

## JUDGES, DISCRETION AND ECONOMIC GROWTH

Policymakers across the world have reached wide if not absolute consensus that courts are a key component to economic development. The OECD has long recognized the crucial role judicial systems play in determining economic performance by guaranteeing the security of property rights and the enforcement of contracts.<sup>1</sup> It occasionally publishes research reports on the efficiency of judicial systems across different countries coupled with policy recommendations. The World Bank's Doing Business Project acknowledges that economies with more efficient judicial systems, where courts effectively enforce contractual obligations, tend to have a higher level of overall development<sup>2</sup>. National governments are struggling with never ending reforms on improving the quality and efficiency of their judicial systems to foster economic growth and to attract foreign investments.

Quality and efficiency of the judicial system is an important puzzle piece in the entire economic landscape and at the same time is a whole picture on its own that can be broken down into multiple elements, such as corruption, independence of judges, duration of process, expenses, competency levels of judges, enforcement of judicial decisions, predictability and consistency of judgements.

The purpose of this article is not to focus on the judicial quality and efficiency as a whole but to illustrate and explain the process of how exactly judges, while acting within their discretionary powers, affect not only the parties to the dispute under their resolution but the overall economy. A number of prominent studies have confirmed correlation between economic growth and various components of quality and efficiency of courts through econometric models.<sup>3</sup> This article aims to shed some light on the processes that lead to such correlation.

We shall begin from clarifying what discretionary powers of a judge are, proceed with analysis of cases across different countries by indicating the scope of judicial discretion in each case and explain how taking one decision over another has affected the economy.

In essence, discretionary power of a judge is the judge's right to decide one way or another. Such discretion can be relatively absolute, where the judge has broad freedom and room for creativity on choosing how to resolve a matter, provided that no law is violated, and limited, where the judge may choose from a limited number of alternatives. Below are major examples of judicial discretion:

1. Given the complexity of mankind and their relations, notably in our fast-paced world, lawmakers cannot anticipate and regulate all possible scenarios, therefore apart from adopting specific rules of behavior, they set standards and principles, leaving it for the law enforcers and courts to decide whether specific conduct conforms to the given standard or principle. As an illustration, 1-304 of the Uniform Commercial Code (UCC) of the US states that every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement. UCC defines good faith as honesty in fact and observance of reasonable commercial standards of fair dealing. Whether particular behavior falls within the scope of reasonable commercial standards is for the courts to assess.

---

<sup>1</sup> <http://www.oecd.org/economy/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf>

<sup>2</sup> <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/why-matters>

<sup>3</sup> Consider Field and Voigt, Economic growth and judicial independence: cross-country evidence using a new set of indicators

2. Often situations arise that are regulated neither by legislation nor precedent but demand legal resolution. Courts have long-established tools for dealing with such scenarios. One common method is applying principles of the specific area of law under question or general principles of law. To give an example, in most common law jurisdictions, courts use principles of equity when resolving contractual disputes. The way such principles are applied fall under broad judicial discretion. Another method is resorting to analogical reasoning, where courts will apply rules resolving issues most similar to the matter at hand.
3. Miscommunications and misunderstandings arise in our daily conversations, by the same token they arise in the process of drafting, adopting and interpreting the law. After all, legislation is a form of communication between drafters and adopters on one side and addressees on the other. Very often what the legislature meant does not conform to what the law enforcers and addressees understand. With various perceptions and possible reasonable interpretations, the exact meaning intended by the legislature is not always obvious and it is up to the court to determine the applicable interpretation.

Having such broad opportunities for exercising discretion, courts can influence the economy in three major ways: 1) destroy either save a major project or a company 2) create new rules that complement, further or adversely interfere with the country's economic policy 3) interpret and enforce the existing rules in a way that sends positive or negative signals to the market.

Let's consider some examples from each of the categories.

