

It's Not All About You: Developments in Third Party Liability Under EU Competition Law

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Many, if not most, companies directly or indirectly use the services of third party service providers. These include agents, contractors, sub-contractors, consultants, proxy holders and others.

This is often an under-appreciated issue, but it's clear that competition law compliance and counselling in the European Union (EU) and its member states need to take account of these relationships.¹ Potential liability for competition law infringements does not start and finish with the actions of an entity and its employees and subsidiaries.² The actions of third parties (as well as simple interaction with them) can also give rise to risk.

The recent judgment of the EU's highest court (European Court of Justice or ECJ) in the *VM Remonts* case has brought this issue into focus once again.³ This was the first time that the ECJ had considered whether a third party, acting outside the scope of its authority and without the knowledge of the company hiring it (so a "rogue"), could produce competition law liability for the hiring company. It follows a number of other EU cases over the years which have considered the scope of liability for third parties.

VM Remonts; Background and Facts

This important ECJ case was a request for a "preliminary ruling" by the ECJ on questions raised by a Latvian court. The facts are relatively complex but worth appreciating, not least since they show the ease with which a company dealing with a third party service provider (in an everyday situation) may run across competition law concerns when it does not expect to.

The case before the Latvian court concerned a call for tenders by the municipal council of the city of Jūrmala for the supply of food products to educational establishments. DIV un Ko, Ausma grupa and Pārtikas kompānija submitted tenders in response to that call.

Pārtikas kompānija instructed a third party service provider, SIA 'Juridiskā sabiedrība "B&Š partneri"',⁴ to provide it with legal assistance in the preparation and submission of its tender (i.e., this was a law firm). The law firm, in turn, used a sub-contractor, SIA 'MMD lietas', which received a draft tender from Pārtikas kompānija. The Latvian court found that Pārtikas kompānija had prepared that draft independently, without colluding with DIV un Ko or Ausma grupa on prices.

At the same time, and without informing Pārtikas kompānija, MMD lietas had agreed to prepare the tenders for DIV un Ko and Ausma grupa (there seems to have been no contractual restriction on this). An employee of MMD lietas used the ten-

der received from Pārtikas kompānija as a point of reference in preparing the tenders of the other two tenderers. In particular, that employee drew up those two tenders on the basis of the prices given in Pārtikas kompānija's tender, so that the Ausma grupa tender was approximately 5% lower than the Pārtikas kompānija tender, and the DIV un Ko tender was approximately 5% lower than that of Ausma grupa.

The Latvian Competition Council investigated and in 2011 held that the three tendering undertakings had infringed Article 11(1), point (5) of the Latvian Law on Competition (Konkurences likums), by preparing their tenders jointly with the aim of creating the impression that there was actual competition between them.⁵ Article 11(1) is in substance identical to Article 101(1) of the EU Treaty on the Functioning of the European Union (TFEU) (the basic EU-wide ban on anti-competitive agreements, including cartels such as bid rigging). The Competition Council held that the concerted practice in question had distorted competition and imposed a fine on the undertakings.

DIV un Ko, Ausma grupa and Pārtikas kompānija appealed and on July 3, 2013 the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) annulled the decision in so far as it made a finding of infringement against Pārtikas kompānija but upheld the decision with regard to the other two undertakings.

That court took the view that the arithmetic correlation between the prices proposed by the three tenderers showed there to have been a concerted practice. However, it also took the view that nothing demonstrated that Pārtikas kompānija had been involved in that practice. DIV un Ko and Ausma grupa brought an appeal on a point of law before the Augstākā Tiesa (Supreme Court, Latvia) against the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court) in so far as it had dismissed their actions. The Competition Council appealed on a point of law against the judgment in so far as it upheld the action brought by Pārtikas kompānija (i.e., therefore annulling the infringement finding against that company).

The Latvian Supreme Court took the view that, given the direct parallel between Latvian and EU competition law and the alignment of the two sets of law, it needed to seek the view of the ECJ on the position of Pārtikas kompānija. In particular, it noted that the Administratīvā apgabaltiesa (Regional Administrative Court) had not found that the senior managers of Pārtikas kompānija had authorised the actions taken by MMD lietas or been aware of those actions. It was unsure whether, in such a case, an undertaking such as Pārtikas kompānija should be considered answerable for participation in a concerted practice in

breach of EU (and Latvian) competition law. It asked this question on November 27, 2014, and the ECJ opined on July 21, 2016 (not an unusually long period).

The Position of Employees and Subsidiaries

VM Remonts referred to the position of employees, but was not a case about employees. It is nevertheless useful as background to consider the law relating to them, as well as the long-standing case law on subsidiaries.

Although an employee is not normally seen as a third party, it is of course at the same time a separate (albeit natural) person from the company. Therefore, arguments have been raised as to companies' responsibility for their employees' actions.

