The economic continuity principle

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The principle of economic continuity enables the European Commission to attribute liability for a violation of EU competition law to a legal entity who has not committed the infringement. This option, which is often presented as an exception to the principle of personal responsibility, is subject to narrow limits set by the EU Courts.

Rationale behind the economic continuity principle

Responsibility for committing a competition law infringement is in principle personal, owing to the nature and degree of severity of the ensuing penalties. Accordingly, the Commission shall normally impute liability on the legal person who ran the infringing business at the time the infringement was committed (the initial operator): this is the principle of personal responsibility.

References:
Case T-6/89 Enichem Anic v Commission, para 236
Case C-248/98 NV Koninklijke KNP BT v Commission, para 71

However, in certain cases, the formalistic application of the principle of personal responsibility may affect the Commission’s ability to ensure effective enforcement of competition law, either because the initial operator no longer exists or because it underwent organizational changes.

References:
Case C-280/06 ETI SpA v Autorità Garante della Concorrenza e del Mercato, para 74

Hence, the principle of economic continuity provides that when adopting a decision imposing fines, the Commission may, by way of exception, attribute liability to a legal person that did not run the business at the time the infringement was committed (the new operator). According to the EU Courts case-law, this exception only applies in the following circumstances:

- when the initial operator no longer exists (legally or economically) when the infringement decision is adopted
  
  References:
  Case T-6/89 Enichem Anic v Commission, para 237

- when the initial operator still exists when the infringement decision is adopted, but:
  - the infringing business has been transferred to a new operator that belongs to the same group of companies (intra-group transfers) (see the Court of Justice’s judgment in Versalis), or
  
  References:
  Case C-511/11 Versalis SpA v Commission, para 52
  - the infringing business has been transferred to a new operator under something other than normal market conditions with the intention of avoiding antitrust law penalties
  
  References:
  Case T-9/99 HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH v Commission, para 107

In the sections below, each of the above circumstances is explored in more detail.
Liability of the successor when the initial operator has ceased to exist

If the initial operator has ceased to exist when the infringement decision is taken, the application of the principle of personal responsibility may prevent the Commission from being able to impose penalties for the infringement. As a result, the principle of economic continuity will apply when the initial operator has ceased to exist either in law or in fact.

The initial operator has ceased to exist in law

The Court of Justice has ruled that, when the initial operator has ceased to exist in law, it is necessary:

- first, to find the combination of physical and human elements which contributed to the commission of the infringement (ie the infringing business, which will typically include staff, factories, land, buildings, etc), and
- second, to identify the person who has become responsible for their operation.

References:
Case T-6/89 Enichem Anic v Commission, para 237

The same solution shall apply when the initial operator has been absorbed by another legal person, who 'inherits' the assets and liabilities of the former, including its liability for the infringement:

- this issue was raised in Raiffeisen Zentralbank Österreich, where Erste Bank had absorbed an infringing company (Girocredit) during the period of infringement. The Court of Justice found that, as a result of this absorption, Girocredit's liability for antitrust infringement had been passed on to Erste Bank, which was held liable for the entire duration of the infringement

References:
Joined Cases T-259/02 to T-264/02 and T-271/02 Raiffeisen Zentralbank Österreich AG v Commission, para 326

- interestingly, in SNIA and Uralita, the General Court found that the same type of 'inherency' could apply when the parent company of a subsidiary that had committed an infringement was absorbed by another company after the period of infringement. As the parent company was liable for the infringement on the basis of parental liability, this liability was passed on to the absorbing company, which became the economic successor of the parent company. Hence, the absorbing company was held liable for the infringement.

References:
Case T-194/06 SNIA SpA v Commission
Case T-349/08 Uralita, SA v Commission

For details on the scope of parental company liability and recent cases, see further, The construct of parental company liability.

The initial operator has ceased to exist in fact

The Court of Justice found that the principle of economic continuity also applies when the initial operator has ceased to exist in fact (because it no longer carries out any significant economic activity) on the grounds that imposing a penalty on an undertaking that continues to exist in law but has ceased economic activity is unlikely to have a deterrent effect:

References:
Case C-280/06 ETI SpA v Autorità Garante della Concorrenza e del Mercato, para 40

- in NMH Stahlwerke GmbH, the General Court confirmed that the principle of economic succession applied in the case where Eisenwerk, the initial operator, had transferred its assets, during the period of the infringement, to another company, NMH (in 1990). As of that date, Eisenwerk
ceased trading and went bankrupt, while NMH took over the business. Despite the fact that Eisenwerk legally existed until after the infringement decision had been taken, the General Court took the view that it had ceased to exist in fact as of 1990. Hence, NMH had to be regarded as its economic successor and was held liable for the entire duration of the infringement.