### **FAREWELL BEFORE ARRIVAL**

The first case takes us to autumn of 2015, which brought great enthusiasm to Star Wars fans living in Chicago. It was officially announced that George Lucas is building a "Star Wars" Museum in Chicago scheduled to open in 2019. One can imagine the excitement of fans about such grand opening, as well as of the City of Chicago about delivering such major project to its residents. The museum was planned to be built on lakefront on the site of two large parking lots taking a shape of a futuristic building combining gallery, theater and education spaces. The lands were to be transferred to Lucas Museum of Narrative Arts (LMNA) under a long-term ground lease agreement. The project, wholly financed by private funds, estimated at around \$1 billion, was philanthropic in nature. Namely, according to the agreement between the City of Chicago and Lucas Museum of Narrative Art proceeds from the admission tickets would be used solely for the use, maintenance, management and control of the Museum, including the expansion of the Museum's collection. In addition, the Museum would offer 52 days of free admission per year and free admission for designated classes.<sup>4</sup> Following negotiations, the project was already on track and moving forward smoothly. At the heat of excitement, little was it anticipated that one year after the big news announcement Chicago would be deprived of a major opportunity to enrich its cultural scene due to a lawsuit filed by an environmentalist organization founded on more than a century old public trust doctrine. So what exactly is behind this story?

Friends of the Parks, an environmentalist organization, was unhappy with the idea of museum construction on lakefront area and sued City of Chicago seeking to enjoin it from approving the project and proceeding with the construction of a museum on a land adjacent to Lake Michigan. Their claim was based on a public trust doctrine dating back to 1892. According to this doctrine, Illinois, as a sovereign state, holds lands submerged by navigable waters in trust for public use, meaning that such land "is held by the whole people for purposes in which the

---

<sup>4</sup> [https://www.chicagoparkdistrict.com/sites/default/files/images/page/MOU\\_-\\_EXECUTION\\_VERSION\\_LMNA\\_Chicago\\_Park\\_District.pdf](https://www.chicagoparkdistrict.com/sites/default/files/images/page/MOU_-_EXECUTION_VERSION_LMNA_Chicago_Park_District.pdf)

whole people are interested."<sup>5</sup> The area, designated for museum construction, was located on lands submerged by Lake Michigan and therefore was protected by the public trust doctrine. Control over lands under public trust can be transferred to private parties only if the following two conditions are in place 1) they are used in promoting the interests of the public or can be disposed of without substantial impairment to public interest and 2) there has been relevant action on transfer by the Illinois General Assembly.<sup>6</sup>

Although there are a number legal issues pertaining to this case<sup>7</sup>, the central questions were:

- Was there proper authorization on transfer by the Illinois General assembly?
- Was the transfer effectuated for the purpose of public interest?

The Museums in Parks Act contains a rule that gives “the corporate authorities of park districts power to erect and maintain museums within any park, and *to permit the directors or trustees of any museum* to erect the same in any park and to charge an admission fee, except on certain days named”. The environmental company claimed that the cited provision of the Museum in Parks Act did not amount to authorization and in order for it to be proper, General Assembly had to specifically refer to the land that is subject of transfer, the receiving party and the mode of transfer. Previous cases on public trust doctrine involved specific legislative enactments but no clear-cut rules indicate that specific legislative enactments are required. Thus, the court has at least two alternative possible decisions:

- 1) The language of the Museum in Parks Act is sufficient to effectuate the transfer of lands because it is not general and does not permit all or broad kinds of transfer but narrowly draws the permissible usage of the land, namely to host museums. In addition, the Act was adopted by the Illinois General Assembly and therefore expresses its intent. Thus, Friends of the Parks’ allegations do not give rise to a plausible claim.
- 2) The language of the Museum act is not sufficient to effectuate transfer because the rule relates to general transfer and usage of land but an exception applies for lands protected under the public trust doctrine. For lands, other than those protected under the public trust doctrine, such language is sufficient but for lands falling under the public trust, an approval with specific referrals by the Illinois General Assembly shall be in place.

The second issue relates to whether the construction of Lucas Museum of Narrative Arts primarily benefits public or private interest. The answer to the question requires an assessment by the court where again it can choose from at least two possible alternatives:

- 1) The Museum is predominantly for public interest because City of Chicago and LMNA have agreed that the project shall be financed wholly with private funds and at the same time no income shall be received by private parties, instead proceeds from the admission tickets would be used solely for the use, maintenance, management and control of the Museum. Essentially, the museum is a gift to Chicagoans by George Lucas.
- 2) Although the Museum has some large aspects of public benefit, namely it conveys significant cultural, educational and economic benefits to the public, it will predominantly benefit private interest for private interest is not limited to financial interest. Promotion of ideas, art and collections of private persons may also be reasonably considered as serving a private interest.

