Not Far from the Tree

The problem of *inverted* liability: imputation of unlawful conduct to the subsidiary for the parent company's wrongdoing

Catarina Vieira Peres

Introduction

Much has been written on the EU's doctrine of the single economic unit and the Commission's practice of attributing liability to the parent company for antitrust infringements committed by the subsidiary.[1] The ECN+ Directive[2] has made clear that Member States are required to apply the EU notion of undertaking in the context of public enforcement and the *Skanska* ruling[3] offered an affirmative answer to the question of whether such notion should also apply in the realm of private enforcement.

---

[1] To name a few examples: BRAVO, T. (2013) A Responsabilidade das Sociedades-Mães e das Filiais em Direito Europeu da Concorrência. Análise Crítica da Jurisprudência *Akzo Nobel*. *Revista Portuguesa de Ciência Criminal.* pp. 613-656. BRIGGS, J. and JORDAN, S. (2007) Presumed Guilty: Shareholder Liability for Subsidiary's Infringements of Article 81 EC Treaty. *Business Law International* . 8 (1). pp. 1-37. BURNLEY, R. (2010) Group Liability for Antitrust Infringements: Responsibility and Accountability. *World Competition*. 33 (4). pp. 595-614. CARAVACA, A. and GONZÁLEZ, J. (2018) El Derecho Internacional Privado de la Unión Europea Frente a las Acciones por Daños Anticompetitivos. *Cuadernos de Derecho Transnacional* .10 (2). pp. 7-178. GHEZZI, F. And Maggiolino, M. (2014) L'Imputazione delle Sanzioni Antitrust Nei gruppi di Imprese, tra "responsbilità Personale" e Finalità Dissuasive. *Rivista delle Società*. 5. pp. 1060-1122. LANG, J. (2014) How Can the Problem of the Liability of a Parent Company for Parent Company for Price Fixing by a Wholly-Owned Subsidiary Be Resolved. *Fordham International Law Journa*l. 37. pp. 1481-1524. PERESTRELO DE OLIVEIRA, A. and SOUSA FERRO, M. (2010) The Sins of the Son: Parent Company Liability for Competition Law Infringements. *Revista da Concorrência e Regulação.* 1 (3). pp. 53-92. SOLEK, L. and WARTINGER, S. (2015) Parental Liability: Rebutting the Presumption of Decisive Influence. *Journal of European Competition Law & Practice*. 6 (2). pp. 73-84. THOMAS, S. (2012) Guilty of a Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law. *Journal of European Competition Law & Practice.* 3 (1). pp. 11-28. WARDHAUGH, B. (2017) Punishing Parents for the Sins of their Child: Extending EU Competition Liability in Groups and to Subcontractors. *Journal of Antitrust Enforcement*. 5. pp. 22-48. WILS, W. (2000) The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons. *European Law Review.* 25 (2). pp. 99-116

[2] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. OJ L 11, 14.1.2019, p. 3–33.

[3] Judgment of the ECJ of 14 March 2019, V*antaan kaupunki v Skanska Industrial Solutions Oy et al.*, C-724/17, ECLI:EU:C:2019:204.

However, as damages actions become a more common phenomenon throughout the EU, a new question has emerged: can an innocent subsidiary be held liable for an infringement committed by the parent company?

While the advantages of holding a parent company liable for the conduct of a subsidiary are obvious,[4] the reasons why an authority or an injured party would choose to sue a subsidiary *in lieu* of a parent company are less evident.

Indeed, in the realm of public enforcement, cases of *inverted* liability are extremely rare. The European Court of Justice (ECJ) has handed down an extremely vast amount of cases on parent company liability but it has yet to decide one single case on subsidiary liability.

The problem of subsidiary liability comes up more frequently in the context of actions for damages. The reason for this being that if the subsidiary is in a healthy financial situation and has enough assets to pay for the demanded compensation, plaintiffs might wish to avoid the extra costs and difficulties of suing a foreign parent company.[5] The decision to sue a subsidiary might also lie on a desire to anchor a claim in jurisdictions that have a tradition of private enforcement and a reputation for being "claimant-friendly". Especially before the adoption of the Private Enforcement Directive, obtaining compensation for an antitrust infringement was notably easier in certain Member States.[6]

Subsidiary liability in UK case law

---

[4] Namely, attributing liability to the parent company allows the imposition of a higher fine as the maximum threshold will be 10% of the group's, not the subsidiary's, total worldwide turnover in the preceding year; the parent company is much more likely to have the necessary funds to pay the fine and it prevents opportunistic corporate restructurings engaged to avoid the payment of fines or damages.

[5] *See* WAGENER, H. (2019) And Again: Liability for Cartel Damages. [Online] Available at: https://www.d-kart.de/en/blog/2019/11/15/auf-ein-neues-haftung-von-konzerngesellschaften/#comments

[6] KERSTING also points out that being able to hold a sister company liable ensures direct access to its own assets. If liability is limited to the parent company, creditors will only be able to have access to the parent company's shares in the sister company. This means that the creditors of the parent company will be put at a disadvantage in relation to the creditors of the sister company as their liability will be subordinated: this is specially the case where the parent company is not the sole owner of the subsidiary. Another example given by the author where sister company liability might be relevant refers to cases where an innocent sister company is sued for damages by mistake (for instance due to name changes within the corporate group) and the claim against the infringing subsidiary has, in the meanwhile, become time-barred. KERSTING, C. (2019) Liability of Sister Companies and Subsidiaries in European Competition Law. [Online] Available from: https://ssrn.com/abstract=3355816. Translation of: (2018) Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht. *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*. 182. pp. 8-31.

In the United Kingdom, one of the few countries in Europe were actions for damages were common before the adoption of the Directive, the question of whether it is possible to claim damages from a subsidiary that is not an addressee of a Commission decision has been thoroughly discussed in various court cases.

One of the first of such cases was *Provimi.*[7] In order to prove jurisdiction, the claimants had to make a *prima facie* case showing sufficient links between the entities with which they had contractual relations and the entities found responsible of having engaged in cartel activity by the Commission. The claimants argued that these entities were all part of the same undertaking.

The court decided in favour of the claimants, holding that they were not required to plead and prove that the subsidiaries knew about the infringement. According to the judge, while English law does not allow knowledge of one corporation to be readily imputed to another entity, under the EU concept of undertaking, if two entities are deemed to be part of the same economic unit, they have no independence of action or will and therefore there is no need to impute the knowledge or will from one entity to another. The Court thus accepted an analysis that holds liable any company within a single undertaking which implements - even if innocently - an infringing agreement entered into by another entity within the same undertaking with third parties.

However, in subsequent decisions, British courts adopted a more conservative approach. They have argued that under EU competition law the imputation of knowledge, intent or unlawful conduct from one legal entity to another thus not depend merely on the two entities belonging to the same economic concern. Imputation of liability depends on the verification of an additional threshold: the exercise of control. Accordingly, an entity can only be held liable for the conduct of another if it exercised decisive influence over the latter. Given that a subsidiary does not control a parent company, such imputation is not possible.[8]

The Competition Appeal Tribunal, in *Sainsbury's Supermarkets*, considered that - even though they were closely related - the question as to the existence of an undertaking is a different question as to the attribution of liability between different companies. In the words of this court, even though it might be tempting to apply the logic and "*hold that each and every constituent person forming part of an "undertaking" should be liable for an infringement for which that undertaking is responsible. Yet, as we have seen, the Court of Justice has not stated the position in*

---

[7] Judgement of the English High Court of 2 of May 2003, *Roche Products et al. v Provimi* [2003] EWHC 961 (Comm) paragraphs 30-36.

