The construct of parental company liability

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- The legal construct of parental company liability
- Pure financial investors
- The approach towards joint ventures
- The treatment of 'intermediate companies'
- Leniency considerations
- The fine allocation
- Consequences of parental company liability

Under EU competition law, a parent company may be held jointly and severally liable for antitrust violations committed by its subsidiary, where the parent company exercises decisive influence over the subsidiary. There has been much recent case law on the construct of parental company liability which has the potential to open up considerable risk for companies.

The legal construct of parental company liability

The concept of undertaking

Article 101 TFEU applies to 'undertakings'. The concept of an undertaking is not defined in the EU Treaties and/or regulations. The case law commonly describes an undertaking 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. Undertakings are thus economic, rather than legal entities. As a result, an undertaking under Article 101 TFEU does not necessarily correspond with the definition of a legal person under national corporate law (eg limited liability company)—an economic unit comprising different legal or natural persons may form a single undertaking for competition law purposes.

References: Art 101 TFEU

It is the economic unity of the undertaking that enables the Commission to target entire corporate groups and hold the parent company jointly and severally liable for antitrust violations committed by one of the group's subsidiaries.

See further practice note: Prohibition on restrictive agreements—an introduction.

The rationale

Initially, the rationale behind the institution of parental company liability appeared to be to safeguard the Commission's ability to (fully) recover fines for infringements of antitrust rules (eg in cases where a subsidiary would organise its insolvency or be liquidated). The concept, however, is increasingly being used as a means to deter anti-competitive conduct, as it allows the Commission to target the entire corporate group and impose far greater fines (in particular, given that the 10% turnover ceiling provided for in Article 23 of Regulation 1/2003 applies to the entire undertaking, as opposed to merely the infringing legal entity).

References: Regulation 1/2003, art 23

The basic premise

In order to attribute liability to the parent company for a subsidiary's conduct, it is not necessary for the Commission to prove that the parent company played any material role in the perpetration of the antitrust violation, or that it had contemporaneous knowledge about the subsidiary's conduct. The Commission only needs to prove that the parent company:

References: Case C-97/08 P Akzo Nobel and Others v Commission

- has the ability to exercise decisive influence over the conduct of the subsidiary, and
- did in fact exercise such influence during the period of infringement

Over the years, the meaning of 'decisive influence' has evolved from that of a general power to direct the subsidiary's commercial policy, into the consequence of the group's structure. In the most modern articulation of the concept:

- the absence of autonomy of the subsidiary on the market is only one of the factors to be taken into account in assessing whether to attribute liability to the parent company—and it is a decreasingly relevant one
  References: Case T-112/05 Akzo Nobel v Commission
- in contrast, of ever increasing relevance are the economic, organisational and legal links between the parent company and the subsidiary
  References: Joined Cases C-628/10 P and C-14/11 P Alliance One International and Standard Commercial Tobacco v Commission, and Commission v Alliance One International and Others; Case C-520/09 P Arkema v Commission; Case T-146/09 Parker ITR and Parker-Hannifin v Commission; Case C-90/09 P General Química and Others v Commission; Case T-38/07 Shell Petroleum and Others v Commission
- a parent company may be found to exercise decisive influence over its subsidiary even when it abstains from intervening in the subsidiary's commercial policy. A company's mere membership in a group may be sufficient to influence its market conduct (eg in relation to against whom that company should actively compete)
  References: Case 97/08 Akzo Nobel and others v Commission, opinion of Advocate-General Kokott

The quasi-irrebutable presumption

In a situation where the parent company holds 100% (or nearly 100%—it remains unclear how 'elastic' the presumption is) of the capital of the subsidiary, which has committed the antitrust violation, the fulfilment of neither condition of the above-mentioned two-prong test is particularly onerous:

References: Case C-97/08 P Akzo Nobel and Others v Commission; Joined cases T-71/03, T-74/03, T-87/03 and T-91/03 Tokai Carbon v Commission, Intech EDM v Commission, Intech EDM v Commission and SGL Carbon v Commission; Case C-286/98 P Stora Kopparbergs Bergslags v Commission

- the first condition is essentially a tautology. Since the parent company owns the subsidiary, it is taken for granted that it has the ability to exercise decisive influence over its conduct
- as to the second condition, a presumption applies that the parent company does in fact exercise decisive influence over the subsidiary's conduct

Where the presumption is applicable, the Commission is not bound to rely exclusively on it. Nothing prevents the Commission from establishing that a parent company actually exercises decisive influence over its subsidiary by means of other evidence, or by a combination of such evidence and the presumption (ie using a 'dual-basis' method). See, as a recent example, the Court of Justice's judgment in Alstom and Others v Commission (Switchgear cartel).