The position under EU competition law is that employees are a special type of third party and considered to be part of the employer. The rationale for this is that since an employee performs his duties for and under the direction of the undertaking (economic unit) for which he works he should be considered to be incorporated into it.⁶

It follows from this that, for the purposes of a finding of infringement of EU competition law, any anti-competitive conduct on the part of an employee is attributable to the undertaking to which he or she belongs and that undertaking is, as a matter of principle, liable for that conduct.

This is strict liability; there is no "bad apple" or "rogue employee" defense (although this has been and continues to be argued). Equally, there is no need for managers of the employee in question to have been involved or even had knowledge of the actions of the employee. The argument that an employee was acting contrary to instructions is not even a mitigating circumstance for the purposes of the level of fines imposed by the European Commission (EC) in EU competition law cases.

Turning to subsidiaries, it is well-established that a parent will be liable for the activities of a subsidiary if the parent has the ability to exercise decisive influence over the conduct of the subsidiary and did in fact exercise such influence during the period of infringement. In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed competition law, the parent company can exercise decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary.

This presumption is in practice nearly impossible to rebut, meaning that a parent should be assumed always to be responsible for the actions of wholly-owned subsidiaries.⁷ The position may be (but not necessarily will be) different for minority holdings including joint ventures.

The Position of Agents

VM Remonts was also not a case about agents (and it was observed by the Advocate General advising the ECJ that the case did not fit into the case law on agents), but agents are an

important and frequently used type of third party and therefore also relevant in the current context.

In practice, third party agents are often seen as (and are intended to be) synonymous with their principals, and this is reflected in their treatment under EU competition law. An agent's principal may, even if it was not aware of the activities, be held liable for the agent's involvement in an infringement, provided that the agent acted within the scope of its responsibility.

A leading EU case arose out of the prestressing steel cartel investigated by the EC and fined in 2010. In that case, the EC imposed a fine jointly and severally on, among others, the companies voestalpine and voestalpine Austria Draht. On appeal to the EU General Court (the EU's second highest court) it was found that the EC had failed to establish that voestalpine Austria Draht had participated directly in some of the branches of the cartel (i.e., "Club Zurich," "Club Europe" and "Club España").⁸ However, the court also took the view that voestalpine Austria Draht was correctly held by the EC to have participated in another branch, "Club Italia," given the anticompetitive actions of its commercial agent in Italy.

There was no evidence that voestalpine Austria Draht had been aware of that agent's unlawful behaviour. However, so long as it was acting within its authority, which covered only Italy, the commercial agent had to be regarded as forming part of the undertaking, and the undertaking was liable for its actions. Following this reasoning, the court further took the view that the liability for that agent's anticompetitive actions outside the Italian market could not be imputed to voestalpine Austria Draht, as the EC had found (and the court accordingly reduced the fine imposed on the two companies).

The Position of Controlled Service Providers

The ECJ in *VM Remonts* was specifically asked to consider the position of third party service providers. It described such a provider as being a company which "in return for payment, [offers] services on a given market on an independent basis."⁹ This is a separate undertaking from the company to which it provides services and therefore "the acts of such a provider cannot automatically be attributed to one of those undertakings"¹⁰ (this position being contrasted by the court with the situation where an employee is involved).

The court then took the view that a company may be liable for the anticompetitive acts of an independent service provider in three scenarios. The first scenario is where the provider is controlled, or an "employee in disguise" (not wording used by the court). This arises where a service provider which presents itself as independent is in fact acting under the direction or control of an undertaking that is using its services.

According to the ECJ, this would be the case, for example, in circumstances in which the service provider had little or no autonomy or flexibility with regard to the way in which the activity concerned was carried out, its notional independence dis-

guising an employment relationship.¹¹ Such direction or control might also be inferred from the existence of particular organizational, economic and legal links between the service provider in question and the user of the services, similar to the relationship between parent companies and their subsidiaries.¹²

In these circumstances, according to the court, it is appropriate that the undertaking using the services can be held liable for unlawful conduct of the service provider. The court, it can be assumed, saw this type of situation as really an employment relationship (so the service provider is an employee in disguise and should be treated as such).

The Position of Genuinely Independent Service Providers, Including Sub-Contractors

The court then considered two other scenarios in which a company may be liable for acts of an independent service provider. Turning to situations where the service provider is genuinely independent, the ECJ stated that its activities may only be attributed to undertakings using its services in the following two situations:

- The undertaking was aware of the anticompetitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct.

