# *Liability in competition law: as incredible as a children's story - a commentary on Case C-542/14 VM Remonts*

*Competition law – liability for the behaviour of a service provider – foreseeability – FNV Kunsten en Media – AC Treuhand*

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## *Introduction*

Alice in Wonderland and competition law; an unlikely combination. Nevertheless, competition law judgments sometimes appear to be as incredible as a children's book. In Alice in Wonderland, we can find a chapter where the *Cheshire-Cat*, appearing only with his head, decided not to kiss the King's hand. The penalty for this was to cut off his head. Obviously, it appeared to be quite difficult to cut off a head without a body. The executioner did not want to cut off the head of a headless person. Whereas the King did not see any problems. The Queen wanted it to be solved quickly, or she'd have everybody executed. The Queen was willing to hold every person liable for the illegal behaviour of one person, the *Cheshire-Cat*.

In a couple of cases, the latest of which is VM Remonts, the Court of Justice decided to behave like the Queen in Alice in Wonderland and thereby to cut off everyone's head. Or, instead of literally executing everyone, the Court of Justice decided to make undertakings liable in a far-reaching manner for the anti-competitive behaviour of third parties. This post will examine the latest case in this line of "extended liability"cases, namely the *VM Remonts* case of 21 July 2016.

## *Status quo*

A cartelist may be liable for the behaviour of another (legal) person when that (legal) person (1) is a subsidiary[1] (2) is an employee[2] or a 'false' self-employed person,[3] (3) has no link with the undertaking but is engaged in umbrella pricing,[4] or (4) is hired as a service provider to perform services for that undertaking. In the first two situations, liability is extended by regarding the parties as part of one and the same "undertaking", whereas in the latter two situations liability is extended on the basis of economic rational. In the case at hand, *VM Remonts,* the Court refers to the second option and creates the fourth option for

liability. The fourth option for liability will be discussed in this post. Before discussing this option any further, it may be good to provide a basic background to these four types of liability.

The liability of undertakings for a breach of the EU competition rules has been expanded over time. The first method of extending this liability was by the adoption of a functional approach to the concept of "undertaking" by the Court of Justice. Any entity engaged in an economic activity is to be regarded as an undertaking. This definition, which is quite straight forward at first sight, gave room for an extension of liability to bodies which are regarded to be part of the same economic entity. An undertaking is liable for the behaviour of its employees, since they are "incorporated into the [undertaking] and thus form an economic unit with [the undertaking]."[5] In 2014 the Court extended implicitly the liability of undertakings to the behaviour of self-employed persons since, in particular circumstances, those persons can be regarded as employees and thus as part of the undertaking.[6] As the Court also stated in the case at hand, *VM Remonts*, "a service provider which presents itself as independent is in fact under the direction or control of an undertaking that is using its services (par. 27)" can be regarded as a 'false' self-employed person. The Court continues by providing that such "would be the case, for example, in circumstances in which the service provider had only little or no autonomy or flexibility with regard to the way in which the activity concerned was carried out, its notional independence disguising an employment relationship (par. 27)." A comparison is then made with the control which a parent undertaking might have over its subsidiary (par. 27). In the past, the Court has extended liability for the behaviour of another entity (in group structures) by applying a functional approach of the concept of undertaking. Even undertakings which are not wholly owned can be under the direction of a parent undertaking, and can thus be regarded as part of the economic entity.[7] In both cases where the Court has extended liability of a company by using a functional definition of the concept of "undertaking". This may boil down to whether or not there is unity in the conduct of the entities concerned on the market.[8]

As far as the other two types of liability are concerned, the Court of Justice created the possibility to hold an undertaking liable for the behaviour of a third party, even when that party is not part of the undertaking. By doing so the Court of Justice used a more economic rational. In the *Kone* case, the Court of Justice, ruled that cartelists may be held liable for the behaviour of non-cartelists "where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being

applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel."[9] I do not want to be too critical about the Court's judgment in the *Kone* case, but the first part of the test created by the Court is probably quite easily met. Umbrella pricing is a likely occurrence when a cartel is created on the market. After all, cartels do need some market power to subsist. Furthermore, can cartelists ever ignore the possibility of umbrella pricing?[10]

