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Intragroup allocation of an antitrust fine under German law

The German Federal Court of Justice allows claims of a parent company from its (former) subsidiary because of its participation in a cartel

In its judgment of 18 November 2014, the Federal Court of Justice ("the Court") held that, subject to certain conditions, a parent company is entitled to claim compensation from its subsidiary in case both were held jointly and severally liable for the payment of a fine issued for participation in a cartel by the European Commission ("Commission"). This shall apply irrespective of whether the subsidiary continues to be part of the same undertaking or not.[1]

Facts of the Case

The Plaintiff, Gigaset AG (formerly Arques Industries AG), used to be the parent company of an investment vehicle ("Defendant A") which in August 2004 acquired all shares in a company active in the heavy industry sector ("Defendant B"). In the period between May 2006 and July 2007 the Plaintiff gradually sold all its shares in Defendant A.

Already since April 2004, the employees of Defendant B participated in a cartel on the market for calcium carbide and since July 2005 on the market for magnesium granulate respectively. In January 2007, the Commission started an investigation concerning anticompetitive behavior on these markets. In its decision of July 2009, the Commission held the Plaintiff and the two Defendants jointly and severally liable for payment of a fine of EUR 13,8 million due to the fact that they constituted an economic unit.

The Plaintiff sued the Defendants claiming compensation for the fine paid to the Commission in the amount of approximately EUR 6,8 million. The court of first instance[2] as well as the court of appeal[3] dismissed the action. In its capacity as the court of last appeal, the Court eventually allowed the Plaintiff's appeal on points of law, annulled the contested lower-court judgments and referred the case back to the court of appeal for further clarifications of the facts.

Reasoning of the Court

Following a judgment by the European Court of Justice[4], the Court held that it is for the national courts to determine the respective shares of the entities held jointly and severally liable for payment of a fine by applying national law as neither the Commission has the power to determine the shares of the fine to be paid by those held jointly and severally liable from the perspective of their internal relationship nor does EU law contain rules for the resolution of such a dispute. In the case at hand, the Court held that the parties have implicitly chosen German law as applicable to the substance of the case by relying on German law throughout the dispute.

Pursuant to Sec. 426 (1) sentence 1 of the German Civil Code ("CC"), jointly and severally liable debtors are equally liable for the compensation of the debt among each other, unless there is a deviating statutory provision, an agreement, or it arises otherwise from the very nature of the legal relationship. The Court held that this provision also applies to the payment of fines issued for participation in a cartel by the Commission.

The Court found that it does not follow from the very nature of a parent company's position within an undertaking that the parent always has a greater responsibility than its subsidiaries for an undertaking's participation in a cartel. In addition, neither EU nor German law lay down general rules that prevent parent companies from claiming compensation from their subsidiaries, irrespective of whether a subsidiary continued to be part of the undertaking or not. The Court therefore held that, when determining the respective shares of the legal persons comprising an undertaking, German courts have to take into account the circumstances of the individual case.

[1] BGH, Judgment of 18 November 2014 , KZR 15/12.
[2] LG Munich, Judgment of 13 July 2011, 37 O 20080/10.
[3] OLG Munich, Judgment of 9 February 2012 , U 3283/11.
[4] ECJ, Judgment of 10 April 2014, C- 231/11 (Siemens Österreich), para. 58, 62, 67.

In a first step, the Court assessed if there had been (express or implied) contractual agreements as to the internal allocation of a fine imposed jointly and severally on the Plaintiff - as the parent company - and the Defendants - as its subsidiaries. In view of its own decision practice[5], the Court considered that particularly profit transfer agreements could point to the parent's full liability within the group, adding that such an agreement, or anything similar, did not exist in the case at hand.

The Court further found that - where contractual agreements as to the internal allocation of the fine do not exist - the individual shares of the fine to be paid by those held jointly and severally liable shall be determined in accordance with the provision on damages in Sec. 254 CC and, thus, according to each party's individual contribution of causation and fault (*Verursachungs- und Verschuldensbeitrag*). The Court listed the following criteria to determine the individual contribution of causation and fault of those held jointly and severally liable:

- **Form of involvement**; the form of involvement in an infringement of competition law shall be taken into consideration. In this regard, the Court considered the violation of organizational and supervisory duties as less serious than an immediate contribution to an infringement of competition law.

- **Benefit generated**; it shall be taken into account which entity has received the benefits generated by the infringement. This aspect shall not be, however, the only determining factor since the allocation of the benefits is often not possible.

- **Economic performance & relevant turnover;** the turnover based 10 % ceiling for a fine pursuant to Art. 23 (2), (4) Regulation No. 1/2003 shall also apply with regard to the internal allocation of a fine. The share of a fine to be paid by one entity shall therefore not exceed 10 % of its individual turnover.

- **Economic importance**; each entity's economic importance for (i) the internal market and (ii) the product market concerned shall be taken into consideration.

The Court dismissed the argument that a parent company may avoid legal liability for an antitrust fine by selling its shares in a subsidiary which is primarily responsible for the undertaking's participation in a cartel to a third party. The Court argued that the acquirer in this case may adjust the offered purchase price accordingly or is entitled to claim damages respectively.

[5] BGH, Judgments of 29 January 2013 , II ZR 91/11 and of 1 December 2003, II ZR/202/01.

Comment

Under German law a parent company and its subsidiaries cannot (yet) be held jointly and severally liable for the payment of an antitrust fine. The decision, thus, refers to cases in which the Commission held the entities comprising an undertaking jointly and severally liable for the payment of a fine.

The Court rightly observed that a parent company must not necessarily be internally solely liable for the payment of a fine but that the circumstances of the individual case have to be taken into account. Such an individual assessment, however, may create legal uncertainties where the subsidiary which participated in a cartel is sold to a third party, unless there are robust criteria to determine the internal allocation of the fine between the parent company and its former subsidiary.

The criteria named by the Court may only serve as a starting point in this regard since they are rather generic. It will therefore be very interesting to watch the outcome of the proceedings before the court of appeal to which the case has been referred for further clarifications of the facts.

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