Cementing the Liability of Infringers of EU Competition Law

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On 14 March 2019, the Court of Justice of the European Union ("**CJEU**") handed down an important judgment for victims of competition law infringements: ensuring that their fundamental right to compensation for losses caused by such infringements cannot be circumvented by the sale or dissolution of the infringing entities, or by corporate restructurings.[1] In addition, the CJEU emphasized the importance of private damages claims in the enforcement of European competition standards more generally, stressing that the role of such claims goes beyond ensuring compensation for losses, and extends to the punishment and deterrence of anticompetitive conduct.

The Finnish Decisions

The issue arose in the context of a Finnish private damages suit relating to an asphalt cartel. Specifically, the legal entities that had participated in the cartel had been dissolved in voluntary liquidation procedures, and the sole shareholders of those companies had acquired the dissolved companies' assets and formed new legal entities which continued the original companies' business activities.

The Supreme Administrative Court of Finland, following a recommendation from the Finnish competition authority, imposed fines upon the successor companies for breach of competition law, and in subsequent private damages claims compensation was sought from the successor companies. The Finnish District Court ruled that the successor companies should be liable to pay compensation on the ground that liability for damages for breach of EU competition laws should be based on the same principles as have been adopted in other member states.

However, the District Court decision was overturned by the Finnish Court of Appeal because Finnish law limits the attribution of liability for damages only to the legal entity that caused the loss. Therefore, because the infringing entity had been dissolved, compensation could not be obtained for the losses suffered as a result of an EU competition law infringement.

The damages claimant, the City of Vantaa, appealed the Court of Appeal's decision to the Finnish Supreme Court, which then sought a ruling from the CJEU on the following three questions: (i) whether the determination of who is liable to pay compensation for harm caused by anticompetitive conduct is a matter of EU or national law; (ii) if a matter of EU law, whether the same principles that apply in respect of liability for penalty payments should be applied to damages claims; and (iii) if a matter of national law, whether a national rule limiting liability for damages claims to the legal entity that caused the harm would, when there had been a corporate restructuring in the manner described above, render the ability to obtain compensation for harm caused by that anticompetitive conduct impossible in practice or unreasonably difficult, such that the national provision was contrary to the principle of effectiveness under EU law.

The CJEU Decision

Recognizing that it is for a member state to lay down the detailed rules governing how the right to claim compensation can be exercised, the CJEU nevertheless held that the question of who is required to provide compensation is a matter directly governed by EU law. The CJEU reasoned that if an individual who has suffered loss as a result of an infringement of the EU competition rules is not able to claim compensation, the fundamental right to that compensation has been ignored.

Advocate General Wahl stated in his opinion for the CJEU that the determination of who is liable to provide compensation for a competition law infringement was "*the other side of the coin*" to the right to claim compensation for harm caused by that competition law infringement. The CJEU emphasized the fundamental right to compensation for loss caused by a breach of the EU competition standards, and the requirement of member states to ensure the full effectiveness of those standards. The CJEU held that if an individual's right to claim damages is put at risk by the existence of a member state's legal regime that allows an entity to avoid answering for the damages caused by its infringement, then EU law is not fully effective.

The CJEU was clear that, just as the public enforcement regime would be undermined if undertakings could avoid penalties through corporate restructuring, private enforcement would also be undermined if an undertaking could avoid claims for compensation in the same way. Specifically, the CJEU referred to its extensive case law on the concept of "undertaking" under EU law, stressing that an "undertaking" should not have a different meaning in the context of the imposition of fines for breach of EU competition law as it has with the interpretation of "undertaking" in actions for damages for breach of the same law. In the public enforcement context, the CJEU applies the "economic continuity test" to determine who should be liable for a penalty for a breach of the competition standards. Under the economic continuity test, liability for the infringement rests with the "undertaking," and the EU law concept of "undertaking" includes the entire economic unit. This requires that liability for a penalty should pass on to a successor when, from an economic point of view, the two entities are identical; or when an entity ceases to exist following the acquisition of its assets and liabilities by a different entity. The CJEU ruled that the same principle should apply in relation to the liability to pay compensation in a private damages claim. The CJEU supported this application by noting that private damages claims are the corollary of penalties in so far as the punishment and deterrence of competition law infringements are concerned. Indeed, Advocate General Wahl went so far as to state in his opinion that the compensatory function of a damages claim is subordinate to its deterrence function.

Analysis

The CJEU has drawn a sensible parallel between public and private enforcement, ensuring the effectiveness of the right of competition law infringement victims to claim damages in all member-states by preventing wrongdoers' evasion of compensation claims through strategic corporate restructurings. In addition, the CJEU has ensured a more uniform approach to damages claims in different member states. Divergence by national courts on such a fundamental issue would have resulted in fundamentally different treatment of damages claims in the various member-states and, inevitably, an increase in "forum-shopping" by damages claimants, something the recent EU Damages Directive, was intended to reduce, if not, eliminate. There is also a risk that a practically ineffective right to damages would have had a profound impact on the deterrent effect of actions for damages, which is itself fundamental to the effectiveness of the enforcement of the EU competition standards.

For those jurisdictions, like Germany, where the courts have not previously applied the concept of the "economic unit" in the attribution of liability in damages claims, the CJEU judgment leads to even more significant changes. It is now clear that all companies belonging to an economic unit, including the parent company of an infringing entity or a corporate successor, can be held liable for the damages caused by an affiliated member of a cartel.

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