EUROPEAN COURT OF JUSTICE CONFIRMS THAT AKZO PARENT COMPANY IS LIABLE FOR SUBSIDIARY'S ANTITRUST VIOLATION

September 15, 2009

To Our Clients and Friends:

A decision handed down by the European Court of Justice ("ECJ") on September 10, 2009, (Case C-97/08 P) confirms that parent companies are subject to a rebuttable presumption of liability for violations of EU competition law committed by their wholly-owned subsidiaries.

In 2004, the European Commission ("Commission") fined Akzo Nobel N.V. ("Akzo"), jointly and severally, with four of its subsidiaries, €20.99 million for participating in a cartel in the market for choline chloride, a Vitamin B4 feed additive. Akzo itself did not produce or sell choline chloride and did not itself take part in the cartel's activities. However, because Akzo was able to exercise decisive influence over the commercial policy of its wholly-owned subsidiaries, the Commission assumed that it in fact did so and decided that the five Akzo group companies, including Akzo itself, constituted a single economic entity that participated in the cartel.

Akzo appealed to the Court of First Instance ("CFI"), arguing that its subsidiaries determined their commercial policy largely on their own and that the Commission was therefore wrong to assume a decisive influence exerted by Akzo. The 2nd chamber of the CFI dismissed the appeal and found that the EU antitrust rules apply to economic entities rather than legal persons. In case of a 100% shareholding in a subsidiary, there is a rebuttable presumption that parent and subsidiary form a single economic entity. With its decision in Akzo, the 2nd chamber of the CFI seemed to contradict an earlier decision by the 5th chamber, ruling that a 100% shareholding is not sufficient to attribute parent liability to a subsidiary, but that additional indicia must be shown ("100% plus x" rule).

In its decision of September 10, 2009, the ECJ upheld the CFI's Akzo decision in its entirety, implicitly rejecting the 100% plus x rule.

The attribution of liability to parent companies can have a significant impact on the calculation of a fine for an antitrust infringement. In particular, under EU law, fines are capped by 10% of an undertaking's total revenues in the preceding business year. In cases of group liability, the 10% cap will be determined on the basis of the group's worldwide revenues and the fine can thus exceed 10% of the revenue of the subsidiary or subsidiaries which committed the infringement.

In practice, cases in which companies were able to rebut the presumption of liability are extremely rare. The EU courts and the Commission do not confine their analysis to those

aspects of commercial policy (*e.g.*, distribution strategy and pricing) which are directly relevant to the specific case, but also consider the general relationship between parent and subsidiary, *i.e.*, their economic, organizational and legal links.

The Commission welcomed the judgment, stating that it is "important because it confirms the Commission finding that a parent company may be held liable for anti-competitive behaviour of its subsidiaries even if it did not itself participate in those activities."

It should be observed that this presumption is contrary to the rule in U.S. courts where – despite the "Copperweld" rule that a parent and wholly-owned subsidiary cannot conspire together – parent entities are not generally liable for the antitrust violations of their subsidiaries, including wholly-owned subsidiaries, unless the parent is involved in the conduct or the parent has conducted its affairs without due regard to the distinct corporate entity of the subsidiary, such as would expose the parent to liability on a veil-piercing theory.

Thus, for groups active in the EU, the ECJ's Akzo decision serves as an important reminder that violations of EU antitrust rules may have dramatic consequences that should be addressed proactively:

- Preventing antitrust problems by means of an effective compliance program is always less expensive than managing problems after they arise.
- Exposure to fines may be avoided or reduced by applying for leniency. However, full immunity is only available for the first company to provide comprehensive information.
- Internal investigations may shed light on potential antitrust exposure and also help to create the groundwork for effective cooperation with the antitrust authorities, as is required in order to benefit from leniency programs.

Please feel free to contact us with any questions.

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