[8] *See* Judgement of the English High Court judgment of 27 of October 2009, *Cooper Tire & Rubber Company v. Shell Chemicals UK et al.* [2009] EWHC 2609 (Comm); Judgment of the England and Wales Court of Appeal 13 September 2012, *KME Yorkshire et al. v. Toshiba Carrier UK et al.* Civ. 1190. Case no. A3/2011/2818.

such wide terms. Nor in our view would it be appropriate to go so far."[9] In the Court's view " *a person is not ipso facto liable for an infringement of Article 101 by reason only of the fact that he, she or it is a member of an undertaking responsible as a matter of EU law for the infringement, in circumstances where the person in question neither participated in the infringement nor had decisive influence over the conduct in the relevant market of other member(s) of the undertaking who did participate*."[10]

Subsidiary liability in continental Europe in the aftermath of the truck cartel

In continental Europe, particularly in Spain and in Germany, the question of subsidiary liability has become highly debated as a result of the famous truck cartel case.[11] In 2016, the Commission imposed a fine on manufacturers of medium and heavy-duty trucks of over € 2.93 billion for their alleged participation on a price-fixing cartel covering the entire European Economic Area and lasting nearly 15 years.[12] The cartel was deemed to have artificially increased the prices of trucks all over Europe.

The Commission's decision led to a flood of damages claims in Spain. Notwithstanding the fact that it was addressed to the parent companies of the groups involved in the cartel and to a couple of German subsidiaries[13] most Spanish injured parties decided to bring their claims against the local subsidiaries of the truck manufacturers. Roughly half of these damage claims have been dismissed, the most common reason being the lack of legal standing of the defendant. Various courts have reasoned that the Spanish subsidiaries cannot be held liable for damages as they are not the addressees of the Commission decision. The subjects of the decision are the parent companies

---

[9] Paragraph 363.

[10] Judgment of the Competition Appeal Tribunal of 14 July 2016, *Sainsbury's Supermarkets vs. Mastercard et al,* 1241/5/7/15 (T) More recently the English High Court rejected a challenge to jurisdiction and confirmed that a UK domiciled company, which is not an addressee of a Commission decision, can nonetheless be used to anchor a claim in British courts, where it can be shown that the UK subsidiary *knowingly* implemented the cartel. (Judgment of the English High Court of 4 July 2018, *Vattenfall AB and others v Prysmian SPA and others* [2018] EWHC 1694).

[11] In Germany, the *Regional Court Mannheim*, in a judgement of 24 of April 2019 (14 O 117/18 Kart=NZKArt 2019, 389) and the *Regional Court Munich I*, in a judgement of 7 of June 2019 (37 O 6039/18=NZKart 2019, 392), rejected attributing liability to subsidiaries and sister companies insofar as they have not been directly involved in the infringement.

[12] Commission Decision of 19 of July 2016, AT.39824.

[13] The Commission found that the following companies had participated in the infringement: MAN SE; MAN Truck & Bus AG; MAN Truck & Bus Deutschland GmbH (Germany); AB Volvo (publ), Volvo Lastvagnar AB, Renault Trucks SAS, (Sweden), Volvo Group Trucks Central Europe GmbH, (Germany), Renault Trucks SAS (France) Daimler AG (Germany), Fiat Chrysler Automobiles N.V (United Kingdom), CNH Industrial N.V. (United Kingdom), Iveco S.p.A. (Italy), Iveco Magirus AG (Germany), PACCAR Inc. (USA), DAF Trucks N.V., (The Netherlands) and DAF Trucks Deutschland GmbH (Germany).

which are different legal entities and there is no specific mention to the subsidiaries in the infringement decision.[14]

For instance, the *Juzgado Mercantil de Madrid* refused to recognise passive legal standing to the subsidiary arguing that EU case law only allows the attribution of liability from the subsidiary to the parent company but not the inverse.[15] This attribution of liability is not automatic and depends on the verification of certain criteria, namely whether the parent company was in position that enabled it to exercise decisive influence over the subsidiary's conduct in the market and whether that influence was effectively exercised. The liability attributed to undertakings by the EU judicature is not of an objective nature.[16] The economic unit doctrine does not represent an exception to the principle of legal personality: it allows the extension of liability to an entity which, even though it was not directly involved in the infringing conduct, it exercised control over the subsidiary that took part in the antitrust violation.[17] The Court considered irrelevant fact that the subsidiary imported cartelised trucks since liability does not arise from the commercial relationship but from the collusive agreement in which the subsidiary played no role.[18]

On the other hand, quite surprisingly, some other courts accepted rather readily the legal liability of the subsidiaries on the ground that they were part of the same economic unit as the parent companies targeted by the Decision.[19]

Some courts discussed this problem at length. For instance, the *Juzgado de Mercantil de Valencia* considered in two different cases that the plaintiffs' legal standing on the *follow-on* actions could be justified on several different grounds.[20]

First of all, the Court held that the EU principle of effectiveness required it to abandon a reductionist view of legal personality and to discard the classical attribution mechanisms. The

---

[14] *Juzgado de Mercantil de Murcia* of 16 October 2018, no. 148/18; *Juzgado de Mercantil de Barcelona* of 23 of January 2019, no. 898/17; *Juzgado de Mercantil de Valencia* of 18 February 2019, no. 298/18; J*uzgado de 1ª instancia de Jaén* of 14 of March 2019 no. 183/18; *Juzgado Mercantil de Madrid* of 2 of July 2019, no. 609/18; Juzgado Mercantil de Madrid of 3 of July 2019, no. 584/18; *Juzgado Mercantil de Madrid* of 17 of July 2019, no. 543/2018; *Juzgado Mercantil de Coruña* of 31 of July 2019, no. 166/18; J*uzgado 1ª Instancia Jaén* of 10 of September 2019, no. 569/17; *Juzgado Mercantil de Madrid* of 24 of September 2019, no. 564/18; *Juzgado Mercantil de Madrid* of 8 of October 2019, no. 1264/17.

[15] *Juzgado Mercantil de Madrid* of 2 of July 2019, no. 609/18.

[16] Paragraphs 44 and 45.

[17] Paragraph 50.

[18] Paragraph 51.

[19] *See Juzgado de lo Mercantil de Murcia* of 27 of September 2018, no. 144/18, *Juzgado Mercantil de Murcia* of 15 of October 2018, no. 143/18.

[20] Paragraph 29 of both decisions of the *Juzgado de lo Mercantil de Valencia* of 20 of February 2019 and of 7 of May 2019, no. 287/18 and no. 338/18.

argument that the plaintiff lacked legal standing was seen as an artificial obstacle undeserving of legal protection.[21] The Court stated that the enlarged concept of undertaking as an economic entity applied not only in the context of public enforcement but also in actions for damages. To the effect, it quoted the conclusions of AG Wahl in the *Skanska* case, in particular paragraphs 61 to 63, where the AG explains that the person liable to pay compensation for an antitrust infringement may be inferred from Article 101 TFEU, a provision which is addressed to undertakings, i.e. entities that do not necessarily correspond to legal persons.

Second, the Court relied on the characteristics of the infringement itself. The Commission stated in its Decision that all of the parent companies involved in the cartel sold their products through distributors throughout Europe, which were either owned by them as part of their internal sales organisation or through independent agents.[22] The plaintiffs were wholly owned subsidiaries whose activity was to commercialise the vehicles, object of the cartel, in Spain. The Court emphasised the fact that the defendants were not active in secondary tasks related to the sale of the vehicles (such as financing or repair services). Their role consisted in selling the trucks affected by the cartel enacted by their parent companies. It was thus possible to invert the mechanism of attribution of liability used by the EU judicature and impute liability to the subsidiaries as they acted as mere instruments of the parent companies: they were used to implement in the Spanish market the distorting effects of the cartel.[23] The subsidiaries would only be able to escape liability if they managed to prove that they had acted autonomously, thereby breaking the economic unit and preventing the transfer to the Spanish market of the damaging effects of the cartel.[24]

---

[21] Paragraph 34 of both decisions of the *Juzgado de lo Mercantil de Valencia.*

[22] Paragraph 37 of both decisions of the *Juzgado de lo Mercantil de Valencia* and paragraph 25 of the Commission's decision.

