INFORMATIVE NOTE

EU AND COMPETITION LAW

COURT OF JUSTICE ANNULS GENERAL COURT'S *ELF AQUITAINE* AND *ARKEMA* RULINGS

By decision of 19 January 2005[1], the European Commission imposed fines on several companies, including Elf Aquitaine SA and its subsidiary at the material time, Arkema SA (formerly Atofina SA), relating to a cartel on the market for monochloroacetic acid[2].

According to the Commission, from 1984 to 1999 the members of the cartel were parties to an agreement to maintain their market shares through a volume and customer allocation system. They also exchanged information on prices and examined, at regular multilateral meetings, actual sales volumes and prices so as to monitor the implementation of agreements.

The Commission imposed a fine of €45 million, jointly and severally, on Elf Aquitaine and Arkema. In addition, it imposed an increase for repeated infringement on Arkema alone, by virtue of its participation in an earlier cartel[3], since, at the time of that first infringement, Arkema was not yet controlled by Elf Aquitaine. Thus, Arkema was also fined, individually €13.5 million.

The companies brought two separate actions before the Court of First Instance (hereinafter CFI, currently General Court) seeking annulment of the Commission's Decision or a reduction of the amount of the fines imposed on them.

By two judgments delivered on 30 September 2009[4], the CFI rejected all the arguments put forward by Elf Aquitaine and Arkema. The CFI held, inter alia, that where all or nearly all of the share capital of a subsidiary is owned by its parent company, the Commission is entitled to presume that the parent company exercises a decisive influence over the commercial policy of its subsidiary. In order to rebut that presumption, the CFI said, the burden is on the parent company to adduce adequate evidence to show that its subsidiary acts independently on the market. The CFI thus considered that the Commission was correct in considering that joint and several liability for the infringements committed by Arkema should be imputed to Elf Aquitaine, since it had failed to adduce sufficient evidence.

By two separate appeals, Elf Aquitaine and Arkema appealed to the Court of Justice, asking the Court to set aside the judgments of the CFI or reduce the amounts of their fines. The Court of Justice decided the cases by judgments of 29 September 2011[5].

[1] Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA).
[2] A substance used as a chemical intermediate, in particular in the manufacture of detergents, adhesives, textile auxiliaries and thickeners in food products, pharmaceuticals and cosmetics.
[3] See Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [101 TFEU] (IV/31865-PVC) (OJ 1994 L 239, p. 14).

[4] See Case T-168/05 *Arkema SA v Commission* and Case T-174/05 Elf Aquitaine SA v Commission.
[5] Case C 520/09 P *Arkema SA v Commission* and C-521/09 P *Elf Acquitaine* SA v Commission.

PLMJ
SOCIEDADE DE ADVOGADOS, RL

A.M.PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE E ASSOCIADOS

As regards Elf Aquitaine, the Court noted that where a decision in a competition law case relates to several addressees and concerns the liability for an infringement, it must include an adequate statement of reasons with respect to each of the addressees. Thus, the Court stated, in the case of a parent company held liable for the illicit conduct of its subsidiary, such a decision must, in principle, contain a detailed statement of reasons justifying the imputability of the infringement to that company.

The Court stated that, as regards more particularly a Commission's decision which is based exclusively, with regard to certain addressees, on the presumption of the actual exercise of a decisive influence over the conduct of a subsidiary, the Commission is in any event required - if that presumption is not to be rendered irrebuttable in practice - to set out adequate reasons why the facts or law relied upon were not sufficient to rebut that presumption. According to the Court, the Commission's duty to give reasons for its decisions in this regard results, inter alia, from the rebuttable nature of the presumption, and rebuttal of such a presumption requires interested parties to adduce evidence of economic, organisational and legal links between the companies concerned.

According to the Court, in view of all the specific circumstances of the case, it was incumbent on the CFI to give particular attention to the question whether the Commission's decision contained a detailed statement of reasons as to why the evidence submitted by Elf Aquitaine was not sufficient to rebut the presumption of liability applied in said decision.

It is true that, according to the Court, the Commission is not bound, in this context, to address all the elements put forward for this purpose or to address those who may be manifestly disproportionate, deprived of any significance or clearly secondary.

However, the Court found that, in this case, the Commission had not given sufficiently reasoned answers to several of the arguments put forward by Elf Aquitaine in order to establish that Arkema determined its conduct on the market independently.

The Court held that the statement of reasons for the Commission's Decision on those arguments consisted solely of a series of mere assertions and negations, which were repetitive and by no means detailed. In the particular circumstances of the case and in the absence of further details, the Court considered that series of assertions and negations was not such as to enable Elf Aquitaine to ascertain the matters justifying the measure adopted or to enable the court having jurisdiction to exercise its power of review.

For example, owing to the way in which the Commission's Decision was worded, it was very difficult, or even impossible, to know whether the body of evidence adduced by Elf Aquitaine to rebut the presumption applied to it by the Commission was rejected because it was insufficient to carry conviction or because, as the Commission saw it, the mere fact that Elf Aquitaine owned nearly all the share capital of Arkema was sufficient for liability for the conduct of Arkema to be imputed to Elf Aquitaine, irrespective of the evidence adduced by the latter in response to the Commission's allegations.

In said circumstances, the Court set aside the judgment of the CFI and also the Commission's Decision insofar as it imputed to Elf Aquitaine the infringement in question and imposed a fine on it.

With regard to Arkema, the Court rejected all its arguments. The Court held, inter alia, that the Commission did not breach the principle of proportionality when calculating the fines it imposed on Arkema.