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I. INTRODUCTION

We have previously discussed the *Akzo Nobel Chemicals* case,[2] in which the Court of Justice of the European Union (formerly European Court of Justice[3]) continued to attribute joint and several liability to parent companies for cartel infringements committed by their wholly owned subsidiaries. The attribution of liability has major implications for the amount—up to 10 percent of global turnover—and payment of any fines imposed by the European Commission (the "Commission") for such infringements.[4]

In this article, we explore how the resulting fine ought to be allocated among a parent and its subsidiaries. In *Siemens AG Österreich*,[5] the General Court (the "Court") clarified that when the Commission attributes joint and several liability to a parent it must consider: (i) the periods during which the parent effectively exercised control over the subsidiaries; and (ii) allocate, if need be, the amount covered by joint and several liability among those entities in order to reflect their liability for the infringement.

II. RECONCILING THE CONCEPT OF "UNDERTAKING" WITH THAT OF "LEGAL ENTITY"

In Europe, a cartel is prosecuted under Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). That provision applies to an "undertaking," which is commonly described as a "unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis" regardless of its legal status and the way in which it is financed.[6] However, decisions against cartel members, and the imposition of fines, can only be addressed to "legal entities." Furthermore, it is customary for the Commission to address a decision to one or more legal entities, such as subsidiaries within a group and their ultimate parent company (under the presumption that the parent actually exercised decisive influence over the conduct of the subsidiaries).[7]

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[2] Case C-97/08, Akzo Nobel NV v. Commission, Judgment of the Court on 10 September 2009, ECR 2009, I-08237.

[3] As a result of the Treaty of Lisbon coming into force on December 1, 2009 the whole court system of the European Union was renamed the Court of Justice of the European Union. It is made up of three courts: the Court of Justice, the General Court, and the Civil Service Tribunal.

[4] Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, O.J. [2006] C 210/2, recitals 32-33.

[5] Joined Cases T-122/07 to T-124/07, Siemens AG Österreich, Siemens Transmission & Distribution Ltd. and Nuova Magrini Galileo SpA v. Commission, Judgment of the General Court on 3 March 2011, not yet reported.

[6] *See*, e.g., Case T-9/99, HFB and Others v. Commission, [2002] ECR II-1487, ¶ 54.

[7] Case C-97/08, Akzo Nobel NV v. Commission, Judgment of the Court on 10 September 2009, ECR 2009, I-08237.

Legal entities within an undertaking that has infringed Article 101 TFEU are not treated as independent participants in the cartel infringement. As such, they may be found jointly and severally liable for the resulting penalty. At the same time, under EU law, each legal entity must be in a position to calculate the extent of its individual exposure to the fine that has been imposed on the undertaking to which it belongs since the legal entity may only be fined for acts imputed to it individually. This causes tension since the legal entities forming part of an undertaking rarely stay within the same undertaking forever. When and where joint and several liability lies and the respective contributions of each of the parent and the subsidiaries may become critical questions at the fining stage. It is on this later point that the Court has recently taken the Commission to task in *Siemens AG Österreich*.

In *Siemens AG Österreich*, the Court held that when the Commission imposes a fine on an entity that must be paid jointly and severally with one or more other entities, the share that these entities must ultimately bear vis-à-vis the other related entities within the same undertaking must be calculated. In order to break down the fine, the Commission must, *inter alia*, specify the periods during which the entities were jointly liable for the unlawful conduct of the undertaking which participated in the cartel and, where necessary, the degree of liability of those entities for that conduct.

III. SIEMENS AG ÖSTERREICH: THE FACTS AT ISSUE

In *Gas Insulated Switchgear,*[8] the Commission found thatReyrolle Ltd, Schneider Electric High Voltage SA ("SEHV"), and Nuova Magrini Galileo S.p.A. ("Magrini") engaged in anticompetitive behavior, along with others in the industry, from April 15, 1988 to December 13, 2000 and from July 1, 2002 to May 11,2004. However, in order to understand who was ultimately liable for the entities' anticompetitive conduct the Commission had to track the movement of beneficial ownership in the subsidiaries of VA Technologie AG ("VA Tech") and Schneider Electric SA ("Schneider") over the time span of the cartel.

