Like father like son –
The parental liability under the EU Competition law today

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In the last couple of years, the parental liability issue has become one of the central questions in the application of European Competition law. Hence, in this article, I would like to analyse fundamental case-law and recent developments in order to answer the essential question: when will the parent company be held liable for its subsidiaries' infringements of the EU Competition law? In the following I will tackle three main issues: first, the liability of the parent company for its 100%-owned subsidiary, the liability in case of a partially-owned subsidiary, and the recent proposals to use Company law approach while examining whether the parent should be held liable.

1. THE SINGLE ENTITY THEORY AND THE "WHOLLY-OWNED" PRESUMPTION

I shall start with the basic notions which are used while deciding whether the Commission or a National Competition Authority (NCA) may hold the parent company liable under EU Competition law. From very early on, the Court of Justice made clear that the notion of an "undertaking" is pre-eminently an economic one.[364] The focus on the *economic unit* rather than the legal entity is clearly set out, for example, in the case of *Hydrotherm* back in 1984[365]:

"In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal."[366] The definition of the particular set of legal entities as an "undertaking" is one of the crucial criteria of the EU Commission and ECJ's analysis while applying Articles 101 and 102 TFUE (former Articles 81 and 82 TCE), as these articles, at the core of EU Competition law, are directed at undertakings and apply to them regardless of their legal nature and how they are organised. However, it should be mentioned that, for effective enforcement purposes, infringement decisions can only be addressed to entities with legal personality.[367]

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[364] "An undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim". Case 19/61, *Mannesmann v. Haute Autorité*, [1962] ECR 675, at paragraph 705.

[365] Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11.

[366] See also Case T-11/89, *Shell International Chemical Company v Commission, [1992]* ECR II-757, at paragraph 311 and Case C-73/95 *P, Viho Europe BV v Commission* [1996] ECR I-5457, at paragraphs 50, 53. The Court of First Instance has in the meantime given its' own, more elaborate definition: cf. footnote 6. It seems to consider though that there is no difference between the substance of both definitions: Cf. Cases T-137/94 *ARBED v Commission* [1999] ECR II-303, paragraph 90, and T-145/94 *Unimétal v Commission* [1999] ECR II-585, paragraph 600 (both "Steel beams").

[367] Case C-97/08 *P Akzo Nobel and Others v Commission* [2009] ECR I-8237, at paragraph 57: "The infringement of Community competition law must be imputed unequivocally to a legal person on whom

Also in *General Química and Others* v *Commission* case[368] the Court described in a very precise manner the concept of an undertaking. First, it is restated that an "undertaking" is any entity engaged in economic activity, regardless of its financing and legal status[369], and that, furthermore, it must be constructed as an economic unit, which might comprise legally distinct persons. Hence, and given that any economic entity violating competition law must answer for that infringement under the principle of personal responsibility[370], it is logical that the parent company cannot eschew liability for the actions taken by its subsidiary when the parent and subsidiary make up one economic unit, in particular when, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries 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 which tie those two legal entities[371], or, further to the wholly-owned presumption stated in *Akzo*.

Thus, the **EU Commission's approach comprises three steps**:

1) It identifies the specific entity that has engaged in the illegal conduct (for example, after establishing that employees[372] or a genuine agent[373] participated in collusive contacts (e.g. cartel meeting), their employer/principal will be held liable for their acts, regardless of whether the managers knew about the involvement in the infringement of the company representative or not);

2) The EU Commission establishes whether that legal entity is part of a broader corporate group that can be held *responsible* for the infringement *as a "single economic entity"*;

3) The EU Commission decides which entity or entities within the economic unit to hold *accountable* for the infringement when imposing the fine.

It is important to note that, where it is proven that the parent company gave instructions to the subsidiary participating in the cartel or knew about the illegal conduct (without intervening), the parent company will be considered itself as a direct participant in the

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fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, [2004] ECR I-00123, paragraph 60, and Joined cases C-322/07 P, C-327/07 P and C-338/07 P *August Koehler and Others v Commission* [2009] ECR I-0000, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations". See also Richard Burnley, Article: Group Liability for Antitrust Infringements: Responsibility and Accountability, World Competition Journal, Volume 33, Issue 4, December 2010, p.596.

[368] Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-0000, paragraphs 34 to 40.

[369] See Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustriand Others* v *Commission* [2005] ECR I-5425, paragraph 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; and Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25.

[370] *Akzo Nobel and Others* v *Commission*, paragraph 56 and the cited case-law.

[371] *Akzo Nobel and Others* v *Commission*, paragraph 58 and the cited case-law.

[372] Joined Cases 100/80 to 103/80 *Musique diffusion française e.a. v Commission*, [1983] ECR 1825, paragraph 97; Case T-9/99 H*FB and others v Commission*, [2002] ECR II-1487, paragraph 275; Case T-15/99 Brugg Rohrsysteme v Commission, [2002] ECR II-1613, paragraph 58; Case T-236/01 *Tokai Carbon v Commission*, [2004] ECR p.II-1181, paragraph 277.

