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The EU General Court confirms that successor liability for EU competition law infringements may only exceptionally be based on economic continuity *(Coveris Rigid France)*

PROCEDURES, FRANCE, DISTRIBUTION/RETAIL, CARTEL, AGRICULTURE / FOOD PRODUCTS , LIABILITY (PERSONAL), PRINCIPLE OF EQUAL TREATMENT

EU General Court, Coveris Rigid France, T-531/15, 6 December 2018

Daniel Vasbeck | Baker Botts (Brussels)

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In December 2018, the EU General Court (the "**General Court**") dismissed the action for annulment lodged by Coveris Rigid France ("**Coveris**") against a decision of the European Commission (the "**Commission**") that held Coveris liable for its participation in the retail food packaging cartel. The judgment rejects Coveris' submission that, instead of Coveris itself, the Commission should have held Coveris' economic successor liable for the infringement. It confirms and further clarifies the interaction between the two principles governing successor liability for EU competition law infringements – personal liability and economic continuity –, and applies those principles to the scenario of an asset transfer.

Background to the case

Successor liability issues arise where an entity involved in an EU competition law infringement is subject, during or subsequent to the infringement period, to organisational changes, in particular a sales transaction. In such a scenario, which has typically occurred in cartel cases, the question arises which entity or entities the Commission should hold liable for the anticompetitive conduct. [*1*]

In the present case, the Commission had found that:

- Coveris was directly involved in an infringement in France from 2004 until 2005; and
- ONO Packaging Portugal S.A. ("**ONO Packaging Portugal**") was directly involved in a separate infringement in South-West Europe ("**SWE**") from 2000 until 2005. [*2*] During the respective infringement periods, both Coveris and ONO Packaging Portugal were, indirectly, wholly owned subsidiaries of the same ultimate parent company (Huhtamäki Oyj), in other words sister companies.

Subsequent to the infringement periods, in 2006, Coveris and ONO Packaging Portugal were the subjects of a mixed, simultaneous share and asset transaction:

- Coveris was the subject of an asset transaction, whereby part of Coveris' assets (including assets used for the manufacture in France of the products concerned by the infringement, polystyrene trays) were transferred to ONO Packaging SAS ("**ONO Packaging**"). Following this partial asset transfer, Coveris ceased its operations on the polystyrene tray market, but continued to exist as an entity both in law and economically.
- In contrast, ONO Packaging Portugal was the subject of a share transaction, which resulted in the transfer of all of its shares to ONO Développement, the parent company of ONO Packaging. In its decision, the Commission had held Coveris and Huhtamäki Oyj jointly and severally liable for the infringement committed in France; it had held ONO Packaging Portugal and Huhtamäki Oyj jointly and severally liable for the infringement committed in SWE.

Judgment of the General Court

Coveris relied on two pleas in law: the first one alleged an erroneous application of the principle of personal liability; the second one alleged an infringement of the principle of equal treatment.

- *Principle of personal liability vs. principle of economic continuity*

Coveris claimed that ONO Packaging, *i.e.* the acquirer of the "infringing" assets, should have been held liable for the infringement committed in France. Liability for the two infringements should not have been "*artificially*" split depending on the nature of the transaction (share or asset deal). The Commission should have taken a "*holistic*" approach, with the result that the ONO Développement group would have been liable not just for the infringement committed in SWE (through ONO Packaging Portugal), but also for the one committed in France (through ONO Packaging). Coveris additionally submitted that the Commission was required to hold ONO Packaging liable on the basis of the principle of economic continuity.

The core and starting point of the General Court's reasoning is the principle of personal liability. According to this principle, when an economic entity (which may be comprised of several legal persons) infringes EU competition law, it falls to that entity to answer for that infringement. The General Court noted that Coveris was not challenging the finding that it had participated in the infringement in France from 2004 until 2005. It observed that, despite the partial asset transfer and the fact that Coveris had ceased its activity on the market concerned by the infringement, Coveris still existed both in law and economically. The General Court concluded that the Commission was entitled to hold Coveris liable for the infringement committed in France. It then examined Coveris' arguments and rejected them one by one.

