

# EU Competition Briefing

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## An update on parent liability for antitrust violations of subsidiaries

*By Yves Botteman and Laura Atlee of Steptoe's EU Competition Practice*

In the judgment of the European Court of Justice (“ECJ”)<sup>1</sup> on 10 September 2009 in the *Akzo Nobel* case,<sup>2</sup> the Community judicature has clarified the presumption of joint and several liability of parent companies for cartel infringements committed by their wholly-owned subsidiaries. The attribution of liability has major implications for the level and payment of any fines imposed by the European Commission (the “Commission”) for such infringements. In this briefing, we discuss the contribution of this judgment to the parent-daughter liability debate.

### Background

In Europe, the Commission is vested with powers to prosecute and impose fines on companies that have been directly involved in cartel activities. The Commission may hold a parent company jointly and severally liable for antitrust infringements by its subsidiary and the payment of the fine thereof if it is established that the “*subsidiary does not decide independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities*”.<sup>3</sup> It is not necessary for the parent to have played any material role in the perpetration of the infringement, or even to have had contemporaneous knowledge about the subsidiary’s infringing behaviour, in order to be held liable.<sup>4</sup> Instead, it is sufficient to prove that the parent has the ability to exercise a decisive influence over the conduct of the subsidiary and that it does in fact exert such influence.<sup>5</sup>

#### STEPTOE & JOHNSON LLP

Avenue Louise 240, Box 5  
B-1050 Brussels, Belgium  
TEL: +32 2 626 0500  
FAX: +32 2 626 0510

1330 Connecticut Avenue, NW  
Washington, DC 20036  
TEL: 202.429.3000  
FAX: 202.429.3902

750 Seventh Avenue  
New York, NY 10019  
TEL: 212.506.3900  
FAX: 212.506.3950

115 South LaSalle Street  
Suite 3100  
Chicago, IL 60603  
TEL: 312.577.1300  
FAX: 312.577.1370

Collier Center  
201 East Washington Street  
16th Floor  
Phoenix, AZ 85004  
TEL: 602.257.5200  
FAX: 602.257.5299

633 West Fifth Street  
Suite 700  
Los Angeles, CA 90071  
TEL: 213.439.9400  
FAX: 213.439.9599

2121 Avenue of the Stars  
Suite 2800  
Los Angeles, CA 90067  
TEL: 310.734.3200  
FAX: 310.734.3300

#### STEPTOE & JOHNSON

99 Gresham Street  
London, EC2V 7NG, England  
TEL: +44 20 7367 8000  
FAX: +44 20 7367 8001

To learn more about any of our offices, visit [www.steptoel.com](http://www.steptoel.com).

<sup>1</sup> Newly renamed the Court of Justice of the European Union by the Lisbon Treaty, which entered into force on December 1, 2009.  
<sup>2</sup> Case C-97/08, *Akzo Nobel NV v. Commission*, Judgment of the Court on 10 September 2009, not yet reported.  
<sup>3</sup> See, e.g., Case C-286/98 P, *Stora Kopparbergs Bergslags AB v. Commission*, [2000] ECR I-9925, para. 26.  
<sup>4</sup> Case T-325/01, *DaimlerChrysler AG v. Commission*, [2005], ECR II-03319, para. 221.  
<sup>5</sup> Case 107/82, *AEG v. Commission*, [1983] ECR 3151, at para. 49

The parent–daughter liability finds its *raison d’être* in the fact that, under EU competition law, the prohibition against cartels applies to independent “undertakings”. This concept is defined as a “unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long–term basis” regardless of its legal status and the way in which it is financed.<sup>6</sup> In practice, the economic unit will only occasionally correspond with the definition of legal person under national corporate law, e.g. limited liability partnership or “société anonyme”. In many cases, the economic unit will consist of a large number of persons, natural or legal. However, under Community law, the infringement must be imputed to a legal person against whom fines may be imposed. The Statement of Objections – which sets out the formal charges that the Commission has formulated against an undertaking – must be addressed to that person and it must specify in which capacity that person is called to answer the allegations contained therein.

When confronted with economic units consisting of large groups of legal entities, the Commission will invariably address the Statement of Objections and the decision imposing fines to the ultimate parent company of the group to which the indicted subsidiary(ies) belong(s). In this way, the Commission ensures the full payment of the fine. Indeed, it does not run the risk that the subsidiary (or the parent) organises its insolvency or will liquidate soon before the issuance of the decision.