[23] Paragraphs 37 and 38 of both decisions of the *Juzgado de lo Mercantil de Valencia.*

[24] Paragraph 39 of both decisions of the *Juzgado de lo Mercantil de Valencia.*

The Court found further arguments in recent Spanish case law which allowed the corporate veil to be pierced in order to recognise passive legal standing to subsidiaries.[25]

The Commercial Court of Valencia then suggests that damages claims against subsidiaries should be constructed as a special type of *follow-on action* where all the relevant elements derive from the administrative decision with the exception of the persons that can be held liable. It is then for the judge to consider the relevant circumstances of the case and to determine whether the attribution of liability to the subsidiary is justified in that specific case. In the case under analysis, the Court decided that the general references of the Commission's decision to the role played by the subsidiaries in the implementation of the price-fixing agreement sufficed to attribute to the subsidiaries the conduct carried out by the parent company.[26]

The Spanish Preliminary Ruling

As a result of the disparity of solutions among Spanish courts, the *Audiencia Provincial de Barcelona* decided to file a request for preliminary ruling before the European Court of Justice essentially asking whether the doctrine of the single economic unit as developed by the EU judicature can only be applied to attribute liability to the parent company for an infringement committed by the subsidiary or whether it can also be applied inversely to attribute liability to a

[25] Decision of the *Supremo Tribunal* of 12 of January 2015, no. 769/2014, ECLI:ES:TS:2015:254. In particular, the Commercial Court refers to two decisions of the Spanish Supreme Court where liability was extended in corporate group settings. The first case emerged in the context of a judicial action initiated to declare an insurance contract void. The defendant, a bank, argued that it lacked passive legal standing as it was not part of the litigated insurance contract, it had merely acted as a mediator. The contract had been entered between the plaintiff and an insurance company. However, the Supreme Court dismissed this argument and confirmed that the action could be brought against the bank given that the product had been designed by it, it was sold in its offices by its employees, it was printed in pages with its logo and the proceeds from the contract ended up in a company that belonged to the same corporate group. The Supreme Court considered that denying passive legal standing to a subsidiary would amount to protecting a mere formal and artificial business structure and would unduly impede the satisfaction of the legitimate rights of the customers. Moreover, in the *Google* case, the Spanish Supreme Court recognised passive legal standing to *Google Spain* holding that it could be held liable for the processing of personal data carried out by its parent company *Google Inc* though *Google Search* despite their distinct legal personalities (Decision of the *Supremo Tribunal* of 5 of April 2016, no. 210/16, ECLI: ES:TS:2016:1280) The Court reasoned that a restrictive interpretation of passive legal standing (i.e. one that would recognise legal standing only the US mother company) would hinder the effectiveness of the protection conferred to fundamental rights by the international, European and Constitutional legal orders against the illegal processing of personal data.

[26] However, the *Juzgado de lo Mercantil de Valencia* denied passive legal standing to an independent authorised dealer of the manufacturer. Since this entity could not be considered as being part of the economic group involved in the cartel, it shared none of the links that the subsidiary shared with the parent company. The dealer was seen as an autonomous intermediary between the manufacturer and the consumer which did not play any role in the infringement, on the contrary did entity was a direct victim of the cartel. Paragraphs 49 and 50 of the decision of the *Juzgado de lo Mercantil de Valencia,* no. 338/18.

subsidiary for the conduct of the parent company.[27] If the ECJ considers such inverse attribution of liability to be permitted, the question is then what conditions must be fulfilled to attribute liability in these cases. In particular, whether the attribution of liability depends solely on the subsidiary being controlled by the parent company or whether other circumstances should be taken into account, such as whether the subsidiary benefited from the cartel.

If the ECJ considers the extension of liability from the parent to the subsidiary permissible, the national court asks whether national norms which only foresee the possibility of imputing the infringing conduct of the subsidiary to the parent company and not the other way round are compatible with EU law.

Will the Court embrace a full form of enterprise liability?

If the ECJ does accept this preliminary ruling it will be interesting to see how it addresses this question. This preliminary ruling offers the Court the opportunity to clarify its case law on the concept of undertaking and its effects. The question is whether the Court is prepared to give a step forward and extend even further the effects of the economic unit by confirming the possibility of attributing liability to one legal entity solely on the ground that it belongs to the same economic concern despite the lack of exercise of control over the infringing entity.

As has been commented by some scholars,[28] there is a clear doctrinal incongruence in the ECJ's case law regarding the classification of the parent company's liability: whether it is of a primary/original or of a derivative/ secondary nature. On the one hand, the EU judicature frequently claims that it is the economic unit itself (i.e. the entity comprising the parent company and the subsidiaries) which is deemed to have committed the infringement and is therefore held personally accountable.[29] According to this reasoning, the parent company's liability must be "*original, primary and independent*" from that of its subsidiary.[30] On the other hand, there are various other

---

[27] *Audiencia Provincial de Barcelona* of 24 October 2019, no. 775/2019, ECLI:ES:APB:2019:9370A. Rectified in 12 of November 2019, ECLI:ES:APB:2019:10072AA.

[28] KOENIG, C. (2017) An Economic Analysis of the Single Economic Doctrine in EU Competition Law. *Journal of Competition Law and Economics*. 13 (2). pp. 281-327.

[29] For instance: *Elf Aquiraine*, T-299/08, Paragraph 178-183, *General Technic-Otis v. Commission*, T-141/07, Paragraph 77; *Total Raffinage Marketing v. Commission*, T-566/08, Paragraph 508. *Total and Elf Aquitaine v. Commission*, T-190/06, Paragraph 201, *Bolloré*, T-372/10, Paragraph 52. *Schindler Holding and Others v. Commission*, C-501/11 P, Paragraph 101 and 102.

[30] KOENIG, C. (2017) *op. cit.* pp. 286.

cases in which the Court refers to the derivative nature of the parent company's liability thereby introducing a further degree of ambiguity to the EU's case law narrative. In various decisions, the Court stated that if a parent company is held liable only by virtue of its subsidiary's participation in an anti-competitive infringement - if the parent company did not directly participate in the cartel - its liability is of a derivative or secondary nature. It follows that the parent's liability cannot exceed that of the subsidiary. Any annulment or alteration of a contested decision regarding the subsidiary must benefit the parent company. It results from these cases that the liability of the parent company is indirect and based on the control it exercises over the infringing entity.[31]

Searching for clues in cases dealing with recidivism, limitation periods and sister company liability…

This doctrinal incongruence has led to contradictory decisions. If the single economic unit doctrine was followed all the way through and liability would unmistakably fall originally on the economic unit regardless of the legal entities involved, cases dealing with recidivism, limitation periods or sister company liability would have a simple answer. The case law of the court, however, illustrates a different picture.

(i) Recidivism

Regarding recidivism, in the first few cases dealing with this question, the General Court (hereinafter 'GC') allowed the Commission to apply higher fines to entities when their parent, their subsidiaries or their sister companies had been involved in previous infringements.[32] The Court reasoned that since an economic entity is the only relevant criterion for the purpose of defining an

---

[31] S*ee* judgment of the GC of 24 of March 2011, *Tomkins v. Commission*, T-382/06, ECLI:EU:T:2011:112, paragraph 38. This was confirmed by the ECJ in appeal in its judgment of the 22 of January of 2013, *Commission v Tomkins*, C-286/11 P, ECLI:EU:C:2013:29, paragraph 37. Judgment of the ECJ of 10 April 2014, *Areva et al. v. Commission,* joined cases C-247/11 P and C-253/11 P, ECLI:EU:C:2014:257, paragraph 138. Judgement of the GC of 9 of September 2015, *Toshiba v. Commission*, T-104/13, ECLI:EU:T:2015:610. Judgement of the ECJ of 19 January 2017, *Commission v. Total and Elf Aquitaine*, C-351/15 P, ECLI:EU:C:2017:27.

