Parents Are Liable for Their Children: Presumption of Parental Liability Under EU Antitrust Law

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Under EU antitrust law, parent companies are presumed liable for antitrust infringement of their wholly owned subsidiaries. While this presumption is rebuttable, it is unclear what a company must do to rebut it successfully. The recent Air Liquide judgment of the General Court of the European Union marks the first time that a company escaped the presumption of liability, if only for procedural reasons. The judgment also sheds some light on the arguments that may work for a parent company.

Under EU antitrust law, parent companies can be jointly and severally liable for antitrust infringements committed by their subsidiaries. In this case, the parent company is also a direct addressee of the European Commission's fining decision. This has far-reaching consequences for parent companies. Given the extraordinary fines amount imposed by the European Commission, this is not a comfortable situation to be in.

The concept of parental liability in EU antitrust law was first established in Imperial Chemical Industries v Commission (Case 48/69) where the European Court of Justice (ECJ) held that the separate legal personality of the subsidiary does not exclude the possibility of imputing its conduct to the parent company. The ECJ held further that a company can exercise decisive influence on the conduct of a wholly owned subsidiary and, if it does, it is jointly and severally liable for any antitrust infringement of the subsidiary. In AEG-Telefunken v Commission (Case 107/82), the ECJ held that there is a rebuttable presumption that a company does in fact exercise that decisive influence on the conduct of its wholly owned subsidiary.

However, the ECJ seemed to require more than a 100 per cent shareholding as evidence in Stora Kopparbergs Bergslags v Commission (Case C-286/98). This led to uncertainty concerning the level of evidence required for the presumption of parental liability. In subsequent decisions, the ECJ rejected this reading of Stora. In Akzo Nobel v Commission (Case C-97/08), the ECJ clarified that in cases of a 100 per cent subsidiary, first, the parent company can exercise decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary. The ECJ said that "it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market."

This was confirmed in recent judgments, such as General Quimica (Case C-90/09) and Air Liquide (Case T-185/06). Therefore, it is settled case law that the Commission only needs to prove the 100 per cent shareholding for the presumption of parental liability to apply. It is then for the parent company to seek to rebut the presumption by adducing sufficient evidence that the subsidiary acted independently on the market.

A Rebuttable Presumption of Parental Liability

In Akzo Nobel and General Quimica, the ECJ made clear that the presumption of liability was rebuttable. However, the Court did not give any precise guidance how and by virtue of which evidence the presumption could be rebutted. The Court ruled that "in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken . . . of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list."

In Air Liquide, the General Court for the first time annulled a Commission decision with regard to the presumption of parent liability. The Commission had adopted a decision against Chemoxal for its participation in a cartel and had held its 100 per cent parent company, Air Liquide, jointly and severally liable for the infringement. Air Liquide appealed against the Commission's decision and argued that the Commission had not taken into account the evidence which Air Liquide had presented in order to show that it did not "exercise any influence over the commercial policy" of Chemoxal and that Chemoxal "acted independently on the market."

The General Court emphasised that the presumption of liability is rebuttable and therefore the Commission is under an obligation to provide a statement of reasons why it considers the evidence submitted as insufficient to rebut the presumption. The Court concluded that the Commission had failed to adopt a position on the evidence and counter-argument adduced by Air Liquide in rebuttal of the presumption that Air Liquide exercised decisive influence over the conduct of Chemoxal.

Relevant and Significant Evidence for the Rebuttal of the Presumption of Liability

The General Court annulled the Commission's decision in Air Liquide on purely procedural grounds without assessing the evidence put forward by Air Liquide on the merits. However, the Court stated that while the Commission is not obliged to adopt a position on all the arguments relied on by the parties, this did not concern the arguments presented by Air Liquide because they were not "manifestly irrelevant or insignificant or plainly of secondary importance". It can be concluded that the evidence presented by Air Liquide was indeed relevant and significant.

The General Court focused on two points. First, Air Liquide relied on "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 of the companies concerned, a wide definition of the powers of the subsidiary's management, the fact that the subsidiary had its own services concerning its commercial activities and its autonomy in relation to strategic projects" (free translation). Second, Air Liquide backed its statements with concrete evidence.

In particular, the following points can be considered as relevant and significant evidence for the rebuttal of the presumption of liability:

- No executive employee of Chemoxal was a member of the board of directors or of any of the governing bodies of Air Liquide. This argument was backed by the submission of payment slips and other documents.
- The director of Chemoxal and the executive director had far-reaching powers to act in the name of Chemoxal. This was backed by minutes of the meetings of the board of directors and circulars.
- Chemoxal had its own units for supply, marketing, accounting, data and human resources, and even had its own research unit with an independent administration. Services provided to Chemoxal by units of Air Liquide and premises rented by Chemoxal from Air Liquide were invoiced. Air Liquide provided the Commission with invoices and the tenancy agreements.
- Chemoxal managed its subsidiaries independently, and links with Air Liquide were only based on tax reasons.
- Chemoxal's business was clearly distinguished from Air Liquide's, and Chemoxal acted independently on the market. To this end, Chemoxal was solely responsible for pricing, strategic business planning, drawing up the budget and managing the relationship with its customers. To back these arguments, Air Liquide submitted circulars, correspondence with customers and internal memos.
- CEFIC, a trade association, regarded Chemoxal as an independent company, which was supported by minutes of meetings.
- Business documents were created in Chemoxal's name. Chemoxal only used Air Liquide's trade name to benefit from its reputation.
- All employees accused of having participated in cartel meetings were employed by Chemoxal and not by Air Liquide, and the Commission file does not contain any evidence of instructions given by Air Liquide to Chemoxal.

Conclusion

Parent companies which are held liable for the infringement of EU antitrust rules by whollye owned subsidiaries must present relevant and significant evidence to rebut the presumption of parental liability. The judgment in Air Liquide is the first time the European Courts have provided guidance on the kinds of evidence that may help the parent company to escape liability for its subsidiaries.

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