According to the General Court, all that mattered was determining the undertaking liable for the infringement committed in France. It considered that that undertaking (the undertaking found liable for the infringement in France) included Coveris, but not ONO Packaging Portugal, as it was a sister company that had only been found liable for the separate infringement in SWE. Accordingly, the fact that, during the infringement periods, Coveris and ONO Packaging Portugal were, from the perspective of company law, part of the same group, *i.e.* the Huhtamäki group, as well as the circumstances surrounding the sale of the shares in ONO Packaging Portugal, were immaterial. [*3*] The General Court went on to hold that the objectives of and economic reasons for such transactions were irrelevant for the purposes of the assessment of personal liability. Therefore, whether the two share and asset transactions of 2006 constituted one and the same transaction and/or a single concentration for merger control purposes was equally irrelevant.

The General Court then provided an overview of the circumstances in which successor liability may, as an exception to personal liability, be determined on the basis of economic continuity, resulting in an entity being penalised for an infringement although it is not responsible for that infringement. [*4*] It emphasised that the principle of economic continuity is not intended as a substitute for the principle of personal liability, but merely to supplement it to the extent necessary to enforce EU competition law (and in particular, to punish cartels) in a proportionate and effective manner. Therefore, reliance on this principle must remain exceptional. The General Court found that none of these exceptional circumstances were present in the case at hand:

- Disappearance of the responsible entity: First, an entity that is not responsible for the infringement may exceptionally be held liable if the entity that has committed the infringement has ceased to exist, either in law or economically. Where the assets of an entity that participated in an infringement are transferred to an independent undertaking (such as in the case of Coveris), liability follows those assets only in this exceptional scenario. The General Court found that since Coveris had not ceased to exist, this exception could not apply.

- Intra-group transfer: Second, even where the entity that committed the infringement still exists, it is permissible to hold the entity to which its economic activities were transferred liable where the two entities constitute one and the same economic entity, in particular where those entities have been under the control of the same person (in other words, in the context of an intra-group transfer). The General Court found that there was no evidence that the transfer of Coveris' assets constituted an intra-group transfer since the transferor (Coveris) and the transferee (ONO Packaging) were not structurally linked at the time of transfer of the assets. It held that, in any event, the Commission retained a wide margin of discretion to establish liability in cases of intra-group economic succession. In other words, it was under no obligation to apply this exception in every case where the conditions are met. The General Court added that the principle of economic continuity had to be applied in a transparent and predictable manner, making it impossible to take subjective factors into account. On that basis, it dismissed Coveris' argument that the transaction should be treated as equivalent to an internal restructuring because it amounted to a partial management buyout.

- Risk of circumvention: Third, in the event of a risk of circumvention of the effective enforcement of EU competition law, a further exception to the principle of personal liability could be justified, including situations not covered by scenarios (i) and (ii), *i.e.* where assets are transferred between independent undertakings and the legal entity responsible for the infringement has not ceased to exist in law or economically. However, the General Court added that such an exception needed to be closely circumscribed, *i.e.* the attribution of liability to a transferee could be permissible only if the transaction had taken place between two independent undertakings acting in bad faith, in particular with the intention of avoiding the penalties laid down by EU competition law. The General Court noted that there were no indications of such intention in the present case.

- *Equal treatment of share and asset transfers*

Coveris also alleged that the Commission had infringed the principle of equal treatment. The arguments on which Coveris relied in support of this plea in law were largely similar to those that formed the basis of the first plea in law. According to Coveris, the Commission had disregarded the principle of equal treatment by making a distinction between the asset transfer and the share transfer that took place (on the same day) in 2006. In Coveris' submission, this resulted in the attribution of liability to two legal entities (*i.e.* Coveris and ONO Packaging Portugal) belonging to separate undertakings even though the two infringements were committed by one and the same undertaking, which remained the same prior and subsequent to the 2006 transactions.

The General Court dismissed this submission, recalling at the outset its finding that ONO Packaging Portugal was not part of the undertaking found liable for the infringement committed in France. It added that, for the purposes of carrying out an objective comparison of the two transactions, their purpose and economic rationale could not be taken into account. Further, the General Court found that the situations of Coveris and ONO Packaging Portugal were not comparable since (i) the two entities were held liable for two separate infringements and (ii) an asset transfer and a share transfer constituted inherently different transactions.