A parent company may rebut the applicable presumption by adducing sufficient evidence that the subsidiary acts autonomously of the parent company (in which case the Commission will then need to provide evidence that the parent company actually exercised decisive influence on the subsidiary). The parent company should not merely call into question the factual elements adduced by the Commission in support of the presumption. It should provide comprehensive, detailed and coherent facts showing that the subsidiary acted autonomously on the market. Over the years, many parent companies caught by the presumption have attempted to rebut it—but without any success. A non-exhaustive list of the arguments used in that regard, together with the reasons for their dismissal, are provided below.

Companies' Arguments	Grounds of Dismissal by Court
The parent company is a pure financial holding company with no operational role	This does not rule out the possibility that it exercises decisive influence over the conduct of its subsidiaries by coordinating financial investments (Case T-168/05 Arkema v Commission)
The parent company does not intervene in the commercial policy of the subsidiary	The division of functions inside a group is a normal phenomenon (Case T-168/05 Arkema v Commission)
The parent company is only involved in high level strategic decisions by the subsidiaries which affect the group as a whole	This demonstrates that the parent company's function is to ensure that the group runs as one, and confirms the existence of a single economic entity (Case T-72/06 Groupe Gascogne v Commission)
The subsidiary determines its own commercial policy without reference to the parent company	The exercise of decisive influence is not confined to commercial activity in the narrowest sense (eg distribution strategy or price) (Case T-197/06 FMC v Commission)
The group has a documented philosophy of delegation of powers to the subsidiaries	The application of an organisational model based on maximum delegation to the subsidiaries does not prove the autonomy of the subsidiaries (Case T-376/06 Legris Industries v Commission)
There is no reporting system between the subsidiary and the parent company on operational matters, but only on regulatory and financial matters, as required by law	Since the assessment of the existence of autonomy is not limited to operational factors, the absence of a reporting system does not suffice to prove the autonomy of the subsidiary (Case T-197/06 FMC v Commission)
The parent company is a holding company of a diversified conglomerate whose supervisory activity of subsidiaries is limited to what is required under applicable law in order to abide by its obligations towards its own shareholders	In a group context, a holding company's function of seeking to regroup shareholdings and ensure that various companies are run as one can amount to the exercise of decisive influence (Case T-376/06 Legris Industries v Commission)
The parent company shares no common customers or commercial activities with its subsidiaries	This is irrelevant (Case C-508/11 Eni v Commission, Case T-72/06 Groupe Gascogne v Commission and Case T-168/05 Arkema v Commission)
The industry and the public perceive the subsidiary as a separate player in its own right	Perceptions of the company image by third parties are irrelevant (Case T-185/06 L'Air Liquide v Commission)
The subsidiary changed hands during the period of infringement and its previous owner continued influencing its business conduct	A former parent company's continued influence over a subsidiary does not break the 'chain' between the subsidiary and its current parent company (Case T-384/09 SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie v Commission)
The parent company's activities consist of acquiring companies in difficult positions, restructuring and developing them and then reselling them within a short time-frame	The fact that the parent company restructures and develops the subsidiary is evidence of the exercise of decisive influence over it (Case T-384/09 SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie v Commission)
Requiring proof of total autonomy from the parent company requires a refutation of abstract possibility, which amounts to *probatio diabolica* and renders the presumption irrebuttable	Companies are able to refute the presumption by means of any evidence relating to the economic, organisational and economic links between the two legal entities that are apt to show that they did not constitute a single economic unit. The fact that the companies could not produce such evidence in a specific case does not show that the presumption can never be rebutted (Case T-168/05 Arkema v Commission)
The autonomy of the subsidiary has been confirmed by the Commission in treating it as a separate undertaking in previous cases	The Commission is not obliged to systematically check that infringing conduct by a subsidiary is attributable to the parent company

The case law evidences that the bar for rebutting the presumption has been set so high that, in practice, the presumption appears to be quasi-irrebuttible. The presumption has failed in a handful of cases, but this has been due to reasons other than the actual rebuttal argumentation. As a result, the construct of parental company liability has been left intact.

