Presumption of Parental Liability Revisited

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The European General Court found on 15 September 2011 that the European Commission can only rely on the presumption of liability of a parent company for a wholly owned subsidiary if it included an adequate statement of reasons in its decision explaining that it indeed relied on that presumption as the basis for the liability of the parent company. This judgement is part of a recent trend to somewhat restrict the apparently boundless liability of parent companies.

On 15 September 2011, the European General Court (GC) in *Koninklijke Grolsch NV v Commission* (Case T 234/07) annulled a European Commission decision which held a parent company liable for an antitrust infringement of a subsidiary. This annulment comes just months after the GC in *Air Liquide v Commission* (T-185/06) for the first time quashed a Commission decision with regard to the presumption of parent liability.

The judgment deals with a number of important issues concerning the Commission's cartel enforcement, e.g., the concept of a "single and continuous" infringement in a complex cartel case and the evidentiary standard to establish an infringement in such a case. Most importantly, it limits the application of the presumption of parental liability in European antitrust law.

In a 2007 decision, the Commission levied fines of more than EUR 273 million on Koninklijke Grolsch NV, amongst others, for participation in a cartel regarding price fixing and customer allocation in the period between 1996 and 1999. The Commission's decision was only directed to Koninklijke Grolsch NV. However, the documents concerning the meetings between the involved parties were, according to the GC, not sufficient evidence to establish the direct participation of Koninklijke Grolsch NV in the cartel, but only showed that employees of its wholly owned subsidiary, Grolsche Bierbrouwerij Nederland BV, participated in the cartel meetings. On appeal, the GC stressed that there is a (rebuttable) presumption for wholly owned subsidiaries as recently confirmed by the Court of Justice in *Akzo Nobel v Commission* (Case C-97/08). Therefore, the Commission is right to presume that a parent company can exercise decisive influence over the conduct of the subsidiary, and also that the parent company does in fact exercise this decisive influence, which is a sufficient basis for the liability of the parent company.

However, the GC found that the Commission could not rely on this presumption in the case at hand. The GC annulled the decision, explicitly holding that the Commission must include an *adequate statement of reasons* with respect to each of the addressees, in particular those which, according to the decision, must bear the liability for that infringement. Although in the case of a wholly owned subsidiary it is sufficient for parental liability to show that 100 per cent of the capital is held by the parent company, the Commission must say so. Failure to do so deprives the

parent company of the possibility to rebut the presumption that it actually exercised decisive influence over the conduct of its subsidiary. Such a Commission decision must not stand.

The GC found that the Commission in its decision did not distinguish between the parent company and the subsidiary. Instead, the Commission decision stated that Koninklijke Grolsch NV had participated in the alleged cartel and the decision was only directed to Koninklijke Grolsch NV without distinguishing it from its subsidiary, Grolsche Bierbrouwerij Nederland BV, the employees of which participated in the cartel meetings. The name of the subsidiary was mentioned nowhere in the document. The Commission only referred to the "Grolsch Group" and effectively treated the parent and the subsidiary as one company. In particular, the Commission made no reference to the economic, organisational and legal links between the parent company and its subsidiary, and thus gave no reason why the parent company was held liable and did not expressly rely on the rebuttable presumption of parent liability.

The irony of the case is that the conditions for the well-established presumption of parent liability were clearly fulfilled, but the Commission could not rely on this presumption because it failed to address the corporate structure of what it referred to as the "Grolsch Group". Usually, the Commission would also address the decision to both the parent and the subsidiary. It remains unclear why it changed its usual practice in this case. For these reasons, the case is likely to remain an aberration. But in the wider picture, it is worth noting that the GC has for the second time in the span of a few months restricted the application of the presumption of parental liability for procedural reasons. At last, the GC appears to be willing to establish stricter standards for parental liability. It will be interesting to follow the further evolution of this area of law, in particular the question whether the European courts will also move towards a stricter substantial standard for parental liability.