

ANTITRUST ALERT

PARENT COMPANIES FACE REBUTTABLE PRESUMPTION OF LIABILITY IN EUROPE FOR THE ANTICOMPETITIVE CONDUCT OF THEIR WHOLLY OWNED SUBSIDIARIES

A recent opinion by an advocate general of the European Court of Justice highlights the markedly different standards applied in the United States and Europe for determining when a parent corporation can be held liable for the actions of its subsidiaries. The opinion issued last month, *Akzo Nobel v. Commission of the European Communities*,¹ arose in the context of the choline chloride (vitamin B4) price-fixing cartel. Under European competition law, a parent corporation and its subsidiaries are generally treated as a single economic unit; at issue in the case was the quantity and quality of evidence that must be offered to show that the parent **does not** control its subsidiaries. If the opinion is followed by the court, it will confirm that Akzo Nobel will be held liable for the alleged anticompetitive conduct of its subsidiaries merely because it is the 100 percent shareholder of those subsidiaries. The opinion should raise a red flag for all U.S. companies that operate in Europe and should cause those companies to consider their antitrust compliance programs: since the activities of European subsidiaries could expose the corporation to antitrust liability, perhaps compliance programs should be expanded to encompass European subsidiaries as well?

THE ADVOCATE GENERAL'S OPINION IN *AKZO NOBEL*

The *Akzo Nobel* case arose out of the European Commission (EC) investigation into the choline chloride price-fixing cartel. Several Akzo Nobel subsidiaries

¹ Case C-97/08, *Akzo Nobel NV v. Comm'n of European Communities* (Apr. 23, 2009), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008C0097:EN:HTML> (hereinafter, "*Akzo Nobel*").

allegedly participated in the cartel. The investigation resulted in a contested EC decision holding Akzo Nobel NV and four of its subsidiaries liable for violating Article 81 of the European Community Treaty, which is the law prohibiting price-fixing and other forms of anticompetitive cooperation. The EC fined the companies €20.99 million. The EC's finding of liability as to the parent company, Akzo Nobel, was based solely on the activities of its subsidiaries, under the theory—commonly accepted in European competition cases—that a corporation and its subsidiaries comprise a single undertaking. The Court of First Instance upheld the EC's decision in 2007. Akzo Nobel appealed to the Court of Justice arguing that the lower court erred in attributing the conduct of the subsidiaries to the parent, and, last month, an advocate general of the European Court of Justice issued an opinion recommending the Court of Justice confirm the lower court's opinion.²

Under European competition law, a subsidiary's conduct is attributed to the parent company when the parent company is in a position to exercise “decisive influence” over the subsidiary and actually exerts such influence. Akzo's appeal contended that the Court of First Instance erred by (1) failing to require proof that the parent entity actually exercised “decisive influence” and (2) examining “all economic and legal organizational links” between parent and subsidiary in evaluating “decisive influence,” rather than focusing only on influence over market conduct.

The advocate general rejected all of Akzo Nobel's arguments. On the first issue, the advocate general ruled that there was a rebuttable presumption of “decisive influence” whenever a parent owned 100 percent of the subsidiary's capital, and that the EC need only “set out the shareholding structure [of the company] in its statement of objections.” In so ruling, the advocate general rejected a contrary Court of First Instance opinion advanced by Akzo that had required “[s]omething more than the extent of the shareholding” in order for parent company liability to attach to subsidiary conduct.³ The advocate general explained that “effective enforcement of competition law requires clear rules” and that a presumption based on 100 percent ownership alone “creates legal certainty and is straightforward to implement in practice.” The advocate general further held that in order to rebut the presumption, a company must present “cogent evidence” that the parent “exercised restraint and did not influence the market conduct of its subsidiary.”

On the second issue, the advocate general noted that “the absence of autonomy of the subsidiary in terms of its market conduct is only one possible connecting factor on which to base an attribution of responsibility to the parent company”; “a single commercial policy within a group may also be

² The Courts of Justice in the European Union are assisted by eight “advocates-general” who present to the court their opinions on cases pending with the Court. They are not dispositive of the matter, but they carry weight with the court.

³ *Akzo Nobel*, ¶ 67 (quoting Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, and T-136/02, *Bolloré v. Commission*, 2007 E.C.R. II-947).

inferred *indirectly* from the totality of the economic and legal links between the parent company and its subsidiaries.” The advocate general explained that, even if the parent company did not directly participate in the cartel activities, “that does not detract from its personal (co-)responsibility for the offen[s]e” because “[a]s the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies.”

In light of these findings, the advocate general recommended to the Court of Justice that Akzo Nobel’s appeal be dismissed. The court will determine whether to adopt the advocate general’s opinion in the coming months.

IMPLICATIONS OF *AKZO NOBEL*

The *Akzo Nobel* recommendation is notable because it would clearly confirm a rebuttable presumption of parent liability that is effectively the opposite of the law in the United States. Under U.S. law, incorporation is a method for limiting liabilities—the presumption is that a parent corporation is separate from, and not liable for, the acts of its subsidiaries. There is a well-defined set of narrow circumstances in which a parent can be held liable for its subsidiaries’ actions, but most of those circumstances require the parent company to actually exercise control over the actions of its subsidiary.⁴ *Akzo Nobel*, by contrast, confirms that, in the context of European competition law, parent liability can arise without any indicia of actual control beyond 100 percent ownership and without any proof of the parent’s participation in the anticompetitive conduct. The only way to avoid such liability would be for the parent to come forward with “cogent evidence” that it did not influence its subsidiary’s market conduct.

Multinational corporations under investigation by EC authorities must be mindful of the sometimes dramatic consequences of these different standards of liability when deciding how to respond to an antitrust investigation. For example, a European court’s finding of parent company liability could subject that parent company to civil damages actions in Europe, even though the parent company did not participate in the anticompetitive conduct. In addition, by finding the parent liable for an antitrust infringement in Europe, the European Commission is able to—often dramatically—increase the level of fine it imposes. Such a finding of liability in Europe against a parent company could have implications for any criminal or civil proceedings that may be underway in the United States against the subsidiaries of the parent. Even though the parent is not held liable in the United States, information and/or documents made public in the proceedings against the parent in Europe might impact the proceedings against the subsidiaries in the United States.

⁴ For a discussion of the standards in the United States for holding a parent liable for the actions of its subsidiaries, see *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993); see also *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) (“[M]ere ownership of a subsidiary does not justify the imposition of liability on the parent.”).

At bottom, *Akzo Nobel* is an important reminder that concepts that are taken for granted in the United States, such as the limits on liability obtained through incorporation, cannot be taken for granted when the company is determining the scope of the worldwide liability that a government investigation might bring. Factoring in the full scope of potential liabilities in every jurisdiction in which the company operates is an essential task that must be done very early in the investigation.

Advisors at Akin Gump Strauss Hauer & Feld LLP have extensive experience representing companies in government investigations.

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