[32] In *Michelin,* a finding of recidivism was found between two sister companies (judgment of the CFI of 30 September 2003, *Manufacture française des pneumatiques Michelin v Commission*, T-203/01, ECLI:EU:T:2003:250, paragraph 290). In *BPB,* the applicant was sanctioned for its direct participation in the infringement in question and the Commission took into consideration, to establish recidivism, a previous infringement committed by one of its subsidiaries (judgment of the CFI of 8 July 2008, BPB v Commission, T-53/03, ECLI:EU:T:2008:254). The possibility of increasing the fine due to recidivism was also confirmed in *Lafarge*, where the first infringement had been committed by the parent company and the second infringement was committed by a virtually wholly owned subsidiary (judgment of the CFI of 8 July 2008, *Lafarge v. Commission,* T-54/03, ECLI:EU:T:2008:255).

"undertaking" within the meaning of EU competition law, it suffices that it has been involved in a number of infringements for a finding of recidivism to be made.[33]

However, in *Versalis and Eni v. Commission*,[34] the GC adopted a more cautions approach, placing emphasis on the rights of defence of the parent company. In this case, the Commission had held liable a wholly owned subsidiary, *Versalis,* for its direct participation in a cartel, and its parent company, *Eni*, as well as two other subsidiaries. *Eni* argued that the Commission could not apply to it the aggravating circumstance of recidivism since the two previous infringement decisions had been addressed to its subsidiaries. *Eni* itself had not been implicated. Charging it with recidivism, *Eni* argued, amounted to a a violation of its rights of defence and of the principals of personal liability and legal certainty, since it had never been given the opportunity to defend itself from the behaviour of its subsidiaries nor to prove that they did not form a single economic entity.

In this case, the GC considered necessary to articulate previous case law on recidivism with the presumption developed in *Akzo Nobel*,[35] according to which the Commission can only impute the conduct of a wholly owned subsidiary to the parent company when the latter fails to rebut the presumption that it exercised decisive influence over the conduct of its subsidiary in the market. Since the parent company had not been the addressee of the previous infringement decision, it did not have the opportunity to rebut the presumption. Moreover, in the previous decisions the Commission had not even tried to prove that the subsidiaries formed an economic unit with the parent company. *Eni* did not have any role in the administrative proceedings leading to the adoption of those decisions. The GC agreed with *Eni* in that charging it with recidivism amounted to a violation of its rights of defence. As such, the Commission, when making a finding of recurrence, could not take into account a previous infringement decision that had not been addressed to the

---

[33] Judgment of the GC of 6 of March 6 March 2012, *UPM-Kymmene v Commission*, T-53/06, ECLI:EU:T:2012:101, paragraph 129.

[34] Judgement of the GC of 13 December 2012, *Versalis* and *Eni v Commission*, T-103/08, ECLI:EU:T:2012:686

[35] Judgment of the CJEC of 10 September 2009, *Akzo Nobel NV and Others v Commission of the European Communities,* C-97/08, ECLI:EU:C:2009:536.

parent company and where the latter had not been given the opportunity to contest that it was part of the same economic unit.[36]

However, the case law on this matter changed when it made its way to the ECJ.[37] This Court confirmed that for the aggravating circumstance of repeated infringement to be established it is not necessary that the company has been the subject of previous legal proceedings; what matters is an earlier finding of a first infringement carried out by a subsidiary with which the parent company involved in the second infringement formed, already at the time of the previous infringement, a single undertaking.[38] But - in disagreement with the GC - the ECJ considered that the observance of the rights of defence of the legal person against whom an allegation of repeated infringement has been made does not require the legal person to have had the opportunity, in the administrative proceedings regarding the previous infringement, to dispute that it formed a single economic unit. The crucial question is whether that legal person is able to defend itself at the time when the repeated infringement is alleged against it.[39] As such, the statement of objections in the second proceedings has to contain all the information necessary for the person to defend itself against the

---

[36] Paragraphs 273-274 and 281. However a finding of recidivism could be made in relation to *Versalis* as it was the economic successor of a subsidiary previously involved in a competition law infringement. See also judgment of the GC of 23 January 2014, *Evonik Degussa and AlzChem v. European Commission*, T−391/09, ECLI:EU:T:2014:22, where the GC agreed with the second appellant's argument that the aggravating circumstance could not be established as it had not been the addressee of the first decision and thus did not have the opportunity to reject the argument that it formed an economic unit with the first appellant. The fact that the appellants formed an economic unit during the subsequent infringement did not suffice to apply the aggravating circumstance to the second appellant. In *Saint Gobain,* the GC also did not allow the Commission to apply the aggravating circumstances of recidivism for the same reasons (judgment of the GC of 27 of March 2014, *Saint Gobain Glass France et al. v. Commission*, T-56/09, ECLI:EU:T:2014:160). However, in this case, there were two previous infringement decisions: one addressed only to a subsidiary and another addressed to a subsidiary and the parent company. The GC drew a distinction between the two previous decisions. The decision that had been addressed only to a subsidiary could not be taken into account to establish recurrence, as the parent company was not given the opportunity to rebut the presumption of exercise of decisive influence. As stated in *Versalis and Eni,* taking into consideration this decision this would amount to a violation of the rights of defence of the parent company. The Court added that this decision is all the more valid as the Commission is not bound by a limitation period when reaching a finding of repeated infringement and as such a finding may be reached after a long period of time has elapsed, making it impossible or exceedingly difficult for the company concerned to dispute the existence of an economic unit. For the Commission to reach a conclusion of recidivism it should only take into account previous decisions which had been addressed both to a subsidiary and the parent company (paragraph 319).However the Commission could rely on the other decision to establish the aggravating circumstance of recidivism, since it had been addressed, not only to a subsidiary, but also to the parent company with which it formed an economic unit. *See also* judgement of the GC of 12 December 2014, *Eni v. Commission*, T-558/08, ECLI:EU:T:2014:1080.

[37] Judgment of the ECJ of 5 of March 2015, *Commission v. Versalis and Eni*, joined cases C-93/13 P and C-123/13 P, ECLI:EU:C:2015:150. This decision is an appeal from *Versalis* and *Eni v Commission*, T-103/08, discussed above.

[38] Paragraph 91.

[39] Paragraph 93 and 94.

aggravating circumstance of recidivism. If that is the case, then the rights of defence of the undertaking are fully observed.[40]

In *Deutsche Telekom*,[41] the problem of interaction between recidivism and the single economic entity was discussed from a different perspective: in this case, it was the parent company who argued that the finding of recidivism should be made in relation to the whole economic unit and not only in relation to itself. The previous infringement decision had been addressed solely to the parent company (*Deutsche Telekom*), whereas in the second infringement decision the Commission attributed liability to the subsidiary (*Slovak Telekom*), due to the latter's direct participation in the infringement, and to *Deutsche Telekom*, because it was deemed to form an economic unit with *Slovak Telekom*. When calculating the fine, the Commission applied the aggravating circumstance of recidivism only to the *Deutsche Telekom* but not to *Slovak Telekom*. However, *Deutsche Telekom* argued that since its responsibility, in the second decision, was of a pure derivative nature, the Commission could not attribute to it solely the consequences of recidivism. The GC rejected this argument. According to the GC, EU case law on the principle of the individual nature of penalties must be reconciled with the case law according to which certain factors may characterise individually the conduct of the parent company and may justify the application to it of a higher sanction than the sanction to be applied to its subsidiary.[42] Even though the unity of the conduct in the market of an undertaking justifies holding jointly and severally liable the legal entities composing such undertaking, an exception must be made regarding aggravating and attenuating circumstances and, more generally, in relation to circumstances that are only present in relation to some entities but not to others.[43] In particular, an aggravating circumstance might only characterise the individual conduct of a parent company and justifies that its responsibility exceeds the one of its subsidiary.[44] In this case, the first infringement decision was only addressed to the *Deutsche Telekom* and it only referred to its conduct, even though *Slovak Telekom* was already part of the corporate group during a significant part of the infringement period, it took no part in the previous infringement. The GC went on to add that, in any case, according to the case law, the

[40] Paragraphs 95 and 96. In this case, since the decision at issue contained no reasoning allowing the parent company to defend itself or the EU judicature to carry out its review, the ECJ considered that the aggravating circumstance of recidivism could not be applied to the parent company. Furthermore, regarding the other appellant - *Versalis* - the ECJ considered that the GC was right in confirming the finding of repeated infringement on the grounds of economic succession.

