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Competition Law

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Recidivism revisited

Court of Justice holds parent companies may be fined for repeat infringements even without being an addressee of the earlier decisions

On 5 March 2015, the European Court of Justice (CoJ) handed down its judgment in Versalis,[1] concerning the increasing of fines for antitrust infringements where a company is found to be a repeat offender. The judgment raises important questions about the respect for the rights of defence in EU competition law proceedings.

Eni and Versalis were fined by the European Commission in December 2007 for their participation in the *Chloroprene Rubber* cartel. The Commission increased the initial fines, finding the parties to be repeat offenders on account of the participation of a subsidiary of Eni and Versalis in the 1986 *Polypropylene* cartel and of a subsidiary of Eni in the 1994 *PVC II* cartel.

Eni and Versalis challenged the Commission's Decision before the General Court (GC), which ruled[2] that, since Eni had neither been an addressee of the Commission's Decisions in the *Polypropylene* and *PVC II* cases, nor participated in the administrative procedure leading up to those Decisions, the Commission could not rely on the fact that Eni was the parent company of the offending entities in the earlier cases to describe it as a recidivist in the *Chloroprene Rubber* Decision. The GC determined that to do so would infringe Eni's rights of defence, as it had not been heard in respect of the finding that it exercised decisive influence over the conduct of the cartelists in the earlier cases. It thus held that the Commission could not effectively hold Eni liable for an earlier infringement for which it had not been penalised.

In its judgment of 5 March, however, the EU's highest court overturned the ruling of the GC on this point. The CoJ found that it would not infringe Eni's rights of defence to find it liable for an earlier infringement, as long as the Commission's charge sheet – the Statement of Objections – fully communicated the allegation and the reasons for finding its decisions. This would be the case even where the two infringements were many years apart, though the CoJ did say that such a delay would be taken into account by the EU courts, as it could have an impact on the entity's ability to adduce evidence to counter any suggestion that it exercised decisive influence over a subsidiary in relation to conduct that may have occurred many years earlier. In the specific circumstances the CoJ did find that the Commission had not included sufficient information in its

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1 Joined Cases C-93/13 P and C-123/13 P *Commission and others v Versalis and others* EU:C:2015:150

2 Case T-103/08 *Versalis and Eni v Commission* EU:T:2012:686

Statements of Objections to allow Eni to properly defend itself against the allegation of liability for the earlier infringement, and therefore did not overturn the GC's decision.

The CoJ judgment appears to be designed to preserve the long standing focus of EU competition law on the activities of 'undertakings', i.e. economic, rather than legal, entities. The CoJ clearly felt that limiting the Commission's ability to make a finding of recidivism in circumstances such as those in *Versalis* would jeopardise the effectiveness of deterrent penalties, as it could permit an entity to avoid an increase in a fine simply by altering its legal structure.

However, the CoJ's concerns appear to be misplaced, and are addressed at a far greater cost – the erosion of the rights of defence. Firstly, the judgment of the GC did not appear to permit, as the CoJ feared, entities to avoid increased penalties by creating new subsidiaries (especially since only the parent company's liability is concerned and not the subsidiary's liability). Rather, it dealt with the specific circumstance where the Commission could have addressed its objections and decision to the infringer's parent company, but chose not to. In those circumstances, it appears remarkable that the Commission should be permitted, at an unspecified later date, to find the parent company liable for the earlier infringement, purely for the purpose of increasing the fine for another unrelated infringement.

From a practical perspective, the judgment means that parent companies whose subsidiaries have been fined in the past for antitrust infringements, but who were not involved in the proceedings relating to such infringements, may find that they are called upon to produce evidence of their lack of influence over that subsidiary (or worse, to rebut a presumption of such influence) years later. This development is particularly troubling in light of the Commission's ability to presume the existence and exercise of decisive influence by a parent over a subsidiary based purely on the size of the parent's shareholding. This presumption has proved virtually impossible to rebut in practice and there seems little prospect of successful rebuttal where the relevant factual circumstances are, in business terms, ancient history.

The CoJ judgment, and in particular the Advocate-General's Opinion,[3] do recognise that the communication of the Commission's allegations is an important procedural safeguard. However neither the Advocate-General nor the CoJ seem troubled by the fact that the Commission can 'reactivate' a previous infringement merely by setting out the matters alleged in the same way that it would have done had it pursued the parent in the first instance. Both the CoJ and the Advocate-General apparently ignore the debilitating effect that the passage of time could have on a company's ability to respond to allegations of infringing conduct.

The CoJ judgment therefore also raises serious questions of legal certainty. A prior infringement relied upon by the Commission could have occurred many years in the past, and the relevant decision may have become definitive for the parties it was addressed to long before the second infringement is investigated. This runs counter to the principle of limitation. It now appears that parties not addressed by a decision can no longer be sure that an investigation has been concluded as regards their possible liability, even though the relevant limitation period may have expired. A parent can effectively be held liable (through increased future fines) for the conduct of its subsidiary perhaps decades earlier.

3 Opinion of Advocate-General Cruz Villalón in Joined Cases C-93/13 P and C-123/13 P *Commission and others* v Versalis and others ECLI:EU:C:2014:2487