VA Tech acquired Reyrolle in 1998. In 2001, through a wholly owned subsidiary ("KEG"), VA Tech transferred Reyrolle to a newly created entity ("VAS"), which was a joint venture with Schneider. For its part, Schneider transferred two wholly owned subsidiaries, SEHV and Magrini, to VAS. As a result of these transactions, Schneider had a minority shareholding in VAS. VA Tech, through KEG, had a controlling share. In August 2004, VA Tech took sole control of VAS and renamed it. After the subsidiaries had ceased their anticompetitive behavior, VA Tech (including VAS) was merged into Siemens AG Österreich. VA Tech thus ceased to exist as a legal entity.

On that basis, the Commission attributed joint and several liability in the following way:

- April 15, 1988 to September 20, 1998: Reyrolle solely liable for participation in the cartel;
- April 15, 1988 to December 13,2000: SEHV and Magrini jointly and severally liable with Schneider; and

[8] C(2006) 6762 final – Commission Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement Case COMP/F/38.899 – Gas Insulated Switchgear

- September 20, 1998 – December13, 2000 and July 1, 2002 to May 11, 2004: Siemens AG Österreich and KEG jointly and severally liable with Reyrolle, and from July 1, 2002 onwards, also jointly and severally with SEHV and Magrini.[9]

However, when calculating the fines, the Commission failed to take into account the above conclusions. In its decision, the Commission imposed fines on the parent companies and their current or former subsidiaries and, in vague terms, it held the entities within the undertakings jointly and severally liable for portions of their sisters' or subsidiaries' fines. The decision was silent as to precisely how much each entity was liable for and how the Commission arrived at each figure.

IV. SIEMENS AG ÖSTERREICH: APPROPRIATE ALLOCATION AT THE FINING STAGE

While the Court agreed with the Commission's findings as to when the entities were jointly and severally liable, it took issue with the way in which the Commission allocated the fines.[10]

The Court agreed that several entities within an undertaking can be fined jointly and severally, although their individual liability for the infringement may vary. However, joint and several liability for payment of a fine only applies for the period of infringement during which the entities formed an undertaking, i.e., composed a "single economic unit."

Contrary to the Commission's position, the Court held that the Commission is not free to determine which sums are to be paid jointly and severally.[11] Rather, it must (among other things) take due account of:(i) the periods during which the entities concerned were jointly and severally liable for the undertakings' infringing conduct; and (ii) where necessary, the entities' individual "degree of liability for the conduct."

With respect to (ii), it is unclear what "degree of liability" exactly means. Later in the judgment, the Court pointed out that it is "exclusively for the Commission…to determine the respective shares of the various companies of the fines imposed on them jointly and severally."[12]

One interpretation of the phrase "degree of liability" would be that amounts must simply reflect, directly and equally, the weighing of the individual shares of the joint liability among those entities. Unless certain entities within an undertaking are more responsible than others for the undertaking's participation in the cartel during a given period, the Commission will assume that they are all equally liable and, consequently, that the shares of the fine imposed on them jointly and severally are equal. Alternatively, this phrase could, on its face, refer to the degree of culpability among the various entities and, thus, provide an opportunity for seeking a proportional allocation of the fine based on this factor.

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[9] Joined Cases T-122/07 to T-124/07, Siemens AG Österreich, Siemens Transmission & Distribution Ltd. and Nuova Magrini Galileo SpA v. Commission, Judgment of the General Court on 3 March 2011, not yet reported, ¶ 147.

[10] Schneider was fined EUR 8.1 million, with SEHV and Magrini being jointly and severally liable for EUR 4.5 million. Reyrolle was fined EUR 22.05 million, with SEHV and Magrini being jointly and severally liable for EUR 17.55 million and Siemens Österreich and KEG being jointly and severally liable for EUR 12.6 million.

[11] ¶¶ 152-153.

[12] ¶ 157.

V. THE COURT'S APPROACH TO THE MATTER IN DISPUTE

In its decision, the Commission ignored at the fining stage its own findings regarding the periods when the entities should be held joint and severally liable and did not otherwise explain how it calculated the shares in the fines. Instead, it appeared to have randomly allocated portions of the fines to the various parent companies and their (former) subsidiaries. Therefore, armed with its newly articulated two-step approach to allocating portions of jointly and severally paid fines, the Court revisited the fines the Commission imposed on the various entities within Schneider and (formerly) VA Tech.