- In *L'Air liquide*, the General Court overturned the Commission's determinations on parental liability for lack of reasoning. The General Court did not consider the evidence presented to rebut the presumption on its merits.
References: Case T-185/06 L'Air liquide v. Commission

- In *Alliance One*, the General Court refused to find that an economic entity existed despite virtually all the capital being held by the parent company, because the Commission had imposed a fine on the parent company of one of the cartel participants, but had refrained from proceeding by analogy with respect to the other cartel members. The General Court did not apply the presumption for reasons of equal treatment.
References: Case T-24/05 Alliance One International and Others v Commission

In light of the above, even the most decentralised structures will generally be deemed insufficient to rule out the effective exercise of decisive influence. It is somewhat of a challenge to imagine any circumstances in which a group parent would escape the liability that arises from its subsidiaries' antitrust violations. The Commission has only cited the following exceptional situations:

References: Case C-97/08 P Akzo Nobel and Others v Commission, opinion of AG Kokott; Joined Cases 6/73 and 7/73 Commercial Solvents v Commission, opinion of AG Warner

- the parent company holds 100% of the shares in the subsidiary only temporarily and for a short period
- the parent company is prevented for legal reasons from fully exercising its 100% control over the subsidiary
- the parent company is an investment company and behaves as a 'pure' financial investor (however, as seen above, this argument has, so far, not been successful)

Pure financial investors

The Commission has held financial investors, in particular private equity funds, jointly and severally liable for antitrust violations committed by their portfolio companies, applying to them the same decisive influence test as that applied to traditional holding companies. This raises the question what kind of financial investor is considered to be pure and, therefore, may fall under the exceptional situations cited by the Commission (see above). Recent case law indicates that a pure financial investor is one who holds shares in a company in order to make a profit, but refrains from any involvement in the company's management and control. For example, it has been held that a financial investor is not a pure one where the majority of the members of the infringing company's board have been appointed by the financial investor and at the same time hold functions in it.

See further, as recent examples, General Court's judgments in Gigaset v Commission (Calcium carbide cartel), 1. garantovaná v Commission (Calcium carbide cartel) and the Commission's decision in Power cables.

The approach towards joint ventures

The *Rubber Chemicals* decision, in which the Commission held that a joint venture could, in principle, be presumed to be autonomous from its parent companies, has been 'tossed away' by the European Courts in recent years.

References: Case COMP/F/38.443 Rubber Chemicals

On the basis of the most recent case law, joint ventures are treated very much like 100% owned subsidiaries when it comes to parental liability. Simply by setting up a joint venture and having joint control over it, the parent companies are presumed to exercise decisive influence over it. The only possible defence left to a parent company is to try to convince the Commission and/or the European courts that it does not, in fact, exercise decisive influence over the joint venture. In that regard, it has been held that:

- although a full-function joint venture can be economically autonomous from an operational viewpoint, this does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. This marks a significant departure from the way joint ventures are reviewed under the EU Merger Regulation (see further, Analysing joint ventures under merger rules)
- even if a parent company is unable to impose its decisions on the joint venture ('negative' nature of joint control), the parent company does exercise decisive influence over the joint venture's business strategy if it can prevent it from taking certain decisions

See further, as examples, the General Court's judgments in EI du Pont de Nemours and Dow Chemical v Commission (Chloroprene rubber cartel), *Cementbouw* and *Avebe*

References: Case T-282/02 Cementbouw Handel & Industrie v Commission; Case T-77/08 Dow Chemicals v Commission; Case T-76/08 El du Pont de Nemours and others v Commission; Case T-314/01 Avebe v Commission

The treatment of 'intermediate companies'

