications apart from the payment of the antitrust fine. These include:

- a. even if the liability established in the prohibition decision of the European Commission is joint and several liability, the parent company may be held liable for damages caused by the infringement on the basis of that decision in a so-called follow-on damages action before courts of the Member States;
- b. the parent company may suffer disadvantages in eventually initiated other antitrust procedures because the basis of the fine will be increased on the basis of recidivism even if the actual infringement was committed by the subsidiary; and
- c. the parent company may eventually face extraterritorial antitrust procedures because of the establishment of a subsidiary in the given jurisdiction.¹⁵

2.2 SPANISH TOBACCO CASE

The issue of liability of a parent company for the infringement of Article 101 TFEU by its subsidiary was recently addressed again by the Court of

¹³ Case T-314/01 *Aebe v Commission* [2006] ECR II-3085

¹⁴ *WILS*, p. 103

¹⁵ *WHISH*, p 94-95

Justice of the European Union in the litigation arising from the Spanish Tobacco case¹⁶ of the European Commission.

In the Alliance One judgment¹⁷ the General Court had to address the issue, whether parent liability applies to a chain of parent companies, among which certain companies are only special purpose vehicles, only holding the subsidiary, but not exerting decisive influence. The company directly involved in the infringement was World Wide Tobacco Espana ("WWTE"), a Spanish subsidiary of Trans-Continental Leaf Tobacco ("TCLT"). TCLT held two-thirds of the capital of WWTE, while TCLT itself was a wholly-owned subsidiary of Standard Commercial Tobacco ("SCT"), also a wholly-owned subsidiary of Standard Commercial ("SC"), the American head company of the company group. The shareholding of TCLT in WWTE increased during the years to almost 90% and by 1999 apart from the shareholding of TCLT, only shares of SC and own shares of WWTE existed in the company. The Commission imposed a fine on WWTE and held all parent companies (i.e. TCLT, SCT and SC) jointly and severally liable for the antitrust fine. The liability of WWTE was not disputed in the court proceedings.

The Spanish Tobacco case was particularly interesting, because in the end the Commission did not hold liable several parent companies for the direct involvement of their subsidiaries on the basis that there was no evidence on their material involvement in the market conduct of the subsidiaries. The Commission established that the subsidiaries operated independently on the basis that they were not wholly-owned by the parent companies and the parent companies shareholding was purely financial.

Although WWTE was also not wholly-owned by TCLT, the Commission established that there were certain mechanisms in place, which enabled TCLT to exert effective control over the commercial policy of WWTE. This shows that the Commission did not rely exclusively on the presumption of parental liability in case of wholly-owned subsidiaries, but also on other factors (e.g. the managing directors appointed by the parent company, or involved in the parent companies management; the approval of the parent companies necessary for business decisions, etc.).

The applicants of the case (TCLT, SCT and SC) argued that the condition of parental liability is that the parent company is in a position to exercise decisive influence and it did actually influence the commercial policy of the subsidiary. The applicants presented a two-sided argument in connection

¹⁶ Commission Decision of 20 October 2004 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.238/B.2) - Raw tobacco-Spain

¹⁷ Case T-24/05 Alliance One International and others v Commission, [2010] ECR not yet reported, the judgment was appealed by the applicants and the Commission as well, see Case C-628/10 P and Case C-14/11 P

with the first condition: either SCT and SC are not liable because of their indirect interest in WWTE, or TCLT is not liable because its shareholding was purely financial. In connection with the second condition, the applicants argued that the influence must be aimed at the infringement itself, not to commercial policy in general, therefore, instructions relating to the infringement would be necessary for the establishment of the parent companies' liability.

The General Court found that the Commission is entitled to impose the fine on parent companies not because they were actually instigating the infringement, but because the parent companies form a single economic unit (undertaking) with the subsidiaries and therefore, they are also liable for the infringement committed by the undertaking.¹⁸

The General Court also found that the presumption that the parent companies fulfil the conditions of parental liability also applies not only to direct relationships.¹⁹

The General Court clarified that the Commission did not impose a fine on other parent companies because the lack of evidence and not because the lack of liability. It is within the discretion of the Commission to rely exclusively on the presumption or rely on further evidence. The Commission relying on further evidence was a prudent approach and the liability of the applicants was established because unlike the other parent companies, they could not adduce evidence to refute the evidence relied on by the Commission and to call in question the Commission's finding.²⁰

The General Court pointed out that decisive influence must neither relate to certain activities of the subsidiary, nor directly linked to the infringement committed, in order to establish the liability of the parent company.²¹

