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QUICK LINKS

Court of Justice rules that subsidiaries can be liable for harm caused by cartels

INTRODUCTION

The European Court of Justice (CJ) has confirmed that damages claims can be brought against subsidiaries of undertakings that have participated in cartel activity prohibited by Article 101 of the Treaty on the Functioning of the European Union. The CJ provided guidance on the conditions to be met for such compensation claims to be brought against subsidiaries.

BACKGROUND

In July 2016 the European Commission found that the ultimate parent company of the Daimler group, Daimler AG, had formed part of a cartel from 1997 to 2011 which fixed prices and coordinated price increases for trucks sold in the European Economic Area.

Following the Commission's decision, Sumal SL brought a claim in the Barcelona Commercial Court against Mercedes Benz Trucks España, a subsidiary of the Daimler Group. Sumal had bought some trucks from MBTE between 1997 and 1999, and now sought compensation for an overcharge paid as a result of price fixing by the cartel. The Barcelona Commercial Court rejected this claim on the grounds that only Daimler, not MBTE, had been the subject of the Commission's 2016 decision.

Sumal appealed that decision to the Barcelona Provincial Court, which referred a number of questions to the CJ seeking guidance on (i) whether an action for damages may be brought against a subsidiary following a Commission decision finding its parent company guilty of carrying out anti-competitive practices, and if so, (ii) the conditions necessary to bring such an action against a subsidiary.

JUDGMENT

On 6 October 2021 the CJ published its answers to the referred questions. It found that where there has been an established infringement of Article 101(1) TFEU by a parent company, it is possible for any victim of that infringement to bring a damages claim against a subsidiary of that parent company, provided certain conditions are met.

A LINK BETWEEN THE SUBSIDIARY AND THE PARENT

Firstly, there has to be an "*economic, organisational and legal link*" between the parent company and the subsidiary from whom compensation is being sought. If the subsidiary formed part of an undertaking or "*economic unit*" with the parent at the time that the parent committed the relevant infringement, then the subsidiary could be liable for the

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

parent's activities, in line with the principle of joint and several liability of an undertaking.

The CJ stressed that not every subsidiary of a parent company can be liable for the activities of its parent company, particularly if the subsidiary and the parent operate in completely different economic sectors (as may occur with large conglomerate groups that operate across several sectors). Therefore, it will be necessary to prove that the subsidiary and the parent engage in the same economic activity in order to impute the parent's behaviour to the subsidiary.

A LINK BETWEEN THE SUBSIDIARY'S ACTIVITIES AND THE SUBJECT MATTER OF THE INFRINGEMENT

Secondly, there must be a link between the economic activity being carried out by the subsidiary, and the subject matter of the infringement for which the parent company was found guilty. In Sumal's case, the CJ observed that it would be necessary to show that the anti-competitive activities being carried out by the parent company, Daimler, concerned the same products as those sold to Sumal by the subsidiary, MBTE. This would go to showing that the subsidiary formed "*precisely*" part of the same economic unit as the parent in respect of the anti-competitive behaviour, and is therefore jointly and severally liable for the parent's actions.

RIGHT TO A FAIR TRIAL

In any claim for compensation against a relevant subsidiary, the defendant subsidiary must be given the right to an effective remedy and fair trial under Article 47 of the Charter of Fundamental Rights of the European Union.

Where there is an existing Commission decision against the parent company, the subsidiary should be able to raise any grounds it could have raised had it participated in the Commission proceedings, in order to dispute that it belongs to the same economic unit as the parent company. However, it cannot dispute the fact that an infringement has occurred, as national courts cannot make decisions that run counter to Commission decisions.

Where there is no existing Commission decision against the parent company, the subsidiary will be able to dispute both the fact that an infringement has occurred and that it belongs to the same economic unit as the parent company.

IMPLICATIONS

As a result of this judgment, subsidiaries may now find themselves, in certain circumstances, exposed to damages claims in respect of cartel activity engaged in by their parents. Indeed, the CJ noted that there was "*in principle…nothing to preclude*" Sumal from bringing its compensation claim against Daimler, or Daimler and MBTE jointly. Given that subsidiaries may have little oversight of or involvement in the activities of their parents, it may be difficult for such subsidiaries to protect themselves from this exposure.

In addition, the CJ noted that in accordance with previous case law, claimants seeking damages may sue the relevant defendant either in the place where the damage occurred, or the place of the event giving rise to it.

This decision may therefore encourage forum shopping by claimants when choosing where and against whom to initiate damages proceedings. It remains to be seen whether this decision will encourage increased private enforcement by victims of cartel activity in the EU.

OTHER DEVELOPMENTS

ANTITRUST

GENERAL COURT UPHOLDS EU CAPACITORS CARTEL DECISION

On 29 September 2021 the European General Court (GC) issued several judgments in relation to the aluminium electrolytic capacitors and tantalum electrolytic capacitors cartel decision. In this decision of 21 March 2018 the European Commission imposed a total fine of circa €254 million on nine Japanese undertakings and groups of undertakings for their participation in the cartel during various periods between 1998 and 2012. Of these, NEC

Corporation, Nichicon, Tokin, Rubykon and Nippon Chemi-Con brought actions before the GC to annul the decision or to reduce their respective fines.