The Commission is not obliged to always hold the parent company jointly liable—even where the parent company holds 100% of the capital of the subsidiary which has committed the antitrust violation. Rather, the Commission claims the discretion to impute liability to:

References: Case T-259/02 Raiffeisen Zentralbank Österreich v Commission

- any corporate entity directly involved in the cartel
- those above it in the corporate chain who might have some degree of control over it, right up to the top group holding company; and
- all of them, jointly and severally

In practice, the Commission prefers to by-pass pure 'intermediate companies', even if 100% parental control is exercised indirectly through them. It rather targets the operating companies allegedly directly involved in the cartel and the top group holding company, and imposes joint and several liability on them.

Leniency considerations

The application of parental company liability has significant effects on leniency applications, which should be carefully considered by corporate groups. In particular:

- A leniency application made by the subsidiary will also benefit the parent company, where the latter has not actually participated in the cartel and is held liable solely on account of its subsidiary's participation therein. In such a situation, the parent's liability is considered to be purely derivative, secondary and dependent and, therefore, cannot exceed that of the subsidiary.
  References: T-411/10 Laufen Austria v Commission
- Only companies belonging to the undertaking at the time of the leniency application can have their fines reduced in exchange for their cooperation. For example, where a parent company applies for leniency regarding antitrust violations involving a subsidiary it no longer owns, the leniency will not benefit the subsidiary or the subsequent parent company(ies).

See further, the General Court's judgment in SKW Stahl-Metallurgie Holding, SKW Stahl-Metallurgie, Evonik Degussa, AlzChem and Gigaset v Commission (Calcium carbide cartel).

The fine allocation

It is undertakings that violate antitrust rules, but legal entities that eventually pay the fine imposed by the Commission.

In a controversial ruling, the General Court had held that, when the Commission imposes a fine on an entity which must be paid jointly and severally with one or more other entities of the same group, the share that these entities must ultimately bear vis-à-vis the other related entities within the same undertaking is exclusively for the Commission to determine.

References: Joined Cases T-122/07 to T-124/07 Siemens Österreich and others v Commission

On appeal against that ruling, however, in Commission v Siemens Österreich and Others (Switchgear cartel), the Court of Justice reversed the General Court's findings. The Court of Justice noted that, the Commission's power to hold a number of legal entities jointly and severally liable for the payment of a fine is limited to the determination of joint and several liability from an 'external' perspective. The Commission's power does not extend to the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship. Where there is no contractual agreement as to the shares to be paid by those held jointly and severally liable for the payment of the fine, it is for the national courts to determine those shares, in a manner consistent with EU law, by applying the national law applicable to the dispute.

Interestingly, in a recent ruling by a German court on a recovery claim by a parent company, the court dismissed the parent company's claim that the subsidiary had to bear the whole amount of the fine, since the subsidiary had committed the infringement on its own without the parent company's involvement or knowledge. The court found that it followed from the economic entity doctrine that the parent company, as the head of the group, should bear the fine exclusively vis-à-vis the subsidiary (District Court Munich I, Case 37 O 11927/10).

Consequences of parental company liability

Attributing liability to a parent company has potentially significant practical consequences, including the following:

- the maximum fining cap of 10% of worldwide turnover applies to the aggregate sales of the group constituting the undertaking. As a result, subsidiaries may be held jointly and severally liable for fines that are much higher than the cap that would apply to them as an individual company
- the risk of finding recidivism (which may lead to a higher fine) increases. Any previous cartel behaviour by the other entities in the group may potentially be taken into account in assessing whether there is a situation of a repeating offender. However, such a finding will be dependent on the composition and structure of the group at the time of the first infringement decision
- the deterrence uplift applied to large undertakings will more readily be triggered, if total group turnover is taken as the yardstick; and

the filing of civil damages claims may be facilitated

Given the above consequences and the risks associated with rogue subsidiaries, parent companies should take every possible step to devise and implement robust compliance programs and undertake appropriate antitrust due diligence when engaging in acquisitions of assets or legal entities.

References: Case T-39/07 ENI v Commission; Case T-161/05 Hoechst v Commission; Case T-112/05 Akzo Nobel and Others v Commission