First, the Court examined who owned the subsidiaries when they were engaging in anticompetitive behavior. For example, from April 15, 1988 to December 13,2000, SEHV and Magrini belonged to the Schneider group. Second, the Court took the basic amount calculated by the Commission for the undertaking (e.g., EUR 3.6 million for the Schneider undertaking) and increased it by 125 percent due to the duration of the infringing behavior. There were no aggravating or mitigating circumstances to consider. Third, the resulting basic amount of EUR 8.1 million was equally allocated among the three entities. The Court took this default position since the file did not indicate that one entity was more liable than another for the anticompetitive conduct.

Therefore, for the first phase, SEHV, Magrini and Schneider were each liable for EUR 2.7 million rather than Schneider being individually liable for EUR 3.6 million plus Schneider, SEHV, and Magrini being jointly and severally liable for EUR 4.5 million. The Court took the same approach when evaluating SEHV's and Magrini's second phase of infringing conduct, when both companies were part of the VA Tech undertaking and when it calculated the fines as a result of Reyrolle's participation in the cartel.

VI. SO…. HOW MUCH WILL THIS COST?

The Court has said that unless "certain companies are more responsible than others for the participation of that undertaking in the cartel during a given period, it must be assumed that they are all equally liable and, consequently, that the share of the fine imposed on them jointly and severally are equal."[13] The allocation of a portion of a fine to be jointly and severally paid must be based, in part, on an entity's individual degree of liability for the conduct. But how is the degree of liability for the conduct determined, and how does an entity move from the default position to something more or something less?

Apparently, the degree of liability is unrelated to duration since the Court has said that fines imposed on various entities within an undertaking that participated in a cartel do not have to be proportionate to the duration of the participation of each entity. Then, perhaps it is related to an entity's behavior within a cartel or during the investigation?

The Court has stated that fine multipliers as a result of an entity's mitigating or aggravating actions only influence the fine of that entity in respect of which the circumstance arose or to which it may be imputed. It is unclear whether mitigating or aggravating circumstances would affect a legal entity's degree of liability for the fine for which each entity within the undertaking is jointly and severally liable.

[13] ¶¶ 158-159.

The idea that mitigating and aggravating circumstances are related to a company's degree of liability and, ultimately, its portion of the jointly and severally payable fine, raises even more questions since all of the mitigating circumstances listed in the 2006 Fining Guidelines[14] make reference to actions of the "undertaking." Since the "undertaking" benefits from a reduction due to a mitigating circumstance, would not the benefit be shared equally among the entities within the "undertaking"?

Additionally, the aggravating circumstances in the 2006 Fining Guidelines include: (i) refusal to cooperate with, or obstruction of, the Commission in carrying out its investigations and (ii) role of leader in, or instigator of, the infringement; coercion of other undertakings to participate in the infringement; and/or any retaliatory measures taken against other undertakings to preserve the cartel. Arguably, these are all actions that can be taken by an individual entity rather than an undertaking. Strangely, this would lead to a situation where an entity could increase its degree of liability to its individual detriment, and therefore its portion of the fine, but not similarly decrease it.

It is conceivable that a company's degree of liability is something outside of the scope of mitigating and aggravating circumstances. Perhaps it is an entirely new Court-based concept that the Commission will need to address in future cases when it allocates portions of fines that are to be jointly and severally paid. Alternatively, the Commission may simply adopt the Court's default approach and divide the fine equally among the entities within the undertaking.

VII. CONCLUSION

Companies must pay for the sins of their subsidiary and sister companies, past or present. We already knew this. What we have learned, however, is that when it comes to dipping hands into pockets, the Commission must spell out who is ultimately responsible for how much. But, has this come at a price? Is it an all-or-nothing policy? Assuming that no mitigating or aggravating circumstances are involved, it is likely that everyone within an undertaking will be held equally liable (at least financially) for the infringement. As a subsidiary, if you joined the cartel later as compared to your sister companies, the price tag may be the same. So much for family…

If joint and several liability for payment of a fine rests on (i) time and (ii) liability, if you cannot change time, you will need to look at liability—and deep pockets. From a cash flow and ability to pay perspective, an undertaking may seek to put most of the burden of the fine on certain entities rather than others and, accordingly, may try to convince the Commission that those are the entities within the undertaking that should be held most liable for the infringement. Undertakings infringe; legal entities pay. If the Commission receives the same amount of money irrespective of who in an undertaking is paying, will it care about how the fine is allocated to the various related entities? Probably not.

[14] [2006] OJ C 210/2.