CJEU SENDS A REMINDER TO PARENT COMPANIES AS REGARDS THE IMPOSITION OF LIABILITY FOR THEIR SUBSIDIARIES' INVOLVEMENT IN A CARTEL

Date: 4 July 2016

Antitrust, Competition & Trade Regulation Alert

By: Francesco Carloni, Dr. Annette Mutschler-Siebert, M. Jur. (Oxon), Scott S.Megregian, Marcin Trepka, Neil Baylis, Alessandro Di Mario, Philip Torbøl

INTRODUCTION

On 16 June 2016, the Court of Justice of the EU ("**CJEU**") dismissed appeals against the General Court's ("**GC**") rulings on the calcium carbide cartel. The GC had upheld the European Commission's ("**Commission**") EUR 61 million fine imposed on nine suppliers of calcium carbide and magnesium based reagents ("**Judgment**").

The CJEU relied on the notion of parental liability in order to hold the parent companies liable for the conduct of their subsidiaries even if the parents did not participate in the cartel. It is sufficient to find liability where the parent company is able to exercise decisive influence over the subsidiaries at the time of the infringement. This was particularly relevant in the context of the Judgment where the subsidiaries changed hand and each parent was held liable for its respective period of ownership.

The CJEU rejected the parent companies' arguments contesting their respective parental liability. It found that the mere fact that a subsidiary did not comply with the parent company's order not to enter any anticompetitive agreement is "not sufficient to establish the absence of actual exercise of decisive influence".

The Judgment reaffirms how in practice it is extremely difficult for the parent company to rebut the presumption of decisive influence once it is established. On that basis, a parent company will be held jointly and severally liable for the anticompetitive conduct of its subsidiary.

BACKGROUND

Under EU competition law, where a parent company holds (almost) all of the capital in a subsidiary, there is a rebuttable presumption that the parent exercises decisive influence over its subsidiary. In the absence of a (nearly) 100 per cent shareholding, the Commission must adduce evidence of the exercise of decisive influence. For instance, the exercise of decisive influence may be established where the parent company is able to influence pricing policy, or where organisational links tie the subsidiary to the parent.

The so-called “100 per cent presumption” is rebuttable since a parent company may, in principle, rebut the presumption of exertion of “decisive influence”. The parent must demonstrate that it exercised restraint and did not influence the market conduct of its subsidiary. However, this high evidential threshold for rebuttal has proven extremely difficult to meet in practice.

In the Judgment, one of the parent companies contended that it did not exercise decisive influence over its subsidiary during the time of the cartel infringement as it had sold the subsidiary and that therefore it should not be held liable for its behavior.

In particular, to show its lack of actual decisive influence over the subsidiary, the parent company argued that it had given an express instruction to the subsidiary not to participate in any anticompetitive practices and that the subsidiary failed to comply with such instruction.

However, like the GC, the CJEU found that the mere fact that a subsidiary does not comply with one instruction given by its parent company is not sufficient, by itself, to establish the absence of actual exercise of decisive influence. It is unnecessary for the subsidiary to carry out all the parent company's instructions to demonstrate decisive influence, as long as the failure to carry out those instructions is not the norm.

RELEVANCE FOR COMPANIES

Although the Judgment does not create new law, it does reaffirm the high burden of proof on parent companies to rebut the presumption of decisive influence once the presumption is in place.

On occasion, parents have avoided such liability on the basis of the “pure financial investor” defence, i.e. by demonstrating that they behaved like a pure financial investor, holding shares in a company for profit while refraining from any managerial involvement or control, or representation on the board. However, the Commission is taking a more aggressive approach towards the pure financial investor defence. It has recently found a major financial investor liable for the behavior of its subsidiary in the undersea-cable cartel. The Commission's decision is currently under appeal before the GC, and it will be interesting to see which approach the court adopts.

Whilst compliance programmes do not allow companies to escape liability for their subsidiaries' behavior, such programmes play an important role in mitigating the antitrust risk, through an adequate dissemination of an antitrust corporate culture within the group and internal reporting systems for employees to facilitate early detection of potential infringements. This is particularly relevant for a number of EU jurisdictions where the adoption and implementation of an effective antitrust compliance programme may result in a fine reduction in case of antitrust violation.

KEY CONTACTS

FRANCESCO CARLONI
PARTNER

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM

DR. ANNETTE MUTSCHLER-SIEBERT, M. JUR. (OXON)
PARTNER

BERLIN
+49.30.220.029.355
ANNETTE.MUTSCHLER-SIEBERT@KLGATES.COM