### Discussion

The fourth type of liability is created in the case at hand. The municipality of Jūrmala, which is a seaside town near Riga, issued a call for tenders. Three companies submitted tenders. One company, Pārtikas kompānija, hired a law firm, which in turn subcontracted MMD lietas, to prepare the legal documents for the tender and check whether the submission was in order. Pārtikas kompānija, did, nonetheless draw up the tender which was thereafter checked by MMD lietas. The two other tenderers were also assisted by the same subcontractor of the law firm. The employee which dealt with the tender of Pārtikas kompānija, also managed the tender of the other two companies and basically created a cartel between the three tenderers. It used the tender document drawn up by Pārtikas kompānija and lowered the price for the two other tenders by respectively 5% and 10% below the price of Pārtikas kompānija (par. 7). The national court found the participation of the two other tenderers in the cartel to be proven, although it is not completely clear from the Court's judgment (par. 10) or AG Wathelet's Opinion (par. 10) why this was the case. There appears thus to be no involvement whatsoever by Pārtikas kompānija in the concerted practice (par. 13). The question raised by the national court was, nevertheless, whether Pārtikas kompānija could be held liable for the behaviour of the service provider (par. 13-15).

The status of the service provider is the first step which the Court discusses. If the service provider is a 'false' self-employed person, it will be regarded as an employee and thus part of Pārtikas kompānija (par. 22-27). The behaviour of the service provider may nonetheless be attributable to Pārtikas kompānija even if the national court rules that the service provider is "genuinely independent" (par. 28). As the Court ruled: "the concerted practice at issue may be attributed to the undertaking using the services, inter alia, if the undertaking 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 (par. 30)." It could be the case that the undertaking used the service provider to engage in a cartel by intending "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 (par. 30).” The undertaking should thus intend to disclose commercially sensitive information through the service provider or it should expressly or tacitly give consent to the service provider to exchange that information with its competitors. This does not seem to be unreasonable, since undertakings should behave as prudent traders[11] on the market, which means that their behaviour, whether or not through an intermediary, must comply with the competition rules. The Court, however, did not end with this statement. It included a third possibility for liability by the behaviour of the service provider, namely where the undertaking “could reasonably have foreseen that the service provider retained by it would share its commercial information with its competitors and if it was prepared to accept the risk which that entailed (par. 31).” In this last instance, the undertaking concerned does not want to act through its intermediary, or would have accepted, tacitly at the least, that the intermediary would have acted against the competition rules. The latter situation truly seems to rely on the concept of a prudent trader. Behaving on the market has become a bit more dangerous with this statement. Undertakings should be very careful when hiring a service provider. It is unclear though in which circumstances an undertaking “could reasonably have foreseen” that the intermediary would share commercial information with competitors of the service recipient. Arguably this can be accepted quite quickly,[12] since, as mentioned before, the Court uses the concept of a prudent trader who has to act with caution on the market.

The last possibility to attribute liability to a service provider might seem quite far-fetched. Not all authors received this judgment particularly well. Sanchez-Graells for example mentioned that the “[j]udgment should be welcomed for what it does not do”,[13] namely following the approach suggested by the AG. The AG went further than the Court by suggesting a presumption of liability. Nevertheless, the Court did focus more on the possible awareness of the undertaking concerned. Strikingly, the Court often refers to the possibility for an undertaking to obtain legal advice in cases where the legal certainty principle is at stake.[14] This statement sits uncomfortably with the case at hand, where the undertaking concerned actually sought counsel from a lawyer to make sure that the tender was in compliance with the public procurement rules. An undertaking should thus, on one hand, know the law, if need be with legal advice, and it should adjust its behaviour accordingly. On the other hand, undertakings may not trust blindly the activities of a service provider, in the case at hand a lawyer, since an infringement of the competition rules by that service provider can be attributed to them. It is a missed opportunity of the Court that it did not take

this particularity of the case into account. Nevertheless, making an undertaking liable for the behaviour of the service provider which it hired is overall a logical step. Undertakings cannot hide behind a service provider or behind ignorance of the behaviour of that service provider. This would probably entail an active duty for undertakings to determine whether the contractor is acting in accordance with the competition rules, since ignorance is in general, as mentioned before, not a successful plea to argue that an undertaking could not reasonably foresee the anti-competitive behaviour. Furthermore, when an undertaking has found out about the possible anti-competitive behaviour of the service provider it cannot decide not to act. The undertaking is probably obliged to remedy this breach and actively distance itself from the anti-competitive behaviour, otherwise a court might easily find the undertaking to be prepared to accept the risk.