In the end, the General Court examined all factual elements of the case and upheld the decision in connection with the liability of STC and SC, while it found that the liability of TCLT, the direct parent company, was not supported by evidence. According to the General Court, the Commission could not rely exclusively on the fact that TCLT held the capital of WWTE, especially since this would discriminate it against other intermediary parent companies, which were not fined.²²

¹⁸ Ibid para 127

¹⁹ Ibid para 132

²⁰ Ibid para 147

²¹ Ibid para 170

²² Ibid para 218

3. SUCCESSION LIABILITY

3.1 PREVIOUS CASE-LAW

Succession liability is a question that arises when the economic unit committing the infringement changes its form. In such cases this change should not affect antitrust liability and therefore, liability must be attributed to the successor. If the economic unit committing the infringement was a subsidiary, which is acquired by another parent company, the subsidiary will remain liable as well as the former parent company may be held jointly and severally liable. The current parent company can only be held responsible, if it (and the subsidiary) has continued the infringement. If the subsidiary is absorbed by another company, the former parent company will be held liable, legal succession only comes to play if the former parent company ceases to exist. If there is a demerger at the subsidiary, the company remaining existent remains liable for the infringement (even if the economic unit committing the infringement is divested to the new company arising from the demerger). If the economic unit is devoid of legal personality, the legal entity, which it formed a part is liable, also after that economic unit (business) has been sold to another company (unless the legal entity which it formed a part ceases to exist).²³

Nevertheless, liability may fall to the successor even if the predecessor is in existent for example if the predecessor is incapable of paying the fine, or succession is a proven attempt to circumvent antitrust liability.²⁴

The *Rheinzink* judgment²⁵ established the notion that legal succession is applicable to antitrust fines as well, and companies remain liable for antitrust fines even if they change their legal form or name.

In the *PVC* case²⁶, legal succession with respect to antitrust fines was based on the fact that corporate changes under the corporate law of the Member States shall not affect the application of EU competition law. For the assessment of the Commission, the functional and economic continuity of the undertakings is decisive.

²³ *MONTESA and GIVAJA*, p. 559

²⁴ *Karen DYKJÆR-HANSEN and Katja HØEGH*, Succession of liability for competition law infringements with special reference to due diligence and warranty claims, *European Competition Law Review*, 24(5):203-212, 2003, p. 212

²⁵ *Cases 29, 30/83 Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679, para 9

²⁶ Commission Decision of 21 December 1988 relating to proceedings pursuant to Article 85 of the EEC Treaty (IV/31.865) - PVC

The *Anic Partecipazioni* judgment²⁷ established the liability of the legal successor of the undertaking (acquirer of business directly related with the infringement) for the antitrust fine only because the undertakings responsible for the infringement (predecessor, transferor) ceased to exist.

The *Cascades* judgment²⁸ confirmed that if the undertaking, which committed the infringement is still in existence at the time the Commission adopts its prohibition decision, the undertaking remains liable for the infringement, even if it has already disposed of its business, which was in direct relation to the infringement itself.

The *HFB* judgment²⁹ established the so-called economic continuity criterion, according to which derogation from personal liability is possible, thus the successor might be held liable for the infringement even if the predecessor is still in existence, if the effectiveness of EU competition rules so require.

The *Aalborg Portland* judgment³⁰ gave guidance on legal succession within a company group (undertaking), according to which, in case of an intragroup transfer of a company directly involved in the infringement, the successor might be held liable for the antitrust fine, even if the predecessor is still in existence with respect to the fact that the person (ultimate parent) managing or being responsible for the undertaking when the infringement was committed remained the same.

On the basis of the above, the following principles can be established regarding successive liability:

- a. in case of legal succession (acquisition of a legal entity, subsidiary), antitrust liability follows the subsidiary;
- b. in case of acquisition of a business unit (not a separate legal entity), the company previously holding the business unit remains liable;
- c. in several cases the liability shifts to the company currently holding the business unit (economic continuity, economic succession): (i) if the company previously holding the business unit is inexistent at the time of adoption of the Commission's decision, (ii) if the company previously holding the business unit

²⁷ Case C-49/92 *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, para 145

²⁸ Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, para 78

²⁹ Case T-9/99 *HFB and others v Commission* [2002] ECR II-1487, paras 105-106

³⁰ Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and others v Commission* [2004] ECR I-123, paras 356-359

is existent but incapable of paying the antitrust fine; (iii) if there is a proven attempt to circumvent liability; and (iv) if there are structural links between company previously holding the business unit and the company currently holding the business unit.³¹

3.2 GAS INSULATED SWITCHGEAR CASE

The issue of liability of a successor for the infringement of Article 101 TFEU by a company acquired as a subsidiary or absorbed in the form of a merger was recently addressed again by the General Court in the litigation arising from the Gas Insulated Switchgear case³². Two parallel proceedings were pending before the General Court for the annulment of the decision of the Commission imposing an antitrust fine, one initiated by Alstom and Areva and one initiated by Siemens Österreich.