---

<sup>5</sup> *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892)

<sup>6</sup> *Id.*

<sup>7</sup> *Friends of the Parks v. Chicago Park Dist.*, 160 F. Supp. 3d 1060 and *Friends of the Parks v. Chicago Park Dist.*, 2015 U.S. Dist. LEXIS 30291

The Court, by choosing from one of the possible alternatives under its discretion, could either dismiss the case due to lack of a plausible claim and thereby refrain from creating hurdles for the project or proceed with case examination which meant months if not years of litigation aka investment of time and resources with uncertain future results. The Court decided to proceed with the second option and found that Friends of the Parks have plausibly stated a claim that specific authorization by the Illinois General Assembly was required and “have sufficiently pled that the proposed Museum is not for the benefit of the public but will impair public interest in the land and benefit the LMNA and promote private and/or commercial interests”.

Disappointment with the prolongation of the lawsuit pushed LMNA to abandon the project in Chicago, which meant loss of around 1 billion USD in philanthropic investments and tremendous opportunities for the city. In summer of 2016 George Lucas announced LMNA’s withdrawal from the city with the following statement: “No one benefits from continuing their seemingly unending litigation to protect a parking lot. The actions initiated by Friends of Parks and their recent attempts to extract concessions from the city have effectively overridden approvals received”<sup>8</sup>.

Then Mayor of Chicago, Emanuel Rahm was also regretful about such outcome. “Chicago’s loss will be another city’s gain”, he said, “This missed opportunity has not only cost us what will be a world-class cultural institution, it has cost thousands of jobs for Chicago workers, millions of dollars in economic investment and countless educational opportunities for Chicago’s youth. Despite widespread support of the project from Chicago’s cultural, business, labor, faith and community leaders and the public, a legal challenge filed by Friends of the Parks threatened to derail this once-in-a-generation opportunity”<sup>9</sup>

Currently LMNA is under construction in Los Angeles and is scheduled to open in 2022 at Exposition Park in Downtown L.A.<sup>10</sup>

## **CORPORATE HAT-TRICK**

The next case to be discussed is one of the most controversial in history of Russian judicial practice and the corporate labyrinth it walks us through leaves more questions than answers. The main “culprit” of the case is Sistema Public Joint Stock Financial Company, a major Russian investment company led by Russian billionaire Vladimir Yevtushenkov, who is the chairman of the board and the controlling shareholder of the company. The investment portfolio of Sistema mainly consists of Russian companies across various industries in the real economy sector<sup>11</sup>. In August of 2005, Sistema acquired a large number of shares in “Bashneft”, a Russian oil company, from “Ural-Invest” and in 2008 became its controlling shareholder. Part of the shares were held by Sistema’s subsidiary Sistema Invest.

In 2014, Sistema and Bashneft underwent certain corporate restructuring procedures, which drew a large amount of assets out of the oil company. In 2014, the deputy prosecutor general of Russian Federation filed a lawsuit against Sistema on behalf of Russian Federation to seize Sistema’s shares in “Bashneft” claiming that privatization of “Bashneft” and alienation of its shares to a private entity did not conform to the legal requirements of state-owned enterprise privatization. As a result, Sistema’s interest in “Bashneft” was seized for the benefit of the Russian Federation. Following this event, Sistema sued “Ural-Invest” for illegally selling the shares and successfully recovered damages. In 2016, Rosneft purchased controlling shares in “Bashneft” from the Federal Agency for State Property Management of the Russian Federation.

---

<sup>8</sup> <https://lucasmuseum.org/news/lucas-museum-of-narrative-art-withdraws-from-chicago>

<sup>9</sup> [https://www.chicago.gov/city/en/depts/mayor/press\\_room/press\\_releases/2016/june/Statement-from-Mayor-on-Lucas-Museum-of-Narrative-Art.html](https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2016/june/Statement-from-Mayor-on-Lucas-Museum-of-Narrative-Art.html)

<sup>10</sup> <https://www.discoverlosangeles.com/things-to-do/seven-things-you-didnt-know-about-the-lucas-museum-of-narrative-art>

<sup>11</sup> <https://sistema.com/about>

After the acquisition, Rosneft and Bashneft sued Sistema and its subsidiary for damages caused to “Bashneft” resulting from the corporate restructuring procedures in 2014.

What is the line of the fuzzy corporate restructuring?

**Step 1.** A new company under the name “Bashneft Invest” spins off from Sistema’s subsidiary, Sistema Invest. Among other assets, Sistema Invest transfers to “Bashneft Invest” 16.8% of Bashneft shares it owned and among other liabilities it transferred the loan it owed to Bashneft’.