Finally, the General Court observed that, even if the situations of Coveris and ONO Packaging Portugal were comparable, in any event, the Commission had determined in both cases liability in accordance with the principle of personal liability, holding, in each case, liable the entities directly involved in each of the two infringements. In other words, the Commission had not treated the two situations differently.

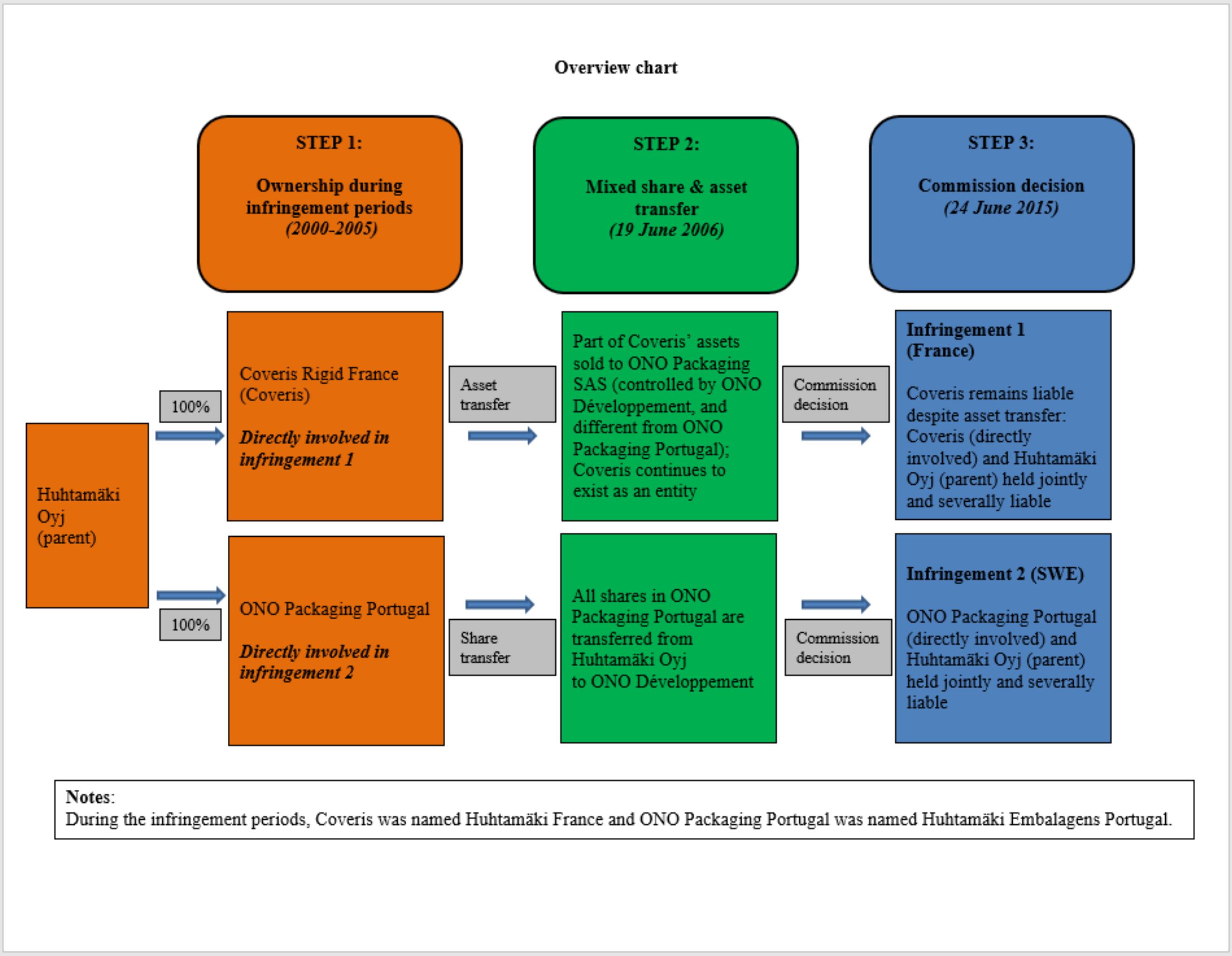
Comments and key takeaways

While the judgment essentially follows previous case-law, it constitutes a helpful reminder of the key principles governing successor liability under EU competition law and applies those principles to an asset transfer scenario. In light of the recent adoption of the ECN+ Directive, [*5*] which contains a provision on successor liability, these key principles may also be relevant to the enforcement of EU competition law by national competition authorities.