3.2.1 ALSTOM/AREVA JUDGMENT

In the Alstom/Areva judgment³³, the General Court analyzed a combination of parental and successive liability with respect to the transfer of a subsidiary within the company group and outside the company group, as well as the liability of the former parent company. First the subsidiary active on the relevant market was Alsthom SA (subsequently renamed GEC Alsthom SA). The parent company of the subsidiary was GEC Alsthom NV, while the ultimate parent company was Alstom. The activities were transferred to Kléber Eylau (subsequently renamed GEC Alsthom T&D SA) becoming the subsidiary active on the relevant market. Later, GEC Alsthom T&D SA was renamed Alstom T&D SA and the ultimate parent company (Alstom) became its direct parent company. Subsequently, the subsidiary active on the relevant market (Alstom T&D SA) was transferred to a different company group and it merged with Areva T&D SA. The direct parent company of Areva T&D SA was Areva T&D Holdings SA, while the ultimate parent company was Areva.³⁴

The Commission imposed a fine on (i) Alstom individually, because it was the parent company of the subsidiary directly involved in the infringement at the time of the infringement; (ii) Areva T&D SA for which it was jointly and severally liable with Alstom, because it was the subsidiary directly

³¹ Katja HØEGH, Succession of liability for competition law infringements - the Cement judgment, *European Competition Law Review*, 25(9): 534-537, 2004, p. 536

³² Commission Decision of 24 January 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (Case COMP/38.899 - Gas Insulated Switchgear)

³³ Cases T-117/07 and T-121/07 *Alstom / Areva and others v Commission*, [2011] ECR not yet reported

³⁴ For the sake of clarity, the Swiss branch of the companies involved was omitted.

involved in the infringement; and (iii) Areva T&D SA for which it was jointly and severally liable with Areva T&D Holdings SA and Areva, because they were the parent companies of the subsidiary directly involved in the infringement at the time of the decision.

The applicants argued that it would infringe the principle of personal liability, if one of the applicants would have to pay a fine (part of the fine imposed with joint and several liability) imposed on the basis of the infringement committed by another applicant (subsidiary of the applicant transferred to the other applicant). The applicants noted that joint and several liability of the parent company may only be established, if the subsidiary directly involved in the infringement and the parent company at the time of the decision still belong to the same company group (undertaking). The applicants complained that because of the nature of joint and several liability, establishment of such liability on companies not belonging to the same undertaking is extremely problematic (the proportion of the fine is not adjusted to the proportion of liability with respect to the transfer of the subsidiary).

The General Court held that it is in accordance with the case-law to penalize the transferee in case of an intragroup transfer of business for the infringement committed before the transfer was effected, even if the transferor controlling the business directly involved in the infringement still exists. Therefore, irrespective of the corporate changes at Kléber Eylau/GEC Alstom T&D SA/Alstom T&D SA, Alstom, as the person responsible for or managing, through intermediaries, the company directly involved in the infringement, remains personally liable for the infringement.³⁵

The General Court also rejected that transferor still in existence at the time of adoption of the Commission's decision should be released of liability with respect to a loss of control, irrespective of the (joint and several) liability of the successor.³⁶

The General Court stated that although Areva T&D SA belongs to a different undertaking at the time of the adoption of the Commission's decision, it is legally identical with Alstom T&D SA, therefore as a subsidiary directly involved in the infringement, it might be held liable jointly and severally with its parent company (Alstom) before the intergroup transfer and at the time of the infringement.³⁷

³⁵ Cases T-117/07 and T-121/07 Alstom / Areva and others v Commission, [2011] ECR not yet reported, para 78

³⁶ Ibid para 119

³⁷ Ibid para 134 and 137

The General Court rejected that the principle of personal liability would exclude joint and several liability of a parent company, which transferred its subsidiary to another company group, on the basis that the Commission has discretion to establish the liability of the parent company additionally to the liability of the subsidiary and the parent company's liability for its conduct at the time it formed an undertaking with its subsidiary would not diminish just because at the time of the decision they do not form a single undertaking any more.³⁸

Regarding the nature of joint and several liability, the General Court stipulated that in the absence of a contrary indication, the liability and the fine burden the applicants in equal measure. On the one hand, the companies become aware of the financial consequences of the decision with sufficient certainty even in case of a fine imposed with joint and several liability (the company might have to pay the entire amount of the fine), on the other hand, if one of the applicants pays the entire amount of the fine, it may recover the proportion for which other applicants are liable.³⁹

In the end, the General Court decreased the fines but upheld the decision of the Commission on the distribution of liability.