### **The presumption**

To attribute liability for conduct to a parent company, the Commission must prove that the parent has the ability to exert decisive influence over the conduct of the subsidiary and that it does in fact exert such influence. The test slightly differs from the concept of ‘control’ under the EC Merger Regulation, which requires that the parent have the mere possibility of exercising decisive influence over the subsidiary.

In *Stora*, in which the parent company held 100% of the capital of a subsidiary that had committed an infringement, the ECJ held that: (i) the parent company could exercise a decisive influence over the conduct of the subsidiary and (ii) it could be assumed that the parent company “in fact exercised decisive influence over its subsidiary’s conduct”.<sup>7</sup> The Court stated, in part:

<sup>6</sup> See, e.g., Case T-9/99, HFB and Others v. Commission, [2002] ECR II-1487, paragraph 54.

<sup>7</sup> Case C-286/98 P, Stora Kopparbergs Bergslags AB v. Commission, [2000] ECR I-9925, para. 29.

“As that subsidiary was wholly-owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary’s conduct, *particularly since* it had found [...] that during the administrative procedure ‘the appellant had presented itself as being, as regards companies in the Stora Group, the Commission’s sole interlocutor concerning the infringement in question’. In those circumstances, it was for the appellant to reverse that presumption by adducing sufficient evidence.” (Emphasis added.)

Based on *Stora*, it would appear that the presumption that the parent in fact exercised decisive influence could not be made absent additional indicia pointing towards actual exercise of decisive influence. The Court’s reference to the fact that the parent had represented the subsidiary in the administrative procedure could be such an additional indication. The language would indicate that the Commission could not rely on the presumption without adducing further evidence of actual decisive influence. In practice, the Commission has not only used the 100% shareholding criterion, but has also relied on additional evidence in order to attribute liability to the parent company. However, in 2005, the Court of First Instance indicated in *Tokai Carbon* that the presumption operates “*without needing to check whether the parent company in fact exercised that power*”<sup>8</sup>, suggesting that the Commission did not need to refer to other indicia to establish that the parent actually exercised decisive influence over the subsidiary.

On 10 September 2009, the ECJ in *Akzo* put an end to this debate by holding that the ECJ in *Stora* referred to other circumstances:

“for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption [...] subject to the production of additional indicia relating to the actual exercise of influence by the parent company”.<sup>9</sup>

As a result, the Commission may rely on the presumption without referring to other indicia purported to establish that the parent actually exercised decisive influence over the subsidiary. To rebut the presumption, the parent has to adduce sufficient evidence that the subsidiary acts autonomously on the market. In other words, the parent has to demonstrate that it does not form with the subsidiary a “single economic unit”.<sup>10</sup>

<sup>8</sup> Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon v. Commission*, [2005] ECR II-00010\*, para. 60.

<sup>9</sup> Case C-97/08, *Akzo Nobel NV v. Commission*, Judgment of the Court on 10 September 2009, not yet reported, para. 62.

<sup>10</sup> Case C-97/08, *Akzo Nobel NV v. Commission*, Judgment of the Court on 10 September 2009, not yet reported, para. 65.

### **Irrebuttable presumption?**

Over the years, companies caught by the Stora presumption have attempted to rebut it on the basis of a wide range of arguments, including:

- The parent company is a pure holding company restricted to major and broad financial and strategic decisions without sufficient operational resources to exercise any influence on the business conduct of the subsidiaries;<sup>11</sup>
- The reporting is limited to financial results and forecasts and does not cover the commercial policy of the subsidiary;<sup>12</sup>
- The parent and the subsidiary operate on distinct product markets;<sup>13</sup> or
- The parent company's influence was not exerted in the specific area in which the infringement occurred.<sup>14</sup>

All of the above arguments have been rejected by the EC courts. In view of these rulings, some have argued that establishing the absence of decisive influence is extremely difficult to discharge given that the company has to provide *negative* evidence. As such, the presumption is quasi-irrebuttable. Others have also pointed out that a number of indicia used by the Commission to bolster the Stora presumption are circular, in particular, the fact that the sole shareholder has the right to appoint senior managers and to approve the annual budget and business plan. Those rights are inherent to the holding of 100% of the capital of an undertaking and, hence, should not be used to rebut the claims made by parent companies that they did not exercise in fact decisive control over the undertaking.