An example of this is a situation in which the undertaking intended, through the intermediary of its service provider, to disclose commercially sensitive information to its competitors, or when it expressly or tacitly consented to the provider sharing that commercially sensitive information with them.¹³ The ECJ stated in its judgment in *VM Remonts* (therefore apparently reviewing the facts of the case and therefore pre-empting the Latvian court's decision following the preliminary reference judgment, which it would not normally do in a preliminary reference situation) that the condition is, however, not met when a service provider in that situation has, without informing the undertaking using its services, used the undertaking's commercially sensitive information to complete those competitors' tenders; or

- The undertaking using a service provider could reasonably have foreseen the anticompetitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.

An example of this would be an undertaking using a service provider where it could reasonably have foreseen that the service provider would share its commercial information with its competitors (and it was prepared to accept the risk which that entailed).

These are not cumulative conditions; either is enough. Therefore, a company can become liable for the actions of a third party service provider when, in the words of the court's ruling, it "could reasonably have foreseen the anti-competitive

acts of its competitors and the service provider" and also "was prepared to accept the risk which they entailed."

There will no doubt be many arguments around the meaning of "reasonably foreseen" in this test and it's not clear how high the bar will be set. It is however worth noting again that the ECJ in this case assumed that liability could arise in relation to the activities of a sub-contractor (SIA 'MMD lietas' was not a direct service provider to Pārtikas kompānija, but a sub-contractor used by SIA 'Juridiskā sabiedrība "B&S partneri"').

Comments

The practical issue raised by *VM Remonts* and similar case law is that companies need to consider how to protect themselves against liability for the activity of a third party (and in some cases for liability for their own interaction with a third party). The risk is not only regulatory enforcement but, of course, now follow-on (or stand-alone) private damages actions in national courts.

Employees are normally covered by a standard competition compliance program. This should be tailored to the company in question but normally would include at least a manual and regular in-person training, ideally backed up by regular audits. In addition, consideration should be given to specific contractual provisions in employment contracts (or incorporated codes of conduct) regarding compliance with competition law. That may be difficult to enforce, but at the very least it focuses the mind.

Subsidiaries will similarly normally be covered by a group competition compliance program. Sensitivities (and legal complications) will arise in relation to joint venture and other minority situations, and those need to be considered on a case-by-case basis.

Concerning true third parties (i.e., other than employees and subsidiaries), the threshold issue is whether the party is part of the undertaking or is truly independent under the *VM Remonts* test. The risk is clearly greater if the third party is not truly independent. Whether this is the case is a factual question based on a range of factors, in particular those referred to in the ECJ's judgment, and the contract with the third party will not necessarily be decisive.

If the third party can be treated as truly independent, then under the *VM Remonts* test the hiring undertaking will find it easier to escape liability. Nevertheless, in order to do this, it may in practice end up trying to prove a negative, so care still needs to be taken. It's always better if an issue does not arise in the first place, and sensible steps taken in advance and during a relationship will help to ensure this.

The first step in relation to true third parties is again to give consideration to specific contractual provisions, including, for example, confidentiality and exclusivity provisions (so as to limit information flow to third parties; these should really be standard anyway) and a code of conduct for the specific relationship. In any event, the areas of responsibility and authority of the

third party should be clearly set out. Third parties may also be banned from representing the company at or even attending trade associations (trade associations very commonly being venues for anticompetitive activity) and required to report any unusual market behavior or contacts with competitors.

More generally, when dealing with several third parties which compete with each other, a company should not create an environment in which they are required or feel obliged to disclose confidential business information to each other when this is not needed. If interaction among competitors is necessary, the arrangements should be designed to limit it to the extent absolutely required to provide the services, with “Chinese Walls” being used.

In addition, the following specific compliance steps should be considered:

- a specific internal third party competition compliance policy, tailored to the undertaking in question (the hiring business);
- due diligence and risk assessment in vetting and selecting prior to hiring the service provider, including simply analyzing its reaction to questions about competition law compliance. Issues here will include whether the third party acts in a high risk area (geographic, industry or market), its history and whether it has its own compliance policy, procedure and training programs already;
- regular follow-up and monitoring/managing of its activities during the course of the contract, for example by requiring certification of compliance and audits. The hiring undertaking’s expectations must be made clear and reinforced throughout the period of the relationship, and requiring the service provider to agree to a monitoring/auditing plan will help;
- training (although this may be difficult to manage due to privilege issues and the third party may anyway not agree);¹⁴
- be prepared to publicly distance the hiring undertaking from any anticompetitive actions of a third party service provider which come to light (and/or to seek leniency from regulators so as to protect against fines).

It will be noted that all of this may help in particular with an argument that the company was not “prepared to accept the risk” of an infringement or indeed could not reasonably have foreseen it. However, unfortunately, this may also be used to show “direction or control.” That risk needs to be accepted, but on balance it seems more beneficial to implement these steps.

Many of these steps (and indeed the underlying responsibility for the actions of third parties) will be familiar to those involved in advising on bribery and corruption compliance.¹⁵ Indeed, in many cases due diligence for competition law can be modelled on that already used for bribery and corruption compliance.