**Step 2.** “Bashneft Invest”, subsidiary of Sistema Invest merges into Bashneft. Shares of “Bashneft Invest” were compensated with 49.1% shares of Sistema Invest owed by Bashneft (yes, there was cross-ownership between Bashneft and Sistema Invest). Thus, as a result of the merger Sistema Invest acquired 49.1% of its own shares which were redeemed. In addition 16.8% of Bashneft’ shares owned by “Bashneft Invest” were also redeemed. Last but not least, the loan owed to Bashneft ceased to exist because by virtue of the merger Bashneft acquired a loan that was owed to itself.

**Step 3.** Shares of Bashneft’s minority shareholders, who voted against the merger, were bought back at market price.

**Step 4.** Payments to minority shareholders for the share buyback coupled with deprivation from proceeds of the loan owed by Sistema Invest, brought a serious strain on Bashneft’s liquidity. As a result, the company could not maintain the necessary USD reserves for performing its obligations payable in USD. In May of 2014, the rate of USD against Russian Rouble plummeted almost by 40%. Had the company maintained its USD reserves, it wouldn’t suffer losses while converting Russian Roubles to USD at a higher exchange rate for complying with its USD obligations.

Rosneft claimed that the suspicious corporate restructuring procedures caused Bashneft to lose the following: a loan owed by Sistema Invest, its shares in Sistema Invest, the amounts that had to be paid to minority shareholders who voted against the merger and currency exchange losses due to non-maintenance of USD reserves.

Although the case has multiple intertwined legal and factual issues, a central issue in the case was whether a new controlling shareholder can sue a former controlling shareholder who knowingly possesses illegally acquired shares for damages done to the company?

According to Article 6 of the Federal Law “On Joint-stock Companies”, Shareholders of the subsidiary company shall have the right to demand compensation from the parent company (partnership) for losses inflicted on the subsidiary through its fault. Losses shall be deemed inflicted through the fault of the parent company (partnership) only if the parent company (partnership) used its right and/or opportunity to cause the subsidiary to take an action while being aware that as a result, the subsidiary would incur losses.

Russian legal scholars distinguish various methods for interpreting legal acts. For the purpose of this case we shall discuss three of them: linguistic (textual), teleological (purposive) and functional. Linguistic method of interpretation derives meaning of a rule through philological and grammatic analysis of the text. Purposive method derives meaning of a rule by searching for its purpose, departing from its literal textual meaning. Functional method interprets legal norms taking into consideration specific circumstances involved in the case. Employment of these methods by courts renders different outcomes in a case. Reasonable choice and application of methods is within the discretionary powers of the judge.

Coming back to Article 6 of the Federal Law “On Joint-stock Companies”. On one hand “Shareholders of the subsidiary company shall have the right to demand compensation from the parent company” may mean only existing shareholders can claim damages and only against

an existing parent company, for the moment when a shareholder sells its shares it ceases to be a shareholder, he or she is anything but a “shareholder”, therefore cannot sue and the moment a parent company sells its controlling shares, it is anything but a “parent company”, therefore cannot be sued. Of course such interpretation would lead to absurd and undermine the purpose of the rule as parent companies could avoid liability imposed under this article by merely selling their shares.

Moving to the purposeful method of interpretation. Contrasting shareholders against parent companies suggests that perhaps the purpose of the rule is to protect minority shareholders against abuses of controlling shareholders. Imposing fiduciary duties on controlling shareholders is a common approach employed by a number of countries due to the fact that controlling shareholders are vested with powers of making decisions for the company that affects other shareholders.<sup>12</sup> Where there is power, there is also risk of abuse. Imposition of fiduciary duties on controlling shareholders seeks to protect minority shareholders from losses that may arise from such abuses. Perhaps this rule could mean imposition of fiduciary duties on the subsidiary’s parent as a controlling shareholder. With this approach Rosneft could not claim anything from Sistema because it suffered no damages. Rosneft purchased its shares in Bashneft from the State at a time when the restructuring procedures were complete and properly documented, it was of no secret that the assets of Bashneft were decreased. Whether shares from the state were bought at a price higher than their fair value is a matter to be resolved between Rosneft and the state.

Turning to functional interpretation, which interprets legal norms in light of surrounding circumstances. At the time of acquiring interest in Bashneft, it could be that Sistema knew of the scandals surrounding privatization and the risk of having to forfeit the shares at some point. By returning a company to the state with decreased assets, it essentially caused damage to the state. Rosneft asserted that the amount of the claim conforms to the amount of dividends distributed by Bashneft between 2009-2014. Although, Rosneft is a legally distinct entity, its majority owner is the state. 50,000,000.01% of its shares belong to “Rosneftgaz”, a 100% state-owned company.

