



THE COURT OF JUSTICE OF THE EUROPEAN UNION STATES THAT SUBSIDIARIES MAY BE LIABLE FOR PARENT COMPANY INFRINGEMENT OF COMPETITION LAW

15 October 2021

Introduction

It is well known that a parent company can be fined if a subsidiary under its control infringes the prohibition of anti-competitive agreements as set out in the Treaty on the Function of European Union No 2012/C 326/01 (“TFEU”). Such has been stated in earlier EU judgments regarding this matter.

On the opposite, it has been unclear, whether the same would apply in a situation where the parent company has infringed the antitrust regulation and if the subsidiary could then become liable for the parent company's committed infringements. In a recent decision, the Court of Justice of the European Union (The EU Court) concluded that the subsidiary can be liable in such a situation.

Background

In July 2016 the European Commission found that 15 European truck manufacturers had infringed the antitrust regulation by entering into agreements regarding pricing and gross price increases for trucks, case AT.39824 (Trucks).

A company, which had acquired 2 trucks from a subsidiary of one of the truck manufacturers in 1997 and 2011 brought an action for damages against the subsidiary, claiming payment of EUR 22,204.35 (corresponding to the purchase price for the 2 trucks).

The claim was raised before the Provincial Court of Barcelona, Spain, who presented the question to the EU Court on whether a parent company's liability under TFEU can be extended to its subsidiary based on the doctrine regarding an "economic unit" and if so, under which circumstances such liability could apply.

Resume

The EU Court found that a subsidiary may be liable for breaches caused by the parent company's infringements of competition law *if* the companies can be considered an "*economic unit*".

To define an "economic unit", the EU Court defined an "undertaking" as a unit that is engaged in economic activity, irrespectively of the unit's legal status and how the unit is financed. The "economic unit" is thereby defined as a unit potentially consisting of several persons; natural or legal, which is engaged in the same economic activity. Therefore, in cases where there at the time of the infringement exists an "economic unit", the companies involved in the "economic unit", will potentially become joint and several liable.

To raise a claim against another legal entity, such as a subsidiary, the burden of proof lays with the claimant, which must prove that the parent company and its subsidiary constituted an "economic unit" at the time of the infringement. It must be documented that economic, organisational, and legal links exist between the two legal. Secondly, the claimant must

prove the existence of a concrete connection between the economic activity of the subsidiary and the subject in relation to the infringement for which the parent company is liable.

The fact that there must be a connection between the subsidiary's economic activity and the subject of the parent company's infringement means that every subsidiary of the parent company cannot automatically be held liable for the parent company's infringements. Only the subsidiaries that actually have such joint activity with the parent company may be jointly liable.

The EU Court noted in this regard that it may vary from group to group when such can be considered as an "economic unit". Especially in relation to "conglomerates", which operates in several economic fields without having any connection between the companies, this could lead to, that the subsidiary will not be held liable if there is no connection between the companies and if the subsidiary under no circumstances has been involved in the infringements.

Our Comments

The decision is a natural consequence of the "undertaking" and "economic unit" from a competition law perspective.

A claimant can choose to bring action against a subsidiary instead of the parent company which is presumed to have or already have breached the competition law. The requirement for the claimant to do so is then to prove that there is constituted an "economic unit" within the definition in the EU law and that both companies are active in the same market to which the infringement relates.

The possibility to bring action against a subsidiary company can e.g., be of interest in cases where there occurs an opportunity to bring action in countries other than the parent company's domicile, or if the subsidiary's financial state is more forceful than the parent company's.

In an M&A acquisition, the buyer should be aware of such possible liability during the due diligence, and whether the potential acquired company can be held liable for a former parent company's infringement of competition law, notwithstanding whether the acquired company has participated in the infringement and/or do not have any information regarding the infringement.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:



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