It’s also worth noting that there are a number of other ways in which contacts with or use of third parties can give rise to antitrust liability (even if the liability is not for the actions of that third party as such, as in the *VM Remonts* case).¹⁶ A high profile recent example is the *Eturas* case in which the ECJ held that travel agents which knew the content of a message distributed over an online travel reservation system could be presumed to have participated in an illegal concerted practice, unless they had distanced themselves from the message, challenged its imposition or adduced other evidence to rebut the presumption, such as systematically granting higher rebates than those set under the cap.¹⁷

Another example is the case law on facilitation. The ECJ has confirmed that a company can be liable for a cartel even if it did not operate on the market in question but only supported and organized the cartel implemented by others. The leading case is now *AC-Treubhand*,¹⁸ in which a consultancy played an essential role in the cartel infringements of others and was remunerated by them for organizing regular cartel meetings at its Zurich premises.

In addition, there are other examples which compliance programs need to cover, including ABC/hub-and-spoke conspiracies. In that situation information is passed between competitors via a third party hub, which itself can be liable. Another example arises from so-called “customer days,” where a customer coordinates contacts between its competitor suppliers; care needs to be taken when attending such meetings and contractual clauses specifying the boundaries of these meetings may be needed.¹⁹

Case law in this area continues to develop, but *VM Remonts* is a reminder of how competition law liability may arise when a company is dealing with a third party and has not even considered the issue. Compliance programs need to keep up and internal and external counsel need to be on their toes as to the various risk areas. They are not always obvious.

¹ The position will be the same or similar in certain other jurisdictions around the world, particularly those which expressly or in practice base their competition law rules on EU principles.

² An employee is also a type of third party. For an analysis of the position concerning employees, see the main text.

³ Case C-542/14, SIA ‘VM Remonts’, formerly SIA ‘DIV un KO’, SIA ‘Ausma grupa’, v. Konkurences padome, and Konkurences padome, v. IA ‘Pārtikas kompānija’, (July 21, 2016)(hereinafter, *VM Remonts*), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0542&rid=3>.

⁴ The single and double quotation marks appear in the ECJ’s opinion, and we retain them here for accuracy.

⁵ Article 11(1) of the Konkurences likums of 4 Oct. 2001 (Latvian Vēstnesis, 2001, No 151) provides: “Agreements between economic operators which have as their object or effect the hindering, limiting or distortion of competition within the territory of Latvia shall be prohibited and void ab initio, including agreements relating . . . (5) to the participation or non-participation in calls for tenders or bidding procedures or to arrangements concerning such actions (non-participation), unless the competitors have publicly announced their joint tender and it is not the purpose of such a tender to hinder, limit or distort competition; . . .”

⁶ Case C-22/98, *Becu and Others*, (Sept. 16, 1999), available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=44708&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=435070>.

⁷ See, e.g., Case C-97/08, *P Akzo Nobel and Others v. Comm'n*, (Sept. 10, 2009), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72629&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=618173>.

⁸ Case T-418/10, *voestalpine and voestalpine Wire Rod Austria*, (July 15, 2015), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165831&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=437413>.

⁹ *VM Remonts*, ¶ 25.

¹⁰ *Id.*

¹¹ See also Case C-413/13, *FNV Kunsten Informatie en Media*, (Dec. 4, 2014), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160305&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=168543>.

¹² See also *Joined Cases C-293/13 P and C-294/13 P, Fresh Del Monte Produce v. Comm'n and Comm'n v. Fresh Del Monte Produce*, (June 24, 2015), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165217&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=168757>.

¹³ See by analogy *Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland and Others v.*

Comm'n, (Jan. 7, 2004), available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48825&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=435154>; and Case C-74/14, *Eturas*, *infra*, note 17.

¹⁴ See Brent Snyder, *Compliance is a Culture, Not Just a Policy*, Address Before the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), available at www.justice.gov/atr/file/517796/download.

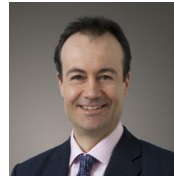
¹⁵ See in particular the “adequate procedures” defence under the UK Bribery Act 2010.

¹⁶ A further example would be the reverse of the *VM Remonts* situation, where a company engages a third party to organize a tendering process for the provision of services to the company and where competitors will be bidding. “Chinese Walls” may also be needed, particularly where the service provider is also a competitor. See also the main text.

¹⁷ Case C-74/14, *‘Eturas’ UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, (Jan. 21, 2016), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=173680&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=413227>.

¹⁸ Case C-194/14 P, *AC-Treuhand AG v. Comm'n*, (Oct. 22, 2015), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=170304&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=416201>.

¹⁹ Liability of a parent for the activities of a subsidiary is another example, as described in the main text.



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