3.2.2 SIEMENS ÖSTERREICH JUDGMENT

In the Siemens Österreich judgment⁴⁰, the General Court analyzed an even more complex corporate structure. Nuova Magrini Galileo ("Magrini"), Schneider Electric High Voltage SA (subsequent names: VA Tech T&D SA and Siemens T&D SA) and Reyrolle Ltd. (subsequent names: VA Tech Reyrolle Ltd. and Siemens T&D Ltd.), three subsidiaries bundled their activities together in a company (VA Tech Schneider High Voltage GmbH). The parent company of SEHV was Schneider Electric SA, while the intermediary parent company of Reyrolle was VA Tech T&D GmbH & Co. KEG ("KEG") and the ultimate parent company was VA Technologie AG ("VAS"). During the infringement, VAS acquired full control over the common company and thereby the three subsidiaries and Siemens AG, through its subsidiary, Siemens Österreich AG, acquired VAS, which merged with Siemens Österreich in the end.

The Commission distributed liability to three groups: (i) Reyrolle, KEG and Siemens Österreich jointly and severally liable (subsidiary-parent-ultimate parent); (ii) Reyrolle, SEHV and Magrini jointly and severally liable (three

³⁸ Ibid para 206

³⁹ Ibid para 215

⁴⁰ Cases T-122/07 to T-124/07 Siemens Österreich and others v Commission, [2011] ECR not yet reported, the judgment was appealed by the applicants and the Commission as well, see Cases C-231/11 P to C-233/11 P

subsidiaries); (iii) SEHV, Magrini and Schneider Electric SA jointly and severally liable (subsidiaries and parent company).

One of the arguments of the applicants was that the fines exceeded the statutory limit of 10% of the net worldwide turnover of the undertaking⁴¹, on the basis that this turnover pertains to the company committing the infringement. The applicants also argued that if the parent company is held liable for the infringement, establishing the liability of imposing a fine on the subsidiary is not justified.

The General Court held that it is not the individual turnover of the companies, but the turnover of the undertaking (i.e. the turnover of all companies belonging to the undertaking) that must be taken into consideration while calculating the antitrust fine. According to the General Court, in order to maintain the deterrent effect of the antitrust fine, the fine must be sufficiently material and not for the company but for the entire economic unit (i.e. company group).⁴²

The General Court stated that the parent companies' joint and several liability does not exempt the subsidiary of its own liability and the liability of the parent company is in any case additional.⁴³

The General Court clarified that if a company participated in an infringement on its own right and was acquired but not absorbed and it continued its activity after acquisition, it has to bear responsibility for the infringement committed before acquisition, while the acquiring company may only be held liable for infringements committed after the acquisition. The same applies to subsidiaries, however, in that case even the former parent company might be held jointly and severally liable for the infringement committed before the acquisition.⁴⁴

The General Court established that Siemens Österreich must bear liability as a legal successor of the parent company (VAS) for the infringements committed by Reyrolle and after acquiring full control over the common company for the infringements committed by Reyrolle, SEHV and Magrini.⁴⁵

⁴¹ See Article 23 (2) of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25

⁴² Cases T-122/07 to T-124/07 *Siemens Österreich and others v Commission*, [2011] ECR not yet reported, para 126

⁴³ *Ibid* para 135

⁴⁴ *Ibid* para 139-141

⁴⁵ *Ibid* para 144

In the end, the General Court decreased the fines and redistributed liability on the basis of the above principles in the following way:

- a. SEHV, Magrini and Schneider Electric SA jointly and severally (parental liability);
- b. Reyrolle, Siemens Österreich and KEG jointly and severally (parental and successive liability);
- c. Reyrolle, Siemens Österreich, KEG, SEHV and Magrini jointly and severally (parental and successive liability); and
- d. Reyrolle individually.

