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EU COMPETITION LAW PRINCIPLES ON UNDERTAKINGS LIABLE FOR FINES ALSO APPLY IN THE CONTEXT OF LIABILITY FOR DAMAGES

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Legal Briefings

In a preliminary ruling request made by the Finnish Supreme Court on the question of the relevant entities liable for damages, the Court of Justice of the EU (CJEU) held that principles applied in order to determine the relevant entities for liability for fines under Articles 101 and 102 TFEU (and in particular the successor liability principle) should also be applied to determine the relevant entities liable for damages under private damages claims. The CJEU held that the determination of the entity that may be held liable for compensation is governed by the definition of "undertaking" under EU law, as the right to claim damages for breach of the competition rules is an integral part of the enforcement of EU competition law

The CJEU therefore held that in a case like this case, where all the shares in the companies which participated in the cartel were acquired by other companies which dissolved the former companies and continued their commercial activities (i.e. successor companies), the acquiring companies may be liable for the damage caused by the cartel on the basis of the successor liability principle.

BACKGROUND TO THE CASE

In September 2009 the Finnish competition authority imposed fines on seven of companies for their participation in a cartel in the asphalt market between 1994 and 2002. Some of the infringing companies had since gone into voluntary liquidation with their respective parent companies acquiring their assets and continuing their economic activity. Based on the principle of economic continuity the fine was also imposed on the parent companies which had absorbed their infringing subsidiaries.

When the city of Vaan subsequently brought a claim for damages, seeking compensation for the harm caused by the excessive prices paid for asphalt works as a result of the cartel, it brought the claim jointly and severally against the same companies that had been fined for breach of Article 101TFEU. Skanska, NCC Industry and Asfaltmix, who had each been fined for the infringement by their now dissolved subsidiaries, argued that they could not be liable in damages for the conduct of those subsidiaries which were legally independent entities under Finnish law, and that the city of Vaan should instead have lodged its damages claim during the liquidation proceedings of those companies.

The Finish courts took different approaches on this point:

- **The District Court** concluded that the principle of economic continuity should apply here, as it would otherwise be impossible or very difficult to obtain damages for harm caused by a breach of the competition rules. The District Court held that, in order to ensure the effectiveness of Article 101 TFEU, the same principle should apply for liability for damages as is applied for liability for fines for breach of the provision.

- **The Court of Appeal** on the other hand found that there were no grounds for applying the principle of economic continuity to private actions for damages. According to the Court of Appeal, in the absence of detailed rules or more specific provisions on this issue, the need to ensure the effectiveness of EU competition law cannot justify interference with the fundamental principles of extra-contractual liability under the domestic legal system.

QUESTIONS PUT TO THE CJEU

On a further appeal before the Supreme Court, the Finish Supreme Court asked the CJEU for clarification, as it was not clear from the case law:

- whether the domestic rules of the Member States apply in order to determine the relevant entities liable for damages in private enforcement claims or whether this is to be determined by reference to Article 101 TFEU;

- If the latter, whether the same principles applied by the CJEU in determining the entities liable for fines (which include the single economic entity and economic continuity concepts) should apply when determining the entities liable for damages.

THE CJEU RULING

The CJEU starts with a reminder that Article 101 and 102 TFEU have direct effect and create rights for individuals which the national courts must protect.

It is also settled case law that, in order to ensure the full effectiveness of the EU competition rules, an individual has the right to bring a claim for damages for loss caused by a breach of the EU competition rules, where there is a causal link between the loss suffered and the anti-competitive conduct.

Unlike the substantive provisions set out in Articles 101 and 102 TFEU, the rules on private enforcement are not harmonised at EU level, and it is therefore up to the Member States to adopt their own rules, taking into account the principles of equivalence and effectiveness. The determination of the entity that may be held liable for compensation however should be governed by the definition of "undertaking" under EU law, as it affects the very existence of the right to claim compensation. The concept of undertaking is used to designate the infringing entity under Articles 101 and 102 TFEU, and it is the same entity that infringes those rules that must be liable for damages caused by that infringement.

Where as a result of the restructuring of an undertaking, under which the entity that committed the breach ceases to be distinct, EU case law has developed the principle of successor liability in order to ensure the effective implementation of the competition rules. Although the case law has developed in the context of liability for fines the same principles apply in the context of damages actions which should be seen as an integral part of the enforcement of the competition rules. If undertakings responsible for damages caused by their infringement of the competition rules could escape liability by simply changing their identity through restructuring, sales or other legal or organisational changes, the effectiveness of the competition rules would be jeopardised.

The CJEU therefore concluded that in a case like this case, where all the shares in the companies which participated in the cartel were acquired by other companies which dissolved the former companies and continued their commercial activities, the acquiring companies may be liable for the damage caused by the cartel.

COMMENT

The CJEU's ruling in this case makes it clear that companies will not be able to use corporate restructuring in order to avoid liability for damages. The Court confirms that EU law and the body of EU case law on the concept of undertaking for the purpose of the application of Articles 101 and 102 TFEU will equally apply in the context of private damages claims for breach of those rules.

The concepts of parental liability and successor liability as developed in the case law have resulted in a wide definition of the concept of undertaking for the purpose of EU competition law. A parent company may be held liable for its subsidiaries where it can exercise decisive influence over its subsidiary, and under the principle of economic succession liability attaches to the business/assets involved in the infringement and can transfer to a new legal entity.

In addition to the risk of fines, parent companies and economic successors of infringing entities will now need to be aware that they may equally be liable for the damages claims subsequently brought against the infringing undertakings and that they will not be protected by the corporate responsibility rules of their domestic regimes. The risk of liability for damages will now clearly need to be factored into any compliance programme and when carrying out due diligence in an M&A context.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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