[41] Judgment of the GC of 13 December 2018, *Slovak Telecom v. Commission*, T-851/14, ECLI:EU:T:2018:929.

[42] Paragraph 504.

[43] Paragraph 505.

[44] Paragraph 506.

Commission can only apply the aggravating circumstance of recidivism to a company that was not the addressee in the prior infringement decision, if the company is given the opportunity - in this second case - to understand in what quality it was deemed to be involved in the first infringement.[45] *Slovak Telekom* had no involvement in the first decision: it was not the parent company and it took no part in the infringement. Thus, the GC considered that the Commission, in applying the aggravating circumstance of recidivism only to the parent company, had not committed an error of law.

(ii) Limitation Periods

Regarding limitation periods, the EU judicature has applied the economic unit doctrine and the principle of the personal responsibility of the undertaking itself all the way through. A good example is the *Akzo Nobel* case,[46] where even though the parent company was not directly involved in the infringement, the ECJ confirmed that the parent company's liability was not affected by the fact that the limitation period had expired in relation to the subsidiaries that participated in the infringement and with which it formed an economic unit.[47] According to the Court, the Commission's power to impose penalties can be time-barred via-à-vis the subsidiary but not the parent company, even when the parent company's liability is entirely based on the unlawful conduct of the subsidiary. The ECJ then explained the rationale: *Akzo Nobel* was held liable, as the ultimate parent company of the group. It was individually liable for actions contrary to competition law which it was itself deemed to have taken.[48] The fact that the limitation period had expired in relation to the subsidiaries *"*[did] *not preclude another company, which* [was] *considered personally responsible and jointly and severally liable with those companies for the same anticompetitive behaviour, and in respect to which the limitation period* [had] *not expired, from having proceedings instituted against it*".[49] The ECJ added the fact that the parent company's liability was purely derivative could not affect this conclusion.[50] This decision was criticised by some commentators

[45] Paragraph 510.

[46] Judgment of the GC of 15 July 2015, *Akzo Nobel* and *Others v Commission*, T-47/10, ECLI:EU:T:2015:506 and judgment of the ECJ of 27 April 2017, *Akzo Nobel* and *Others v Commission*, C-516/15 P, ECLI:EU:C:2017:314.

[47] Paragraphs 125-129.

[48] Paragraphs 57-70.

[49] Paragraph 71.

[50] Paragraph 72.

who saw yet another step of the case law towards recognition of even greater liability of parent companies. Such authors argue that, conceptually, it is reasonable to distinguish the level of substantive liability of a subsidiary and the respective derivative liability attributed to a parent company from legal barriers to enforce a fine. The inherent derivative nature of parental liability should lead to the contrary conclusion: the Commission should not hold a parent company liable, where it is no longer possible to fine a subsidiary.[51]

(iii) Sister company liability

The Court has never affirmed that the Commission is entitled to hold liable a sister company solely on the basis that it is part of the same undertaking as the infringing company. The two relevant cases dealing with sister company liability - *Jungbunzlauer*[52] and *Knauf Gips*[53] - have very specific contours making it impossible to extrapolate their findings.

In *Jungbunzlauer,*[54] the Court of First Instance (hereinafter 'CFI') allowed the Commission to attribute liability to the appellant for its sister company's wrongdoings since the activities of the latter were limited to the mere production of the relevant product, while the entire management of the group business was in the hands of the appellant.[55] The sister company could not decide independently upon its own conduct on the market but carried out, in all material respects, the instructions given by the appellant.[56] In other words, the appellant controlled the sister company and therefore the Commission was allowed to attribute to it liability for the infringement.[57] The CFI considered irrelevant the argument that the common parent company could at any time withdraw from one of its subsidiaries the right to control its sister companies.[58]

---

[51] SCHMIDT, J. (2018) Akzo Nobel and Others v Commission: When Can Parent Companies be Liable for the Acts of Subsidiaries Even if Action Against the Subsidiary is Time-barred? *Journal of European Competition Law & Practice.* 9 (1). pp. 31-33, 33.

[52] Judgment of the CFI of 27 September 2006, *Jungbunzlauer v Commission*, T-43/02, ECLI:EU:T:2006:270.

[53] Judgment of the CFI of 8 July 2008, *Knauf Gips v Commission*, T-52/03, ECLI:EU:T:2008:253 and judgment of the ECJ of 1 July 2010, *Knauf Gips v Commission*, C-407/08 P, ECLI:EU:C:2010:389.

[54] Judgment of the CFI of 27 September 2006, *Jungbunzlauer v Commission*, T-43/02, ECLI:EU:T:2006:270.

[55] Paragraph 127.

[56] Paragraph 129.

[57] Paragraph 130.

[58] Paragraph 109.

In *Knauf Gips,*[59] the appellant was held responsible for all the actions of the group to which it belonged, including those of its sister company and its subsidiaries. The appellant and its sister company were held by 22 common shareholders, all members of the same family. The appellant argued that it did not form an economic unit with the other entities of the group (since none of the shareholders had a majority of shares or votes) and that it could not be held liable for the infringements committed by them. The CFI dismissed the appeal and the case was brought to the ECJ.

The ECJ began by agreeing with the CFI's assessment that the appellant was part of the same economic unit as the other entities of the group. The ECJ considered that the CFI had inferred the existence of an economic unit based on a body of consistent evidence[60] and held that the possibility of varying majorities forming within a group of companies did not, by itself, exclude the possibility of the existence of such unit.[61]

Regarding the question of whether the appellant could be held responsible for the infringements committed by the other companies of the group, the CFI had considered that the Commission was entitled to do since the appellant had presented itself as the sole interlocutor of the group and had not denied that capacity at any time during the administrative proceedings. The ECJ, however, found that regarding this aspect the CFI had erred in law,[62] reasoning that there is no requirement under EU law for the addressee of the statement of objections to challenge the various matters of fact or law during the administrative procedure, being otherwise barred from doing so

---

[59] Judgment of the CFI of 8 July 2008, *Knauf Gips v Commission*, T-52/03, ECLI:EU:T:2008:253 and judgment of the ECJ of 1 July 2010, *Knauf Gips v Commission*, C-407/08 P, ECLI:EU:C:2010:389.

[60] Including the fact that the appellant and its sister company shared the same managing shareholders; the shareholders were bound by a family contract, the purpose of which was to ensure "*the single management and direction*" of the companies in the group; the sister company was merely a holding company and depended on the appellant for both staff and premises; and the sales figures exchanged during the infringement referred both to the appellant as well as the sister's subsidiaries.

[61] Paragraph 37.

[62] Paragraph 92.

later at the stage of the judicial proceedings.[63] The Court thereby overruled the case law of the CFI regarding this procedural issue.[64]

Nonetheless, the ECJ considered that the appellant could be held liable for the activities of the group for a number of reasons, including (i) the fact that the sister company was only a holding and depended on the appellant for both its premises and for its staff; (ii) most of the documents seized during the investigation contained the appellant's letterhead and (iii) the appellant was the company within the group with the largest turnover on the relevant market, the Court saw this as an indication of "*its predominance within that group, at least as regards that market*".[65]

As stated above, it is difficult to draw conclusions from this case or to interpret it as an outright acceptance of sister company liability given the peculiar structure of the group at stake. Moreover, the Court attributed relevance to the predominant role which the appellant adopted. In other words, this case cannot be interpreted as a green light from the Court to the Commission allowing it to hold liable any entity that is part of an economic unit which committed an antitrust infringement, regardless of its role in the infringement or position in the group.

Mixed signals from the *Biogaran* case

The GC has recently had the opportunity to express its thoughts on the possibility of holding a subsidiary liable for an infringement committed by the parent company in the *Biogaran* case.[66] Unfortunately the ruling lacks clarity. An appeal to the ECJ is currently pending and hopefully the ruling of this Court will shed further light on this issue.

