INFORMATIVE NOTE

EU AND COMPETITION LAW PRACTICE AREA

GENERAL COURT UPHOLDS COMMISSION DECISION CONSIDERING PARENT COMPANIES OF SUBSIDIARY INVOLVED IN CARTEL INFRINGEMENTS LIABLE FOR PAYMENT OF FINE

On 14 July the General Court delivered two judgments[1] upholding the Commission's decision[2] regarding the "bleaching agents" cartel. With this ruling, the court confirmed that the imputability of the unlawful conduct of their subsidiary to the two parent companies applied even in case where the parent company holds (only) virtually all the capital in the subsidiary.

By decision of May 2006 the Commission imposed fines totalling €388.13 million on a number of companies for their participation in a cartel on the market for hydrogen peroxide and sodium perborate. Amongst the companies penalised were Arkema France SA and its parent companies, Elf Aquitaine SA and Total SA.

Arkema was ordered to pay this fine for its participation, between May 1995 and December 2000, in a cartel consisting mainly in exchanging confidential information, controlling production, allocating market shares and customers and fixing prices on the market for hydrogen peroxide and sodium perborate, bleaching agents used in the paper industry. Elf, which held more than 96% of Arkema's capital throughout the infringement period, was held jointly and severally liable for payment of the fine in the amount of €65.1 million; Total, which from April 2000 to 31 December 2000 controlled over 99% of Elf's capital, was held liable for the payment of €42 million.

The three companies attempted to demonstrate the non-involvement of Total and Elf. The General Court found that their arguments consisted of mere "assertions" that were manifestly insufficient to rebut the presumption of imputability to the parent company, not being substantiated by specific evidence of the independence of their subsidiary. In this respect, the General Court highlighted that, in accordance with settled case-law, there is a presumption that a subsidiary which is wholly-owned by its parent company does not decide independently upon its own conduct on the market. In such a situation, the Commission is able to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement, unless the parent company adduces sufficient evidence to rebut the presumption.

In the judgments of 14 July, the General Court extended such presumption to the case where the parent company holds virtually, but not all, the share capital in the subsidiary.

As Arkema, Total and Elf Aquitaine failed to prove that Arkema's behaviour in a cartel was determined independently, and that the latter two firms, as the successive parent companies, should be exonerated from joint liability for payment of the fine imposed by the European Commission in May 2006, the General Court rejected the appeal and upheld the initial fine of €78.66 million applied to those companies.

1 Judgments T-189/06 and T-190/06.

2 Commission Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.620 – Hydrogen peroxide and perborate), a summary of which is published in OJ 2006 L 353, p. 54.

Ricardo Oliveira
(ricardo.oliveira@plmj.pt)

Tais Issa De Fendi
(tais.fendi@plmj.pt)

PLMJ
SOCIEDADE DE ADVOGADOS, RL
A.M.PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE E ASSOCIADOS