4. PASSED-ON LIABILITY

Another recently addressed issue in connection with the concept of undertaking, the focus of antitrust law on undertakings and liability of undertakings for antitrust fines was the Safeway case in the United Kingdom. The retail company Safeway made an attempt to recover the antitrust fine imposed by the Office of Fair Trading, from its former managers and employees, who actually committed the acts, which qualified the companies conduct as an infringement of antitrust law.

The High Court adopted a judgment⁴⁶ in the case regarding the application of the defendants (i.e. former directors and employees) to adopt a summary judgment and strike out the claim. The claimants (i.e. supermarket) argued that the defendants were in breach of their contract of employment engaging in anticompetitive conduct, which subsequently lead to a suffered loss (antitrust fine imposed on the company and the legal costs).

The defendants argued with two grounds of public policy: (i) the principle of *ex turpi causa* according to which the claimant may not rely on its own illegal act giving rise to an action; and (ii) the consistency of competition law.

In connection with the first ground, the High Court considered rules of attribution and imputation, in the course of which the High Court found that the liability of the companies for infringements of competition law is not primary liability, but vicarious liability, furthermore, the actions of the employees and directors (agents) may only be imputed to the company, if they were the directing mind and will of the company.⁴⁷ According to the

⁴⁶ *Safeway and others v Simon John Twigger and others*, [2010] EWHC 11 (Comm)

⁴⁷ *Ibid* para 51 and 53

High Court, the *ex turpi causa* principle would only apply, if the company would be personally at fault, which is not the case.⁴⁸

With respect to the second ground, the High Court noted that the action of the claimants is not new, it relies on well established principles, which excludes its inconsistency with rules in force. Also, the fact that competition law applies to undertakings and not individuals is true to any form of corporate regulation, which in itself does not include the liability of individuals under these rules.⁴⁹

The High Court dismissed the application of the defendants to strike out the claim on the basis that it believed that the claimants have good grounds to succeed on trial.

The defendants submitted an appeal on the basis of which the Court of Appeal adopted a judgment⁵⁰, according to which the *ex turpi causa* is applicable to the case. Lord Justice Longmore set forth that the claimant's liability is not vicarious, the company is not liable for the illegal acts of its employees since competition rules impose liability only on the undertakings for the specific conduct. Therefore, the liability of the claimant is personal liability, the company is personally at fault.⁵¹

The judgment of the Court of Appeal is considered very significant, since if the defendants would have to bear responsibility, the undertakings committing the infringement would not only profit from the infringement itself, but they might avoid the antitrust fine, which would diminish the deterrent effect of competition rules.⁵²

5. CONCLUSION

On the basis of the above, we can conclude the following:

1. The European Courts approved that it is within the discretion of the Commission to impose a fine either individually or jointly and severally on the parent company for infringement of Article 101 TFEU by a subsidiary. The liability of parent companies seems to be purely additional to the liability of the companies (subsidiaries) actually committing the infringement. Parental liability may arise if it is necessary for achieving sufficient deterrence (if the undertaking is

⁴⁸ Ibid para 102

⁴⁹ Ibid para 125 and 127

⁵⁰ *Safeway and others v Twigger and others* [2010] EWCA Civ 1472

⁵¹ Ibid para 20 and 23

⁵² James SHARPE, *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, *European Competition Law Review*, 32(5):273-275, 2011, p. 274

economically significantly stronger than the subsidiary) or if it is necessary for effectively enforcing the antitrust fine (if the subsidiary is financially not in the position to pay the fine). This is supported by the fining practice of the Commission, which demonstrates that parental liability arises in most cases not as stand-alone liability but as joint and several liability. Also, the parent companies may provide evidence releasing them from liability.

2. Although some authors are suggesting an apparent confusion in connection with succession liability, on the basis of the case-law of the General Court and the Court of Justice, some rules may be drawn up. The first and foremost rule is that liability remains with the undertaking having control over the company directly involved in the infringement at the time of the infringement. The legal or economic successor might have liability only in certain circumstances, which are justified by the deterrence objective of antitrust rules or practicability in the enforcement of the fine. It is the latter justification, why succession liability is often joint and several liability (not considering cases where the company directly involved in the infringement is absorbed or a business unit was acquired not having legal personality).
3. It might seem, *prima facie*, justified that a company recovers damages caused by its employee by a breach of contract, however, competition law is a specific body of rules, which apply solely to undertakings and is structured in a way that acts of individuals are imputed to the economic entity which they form part. Therefore an infringement of these rules may not be taken into consideration as unlawful conduct forming the basis of breach of contract. The liability for antitrust fines does not extend to employees and directors (not even indirectly).

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