In *Biogaran*, the applicant argued that the Commission had disregarded the principle of personal responsibility by imputing to it liability for an agreement concluded by its parent company.

---

[63] Paragraph 89.

[64] S*ee* Judgment of the CFI of 27 September 2006, *Akzo Nobel v Commission,* T-330/01, ECLI:EU:T:2006:269, paragraph 88.
As pointed out by WINCKLER the Court's willingness to quash the CFI's judgment is all the more striking in view of the fact that this matter was unlikely to change the substantive outcome of the case. The author sees here a sign of the Court's greater openness to arguments invoking basic rights under the Charter of Fundamental Rights of the EU and the European Convention on Human Rights. (WINCKLER, A. (2011) Fines: New Case Extending Company Liability in the Name of the 'Economic Unit' Concept and Reversing Prior Case Law on Admissible Arguments. *Journal of European Competition Law & Practice*. 2 (1). pp. 34-35, 35).

[65] Paragraph 105.

[66]Judgment of the GC of 12 December 2018, *Biogaran v Commission*, T-677/14, ECLI:EU:T:2018:910.

It claimed to be unaware both of the conduct of its parent company and of the unlawful nature of the settlement concluded between its parent company and a third party.

The GC began by affirming, however, that the applicant had misinterpreted the Commission's decisions and that the Commission had never intended to impute to the subsidiary the acts alleged against the parent company. According to the GC, there were several elements in the Decision demonstrating that the appellant knew about the anticompetitive nature of the agreement and was directly involved in it.[67] Nonetheless the GC went on to argue that *Biogaran*, a wholly owned subsidiary, was part of the same undertaking as its parent company for the purposes of competition law.[68] The *Akzo* presumption[69] has so far only been applied against parent companies in order to attribute to them the conduct of wholly owned, or virtually wholly owned, subsidiaries. But in this case, the GC applied it for the first time the other way round. Despite being wholly owned by the parent company, the Court argued that the subsidiary had failed to demonstrate that it determined its commercial policy independently. In order to demonstrate its independence the appellant had argued that its directors had never held positions in the parent company. However the GC considered that evidence insufficient to rebut the presumption that the parent company actually exercised decisive influence over *Biogaran*.[70] The GC went on to conclude that the Commission was entitled to consider that the subsidiary and the parent company "*were jointly and severally liable for the conduct which was alleged against them, since the acts committed by each were accordingly deemed to have been committed by one and the same undertaking*".[71]

However, the GC does not give the next step and affirm that if a parent company not directly involved in an infringement can be held liable for the subsidiary's conduct because they belong to the same economic unit, then logically a subsidiary not directly involved in an infringement can be held liable for the parent company's conduct. Instead, the GC states that since, in the case under analysis, the infringement resulted *both* from the conduct of the parent and the conduct of the subsidiary, the Commission must be allowed to hold both entities jointly and severally liable. In the words of the GC:

---

[67] Paragraph 209.

[68] Paragraph 215.

[69] Judgment of the Court of Justice of the European Communities (CJEC) of 10 September 2009, *Akzo Nobel et al. v Commission*, C−97/08 P, EU:C:2009:536, paragraph 60

[70] Paragraph 214.

[71] Paragraph 216.

"*If it is possible to impute to a parent company liability for an infringement committed by its subsidiary and, consequently, to make both companies jointly and severally liable for the infringement committed by the undertaking which they comprise, without infringing the principle of personal responsibility, the same applies a fortiori where the infringement committed by the economic entity comprising a parent company and its subsidiary results from the combined conduct of both those companies*."[72]

In our opinion, since the GC did not limit its analysis to whether the subsidiary and the parent were part of the same economic unit but focused on the role played by the subsidiary and its direct involvement in the infringement, it is not possible to draw from this case a recognition of horizontal or inverted liability. One cannot conclude that innocent subsidiaries can be held liable for fines and damages for infringements committed by their parent companies solely by reason that they belong to the same economic concern.

However, the following paragraphs of the judgement confuse the problem a bit further since the GC adds that "*if the Commission had to prove that the subsidiary was aware of the parent company's conduct in order to impute the infringement to the group, this would have an effect on the concept of economic unit*".[73] According to the GC, this would make the finding of infringements of competition law in groups of companies more difficult, would render action to combat anticompetitive practices less effective and this cannot be justified by observance of the principle of personal responsibility for infringements.[74] Nonetheless, the GC recognised that the Commission had drawn sufficient evidence to establish that the subsidiary was aware of the parent company's conduct and of the unlawful nature of the agreement.[75]

In brief, the GC seems tempted to recognise the liability of the subsidiary solely on the ground that it belongs to the same economic unit, but being afraid to give this step, the GC relies on the argument that, in any case, the subsidiary was directly involved and knew about the unlawful nature of the conduct.

---

[72] Paragraph 218.

[73] Paragraph 225.

[74] Paragraph 226.

[75] Paragraph 232.

Some comments on the possibility of recognising subsidiary liability:

What came first: the chicken or the egg?

To answer the question of whether innocent subsidiaries can be held liable, it would be helpful to understand what does the EU judicature consider as the decisive factor for the attribution of liability to the parent company: is it because it belongs to the same undertaking that committed the infringement? Or is it because it controlled the infringing entity? In other words, is the "exercise of decisive influence" test an additional threshold that must be met in order to attribute liability or is it a factor that is considered among others to reach the conclusion that both entities belong to the same undertaking?

According to well established case law that the Commission may only attribute liability for the conduct of a subsidiary when (i) the parent company was in a position that enabled it to exercise decisive influence and when (ii) decisive influence was in fact exercised.[76] In the words of the GC, "*the Commission cannot merely find that an undertaking 'was able to' exert such a decisive influence over the other undertaking, without checking whether that influence actually was exerted* […] *it is, in principle, for the Commission to demonstrate such decisive influence"*.[77]

One might therefore feel tempted to conclude that being part of an economic unit does not suffice for liability to be attributed. An extra threshold needs to be verified: an entity can only be held liable if it exercised control over the company that was directly involved in the infringement. One can find statements of the Court clearly pointing in this direction. For instance, in *Aristrain* the ECJ affirmed that "*the Court of First Instance was wrong to rule* […] *that it is possible to impute to a company all of the acts of a group even though that company has not been identified as the legal person at the head of that group with responsibility for coordinating the group's activities.*"[78]

The problem is that in the vast majority of cases dealing with parent company liability the EU judicature does not take a two-step analysis. It does not first address the question of whether the entities belong to same economic unit and subsequently of whether the entity that is being held liable exercised decisive influence over the infringer. Instead, EU courts begin by addressing the

---

[76] This was first clearly stated by the CJEC in *AEG Telefunken*, however these requirements already resulted from previous case law. Judgment of the CJEC of 25 October 1983, *AEG Telefunken v. Commission,* 107/82, ECLI:EU:C:1983:293, paragraph 50.

[77] Judgment of the CFI of 27 September 2006, *Avebe v. Commission*, T-314/01, ECLI:EU:T:2006:266, paragraph 136.

[78] Judgment of the CJEC of 2 October 2003, *Siderúrgica Aristrain v Commission*, C-196/99 P, ECLI:EU:C:2003:529, paragraph 98.

question of whether the parent company controlled the subsidiary and if they arrive to a positive answer they conclude that the two entities form a single undertaking.

The unclarity of the case law has led to contradictory interpretations among scholars. On the one hand, some authors claim that the exercise of control criterium is not an additional threshold for the attribution of liability but part of the test of whether the entities belong to the same undertaking. According to these authors the crucial test to impute liability is unity of conduct in the market and therefore they recognise the possibility of holding innocent sister companies and subsidiaries liable.[79] For instance, KERSTING argues that the decisive factor regarding liability is the notion of "undertaking": joint liability derives from the unity of action of the undertaking, the existence of decisive influence is not relevant it merely serves to determine whether there is an economic unit.[80]

On the other hand, authors such as VAN LEUKEN believe that the single economic unit doctrine plays no decisive role in determining the legal entities responsible for the infringement: a parent company's liability is based on the fact that it exercises decisive influence over the subsidiary that committed the cartel infringement.[81]

Undoubtedly it would be easier to reason that since economic units (i.e. undertakings), which might be comprised of several different legal entities, are the subjects of competition law, if one of such entities violates antitrust norms, it is the undertaking itself that is deemed to have committed the infringement and accordingly liability - both for fines and damages - must fall on all its entities, regardless of their level of involvement or knowledge about the infringement.