In its press release the GC announced that it rejected all the arguments put forward by the undertakings and maintained the fines imposed by the Commission:

- *Increase in the amount of fine for repeated infringement:* The GC found that the Commission was entitled to increase the fine on NEC for repeated infringement. It held the Commission was entitled to impose an additional penalty because NEC continued to participate in the capacitors cartel for two years after it was penalised for a similar infringement in the DRAM cartel settlement.
- *Territorial jurisdiction:* Several appellants argued that the anti-competitive conduct was Asia-oriented and was not implemented in the EEA. The GC found that although the cartel participants were undertakings headquartered in Japan and the anti-competitive contacts took place in Japan, the contacts had a "global reach" which included the EEA and so the Commission did have jurisdiction.
- *Ne bis in idem principle and proportionality:* The applicant argued that the cartel participants had already been fined in non-EEA countries and so the Commission had infringed the principles of ne bis in idem and proportionality. However, the GC found that the fines imposed by the Commission did not pursue the same objectives as those imposed by non-Member States, clarifying that a distinction should be drawn between preserving undistorted competition in the EEA and protecting the market of non-member countries. The GC further observed that the Commission cannot be required to take into account fines previously imposed by non-Member States, even though it has discretion to do so.

CHINA FINES MEITUAN CNY 3.4 BILLION FOR ABUSE OF DOMINANCE IN THE ONLINE FOOD DELIVERY MARKET

On 8 October 2021 China's State Administration for Market Regulation (SAMR) imposed a fine of CNY 3.44 billion (approximately £390 million) on Meituan, a Chinese food delivery platform, for abusing its dominant market position. In particular, SAMR found Meituan had violated Article 17(4) of the Anti-Monopoly Law (AML), which prohibits dominant undertakings from obliging their trading counterparts to deal exclusively with them (or with another undertaking designated by them) without reasonable justification.

SAMR said Meituan imposed different rates and delayed merchants' launches to ensure those on its platform signed exclusive cooperation agreements, and implemented a "*choose one of two*" practice by collecting exclusive cooperation deposits and imposing punitive measures by technical means involving data and algorithms.

The decision is comparable with SAMR's Alibaba decision from April this year, in which Alibaba was also fined for its violation of the AML through a similar business practice of "*choose one of two*", but there are some notable differences:

- SAMR imposed a fine of 3 per cent of its 2020 Chinese revenue against Meituan, compared with Alibaba's 4 per cent (of its 2019 Chinese revenue). In deciding on the level of fine, SAMR took into account Meituan's cooperative approach, which included admitting various elements of the violation, such as the "*choose one of two*" practice, and providing important evidence to SAMR.
- The investigation into Meituan took around six months (from April to early October 2021), compared with the four-month investigation into Alibaba (from December 2020 to early April 2021).
- The administrative guidance issued to Meituan sets out certain behavioural commitments imposed by SAMR, some of which are not directly related to competition law and have no equivalent in the guidance SAMR issued to Alibaba. For example, Meituan is required to strictly comply with a set of guidelines on the rights and interests of food delivery riders. This follows severe criticism on social media over the past months against Meituan for its alleged

mistreatment of riders and highlights SAMR's willingness to impose remedies that seek to address consumer complaints even if they go beyond competition law considerations.

It is also worth noting that, like Alibaba, Meituan issued a statement in response to SAMR's decision in which it says it sincerely accepts and will firmly implement the decision.

As this is the latest decision in a string of enforcement actions brought against tech companies in China, we expect SAMR will continue to scrutinise the tech sector closely, in particular the "*choose one of two*" business practice often implemented by Chinese internet companies. The decision also further demonstrates the importance of cooperation during the investigation process and that SAMR is willing to impose remedies not directly related to the infringement itself.

GENERAL COMPETITION

CMA CALL FOR INPUTS ON HOW COMPETITION AND CONSUMER REGIMES COULD BETTER SUPPORT SUSTAINABILITY GOALS

On 29 September 2021 the Competition and Markets Authority (CMA) launched a call for inputs to inform advice the CMA will provide to the UK government on how the competition and consumer regimes could better support the UK's Net Zero and environmental sustainability goals, including climate adaptation.

The Secretary of State for Business, Energy and Industrial Strategy (BEIS) asked the CMA to provide comments on - in particular - these three questions: (i) whether, and how, current competition and consumer legal frameworks constrain or frustrate initiatives that might support the UK's goals; (ii) whether there are changes to the UK's competition and consumer law that would help to achieve the UK's goals; and (iii) whether there are other opportunities within the UK's competition and consumer policy toolbox that would support the UK's goals which the government should be considering.

In responding to the Secretary of State, the CMA is aiming to focus on competition law enforcement, the merger control regime, consumer protection law and the markets regime. The CMA is particularly keen to receive input in relation to specific instances where businesses or consumers felt that competition or consumer law impacted their ability to act sustainably. For instance, it is asking respondents to provide information on cases reviewed under the current merger regime where environmental factors were not able to be fully taken into account.

The call for inputs will run until 10 November 2021 and will be followed by the CMA publishing its response in early 2022. For further details on the role that competition law can be expected to play in the effort to meet the targets that will be agreed at the UN Climate Change Conference (COP26) in November, see our Briefing on this topic.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650