

Dutch beer cartel

Emerging restrictions on presumed parental liability?

by **Philipp Werner***

In *Koninklijke Grolsch NV v Commission* Case T-234/07 15 September 2011, the European General Court (GC) annulled the European Commission's decision in the Dutch beer cartel case in which the Commission had fined Koninklijke Grolsch NV for its alleged participation in a cartel. The GC found that the Commission can only rely on the presumption of liability of a parent company for a wholly-owned subsidiary if it includes an adequate statement of reasons in its decision explaining that it had relied on that presumption. This decision can be seen as part of a new trend against the presumption of parental liability.

Under EU antitrust law, parent companies can be jointly and severally liable for antitrust infringements committed by their subsidiaries and are then direct addressees of the Commission's fining decision. Given the extraordinary fines imposed by the European Commission – the fines imposed on Koninklijke Grolsch NV in relation to the beer cartel case totalled almost €32m – this has far-reaching consequences for parent companies.

Parental liability

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 attributing its conduct to the parent company.

In *Akzo Nobel v Commission* Case C-97/08, the ECJ said that in the case of a 100% subsidiary, the parent company can exercise decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does exercise such decisive influence. 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.”

The European Commission has in numerous cases relied on this presumption of parental liability and imposed fines on parent companies for cartel infringements by their subsidiaries. Historically, the European courts have not been very enthusiastic in limiting the scope of parental liability. This may now change after a recent series of judgments.

Background to the GC's judgment

In its 2007 decision relating to the Dutch beer cartel case, the Commission imposed a multimillion fine on Koninklijke Grolsch NV for participation in a cartel regarding price-fixing and customer allocation in the period between 1996 and 1999.

The Commission's decision was directed at Koninklijke Grolsch NV, rather than its wholly-owned subsidiary, Grolsche Bierbrouwerij Nederland BV. However, according to the GC, the documents concerning the meetings between the involved parties were not sufficient evidence to establish the direct participation of Koninklijke Grolsch NV in the cartel; they showed only that employees of 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 confirmed by the ECJ in the *Akzo Nobel* case.

However, the GC found that the Commission could not rely on this presumption in this case and annulled its decision. It held that the Commission did not 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% of the capital is held by the parent company, the judgment shows that the Commission must also state explicitly that it wants to rely on the presumption and that the conditions for the presumption are fulfilled.

The Commission's decision did not make these required statements. On the contrary, the Commission did not distinguish between the parent company and the subsidiary. Instead, its decision stated that Koninklijke Grolsch NV had participated in the alleged cartel and 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 not mentioned anywhere in the document; the Commission referred only 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. It thus gave no reason why the parent company was held liable, nor did it make clear that it was relying on the rebuttable presumption of parent liability.

Ironically, the conditions for the well-established presumption of parent liability were, in fact, fulfilled in this case. The Commission could not rely on this presumption simply because it failed to address the corporate structure of what it referred to as the “Grolsch Group”. In addition, the Commission would usually address the decision to both the parent and the subsidiary; it is unclear why it changed its usual practice in this case. For these reasons, this may remain a singular case. It is, however, worth noting that the GC has, in recent months, restricted the application of the presumption of parental liability for procedural and other reasons in a number of cases. So the *Grolsch* judgment must be considered part of a larger trend rather than the exception.

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Restrictions on liability

In the recent *Air Liquide* judgment Case T-185/06, a company escaped the presumption of liability on procedural grounds because the Commission had failed to adopt a position on the evidence and counter-arguments adduced by Air Liquide in rebuttal of the presumption of parental liability. Together with the GC's judgement in *Koninklijke Grolsch*, these cases indicate a positive new trend in limiting the presumption of parental liability on procedural grounds. In addition, the *Air Liquide* judgment indicates which arguments would work for a parent company aiming to refute the presumption of parental liability.

In *Gosselin Group* Case T-208/08, the parent demonstrated successfully that it did not exercise a decisive influence over its subsidiary. In *Elf Aquitaine* Case C-520/09P, the ECJ found that

neither the Commission nor the GC had been able to demonstrate that the evidence submitted by the parent company was not sufficient to refute the presumption of parental liability. The parent company thus successfully rebutted the presumption of its liability for an antitrust infringement of its subsidiary.

Taken together, these cases show that the European courts at last appear to be willing to apply a more strict interpretation of the hitherto apparently boundless liability of parent companies for cartel infringements by their subsidiaries. The Commission will have to be more careful in future cases when it wants to establish the liability of a parent company. Companies are well advised to devote considerable resources in their attempts to refute the presumption of parental liability, as this has, at last, become a promising strategy.