Published on 1 March 2011 by **Thomas Caveng**, Legal Translator / Marketing Director
t.caveng@soulier-avocats.com
Tel.: + 33 (0)4 72 82 20 80

Read this post online

Antitrust infringements: attribution of liability within groups of companies

By judgment dated January 20, 2011[1], the Court of Justice of the European Union ("CJEU") further extended the scope of the so-called "decisive influence" presumption. This notion is essential to determine who is liable in case of infringements of EU competition and antitrust rules by a company that is a member of a group of companies.

Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibits cartels and other anti-competitive agreements between companies but does not provide any definition of the concept of "*undertaking*", as per EU law. This is yet an extremely important issue for determining which entity(ies) could be sanctioned in case of antitrust infringements. Moving away from traditional definitions, the CJEU clarified this concept in a quite original manner.

According to a settled EU competition-related case law, the classification as "undertaking" applies to "*every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*"[2].

The question of who should be held liable in case of antitrust infringements committed by an undertaking that is a member of a group of companies is likely to arise. Indeed, the Court recalled that, in competition and antitrust law, the term "undertaking" must be understood as "*designating an economic unit even if in law that economic unit consists of several persons, natural or legal*".

As such, a parent company may be held liable for infringements of antitrust and competition rules committed by its subsidiary insofar as such subsidiary does not determine its conducts on the market autonomously. In practice, it is, therefore, necessary to check whether the parent company exercises a decisive influence over its subsidiary.

In order to effectively prosecute and sanction antitrust infringements, the CJEU not only adopted a broad definition of the concept of "undertaking" but also established presumptions enabling to seek a parent company's liability for infringements committed by its subsidiaries.

By a judgment dated September 2009[3], the CJEU established a presumption according to which a parent company owning 100% of the capital of its subsidiary is presumed to exercise a "decisive influence" on such subsidiary. In that case, the CJEU held that the parent company was jointly and severally liable for the antitrust infringements committed by its four subsidiaries (see our e-newsletter of January 2010).

The CJEU recently extended the scope of this presumption and, consequently, the number of entities likely to be held liable for antitrust infringements committed by other companies of their group.

In the above-referenced decision of January 20, 2011, the CJEU ruled that "*where a holding company holds 100% of the capital of an interposed company which, in turn, holds the entire capital of a subsidiary of its group which has committed an infringement of EU competition law, there is a rebuttable presumption that that holding company exercises decisive influence over the conduct of the interposed company and also indirectly, via that company, over the conduct of that subsidiary*".

As such, a holding company can be held liable for the antitrust infringements committed a group company which it does not directly control insofar as the capital of such company is held by a subsidiary wholly-owned by the holding company.

The CJEU held that, in such a case, the three companies are deemed to belong to the same "*economic unit*" and, therefore, constitute a "*single undertaking*" for the purposes of EU competition law. Consequently, the holding company can be held jointly and severally liable for the payment of fines imposed on indirectly-owned group companies that committed infringements of EU antitrust and competition rules.

The CJEU thus continues to apply the principle according to which several group entities may be held jointly and severally liable for the payment of antitrust fines whereas French courts, as a matter of principle, consider that only the infringing entity(ies) may be held liable. In the above-commented decision, the CJEU upheld a decision of the EU Commission that held the parent company, the subsidiary and intermediary jointly and severally liable.

Yet, the presumption applied by the CJEU being rebuttable, the holding company still has the possibility to escape liability by demonstrating that one of the other relevant companies – i.e. the infringing subsidiary or the interposed company – determined its conduct on the market autonomously.

---

[1] CJEU, January 20, 2011, C-90/09 P, General Química e.a./Commission

[2] See for example CJEU, April 23, 1991, C-41/90, Höfner and Elsner; CJEU, January 10, 2006, Cassa di Risparmio di Firenze e.a.

[3] CJCEU, September 10, 2009, C-97/08 P, Akzo Nobel/Commission