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Review

EU, Competition and Trade

Parents Get the Blame Again – ECJ confirms circumstances in which a parent company can be held liable for a breach of competition rules by its subsidiaries.

The European Court of Justice (ECJ) recently confirmed that a parent company may be held liable for the anti-competitive behaviour of its subsidiaries, despite the absence of any involvement by the parent company itself[1]. The ECJ ruling also clarifies the criteria to determine a parent company's liability and on which party the various burdens of proof lie. This judgment follows an appeal brought by five companies belonging to the Akzo Nobel Group against a decision made by the European Court of First Instance (CFI), itself upholding a previous Commission decision[2].

Akzo Nobel NV and its four subsidiaries constituted a single economic entity or "undertaking" within the meaning of Article 81(1).

COMMISSION DECISION

In December 2004, the Commission found that the main producers of choline chloride (a chemical which is used to supplement animal feed), including various subsidiaries of Akzo Nobel NV, were directly involved in cartel activities and had committed serious and continuous breaches of Article 81(1) EC by participating in a series of agreements and concerted practices concerning price fixing, market sharing and actions against competitors for 7 years in the 1990s.

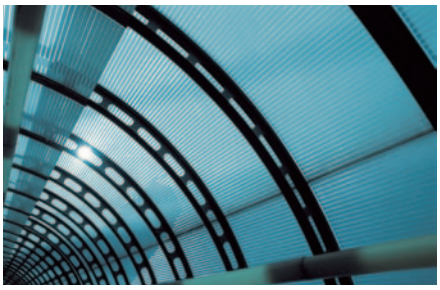
Consequently, the Commission fined Akzo Nobel NV and its subsidiaries EUR 20.99 million and held them jointly and severally liable for payment. The basis of the Commission's decision was that the five companies constituted a single economic entity, or "undertaking" within the meaning of Article 81(1), which participated in the cartel. Even though Akzo Nobel NV had not itself participated in the cartel, the fact that it held (either directly or indirectly) all of the shares in these subsidiaries, for the period of the infringement, meant, for the Commission, that it was reasonable to assume that it was in a position to exert a decisive influence over their commercial policy. The Commission further considered that Akzo Nobel NV had not provided sufficient evidence to the contrary and therefore relied on this presumption to hold Akzo Nobel NV liable to pay a proportion of the fine.

APPEAL/CFI RULING

Akzo Nobel appealed the Commission decision to the CFI and requested its annulment, essentially disputing that a significant shareholding alone in a subsidiary was indicative of a parent exerting decisive influence over its commercial behaviour. Rather, Akzo Nobel argued that in order to incur liability, a parent company must exert actual influence over the commercial policy of its subsidiaries in a strict sense, such that they lose autonomy over those decisions.

1 Case *97/08 P, Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV v Commission of the European Communities, 10 September 2009*).

2 *IP/04/1454 (Commission Decision, 9 December 2004) and Case T-112/05 (Court of First Instance Judgment, 12 December 2007).*



The burden of proof therefore falls on the parent to provide evidence before the court that procedures were in place to ensure the group companies' separate legal and economic structure.

The CFI, in considering this argument, upheld the Commission's argument that when a parent company of subsidiary that has breached competition rules holds 100% of that subsidiary's shares, there is a presumption that the parent company exerts decisive influence over that subsidiary, albeit a rebuttable one. The burden of proof therefore falls on the parent to provide evidence before the court that procedures were in place to ensure the group companies' separate legal and economic structure, and therefore commercial autonomy. Since Akzo Nobel NV was unable to demonstrate that it was sufficiently removed from its subsidiaries to establish that they did not constitute a single undertaking for the purposes of Community competition law and that they developed commercial strategy in their own account, the CFI ruled that the Commission was right in finding that Akzo Nobel NV was jointly liable. For the CFI, in this context, the companies clearly formed a single entity, acting to pursue a specific economic aim, on a long-term basis[3]. The Commission was therefore right in holding the five group companies jointly and severally liable for the anti-competitive behaviour.

ECJ DECISION

In their appeal to the ECJ, the Akzo companies argued again that the CFI should have limited its assessment of the possible influence exercised by Akzo Nobel NV on its subsidiaries' commercial policy to a strict interpretation, ie, their behaviour on the relevant market(s).

The ECJ, however, confirmed that an assessment of decisive influence cannot be made only by reference to the subsidiaries' commercial policy, but that all the other elements relating to economical, organisational, legal and structural links between those subsidiaries and their parent company should also be taken into consideration.

The ECJ did go on to explain that account will nonetheless also be taken of the ambit of the anti-competitive conduct and whether the subsidiary consistently acted to develop its own strategy without instruction or recourse to its parent. The exact factors will differ in each case and cannot therefore be set out definitively, however, existing case law shows that determining whether a parent influences pricing policy will involve an analysis of factors including sales objectives, distribution activities and cash flow.

The ECJ, in dismissing Akzo Nobel's appeal, has importantly upheld both the Commission's decision and the CFI judgment and, in particular, has supported their interpretation of the meaning of company responsibility in Community competition law. Case law has established that the concept of an "undertaking" for the purposes of competition law includes any entity engaged in economic activity, regardless of its legal status and the way that it is financed. The ECJ confirms that such economic units may consist of several legal persons, and that if any part of that entity infringes the competition rules the whole undertaking (ie, all of the legal entities) is liable to answer for that infringement.

Penalties for the infringement of Community law must fall to the legal person responsible and this allows the Commission to impose fines on the parent company without having to establish its actual involvement in the anticompetitive conduct. The CFI had therefore committed no error of law in determining the sphere in which a subsidiary may be influenced by its parent.

WHAT DOES THIS RULING MEAN IN PRACTICE?

The main consequence of this ruling is that, in order for the Commission to be able to target the parent company of cartel participants in its statement of objections, it is sufficient for the Commission to show that the parent company holds a 100% shareholding in its subsidiary for the parent company to be validly brought into the proceedings. It will then be for such parent company to prove that it does not or did not have a decisive influence over its subsidiary's conduct to escape sanction. In reality, this means that the presumption of liability of the parent company for breach of competition law by its subsidiaries based on capital links, although (theoretically) a rebuttable one, is now becoming extremely difficult to rebut.

3 *Case T-9/99, HFB v Commission of the European Communities, 20 March 2002*

FURTHER INFORMATION

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