References:
Case T-134/94 NMH STAHLwerke GmbH v Commission, para 138

Liability of the successor when the initial operator continues to exist

If, by the time an infringement decision is taken, the initial operator still exists and the infringing business has been transferred to another legal entity, one of three events may have taken place:

- o a transfer of the infringing business to an independent third party
- o an intra-group transfer of the infringing business, or
- o an intra-group transfer of the infringing business in anticipation of it being subsequently transferred to an independent third party.

Transfer of the infringing business to an independent third party

If the transfer takes place after the period of infringement, the Court of Justice has held that the principle of personal responsibility applies, ie the initial operator will be held liable for the entire infringement. In this case, the application of the economic continuity principle is unnecessary and unwarranted. Otherwise, the initial operator could easily escape its liability by selling the infringing assets to a third party.

If the transfer takes place during the period of infringement, and the infringing business continues with its antitrust infringement after it is acquired, both the seller and the acquiring undertaking will be liable. Each undertaking should be responsible for the period of the infringement during which it owned the infringing business. Again, the application of the economic continuity principle is unnecessary.

In Anic Partizipazione, the Commission had imposed a fine on the applicant for taking part in the Polypropylene cartel. The applicant, Anic, claimed that it should not have been held liable on the grounds that it had sold the infringing business to Monte in 1982 at the end of the infringing period. Hence, according to Anic, the fine should have been imposed on the later. The Court of Justice rejected the argument, on the grounds that '[i]n complaining that the Court of First Instance attributed responsibility for the infringement to it although it had transferred its polypropylene business to Monte, Anic is disregarding the principle of personal responsibility.' As a result, Anic was held liable for the entire duration of the infringement. Monte, on the other hand, was not held liable.

References:
Case C-49/92 Commission v Anic Partizipazione, para 145

However, the economic continuity principle should apply when the infringing business has been transferred to an independent third party under something other than normal market conditions with the intention of avoiding antitrust law penalties. This situation appears to be quite theoretical, though: to our knowledge, no finding of economic continuity has been made on such a ground.

References:
Case T-9/99 HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH v Commission, para 107

Intra-group transfer of the infringing business

In case of an intra-group transfer of the infringing business, the Court of Justice, in Aalborg Portland and Versalis, has ruled that the principle of economic continuity may apply, provided that the initial operator and the new operator are controlled by the same person and have therefore carried out the same commercial instructions--which will almost always be the case within a group.

References:
The Commission's ability to apply the principle of economic continuity hinges, in part, on the concept of economic unit. Since the initial operator and the new operator belong to the same group, they form one single economic unit (and therefore an 'undertaking') for the purpose of applying competition rules. As a result, the Court of Justice has found that the Commission may impute liability on either the initial operator or the new operator, depending on the circumstances of the case. For example, if the initial operator has become an 'empty shell' following the transfer of the business, the Commission may want to hold the new operator liable, so that a fine may be effectively imposed and recovered:

References:
Case T-161/05 Hoechst GmbH v Commission, para 64

  o in Versalis, the infringing assets had been transferred from Enichem SpA to Versalis during the period of infringement. Since both companies were under the control of Eni SpA, the Court of Justice confirmed that the Commission could impose the entirety of the penalty on Versalis, as the economic successor of Enichem SpA, despite the fact that Enichem SpA continued to exist.

  References:
  Case C-511/11 Versalis SpA v Commission, para 53

Similarly, the Court of Justice has ruled that, in case of transfer of an infringing business between state-controlled undertakings, the principle of economic continuity applies, provided that the initial operator and the new operator are controlled by the same public entity.

  o in ETI, the Italian Competition Authority imposed a fine on ETI, a public body, for taking part in a cigarettes cartel from 1993 to 2001. ETI, which had been created in 1999, had taken over the cigarette business of another public body, the AAMS. As both undertakings were under the control of the Ministry of Economy and Finance, the Italian Competition Authority and then the Court of Justice found that ETI was the economic successor of AAMS. Hence, ETI was held liable for the entire duration of the infringement.

