Kluwer Competition Law Blog

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 contrary to instructions of senior management. The Court also clarified under which conditions a company can be liable for the anti-competitive conduct of its outside contractors or third-party service providers, which include when the company "could reasonably have foreseen" the conduct and "was prepared to accept the risk". As discussed below, companies should therefore seek advice on how to secure antitrust compliance as part of an employee's employment contract or a contractor's services contract.

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 EU 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 'rogue employee' defence is available, and the European Commission has even refused to accept the fact that employees were acting contrary to the instructions of their employers as a mitigating circumstance.

Thus the only option for the company is to publicly distance itself from any anti-competitive behaviour, in such a way that the other participants will recognise that it is putting an end to its participation; and to consider 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 a proxy holder.

In VM Remonts, the Court considered when the conduct of such contractors may be attributable to their client for the purposes of competition law liability. It confirmed that the essential question is whether the service provider, which presents itself as independent, is in fact acting under the

direction or control of the company that is using its services, thus disguising what is in reality an employment relationship within the same economic unit.

Such direction or control might be inferred from the fact that the activity is carried out with little autonomy or flexibility, or from specific legal or economic links between the service provider and the user of the services.

Liability for the behaviour of genuine outside contractors

What about liability for the acts of a service provider that is **genuinely** independent?

In the VM Remonts case, a company, A, instructed external legal counsel to respond to a call for tenders by a Latvian municipality (for the supply of food products to educational establishments). External legal counsel in turn used a sub-contractor, which, without informing company A, had also undertaken to complete the same responses for two other companies, B and C. The sub-contractor used A's response to prepare the tenders of B and C, even though A was **not aware** of this. As the Latvian court was uncertain as to whether company A could be held liable for the behaviour of its sub-contractor (as A had not authorised the actions taken by the sub-contractor and was not aware of those actions), it requested a preliminary ruling from the Court of Justice.

The Court ruled that a company may, in principle, be held liable for a concerted practice through the acts of an independent service provider supplying it with services only if one of three scenarios applies: **either** the service provider was in fact acting under the direction or control of the company; **or** the company was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct; or it could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed. In the present case, whether company A could reasonably have foreseen that its service provider would share its commercial information with its competitors (and also its readiness to accept that risk) was left for the national court to assess.

The conditions for liability set out above are not cumulative. Liability may thus be triggered when the company "could reasonably have foreseen" the anti-competitive conduct and "was prepared to accept the risk". The concept of 'reasonable foresight' under the third condition could turn out to involve a relatively low threshold for liability, almost akin to an automatic (rebuttable) presumption of liability.

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.

This extensive approach to liability fits with other developments in the case-law. For example, a company may be held liable through its use of a third party IT platform. The Court of Justice recently held that travel agencies that were aware of a proposal communicated by email from Eturas, a third party platform, to uniformly cap their discounts, but which failed to distance themselves from it, violated EU competition law.

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

Because of the extensive approach to antitrust liability in the EU, companies should seek advice on how to secure antitrust compliance as part of employees' employment contracts and contractors' services contracts. For instance, companies should assess whether to include clauses regarding antitrust compliance in contracts of employment, codes of conduct or works rules backed up by regular compliance training and audits.

Moreover, companies should not just "switch off" when they outsource an activity to external service providers, because they could incur antitrust liability through negligence – it might be found that they "could reasonably have foreseen" anti-competitive conduct that occurs and were "prepared to accept the risk". As a start, companies might consider, for example, whether to include a confidentiality clause in the services contract relating to the information that the service providers receive from the company and/or an exclusivity clause to prevent the service providers working with several competitors at the same time. Besides regular compliance training for employees – and internal audits – companies should also consider how best to ensure that their service providers comply with the competition rules, and that any indications that they are failing in this respect are recognised and acted upon.

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