Obviously, as a last point, it might be possible to bring proceedings against the service provider itself for a breach of the competition rules. After all, it is clear since *AC Treuhand* that a facilitator of a cartel might also be held liable for infringements of the competition rules.[15] The Latvian competition authority can therefore start proceedings against the subcontractor which drew Pārtikas kompānija, perhaps against its own will, into the cartel.

### *Conclusion*

The case at hand seems quite logical in the light of the multiple cases in which the Court extended liability of cartelists. Undertakings should act as prudent traders on the market and cannot escape liability merely by hiring a service provider to do the dirty work. Nevertheless, the Court’s judgment is quite far-reaching and might thus be subject to criticism on this point. On the other hand, perhaps the Queen is right, and everyone’s head should be removed. After all, by not playing by the rules undertakings do inflict substantial damage on consumers and the Internal Market. Allowing undertakings to hide behind third parties is indeed not the best way to prevent this damage.

[1] With 100% shareholding there is a presumption of decisive influence and thus one entity, see AKZO. However, one might even exert decisive influence when the undertaking is not 100% owned, see Joined Cases C-293/13 P and C-294/13 P (*Fresh Del Monte*), par. 66-75, where Fresh Del Monte merely held 80% of the shares. This amount of shares in combination with managerial and supervisory powers led the Commission, and the Court, to conclude that Fresh Del Monte could exert decisive influence over Weichert.

[2] Employees are part of the undertaking concerned and in that sense not a third party as such. See Case C-22/98 (*Becu*), par. 26, and Case C-542/14 (*VM Remonts*).

[3] False self-employed persons are regarded as employees and thus part of the undertaking, see Case C-413/13 (*FNV Kunsten Informatie en Media*), par. 42.

[4] Case C-557/12 (*Kone*).

[5] Case C-22/98 (*Becu*), par. 26.

[6] C-413/13 (*FNV Kunsten Informatie en Media*), par. 42.

[7] Joined Cases C-293/13 P and C-294/13 P (*Fresh Del Monte*), par. 50-58.

[8] See Joined Cases C-293/13 P and C-294/13 P (*Fresh Del Monte*), par. 52.

[9] Case C-557/12 (*Kone*), par. 34.

[10] For more information on the (implications of the) Case C-557/12 (*Kone*), see e.g. H. Vedder (2014) 'The Kone Case and the Lifts Cartel – An Upwards Effect on Prices and Effectiveness', *European Law Blog*, http://europeanlawblog.eu/?p=2397, lastly checked 27-10-2016; and M. Veenbrink and C. Rusu (2014) 'Case Comment – Case C-557/12 Kone AG and Others v ÖBB Infrastruktur AG', *Competition Law Review*, pp. 109-117.

[11] See e.g. Case C-501/11 P *(Schindler*), par. 58.

[12] See also e.g. C. Thomas, G. De Stefano and D. Jubrail (2016) 'Liability for anti-competitive behavior by your employees and outside contractors: when you are off the hook and when you are not', *Kluwer Competition Law Blog,* http://kluwercompetitionlawblog.com/2016/08/04/liability-anti-competitive-behaviour-employees-outside-contractors-off-hook-not/, last checked 27-10-2016.

[13] A. Sanchez-Graells (2016) 'CJEU rejected AG Wathelet's proposal for vicarious liability for agent's behavior in competition law: a more stringent test, but how stringent? (C-542/14)', *How to Crack a Nut*, http://www.howtocrackanut.com/blog/2016/8/3/cjeu-rejected-ag-whatelets-

proposal-for-vicarious-liability-in-competition-law-a-more-stringent-test-but-how-stringent-c-54214?rq=VM%20Remont, last checked 27-10-2016.

[14] See e.g. Case C-194/14 P (*AC Treuhand*), par. 43; Case C-501/11 P *(Schindler*), par. 58; and GC, T-336/07 (*Telefónica*), par. 323.

[15] Case C-194/14 P (*AC Treuhand*), par. 38-39.