  References:
  Case C-280/06 ETI SpA v Autorità Garante della Concorrenza e del Mercato, paras 49-50

Combination of operations: intra-group transfer of the infringing business in anticipation of its transfer to an independent third party

A third category of operations raises difficulties as regard economic continuity: these are operations consisting of 'financial engineering', whereby the infringing assets are transferred to a new corporate vehicle created within the initial operator's group, with the sole purpose of facilitating the sale of these assets to an independent third party.

The Court of Justice addressed this issue in Parker Hannifin, where Parker ITR (former ITR Rubber) was fined by the Commission for its participation in the marine hoses cartel from 1986 to 2007. In this case, during the period of infringement, the infringing assets--ie the marine hoses business--had been transferred to an independent third party, Parker Hannifin. However, the transfer followed a two-step process (see diagram below): (1) the intra-group transfer of the infringing marine hoses business from ITR SpA to one of its subsidiaries, ITR Rubber Srl (January 1, 2002); and (2) the sale of ITR Rubber Srl--which was later renamed Parker ITR--to an independent third party, ie Parker Hannifin (January 31, 2002). According to the Commission, Parker ITR was the economic successor of ITR SpA. Hence, it was held liable, not only for the period when it held the infringing assets, ie as of 1 January 2002--but also for the infringing period prior to this date, as the successor of ITR SpA.

Following Parker ITR's appeal, the General Court annulled the Commission decision, on the grounds that economic continuity did not apply in this case. According to the General Court, the first part of the opera-
tion—ie the intra-group transfer of the assets—had to be ignored, because it had been realized for the sole purpose of eventually selling the assets to an independent third party. Therefore, as the operation had to be regarded as a mere transfer of assets to an independent third party, there was no economic continuity between the initial operator—ie ITR SpA—and the new operator—ie ITR Rubber, (see Transfer of the infringing business to an independent third party above). As a result, ITR Rubber Srl should have been held liable only for the period when it held the assets—ie as of 1 January 2002, while liability for the infringement prior to this date should have fallen on ITR SpA.

References:
Case T-146/09 Parker ITR and Parker-Hannifin v Commission

However, the Court of Justice reached a different conclusion. According to the Court of Justice, it did not matter that the intra-group transfer was no more than a transitory step of a limited duration aimed at transferring the business to an independent third party. Hence, the General Court should not have ignored the intra-group transfer when assessing whether economic continuity applied. As a result, the Court of Justice referred the case back to the General Court for a ruling on the merits.

References:
Case C-434/13 Commission v Parker Hannifin Manufacturing and Parker-Hannifin

Arguably, a new analysis taking into account the intra-group transfer will confirm the findings of the Commission as to the applicability of the economic continuity principle in this type of operation: in application of the rules detailed in Intra-group transfer of the infringing business above, Parker ITR became the economic successor of ITR SpA following the intra-group transfer of assets. Therefore, it should be held liable:

- as the economic successor of ITR SpA, from 1986 to 2002 (principle of economic continuity)
- personally, from 2002 to 2007 (principle of personal liability).

Parker-Hannifin would continue to remain liable as the parent company, with its liability starting as of 31 January 2002. This would be in line with the Commission's original decision.

If the General Court follows the approach above, it would also mean that, absent the intra-group transfer prior to the sale of ITR Rubber to an independent third party, economic continuity would not have applied. If that was the case, Parker ITR would have been found liable only for the period when it held the assets—ie as of 1 January 2002. Therefore, the final judgment in this case may have important consequences for businesses: they should be particularly cautious when acquiring assets from an independent third party—particularly when the seller has used a new corporate vehicle specifically for the purpose of divesting them—because the economic continuity principle will likely apply.
1 January 2002: Intragroup transfer of the infringing assets. ITR Rubber acquires ITR SpA liability for the infringing assets (principle of economic continuity).

31 January 2002: Sale of ITR Rubber – with all its assets and liabilities, including liability for the infringing assets – to an independent third party, Parker-Hannifin. As the assets continue with the antitrust infringement, ITR Rubber remains liable (principle of personal liability).

Duration of the infringement: from 1986 to 2007