---

[79] *See* KERSTING, C. (2017) Kartellschadensersatz: Haftungstatbestand - Bindungswirkung - Schadensabwälzung In: KERSTING, C. and PODSZUN, R (eds.), *Die 9. GWB-Novelle.* Chapter 7. Munich: CH Beck; KERSTING, C. and PREUß, N. (2016) Umsetzung der Kartellschadensersatzrichtlinie durch die 9. GWB- Novelle'. *Wirtschaft und Wettbewerb*. 8. pp. 394-403, 395; KERSTING, C. (2015) Konzernhaftung im Kartellrecht. *Der Gesellschafter*. 6. 377, 378; KERSTING, C. (2014) Die Rechtsprechung des EuGH zur Bußgeldhaftung in der wirtschaftlichen Einheit. *Wirtschaft und Wettbewerb*. 64. 1156-1173, 1159; FÜLLER, J. (2016) Art. 101 AEUV. In: BUSCHE, J. and RÖHLING, A. (eds.) *Kölner Kommentar zum Kartellrecht III*. Cologne: Carl Heymanns, paragraph 48; REHBINDER, E. (2016) § 33 GWB. In: LOEWENHEIM, U. *et al*. *Kartellrecht*. 3rd. Munich: CH Beck, paragraph 41; DE BRONETT, G. (2014) Unternehmen' als Wiederholungstäter im EU-Kartellrecht vor und nach der Akzo Nobel- Rechtsprechung des EuGH zum Unternehmensbegriff. *Europäisches Wirtschafts und Steuerrecht*. 6. pp. 313, 321; HEINRICH, M. (2016) *Rechtsfragen der wirtschaftlichen Haftungseinheit des europäischen Kartellbugßeldrechts*. Baden-Baden: Nomos.175; SEELIGER, D and GÜRER, K. (2017) Kartellrechtsrisiken in M&A-Transaktionen – neuere Entwicklungen. *Betriebsberater*. 195-199. GRAVE, C. and NYBERG, (2016) J. Art. 101 Abs. 1 AEUV. In: Loewenheim, U. et al. (eds.) *Kartellrecht*. 3rd. Munich: CH Beck. Paragraphs 180 ff.

[80] KERSTING, C. (2019) Liability of Sister Companies and Subsidiaries in European Competition Law. [Online] Available from: https://ssrn.com/abstract=3355816. Translation of: (2018) Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht. *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*. 182. pp. 8-31. Sharing the same opinion: WAGENER, H. (2019) Follow-up to Skanska - The "Implementation" by National Courts so Far. [Online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455993&dgcid=ejournal_htmlemail_antitrust:antitrust:law:policy:ejournal_abstractlink

[81] VAN LEUKEN, R. (2016) Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries, Is the Approach of the European Court of Justice in *Akzo Nobel* also Relevant in a Private-Law Context? European Review of Private Law. 3 & 4. pp. 513-527, 527.

However, in our view, the economic unit doctrine is more complex. The undertaking might be comprised of various distinct legal entities and the fact that different legal persons belong to the same unit has a number of legal consequences. Some of these consequences depend solely on the fact that the entities belong to the same economic unit (for instance agreements between entities that are part of the same undertaking escape the prohibition of article 101 and mergers between these entities are not deemed to be a notifiable concentration) but more drastic consequences, such as the attribution of liability, depend on the verification of additional criteria. Accordingly liability can only be attributed to one legal entity for the conduct of another if the former effectively controlled the latter during the infringement period.

In our view the fact that the entities belong to the same undertaking cannot suffice to attribute liability for a number of reasons.

(1) **To ensure the compatibility of the single economic unit doctrine with fundamental law principles**

First of all, as the ECJ has itself recognised on several occasions, the punitive nature of measures imposed by competition authorities for punishing cartel offences is at least akin to criminal law.[82] Fundamental criminal law principles such as the principle of personal responsibility and the presumption of innocence therefore play a crucial role in the context of public enforcement. Attributing liability to entities solely on the ground that they belong to the same economic unit would amount to recognising an objective form of liability and would represent a violation to the referred principles. The EU judicature has acknowledged itself that the automatic attribution of liability would be contrary to the principle of personal liability and that the single economic unit doctrine is compatible with criminal law principles because proof is required that the parent

[82] Opinion of AG Kokott delivered on 3 July 2007, in *Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI et al*, C-280/06, ECLI:EU:C:2007:404, paragraph 71. For other examples see opinion of AG Kokott delivered on 8 September 2011, in *Toshiba Corporation et al.*, C-17/10, ECLI:EU:C:2011:552, paragraph 48: "*the similarity of EU antitrust law to criminal law strongly suggests that they should not be applied retroactively as this might infringe the principle of legality in relation to criminal offences and penalties (nullum crimen, nulla poena sine lege), which is protected as a fundamental right at EU level (Article 49(1) of the Charter of Fundamental Rights)*"; opinion of Vesterdoff acting as AG delivered on 10 July 1991, in *Rhône-Poulenc v Commission,* joined cases T-1/89 to T-4/89 and T-6/89 to T-15/89, at 885 "*the fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), have a criminal law character*"; opinion of AG Léger delivered on 3 February 1998, in *Baustahlgewebe v Commission*, C-185/95 P, ECLI:EU:C:1998:608, "*it cannot be disputed — and the Commission does not dispute — that, in the light of the case-law of the European Court of Human Rights and the opinions of the European Commission of Human Rights, the present case involves a 'criminal charge*".

company exercised decisive influence over the subsidiary.[83] It is for the same reasons that the Court insists on the rebuttable nature of the *Akzo* presumption.[84]

Advocate General Kokott's sustained in her Opinion in the *Akzo Nobel* case,[85] in order to reject the argument that imposing liability on the parent of an infringing subsidiary conflicted with the principle of personal responsibility, that even though "*the parent company's involvement in the commission of the offence may not have been directly apparent outwardly, for example, through the participation of its own staff in meetings of the cartel members […] that does not detract from its personal (co-)responsibility for the offence. As the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies. It cannot simply shift responsibility for cartel offences committed within that group just to individual subsidiaries*."[86] The ECJ then expressed the same view in the judgement by stating that "*even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability*."[87]

(2) **How can subsidiary or sister company liability be justified?**

Secondly, the reasons that justify parent company liability cannot be used to justify holding a sister company or a subsidiary liable. In the context of public enforcement, parent company liability serves a deterrent purpose. Not only does it allow the fine to be set at a higher amount, but given that the own assets of the parent company are at stake, it creates a very strong incentive for the parent company to monitor and control the subsidiary and hinder it from engaging in

---

[83] Judgment of the GC of 9 September 2011, *Alliance One International v. Commission*, T-25/06, ECLI:EU:T:2011:442, paragraph 92. Judgment of the ECJ of 10 April 2014, *Commission v Siemens et al. and Siemens Transmission & Distribution et al. v Commission*, joined cases C-231/11 P to C-233/11 P, paragraphs 80 and 81.

[84] Judgment of the ECJ of 29 September 2011, Elf Aquitaine v Commission., C-521/09 P. ECLI:EU:C:2011:620, paragraph 59. "*The purpose of the presumption of actual exercise of decisive influence is, in particular, to strike a balance between, on the one hand, the importance of the objective of combatting conduct contrary to the competition rules […] and, on the other hand, the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms. It is for that reason, among others, that, as is clear from the consistent case-law cited in paragraph 56 above, the presumption is rebuttable.*"

[85] Judgment of the CJEC of 10 September 2009, *Akzo Nobel et al. v Commission,* C-97/08 P. ECLI:EU:C:2009:536.

