Liability for anti-competitive behaviour by your employees and outside contractors: when you are off the hook and when you are not

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In its recent VM Remonts judgment, the Court of Justice of the EU has confirmed the strict liability of companies for the anti-competitive behaviour of their employees, even if the employee was acting in good faith or as a result of a lack of training. The Court held that, where a company may be held liable for the anti-competitive conduct of its employees, it must prove that it was not aware of the anti-competitive acts or was prepared to accept the risk they entailed. In the VM Remonts case, the Court confirmed that the essence of liability for the conduct of one party attributable to another is the existence of a personal link between them, i.e. a duty to act as a reasonable person in the same position would have acted. Where the company was aware of the anti-competitive acts or was prepared to accept the risk they entailed, it would be strictly liable for the conduct of its employees.

Strict liability for the behaviour of employees

Any anti-competitive conduct by an employee is attributable to their employer, and that company is held liable under the competition law for the conduct “as a matter of principle”.

It is not necessary for there to have been action by, or even knowledge on the part of, the principal managers of the company concerned. Thus, no ‘employer defence’ is available, and the European Commission has even refused to accept that full-time employees were acting contrary to the instructions of their employers as a legal reason for not imposing a fine.

That is the very reason why the company is to publicly distance itself from any anti-competitive behaviour in such a way that the other participants will recognize that it is putting an end to its participation, and to continue seeking immunity from fines by reporting the behaviour to the administrative authorities as soon as possible.

Strict liability for the behaviour of outside contractors that are employees in disguise

Physical persons may also act on behalf of legal entities in a different capacity, for instance as an outside contractor, service provider, independent consultant or agent or proxy holder.

In VM Remonts, the Court considered whether the conduct of such contractors may be attributable to their firms despite the lack of a personal link between them. Although the sub-contractor used in the present case was not an employee of the company, the Court was satisfied that it had acted as an independent contractor and was not aware of the anti-competitive acts or was prepared to accept the risk they entailed. In the VM Remonts case, the sub-contractor, which, without knowing it, had also voluntarily to cooperate the same responses for two other companies, B and C. If the sub-contractor used it services to prepare the tenders of B and C, even though it must not know of this, the sub-contractor would not be answerable to its client company A. If it was not aware of the anti-competitive acts or was prepared to accept the risk they entailed, it would be strictly liable for the conduct of its employees.

The Court held that a company may, in principle, be held liable for a concerted practice through the acts of an independent service provider ‘pursuing its own aims or interests’ even if the company was not aware of the anti-competitive objectives pursued by its competitors and the service provider and was unwilling to contribute to them by its own conduct or if it reasonably knew beforehand the anti-competitive acts of its competitors and was unwilling to accept the risk which they entailed in the present case. Consequently, the company A was held to be strictly liable for the anti-competitive acts of its service provider B and C, with no need to prove a personal link.

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The facts in the present case involved the delegation of work from an external legal counsel to a sub-contractor, thus implying that the liability of companies for the conduct of their contractors can extend even further down the chain to sub-contractors.

At what point does liability end?

The facts in the present case involved the delegation of work from an external legal counsel to a sub-contractor, thus implying that the liability of companies for the conduct of their contractors can extend even further down the chain to sub-contractors.

The decision of the Court of Justice of the EU in the VM Remonts case is significant in two respects: firstly, it confirms the strict liability of companies for the anti-competitive behaviour of their employees, even if the employee was acting in good faith or as a result of a lack of training. Secondly, it confirms the strict liability of companies for the anti-competitive behaviour of their employees, even if the employee was acting in good faith or as a result of a lack of training.

Implications of securing competition law compliance in contracts with employees and/or outside contractors

Because of the restrictive approach to an anti-competitive liability, it is first important for companies to develop a comprehensive system of internal controls, in the form of contracts, policies, and procedures. These contracts should contain a clause that ensures that the employee agrees to comply with any such requirements.

Moreover, companies should not just “watch off” when the relationship of their employees in external service providers, because they could also attributing liability through negligence. It might also be inferred that they “could reasonably have foreseen” anti-competitive conduct that occurs and are “prepared to accept the risk”. As a clerk, companies ought consider, for instance, whether to include a confidentiality clause in the terms of their contracts. If this were to be the case, the information that the service providers receive from the company and any usefulness to them of having access to the company’s data, it is likely that they are failing in this respect and are exposed to liability.

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