First, as a rule, the (economic) entity that commits an EU competition law infringement is to be held liable for such an infringement. Only under exceptional, narrowly defined circumstances may liability be attributed to an entity that did not commit the infringement. The way in which businesses structure their transactions – *e.g.* as a share deal or an asset deal – may therefore have a decisive impact on the attribution of liability: in the event of a share transfer, liability follows the legal entity being transferred; in contrast, in the event of an asset transfer, liability generally remains with the legal entity that committed the infringement, irrespective of whether the “infringing” assets are within the scope of the transaction, as illustrated by the case of Coveris. In an asset transfer scenario, the entity that was previously responsible for the assets thus bears the main risk, although the purchaser of the assets may still face liability if the conditions for economic continuity are met, in particular if the infringing entity has ceased to exist.

Second, under EU competition law, successor liability is primarily based on a legal, formalistic approach, rather than on an economic approach. This is likely explained by the fact that the principle of personal liability is a fundamental right. The principle of economic continuity only comes into play to ensure that enforcement remains effective and, in particular, to prevent enforcement gaps or loopholes that would enable businesses to escape liability and fines, as for example in the German “sausage gap” case. [*6*] In the case of Coveris, one might argue that it would have made sense from an economic point of view to hold the transferee of the infringing assets liable. However, the General Court found that, since the conditions were not met, this was not an exceptional case warranting the transferee to be held liable rather than the (still existing) infringing entity. The General Court also applied a relatively precise (and, in certain regards, narrow) interpretation of the concept of undertaking, holding that the fact that one entity was the sister company of another entity during the infringement period does not mean that, for EU competition law purposes, both entities formed part of the (same) undertaking that was found liable in relation to a specific infringement.

Third, even where the conditions of the principle of economic continuity are met, the Commission retains significant discretion as to whether or not to apply it. On the one hand, such flexibility may be explained by the need to ensure the effective enforcement of EU competition law. On the other hand, it entails risks and uncertainty which businesses have to factor in when negotiating transaction agreements. The high degree of discretion allowed to the Commission also appears slightly at odds with the General Court's emphasis on the importance of applying the principle of economic continuity in a transparent and predictable fashion.



[1] Successor liability has to be distinguished from the separate (although connected) issue of parental liability, which concerns the question under which circumstances a parent company may be held liable for the conduct of its subsidiary. The present judgment did not deal with this question, and it is therefore not examined in this article.

[2] The Commission's decision also covered other infringements and entities, which are not relevant to the present judgment.

[*3*] In this context, the General Court referred, in particular, to the CJEU's judgment in *Aristrain* (CJEU, judgment of 2 October 2003, *Siderúrgica Aristrain Madrid v Commission*, Case C-196/99 P, ECLI:EU:C:2003:529).

[*4*] The General Court referred in this regard to previous case-law, in particular *Parker Hannifin* (CJEU, judgment of 18 December 2014, *Commission v Parker Hannifin Manufacturing e.a.*, C-434/13 P, ECLI:EU:C:2014:2456), but also to the Opinion of Advocate General Kokott in *ETI* (Opinion of Advocate General Kokott of 3 July 2007, *ETI e.a.*, C-280/06, ECLI:EU:C:2007:404).

[*5*] Martin Favart, The EU Parliament and Council reach a provisional political agreement on a Commission proposal for a Directive to make Member States' competition authorities even more effective enforcers of EU antitrust rules (ECN+ Directive), 30 May 2018, e-Competitions Bulletin May 2018, Art. N° 87157.

[*6*] European Competition Network Brief, The German Competition Authority announces fines of € 110 million cannot be collected from a sausage cartel due to its members using an old legal loophole of internal restructuring (Bell Deutschland), 26 June 2017, e-Competitions Bulletin June 2017, Art. N° 86355.