

## ECJ Gets Tough with The Commission on Parental Liability

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A number of recent judgments suggest that European courts are getting tougher with the Commission on parental liability.

In *Elf Aquitaine SA v Commission* (Case C-521/09 P), the European Court of Justice (ECJ) ruled on 29 September that Elf Aquitaine was not jointly and severally liable as a parent company for the involvement of its wholly owned subsidiary Arkema in the cartel for monochloroacetic acid. The judgment overturned a Commission decision on procedural grounds. Taken with a number of recent judgments, this suggests that European courts are getting tougher on the Commission and that it will have to work harder in the future to justify a parent company's rebuttal of the presumption of parental liability. It therefore seems more feasible for a parent company that presents good evidence to be able to get itself off the hook.

Under EU antitrust law, the conduct of a subsidiary with a separate legal personality can be imputed to the parent company. The European courts have held consistently that there is a presumption of parental liability for cartel infringements of wholly owned subsidiaries. It has historically been enough for the Commission to show that the parent company holds all or almost all of the shares of its subsidiary to establish the joint and several liability of the parent company. This presumption can be rebutted, but, until very recently, parent companies found it very hard to do so as the Commission can reject the evidence if it does not think it is sufficient.

Several Commission decisions with regard to the presumption of parental liability have been quashed by the European courts in recent months. *Air Liquide v Commission* (Case T-185/06), *Koninklijke Grolsch NV v Commission* (Case T-234/07), and *Edison v Commission* (Case T-196/06) were all quashed on procedural grounds. In *Gosselin Group v Commission* (Joined Cases T-208/08 and 209/08) the European General Court (GC) even annulled a Commission decision on substance, holding that the parent holding company did provide sufficient evidence to rebut the presumption of parental liability.

In *Elf Aquitaine SA*, the Commission found Elf Aquitaine liable for the conduct of its wholly-owned subsidiary Arkema and imposed sanctions totalling EUR 45 million jointly and severally on both companies for Arkema's involvement in the cartel. On appeal, the GC upheld the Commission decision. It held that the Commission can presume that a parent company exercises a decisive influence over its subsidiary where it owns (almost) 100 per cent of the share capital of its subsidiary. The burden to rebut this presumption is on the parent company. Therefore the parent company has to adduce substantive evidence to show that, even though it owns all or nearly all of the share capital of its subsidiary, the subsidiary acts independently in the market.

The ECJ did not disagree with the GC in that it upheld that the Commission can presume that a parent company exercises a decisive influence and that it is up to the parent company to rebut this presumption. However, the ECJ noted that Article 296 Treaty on the Functioning of the European Union requires that every legal act must contain an adequate statement of reasons. Therefore, if a Commission decision is based on the presumption of parental liability, the Commission is required to justify fully its rejection of the arguments presented by the company seeking to rebut the presumption. The ECJ concluded that the Commission's decision did not meet this requirement. Elf Aquitaine had put forward several economic, organisational and legal arguments to show that in the contested period of time its subsidiary acted autonomously on the market and did not follow instructions from the parent company. The Commission had rejected these arguments but had failed to give sufficient reasons for its decision.

While the ECJ accepted that the Commission can exercise some discretion, it held that a series of assumptions and negations, which can neither explain the grounds for the decision to the addressee, nor provides the competent court with sufficient material to exercise its power of review, cannot be considered an adequate statement of reasons.

The judgment does confirm that the Commission can rely on the presumption of parental liability, but it raises the bar for the Commission's justification for dismissing arguments presented by parent companies. It is not enough for the Commission to dismiss the body of evidence brought forward without justifying its decision clearly and credibly.

It is worth noting that the ECJ is following the example set by the GC in *Air Liquide*, *Koninklijke Grolsch*, and *Edison* to restrict the application of the presumption of parental liability on procedural grounds. This recent string of cases may indicate that the European courts will now promote a stricter set of substantive rules for parental liability.

Undoubtedly, the procedural standard for the Commission is getting tougher.

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