WHITE & CASE

"*A plague on both your houses*" Antitrust liability tough to shake off in transactions

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In a judgment delivered on 3 March 2011 in Cases T-117/07 *Areva v European Commission* and T-121/07 *Alstom v European Commission*, the General Court of the European Union (the 'Court') the Court confirmed the general rule that when a wholly-owned subsidiary that has infringed competition law is sold to a new owner, that subsidiary remains liable for any infringement that it commits before the sale and the previous owner is jointly and severally liable with that subsidiary for that infringement relating to behaviour up until the sale.

The Court also held that where a decision has imposed a cartel fine jointly and severally on a number of companies, the companies must contribute in equal amounts to the payment of the fine unless the Commission determines that they are not in fact liable for the infringement in equal measure.

The practical impact is that the new owner, while not legally liable for the fine related to conduct prior to the acquisition, will be financially impacted if the subsidiary has to pay a joint and several fine together with the previous owner for pre-acquisition conduct.

Both these findings highlight that adequate due diligence and consideration of the allocation of any potential liability for antitrust infringements remain paramount when acquiring an entity suspected of anti-competitive conduct. While any contractual allocation cannot affect the Commission's determination of joint and several liability, parties should make adequate provision to allocate liability between themselves in any event.

I. Factual background

The judgment of the Court follows appeals brought by Alstom and Areva against a European Commission ('Commission') decision of 24 January 2007 ('the Decision') fining 10 groups of companies over EUR 750 million for their participation in a cartel on the market for Gas Insulated Switchgear ('GIS') which lasted from 15 April 1988 to 11 May 2004.

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Alstom (and subsequently Areva) carried out GIS activities in France and Switzerland throughout the period between 15 April 1988 and 11 May 2004. The Decision distinguishes between different periods of liability, based on the changing legal form and ownership of the entities that conducted the GIS activities of Alstom and Areva throughout that period. The key period was 7 December 1992 to 8 January 2004, when Alstom's GIS activities were carried out by two wholly-owned subsidiaries. These subsidiaries were then transferred to Areva on 9 January 2004 which became then jointly and severally liable for their behaviour from this point until 11 May 2004 when the cartel ended.

The Decision held Alstom and its previously-owned subsidiaries jointly and severally liable for the infringing conduct during the 7 December 1992 to 8 January 2004 period, notwithstanding the fact that the subsidiaries were transferred in January 2004 to Areva. In addition, the Decision did not indicate the respective contributions, of Alstom and its previously owned subsidiaries, to payment of the fine imposed for the infringement during that period.

II. The Court's Judgment

The Court held that the Commission did not err in its allocation of liability for the December 1992 to January 2004 period. Alstom and Areva drew the Court's attention to their contractual agreement of a guarantee at the time of the sale of the subsidiaries under which Alstom should be solely liable for any cartel fine prior to the transfer of its subsidiaries to Areva. However, the Court held that liability resulting from breach of the European competition rules cannot be affected by what may be privately agreed between the parties.

In addition, the Court's judgment addressed for the first time the respective contributions of jointly and severally liable parties to payment of a fine. The Court held that where a Decision imposes a fine jointly and severally on a number of companies, in the absence of any indication in the Decision that one company was more responsible for the infringement that the others, the companies will incur equal liability for the infringement and will therefore have to contribute equally to payment of that fine. Accordingly, while the Commission is not bound by a contractual allocation of liability for any possible joint and several fine, it remains paramount that parties to a transaction conduct appropriate due diligence and contractually agree on the apportionment of any possible joint and several fine.

In this case, the Court held that, as there was no contrary indication in the Decision, Alstom and its previously-held subsidiaries are each liable for 50% of the fine imposed jointly and severally for the period 7 December 1992 to 8 January 2004.

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