The Court could take almost an infinite number of possible interpretations combining the rule with general principles of damage restitution and abuse of rights prescribed by the RF Civil Code.

What did the Court end up with?

The Court held Sistema liable and ordered to pay compensation to Bashneft in the amount of around 136 bln rubles. It reasoned that at the time of the wrongdoing Sistema held majority stake in Bashneft, therefore was a parent company. In addition, Bashneft was a legal entity that suffered harm from Sistema’s actions and therefore should be entitled to compensation. The amount of compensation was calculated by totaling the following amounts: the forfeited loan that was owed by Sistema, buyback payments transferred to minority shareholders who voted against the merger, losses suffered due to the volatility of USD/Russian Rouble rate and that could be avoided by maintaining USD reserves<sup>13</sup>.

The Bashneft case sends at least the following signals to the market:

- 1) Bona Fide Purchasers may be liable and compelled to forfeit property. In 2014, Sistema was declared as a bona fide purchaser of Bashneft shares by a court decision in the

---

<sup>12</sup> Kahn v. Lynch Communication Systems, 638 A.2d 1110 (1994)

<sup>13</sup> Case No A07-14085/2017, <https://kad.arbitr.ru/Card/890b850e-d4f6-4b81-bb6b-a50a49d459c4>

litigation against Ural-Invest. However, that did not save Sistema from having to relinquish the shares.

- 2) Capital reduction through share repurchase, which is generally normal and widely used practice in corporate world, now always faces the legal risk of being considered as inflicting damages to a corporation.
- 3) Exit becomes more difficult. Investors have to be wary whom they sell their shares to as they do not want to be sued by future shareholders for the manner in which they handled corporate affairs preceding the sale.

Whether the court decision was politically motivated, as claimed in the Russian media, or whether it was fair, is not the topic of the article. The goal was to show how fluid and multi-shade sentences expressing legal rules are and how they can be maneuvered by judges, who leave imprints on the country's economy.

## **FILLING THE CONTOURS OF ANTITRUST POLICY**

The EU is known for its strict competition rules and enforcement aimed at ensuring the proper functioning of the Single Market, a line of policy pursued by the European Commission. In developing and implementing its competition policy, the Commission has been both assisted and obstructed by the Court of Justice of the European Union (CJEU).<sup>14</sup> The last case to be discussed under this article constitutes a manifestation of the former type of action.

Going back to the early 2010s, the Commission detected an international cartel involving dozens of corporations, which aimed at restricting competition for (extra) high voltage submarine and underground power cable projects in certain territories by allocation of markets and customers. The Commission classified the cartel into two configurations. The first configuration served the purpose of allocating territories and customers among the European, Japanese and South Korean producers. To be specific, Japanese and South Korean committed to stay away from competing for projects in the European producers' 'home territory' on one hand and the European producers committed to keep out of the Japanese and South Korean markets on the other. In addition, the members of the cartel divided the rest of the global market (excluding the US) by allocating 60% of the projects to the European producers and the remaining 40% to Asian producers. The second configuration was only on the level of the European producers and pursued the aim of allocating territories and customers among themselves.<sup>15</sup>

Two major European companies in the submarine and underground power cables sector, Prysmian CS and Prysmian SpA (jointly the Prysmian group), were also involved in the collusion. In 2014, the Commission held Prysmian CS and Prysmian SpA liable for participating in the cartel network and imposed a fine of EUR 37 303 000. The US investment bank giant Goldman Sachs was also held 'jointly and severally' liable for the same matter on the grounds that it exercised decisive influence over the Prysmian group for a certain period of time while the group was engaged in the anticompetitive behavior.<sup>16</sup> Goldman Sachs's investments in the Prysmian group were structured as follows:

- Goldman Sachs owned GS Capital Partners V Funds LP and some other intermediate companies,
- GS Capital Partners V Funds LP and those other intermediate companies owned Prysmian SpA,
- Prysmian SpA was the 100% owner of Prysmian CS<sup>17</sup>

---

<sup>14</sup>Jan Blockx, *The Impact of EU Antitrust Procedure on the Role of the EU Courts (1997–2016)*

<sup>15</sup>Goldman Sachs v Commission (T-419/14), paragraph 12

<sup>16</sup>Id. at paragraph 18

<sup>17</sup>Id. at paragraph 1

Dissatisfied with such course of events, Goldman appealed the decision to the EU General Court seeking partial annulment of the Commission’s decision and reduction of the imposed fine.

