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Acquisition of subsidiaries and group liability in respect of antitrust infringements

By judgment dated March 3rd, 2011[1], the General Court of the European Union ("General Court") ruled on the determination of the respective contributions to be paid by companies held jointly and severally liable by the European Commission for the payment of an antitrust fine imposed on them for their participation in a cartel on the market of gas insulated switchgear (GIS).

Among the companies fined were companies of the Alstom group sold to the Areva group on January 8, 2004, the cartel having terminated four months after the sale. By application of the rules applicable to the allocation of liability for antitrust practices within a group and in the event of acquisition by this group of subsidiaries, the companies acquired by Areva groups were held jointly and severally liable by the European Commission for the payment of a fine in its decision of January, 24 2007.

The sale contract stipulated a liability guarantee organizing the liability of the subsidiaries of the Alstom group sold to the Areva group arising from antitrust practices. This clause provided that Alstom should remain liable for any issue arising from the conduct of the transferred subsidiaries prior to the sale. The clause was precisely intended to cover the risk to have the Areva subsidiaries be held liable for an infringement committed during the pre-sale period and ordered to pay a fine.

For the Court, such a clause can only have a strictly limited enforceability in antitrust matters: "*Article 81 EC and, by analogy, Article 53 of the EEA Agreement, are public policy provisions, essential for the accomplishment of the tasks entrusted to the Community and to the EEA, with the result that the nature of the liability and the penalty incurred by companies, where there has been an infringement of those provisions, cannot be left freely to those companies.*"

Already in its decision, the European Commission had considered that this clause, that could be relevant under civil law, was not when determining who should be held liable for antitrust practices and could not in any case affect the European Commission's possibility to find companies jointly and severally liable.

The principle of a joint and several liability of Alstom and of it former subsidiaries that had been transferred to

the Areva group was therefore confirmed. In concrete terms, Alstom was fined EUR 53,550,000 for which it was jointly and severally liable with a subsidiary of Areva, namely Areva T&D SA (formerly known as Alstom T&D SA). Of this amount, this subsidiary was fined EUR 25,500,000 for which it was jointly and severally liable with Areva, Areva T&D Holding (the parent companies) and Areva T&D AG (another subsidiary of Areva, formerly known as Alstom T&D AG).

It is then on the issue of the determination of the respective contributions of the liable parties to the payment of the fine that the discussion focused.

The applicants alleged infringements of the rules on joint and several liability for the payment of fines, drawing the European Commission's attention to the existing uncertainty as regards the payment of the fine, the determination of which debtor is obliged to pay and the legal position of other debtors who are jointly and severally liable.

Questioned on this issue, the Commission answered that, where it imposes a fine for which a number of companies are jointly and severally liable, without giving further detail or indication in the operative part of the decision, it is not seeking to determine the issue of the respective contributions to the payment of that fine by the various debtors. Then, at the hearing, the Commission changed its mind and took the view that joint and several liability for an infringement of competition law is presumed to be liability in equal shares where the operative part of the decision finding that liability does not specify differently.

Of course, the applicants challenged the existence of such a presumption.

The Court decided that "*in the absence of a contrary indication in the decision by which the Commission has imposed a fine jointly and severally on a number of companies for an infringement by an undertaking, that decision attributes that infringement to them in equal measure*".

In practical terms, it means that the Commission determined, in the contested decision, the respective share of liability which Areva T&D SA and Alstom bore for the participation of the company in question in the infringement for the period from 7 December 1992 to 8 January 2004 and, therefore, their respective shares of the amount of the fine for which they were found jointly and severally liable by the Commission: "*In the absence of a contrary indication in the contested decision, Areva T&D SA and Alstom incur equal liability by reason of the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, from which it follows that their respective share in the amount of the fine for which they are jointly and severally liable is, in principle, 50%*".

The consequence of this presumption is harsh, at least from the new owner's perspective: although it is not legally liable pursuant to the sale contract for the fine related to the anti-competitive conduct of its subsidiary prior to its acquisition, it will suffer financial consequences with the previous owner up to 50%.

It is even harsher as the cartel to which the Alstom's subsidiaries took part since 1988 ended only four months after the Alstom group's activities in question were transferred to the Areva group.

[1]GCEU, March 3, 2011, Areva E.A. vs. Commission, C-117/07 and C-121/07 (Other judgments rendered on this cartel: T-110/07 and Joined cases C-122/07 to C-124/07)