### **The Combined Effect of the Attribution of Liability and the 2006 Guidelines on Fines**

The existence of this nearly irrebuttable presumption has serious consequences. Conceived initially as a means to recover the fine, the Commission is now in a position to use the attribution of liability to substantially raise the amount of the fine levied on companies whose subsidiaries have infringed competition laws.

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<sup>11</sup> Case T-175/05, Akzo Nobel NV v. Commission, Judgment of the Court of 30 September 2009, not yet reported, paras. 102 – 104.; Case T-168/05, Arkema SA v. Commission, Judgment of the Court of 30 September 2009, not yet reported, para. 159.

<sup>12</sup> Case T-175/05, Akzo Nobel NV v. Commission, Judgment of the Court of 30 September 2009, not yet reported, paras. 94 – 95; Case T-168/05, Arkema SA v. Commission, Judgment of the Court of 30 September 2009, not yet reported, para. 53.

<sup>13</sup> Case T-168/05, Arkema SA v. Commission, Judgment of the Court of 30 September 2009, not yet reported, para. 53.

<sup>14</sup> Case T-112/05 Akzo Nobel NV v. Commission, [2007] ECR-II 05049, para. 83.

First, in accordance with Article 23.2 of Regulation 1/2003, the Commission may impose fines up to 10% of the worldwide turnover of an undertaking for substantive infringements. Shifting the liability to the parent company enables the Commission to apply the 10% ceiling not to the subsidiary having committed the infringement but to the ultimate parent company. By doing so, the Commission may use a far greater turnover to calculate the ceiling. As a result, the attribution of liability instrument, conceived by the courts (and clarified in *Akzo*) to “impute unequivocally [a conduct] to a legal person on whom fines may be imposed”, is now heavily relied upon by the Commission to move the monetary goalposts.

Second, it is not disputed that the application of the 2006 Guidelines on Fines has a very significant effect on the amount of the fine the Commission will impose for a violation of competition law. Recent enforcement decisions based on these Guidelines are illustrative of this growing intolerance for cartels. Undertakings are being saddled with ever increasing fines including Saint-Gobain (2008) with € 896 million, E.On and GDF Suez (2009) with € 553 million each, and Sasol with € 318 million (2008).

To illustrate the combined effect of the above two points, consider Daughter Co., which is a subsidiary of Parent Co. and has committed an infringement. Parent Co. has a 100% shareholding in Daughter Co., and it is unable to rebut the presumption that it has decisive influence over Daughter Co. Parent Co. has an aggregate turnover of € 900 million for 2009. Daughter Co. has an aggregate turnover of € 300 million. The resulting fine could reach up to € 90 million (as opposed to € 30 million); this fine exceeds by a wide margin the 10% of the aggregate turnover of the subsidiary that committed the infringement. By relying on the parent-subsidiary liability, the Commission may apply the 10% ceiling to the whole group, thereby potentially imposing a much higher fine for the same infringement on Parent Co. than on the other undertakings – who may not be part of large groups – targeted by the Commission’s investigation.

## Conclusion

The justification generally put forward in favour of ever-increasing fines in the EU is the need to ensure effective deterrence. The fact that the Commission lacks the power to impose criminal or administrative penalties against individuals who have taken an active part in the perpetuation of the infringement has also contributed to the Commission's increasingly severe treatment of undertakings. The lack of private enforcement in the EU may also induce the Commission to raise the amount of the fines.

In any event, the presumption of liability has undeniably contributed to the Commission's zero tolerance policy. With *Akzo*, the ECJ has reassured the Commission's reliance on a 100% shareholding to pursue its policy even more vigorously.

Parents are confronted with a dilemma. On the one hand, they should be very wary of their subsidiaries' activities and they may need to take steps to ensure increased oversight to prevent infringing conduct from arising in the first place. But, despite all those efforts, should their subsidiary nevertheless be caught, they will be trapped by the presumption because they actually exercised decisive influence to secure compliance with EC competition rules. The presumption therefore raises the question whether it may not be, in certain circumstances, running counter the deterrence objective.

## Contact

If you have any questions concerning this briefing, please contact your usual Steptoe & Johnson LLP attorney or one of the following attorneys:



Kees Jan Kuilwijk  
Partner  
kkuilwijk@steptoe.com



Yves Botteman  
Associate  
ybotteman@steptoe.com



Laura C. Atlee  
Associate  
latlee@steptoe.com

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Box 5, 240 Avenue Louise  
1050 Brussels  
Tel: +32 (2) 626 05 00  
Fax: +32 (2) 626 05 10