The prohibition of collusive agreements is framed by Article 101 of the Treaty on the Functioning of the European Union (TFEU), which maps the main contours of EU antitrust policy with respect to anti-competitive agreements. Paragraph 1 of Article 101 contains a general prohibition of “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...”. The same paragraph enumerates a non-exhaustive list of such types of agreements, which includes sharing markets or sources of supply. Although the basics of the policy regarding anti-competitive agreements are laid in Article 101 of the TFEU, in the course of adjudicating on antitrust disputes CJEU has developed a number of detailed rules based on the cited article. Among such rules is the possibility of holding the parent company liable for its subsidiary’s violation of competition law when the subsidiary performs instructions dictated by its parent company rather than acting independently on the market.

Let’s turn to the process on how exactly the rule was developed and on what basis. The treaty prohibits collusive arrangements between undertakings but contains no definition of the word “undertaking”, leaving room for judicial discretion in defining the term. While elaborating on the concept, the Court rejected the idea of an undertaking being synonymous to a single company or an entrepreneur, and instead defined it as an economic unit, which may also consist of several persons, both natural or legal.<sup>18</sup> Based on this explanation the Court further noted that the parent company and the subsidiaries under its decisive influence “form a single economic unit and therefore form a single undertaking within the meaning of Article 101 TFEU”.<sup>19</sup>

Coming back to the case at hand, Goldman was held responsible for violations of competition law by two of its subsidiaries Prysmian SpA and Prysmian CS based on the abovementioned doctrines. A major question arising in this case is whether Goldman exercised decisive influence over the Prysmian group. According to another rule developed by CJEU, if a company has a 100% shareholding in a subsidiary that has violated EU competition law it is presumed that the parent company has exercised decisive influence over the conduct of the subsidiary. It is then for the parent company to overcome the presumption by presenting sufficient evidence of the contrary.<sup>20</sup> The fact of holding the shareholding through an intermediate subsidiary does not destroy the presumption.

In the Goldman case, however, the investment bank apart from 41 days of the contested period, held less than 100% of the equity (around 91% at its peak). At the same time, Goldman did control 100% of the voting rights associated with Prysmian’s shares through special arrangements. Although the presumption of exercising decisive influence previously applied to circumstances where the parent company holds 100% ownership in its subsidiary, the Court further extended the rule to apply to circumstances where the parent company controls 100% of the voting rights even if its stake in capital is below 100%. The Court explained such expansion by stating that having 100% of the voting rights places the parent company in a situation similar to that of a sole owner.<sup>21</sup> Because Goldman failed to overcome the presumption, the court dismissed the action and Goldman remained liable for the fine.

---

<sup>18</sup> Akzo Nobel NV and Others v Commission (C-97/08 P)

<sup>19</sup> Goldman Sachs v Commission (T-419/14), paragraph 43

<sup>20</sup> Id. at Paragraph 44

<sup>21</sup> Id. at Paragraph 50



The abovementioned case and its predecessors illustrate how over time the CJEU has tightened the rules prohibiting collusive agreements making it easier for the Commission to enforce antitrust rules. The discussed rule on holding parent companies responsible for competition law violations of their subsidiaries if they exercise decisive influence over their subsidiaries and its broad construction has two important contributions:

- Complementing the general policy on prohibiting anticompetitive agreements, it further decreases incentives for companies to enter into such agreements. Since restricting competition enables firms to maximize their profits, they have strong incentives for engaging in such practices where feasible. Penalties that are greater than the expected profits arising from anticompetitive behavior decrease those incentives. Thus, disallowing a firm to limit its liability while engaging in anticompetitive behavior by creating subsidiaries helps in ensuring that costs arising from prospective penalties exceed the benefits expected from the anticompetitive behavior.
- Assists the Commission in collecting its fees, notably in case of insolvency of the liable subsidiaries.<sup>22</sup>

### **CONCLUSIVE REMARKS**

The idea that a strong judicial system is important for a country's economic development has been widely circulated both among professionals and layperson. Examining how exactly courts affect the economy under magnifying glass helps in detecting the weak spots in the system as well as provides clue on what should be changed. Such examination encompassing a broader scope of cases should be an important step in a judicial reform aimed at economic development.

---

<sup>22</sup> Id at Paragraph 201