McDermott Will & Emery

Brussels Brief - February, 2011

February 2011

KEY DEVELOPMENTS

Parental Liability – Another Piece in the Puzzle
General Química v Commission

In recent years, the highest courts in the European Union have consistently held that parent companies may be held liable for infringements of competition law committed by their subsidiaries – even if the parent did not participate in the infringement. Not only may a parent company be found liable for such infringements, liability is automatically imputed to the parent if the subsidiary is wholly owned. And, while EU courts have ruled that a parent company faced the presumption of liability for the conduct of its wholly owned subsidiary can rebut the presumption, no case exists in which a parent company has actually done so.

This has led to an understandable concern that the so-called "rebuttable" presumption of liability for parents of wholly owned subsidiaries was, in fact, irrebutable. A decision issued on 21 January 2011 by the European Court of Justice (ECJ), however, has helped to clarify the issue. In particular, the ECJ clarified that, even though a parent company may be presumed to be liable for the conduct of its wholly-owned subsidiary (whether directly or indirectly held), the parent company may also adduce evidence to rebut this presumption.
This decision, styled Case C-90/09, General Química and Others v. Commission, [2011] ECR I-0000, involved an appeal against a fine imputed to a parent company for the conduct of its subsidiaries in the European Commission's decision in the Rubber Chemicals cartel case. (See Case COMP/F/38.443, Rubber Chemicals, Commission Decision of 21 December 2005). In particular, the parent, (Repsol YPF SA), its direct, wholly-owned subsidiary (Repsol Química SA "Repsol Química")) and an indirect wholly owned subsidiary (General Química) argued that imputing liability to a parent company/-ies for the conduct of Repsol-Indirect Sub in effect introduced a strict liability regime, which is contrary to the principle of personal responsibility.

The ECJ agreed, overturning the reasoning of the lower court. (See Case T-85/06, General Química v. Commission, [2008] ECR II-00338). The case provides cold comfort, however, because although it confirms that the presumption of liability can be rebutted, it provides little guidance on how or what evidence is required to rebut the presumption.

In General Química, the ECJ first reiterated that the presumption of parental liability applies when a subsidiary is wholly owned, whether directly or indirectly. The ECJ then ruled that neither the Commission nor the lower court had considered the parties' arguments that General Química had, in fact, acted autonomously on the market (and

therefore was not controlled by its parents). The Court further ruled that neither the Commission nor the lower court had given sufficient reasons for rejecting the parties' arguments.

The ECJ then analysed the parties' arguments and found that General Química did not act autonomously on the market from its parents for three reasons. First, Repsol Química's board of directors intervened to a significant extent in the essential strategic matters of General Química. Second, the sole director of General Química, who was designated by Repsol Química, acted as a link between these two entities. Finally, information on the implementation stage of strategic and commercial plans was exchanged between the management of Repsol Química and General Química. The ECJ thus decided that imputing liability to the parents of General Química was proper, even if it disagreed with the Commission and the lower court on the analysis.

The ECJ's decision in General Química shows that it is still extremely difficult for parent companies to extricate themselves from liability originating in the anticompetitive behaviour of their directly or indirectly wholly owned subsidiaries. It is nevertheless comforting that the Court will require the Commission to analyse parties' arguments advanced for the purpose of rebutting the presumption of liability. In other words, General Química is useful in the sense that the Court has at least confirmed that the presumption of liability is, in fact, rebuttable. Nevertheless, companies with subsidiaries operating in the EU would be well-served to consider reinforcing their compliance programmes throughout their groups. Reinforcing compliance is more likely to reduce competition law risks for parent companies than, for example, a strategy of distancing itself from its subsidiaries. As the General Química case shows once more, it is still next to impossible for a parent company to rebut liability for its subsidiary's conduct.