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Parental liability presumption rebuttal

In a decision dated June 16, 2011, the General Court of the European Union ("General Court") annulled the European Commission's ("Commission") decision sentencing a cartel in the bleaching chemicals market, on the basis of its duty to state reasons when rejecting the elements of proof produced by the parent company to rebut the presumption of decisive influence on its wholly-owned subsidiary[1].

In assessing the lawfulness of the Commission's refusal to rebut the presumption that Air Liquide exercised a decisive influence over the conduct of its wholly-owned subsidiary Chemoxal, the General Court sanctioned, on a procedural ground, the Commission's lack of consideration. Even though the General Court does not assess the produced evidence on the merits, its ruling should contribute to revive the discussions on the rebutting of the presumption. From now on, the Commission may no longer simply declare, as it did in the challenged decision, that the elements of proof are not "sufficient". To avoid any possible annulment by the General Court, it should be careful to provide the reasons why such elements do not permit to rebut the presumption.

The presumption

Since its recognition in the Stora Kopparbergs and Akzo Nobel cases, the presumption that a parent company that owns 100% of the shares of its subsidiary exercises a decisive influence over the commercial policy of the subsidiary, thereby enabling the Commission to hold liable the parent company for its subsidiary's unlawful conduct, is highly discussed. This presumption, systematically applied by the Commission, is quite tough since it is sufficient for the Commission to prove that the parent company wholly owns the subsidiary to hold it liable for the subsidiary's conduct.

On this specific issue, the applicants' argument according to which additional evidence of the lack of autonomy should be provided to apply the presumption is easily rejected by the General Court, which merely applies the Court's ruling in Akzo Nobel[2]. The Court, in this case, clearly adopted a firm position on this issue that was highly discussed at the time, i.e. was the ownership of the entire capital sufficient to apply the presumption or should additional evidence of the lack of autonomy be provided?

Faced with this situation, the only option for the parent company is to fight the presumption by providing evidence that the subsidiary acted autonomously, evidence relating to "*the economic, organizational and legal links*" which tie them. The very intricacy is that neither the Commission nor the judge has ever provided guidance on what it expected in terms of proof.

Until now, and even if the presumption is rebuttable, no company has succeeded in rebutting the presumption by providing counter-evidence[3]. To such an extent that it could be considered as impossible to produce counter-evidence which amounts in practice to proving a negative fact.

A rebuttable presumption

With the outcome of the commented case, there is a hope to have some day the presumption rebutted when significant evidence relating to the links that tie the parent company to its subsidiary is provided. With this reminder of the Commission's duty to state reasons and the judicial review by the General Court, the usual arguments exchanged by the parties on the rebutting of the presumption could revive.

In the commented case, Air Liquide happened to provide a great deal of significant and documented proofs – from the General Court's point of view – that should have been considered by the Commission but that were not, and in particular:

- the very specific character of Chemoxal's business compared to the group's other activities;
- the absence of links between the management and the personnel staff of the companies concerned;
- the wide scope of the powers of the subsidiary's management team;
- the fact that the subsidiary had its own services/departments concerning its commercial activities;
- the fact that the subsidiary autonomously developed strategic projects.

In the challenged decision, the Commission only stated, after having listed these elements, that they were not sufficient to rebut the presumption, referring to additional indications of the exercise of a determinant influence (appointment of members of the board of directors and image of the company in the eyes of third parties).

In doing so, the Commission failed in its duty to state the reasons why it refused to consider the produced evidence. As pointed out by the General Court, even if the Commission does not have to discuss every proof provided (in particular those which are "*manifestly irrelevant or insignificant or plainly of secondary importance*"), it has the obligation to discuss any proof that is relevant for considering the subsidiary's autonomy. It is the logic consequence of the rebuttable nature of the presumption, which enables the opponent to rebut it by providing evidence to the contrary.

In these circumstances, the Commission's failure to take a stance on the substantiated evidence put forward is considered as a breach of its duty to state reasons and provides a ground for annulment of the decision.

It is the first time that an applicant obtains from the judge the annulment of a Commission's decision on a ground related to the rebutting of the presumption, on a pure procedural ground however. If the General Court's ruling is not intended to facilitate in the future the production of elements proving that a subsidiary is autonomous, it will nevertheless force the Commission to explain in details its reasoning that leads systematically to the rejection of these elements of countering evidence, knowing that these reasons could be scrutinized by the judge. In its ruling, the General Court disclosed valuable information by pointing out the produced evidence that was relevant and significant in the case and that should have been subject to an in-depth review by the Commission.

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[1] GCEU, June 16, 2011, L'Air Liquide / Commission, case. T-185/06.[2] EUCJ, September 9, 2009, Akzo Nobel / Commission, case. C-97/08.

[3] In a ruling issued the same day by the General Court in the cartel on the international removals market, a company succeeded in rebutting the presumption (Joined Cases T-208/08 and T-209/08, Gosselin Group and Stichting Administratiekantoor Portielje v Commission, June 16, 2011). However, this ruling was given ex abundanti cautela, after the Court decided that the company considered as a parent company by the Commission was not an undertaking within the meaning of EU law.