[86] Paragraph 99.

[87] Paragraph 77.

anticompetitive conduct. This deterrence purpose does not serve to justify the attribution of liability to sister companies or to subsidiaries. Logically, if they do not have any power of control over the entity that engaged in the anticompetitive conduct they are unable to prevent it from violating competition law.

Some authors, addressing the justification of parent company liability from an economic perspective, argue that holding parent companies liable for their subsidiaries' infringements leads to efficient results.[88] If a subsidiary does not have enough assets to pay the full sanction, its expected liability will be limited to the value of the assets available to it. Even if the sanction is set at the optimal level, deterrence will be suboptimal. This has been described by SHAVELL as the judgement proof problem: infringers might be unable to pay the totally of the fine or damages they have been held liable for, consequently, infringers will treat any measure of liability that exceeds their assets as imposing an effective financial penalty only equal to their assets.[89] Holding the parent company liable is one way to restore effective deterrence. However, this reasoning cannot be used to justify sister or subsidiary liability.

The deterrence goal is largely absent in the field of private enforcement, where liability serves mainly a compensatory aim. In this context, the attribution of liability to the parent company can be justified on the principle of effectiveness. EU law recognises the right to compensation for those who have suffered antitrust damages, the exercise of this right would be seriously compromised if it could not be exercised against the parent company given how easy it is through corporate restructuring to extinguish the subsidiary that had been found liable or to deplete it of assets, thereby ensuring that compensation claims would be unsuccessful. On the contrary, holding subsidiaries liable cannot be justified on the need to prevent opportunistic corporate restructurings or on the need to ensure the financial capacity of the liable entity. The question is then whether rejecting the possibility of attributing liability to innocent subsidiaries or sister companies would render the exercise of the right to claim compensation impossible or extremely difficult.

---

[88] KOENIG, C. (2017) An Economic Analysis of the Single Economic Doctrine in EU Competition Law. *Journal of Competition Law and Economics*. 13 (2). pp. 281-327.

[89] According to the author this can have various implications. Namely, this might lead firms to engage in risky activities to a socially excessive extent. Furthermore, it also means that they will have too little incentive to take precaution to reduce risks associated with their activities. The motive to purchase insurance is also diminished. If, nonetheless, insurance is purchased, the problem of excessive risk taking is mitigated but the problem if inadequate level of care can be exarcebated of the insurer's ability to monitor is imperfect. SHAVELL, S. (1986) The Judgment Proof Problem. *International Review of Law and Economics*. 6. pp. 45-58, 45-46.

To answer this question one should take into account the recent preliminary ruling interpreting Regulation 1215/2012 Brussels I bis, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In this decision, the ECJ interpreted Article 7(2) of the said Regulation. This norm establishes certain exceptions to the jurisdictional principle that persons domiciled in a Member State (MS) shall be sued in the courts of that MS, namely - in matters relating to tort, delict or quasi-delict – and allows for persons domiciled in a MS to be sued in the MS where the harmful event occurred. The ECJ held that, in actions for damages for antitrust infringements, the place where the harmful event occurred should be interpreted as the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations.[90]

This means that, in principle, injured parties are able to sue the parent companies in the country where they suffered the harm. Suing a foreign parent company instead of a local subsidiary might represent increased legal costs or perhaps a longer procedure but the impossibility of claiming damages from an innocent subsidiary does not seem to make the exercise of the right to claim damages impossible or extremely difficult. Admittedly, recognising automatic liability to all the entities that are part of an undertaking involved in an infringement would render the right to claim compensation simpler or easier. However, the principle of effectiveness has limits, namely when it leads to the violation of fundamental legal principles, such as the principle of personal liability.

A hybrid subject requires a hybrid solution

Attributing automatic liability to all the companies that are part of the same group on the ground that they compose a single undertaking would certainly amount to a simpler theory, would be easier to apply and would enhance the effectiveness of claims for damages and of the prohibition of article 101.

However, when attributing liability to groups of companies one cannot forget the hybrid and malleable nature of these organisations. If on the one hand, legal entities that belong to corporate

[90] Judgment of the ECJ of 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi v. Daf Trucks*, C-451/18, ECLI:EU:C:2019:635.

groups might not enjoy the same level of autonomy as fully independent legal persons, on the other hand, groups of companies are not "super-companies". Reality demonstrates the existence of a wide range of forms of corporate groups, with various degrees of centralisation: from groups composed of only wholly owned subsidiaries to groups characterised by their decentralised organisation where subsidiaries act as mere profit centres with high decisional autonomy, where the parent company's intervention is limited to the group's survival, solvability and profit maximisation.[91] As has been advocated by some authors, corporate groups, as organisational networks, demand a rupture with the traditional techniques of *unitary imputation* traditionally used in relation to legal persons given their anthropomorphic conception as unitary centres of action and will.

We believe that problems posed by corporate groups cannot be solved neither (i) by insisting on the distinct legal personality, the corporate separateness and the limited liability of the companies that compose the group while completely disregarding the collective identity of the group and its common interests, (ii) but nor can these problems be solved through the opposite solution which sees the group as one single person and liability of one legal entity immediately extends to all the other entities of the group. Corporate groups cannot be regarded as single hierarchical units controlled by the parent company. The reality is much more complex. As such, we should be prepared to accept a technique of *multiple imputation* of rights, duties and liabilities, in lieu of the technique of *unitary imputation.*[92]

The concept of undertaking in competition law can be seen as expression of this multiple imputation technique. It allows the possibility of attributing rights, duties or liabilities (i) to the various entities composing the group; (ii) to only one of the entities; or (iii) partially to the various co-participants. Imputation to one entity will depend on the specific circumstances of the case. Instead of defining the economic unit, the emphasis should be on the aim or the objective that the attribution of the right, duty or liability intends to realise. As such, it is our belief that attributing liability to companies that are unable to control the infringing entity cannot find a strong justification and as such should not be carried out.

---

[91] ANTUNES, J. (2002) Os Grupos de Sociedades. Estrutura e Organização Jurídica da Empresa Plurissocietária. 2.ed. Coimbra: Almedina, 155-156. *See also* GOERDELER, R. (1973) Überlegungen zum Europäischen Konzernrecht. *Zeitschrift für Unternehmens und Gesellschaftsrecht.* 2 (4). pp. 389-409.

[92] *See* TEUBNER, G. (2005) Unitas Multiplex. Translated by ANTUNES, J. *Revista Direito GV*. 2 (1). 77-110.

Concluding remarks

In brief, national courts cannot automatically hold liable subsidiaries (even if wholly owned) when the Commission decision is only addressed to their parent companies. It results from well established case law and the Commission's practice that the fact that a company belongs to a corporate group does not automatically mean that the entity is part of the same undertaking as all the other entities belonging to the same group for competition law purposes. Determining whether two entities belong to the same economic unit requires a case by case analysis where various criteria have to be taken into account, namely the economic, organisational and legal links between such entities and whether the same entities adopt a unified conduct in the market.

Admittedly the Court's theory is not entirely clear as it tends to conclude that an economic unit exists as a result of the control exercised be one entity over the other. However, in our opinion, what justifies the attribution of liability to one legal entity for the conduct of another is the exercise of control. As such, the fact that two entities belong to the same economic unit does not suffice for liability to be attributed. Attribution of liability to an entity that is unable to exercise control will not have any deterrent effect. Moreover, subsidiary liability is not dictated by the principle of effectiveness, since - as EU law stands today - it is not impossible or extremely difficult for those who have suffered damages as a result of a EU competition law infringement to demand compensation from the parent company.

The exercise of control criteria ensures that the single economic unit doctrine does not violate fundamental principles of law.

As such, in our view, subsidiaries should only be held liable when they were directly involved in the infringement and/ or were aware of the unlawfulness of their conduct.

The same reasoning applies to sister companies. Although if these, as a result of an atypical group structure, were able to exercise control over the entity involved in the infringement then liability can be attributed to them by applying the same criteria used when holding parent companies liable.