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Cartel fines: EU's General Court clarifies rules of joint and several liability

Appeal of Siemens AG Österreich against fine in gas insulated switchgear cartel case

On 3 March 2011, the General Court ("Court") decided upon three appeals of members of the gas insulated switchgear cartel[1] who where fined over 750 million by the European Commission ("Commission") in January 2007 for illegal collusive tendering over a duration of more than 16 years.[2] In reassing the level of the fines, the Court clarified the rules of liablity for cartel fines especially as regards the liability of an acquiring parent company for the infringing entity it acquires as well as the Commission's duty to specify the allocation of the fines between group companies.

In the course of the appeal of Siemens AG Österreich, the Court assessed whether the Commission had correctly determined the amount of fines to be paid jointly and severally by Siemens' subsidiaries concerned and their (shifting) parent companies during the period of their infringement. Although the judgement is - in large parts - based on established case-law, it presents a good occasion to summarize the key principles of joint and several liability.

Liability for competition law breaches

Liability generally attaches to and remains with the legal entity managing the operation of the business and the employees who committed the infringement irrespective of a change in name, legal form or business activities (legal succession).[3]

Liability of parent company for subsidiary

The attribution of liability for infringements to parent companies is based on the concept of undertaking. It is long-established practice in European competition law that different companies belonging to the same group form an "*economic unit*" and are therefore regarded as one "*undertaking*" within the meaning of Art. 101 of the Treaty on the Functioning of the European Union ("TFEU"), if the parent company exercises decisive influence over the commercial behaviour of its subsidiaries.[4] Case-law also established that the Commission may reasonably presume that a wholly-owned subsidiary follows, in all material aspects, the instructions by its parent company and therefore forms part of the same economic entity. In this case, the Commission is not required to examine whether the parent company has actually exercised its power. It is rather for the parent comany to rebut the Commission's presumption.[5]

If involved in a cartel, the legal responsibility for the infringement and the imminent fine can therefore not only be imposed on the subsidiary that actually participated in the cartel, but also on the parent company that exercised decisive influence over the commercial behaviour of the subsidiary at the time of the infringement - irrespective of whether the parent participated in or had knowledge of the infringement.

Liability under shifting ownership

Companies which are acquired by another company during their participation in a cartel

[1] Cases T-110/07 *Siemens AG v. Commission*, T-117/07 and T-121/07 *Areva/Alstom v. Commission*, T-122/07-124/07 *Siemens AG Österreich v. Commission*.
[2] See Press Release IP/07/80 of 24 January 2007.
[3] See case T-161/05 *Hoechst v. Commission,* ECR [2009] II-03555, para 50.
[4] See case T-203/01 *Michelin v. Commission*, ECR [2003] II-4071.
[5] See case T-330/01 *Akzo Nobel v. Commission*, ECR [2006] II-3389.

therefore continue to bear responsibility for their conduct prior to their acquisition as long as they are not "*purely and simply absorbed*"[6] by the acquirer, but continue their activities as subsidiaries. With effect of the acquisition, the acquirer itself can only be held responsible for the conduct of its new subsidiary *prior* to the acquisition, if the legal entity that managed the subsidiary at the time of the infringement ceased to exist in law in the meantime (economic succession).[7] However, taking into account the concept of undertaking, the new parent can be held jointly and severally *post*-acquisition, if the subsidiary continues the infringement under the new ownership as part of the economic unit with the parent.

The same prinicples apply, *mutatis mutandis*, to cases where, prior to the acquisition, the company acquired participated in the infringement not independently, but as a subsidiary of another group which can then be held jointly and severally up to the date of the Company's acquisition. [8]

This can lead to the situation, as in the case at hand, that the former as well as the new parent are each held jointly and severally liable with the infringing subsidiary for the period of the infringement during which they formed an economic unit (i.e. up to and from the date of the acquisition respectively).

Share of fine to be paid jointly and severally

The Commission has the right to determine the share of the fine each company of the undertaking should bear. Contrary to the Commission's claims during the appeal proceedings, the task to allocate the respective shares of the various companies forming one undertaking and being held jointly and severally liable cannot be passed on to the national courts (i.e. in the case of recourse claims between the debtors).[9]

If the Commission's decision imposing a fine jointly and severally on several companies does not specify the amounts to be paid by each company, the decision attributes the infringement to them in equal measures which means that they must, in principle, contribute in equal amounts to the payment of the fine imposed for that infringement. Consequently, a company paying the whole amount of the fine may therefore, on the basis of the Commission's decision, make a claim for recourse against each of the other joint debtors in respect of its share.[10]

Principle that penalties must be specific to the offender and the offence

However, the Court clarified in the present case that the Commission is not free to determine (or not to determine) the amounts to be paid jointly and severally, but is bound to the principle that penalties must be specific to the offender and to the offence concerned. Each company, so the Court, must be able to discern from the decision imposing a fine on it to be paid jointly and severally with other companies the amount which it is required to bear in relation to the other joint debtors. While the Commission is not required to set fines in a manner strictly proportionate to the duration of the infringement of the various companies being part of the same undertaking,[11] the Commission must "*specify the periods during which the companies concerned where jointly liable for the unlawful conduct of the undertakings which participated in the cartel and, where necessary, the degree of liability of those companies for that conduct*"[12]. Unfortunately, the Court did not elaborate on its understanding of "*degree of liability*".

The Commission found that this principle had not been accurately been applied by the Commission and adjusted the attribution of the fines between the Siemens companies accordingly without reducing the total fine.

Comment

The case at hand shows the complex nature of the issue of parential liability for cartel fines which results from the concept of a single economic unit, i.e. an undertaking for competition law purposes. As the maximum cap on the amount of the fine applies to the turnover of the addressee of the infringement decision - i.e. in the case of joint and several liability to the parent company's group turnover - the question of liability is decisive for the ultimate level of the fine.

In terms of liability, share deals bear a greater risk from an acquirer's perspective, as liability transfers with the legal entity (legal succession). In the case of an asset deal, by contrast,

6 Case T-122/07-124/07, para 139.
7 Case T-161/05 *Hoechst v. Commission,* ECR [2009] II-03555, para 52, 61 et seq. The principle of personal liability (legal succession) prevails over the principle of economic succession.
8 Case T-122/07-124/07, para 141.
9 Case T-122/07-124/07, para 157.
10 Case T-122/07-124/07, para 158.
11 Case T-122/07-124/07, para 181.
12 Case T-122/07-124/07, para 153.

the acquirer would be excluded from liability for the pre-acquisition period as long as the seller does not dissolve the infringing legal entity to which the assets belonged. Liability will otherwise be transferred to the acquirer under the principle of economic succession. This liability issue should therefore carefully be taken into account when negotiating the warranties and indemnities of the purchase agreement.

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