[373] Case T-66/99 – *Minoan Lines / Commission*, [2003] ECR II-5515, paragraphs 138-139.

cartel infringement, directly and independently liable. Furthermore, even the ultimate and intermediate parents can equally be held jointly liable for having exercised a decisive influence over the commercial policy of its infringing subsidiary, which reinforces the solidity of the Commission's conclusions in the subsequent Court review.

1.1 Single economic unit (the Knauf Gips case)

The conduct of a subsidiary, according to the ECJ and the EU Commission, may be imputed to the parent where the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, taking into consideration the economic, organisational and legal links between two legal entities. In such a situation, the parent company and its subsidiary constitute a single economic unit and therefore a single undertaking within the meaning of EU Competition law.[374]

The decision rendered by the ECJ in the *Knauf Gips* matter[375] provided interesting guidelines as to the criteria of the aforementioned single economic unit in a peculiar situation of sister companies owned by as single family. The Court reminded the appealing company (Knauf Gips) that "the existence of an economic unit may (…) be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such unit."[376] In the case at hand, the shareholders of the parent company and the other entities of the group are the same, viz. 21 individuals from the same family; the two managing shareholders of the parent company are also those of all the other companies; a family contract provides for the single management and direction of the companies in the group. More interestingly, the Court noted that all sales figures related to all companies of the group were communicated by the appellant and the appellant spontaneously provided the Commission with the turnovers of all group companies in the pre-judicial phase.[377]

The consideration of the parent company and its subsidiary as one undertaking gives the EU Commission and the Court the right to hold both of them liable for the cartel infringements committed only by the subsidiary. Furthermore, it has consistently been held that the Commission has the power to impute liability for unlawful conduct to the parent company, to the subsidiary, or to the parent company jointly and severally with its subsidiary.[378]

1.2 Decisive influence: like father like son

In accordance with the case law of the EU Courts, the parent company can exercise a decisive influence over the conduct of its subsidiary and there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.

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374 *Akzo Nobel and Others* v *Commission,* cited above, see also Erik H. Pijnacker Hordijk and Simone J. H. Evans, Article: The Akzo Case: Up a Corporate tree for Parental Liability for Competition Law Infringements, Journal of European Competition Law and practice, 2010, Vol.1, No. 2, p.127.
375 Case C-407/08 P *Knauf Gips KG v Commission* [2010] ECR 00000.
376 Ibidem, paragraph 65.
377 Ibidem, paragraphs 66-71
378 Case T-386/06 *Pegler v Commission* [2011] ECR 00000, paragraph 103, see also Joined cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission* [2006] ECR II-5169, paragraph 331.

The key criterion is the actual exercise of decisive influence of the parent company over its subsidiaries' conduct, which can be presumed in cases where the parent holds close to 100% of the shares of the subsidiary. If there is such an influence, the parent company may be held liable for the infringement by its subsidiary of EU Competition law, unless it demonstrates the complete autonomy of such subsidiary. While under EU merger control rules the possibility of control suffices to find a concentration, for the imputation of infringements of Article 101 or 102 TFEU one needs to establish the possibility of control and the actual exercise of such control rights (which can be presumed under the conditions defined by case-law).

The other important criterion in the equation is the relevant period of time. While analysing a particular case, the EU Commission will look at the relevant period when the parent company may or may not exercise decisive influence.

Thus, one may ask whether the parent company will be held liable for its subsidiary's cartel's involvement because the two companies may, in fact, represent a single economic entity and the actions of one of them will be simply the continuation of their general strategy. One could say, a bit ironically, that the ancient approach "like father like son" or in this particular case, maybe, "like son like father", represents the general attitude of the EU case-law in imposing fines on parent company for the competition rules' infringement made by the subsidiary[379]. Apparently, it is presumed very unlikely that the nearly fully owned subsidiary should be involved in a cartel without its parent's supervision ("like father like son"), therefore, the parent company should be punished for the conduct of its subsidiary ("like son like father").
In addition, the motivation of the EU Commission, when exercising its discretion to hold a parent company liable, is deterrence, which has at least two elements. First, the fine increases considerably by enlarging the scope of the undertaking, for example the 10% cap of the fine will be calculated on the total worldwide turnover of the parent (the group)[380] and deterrence multipliers can be applied to particularly large offenders. Second, the joint liability of a financially strong parent company ensures the payment of the fine in most cases and has a more disciplinary effect on the whole group than fining a small subsidiary.

Interestingly, in the United States, a parent company can only be held liable for the illegal conduct of its subsidiary if the parent was itself directly involved or if the apparent corporate separateness of parent and subsidiary is a sham.[381] Indeed, the cornerstone of corporate liability is the "presumption of separateness" between distinct legal entities,[382] which can be rebutted by "piercing" or "lifting" the corporate veil, but courts are reluctant to allow such exceptions.[383] Mere ownership, common control, and

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379 This analogy is made for the purposes of illustration and does not suggest that the EU Commission would flout the presumption of innocence or that it would hold entities jointly liable without first establishing that they form one undertaking.

380 See, for example, Joined cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, not published in the ECR, paragraph 390.

381 Ibidem,[**12].

382 See Peter Nygh, Article: The Liability of Multinational Corporations for the Torts of their Subsidiaries, European business Organization Law Review 2002/3: 51-81, page 65.

383 See e.g. *A.M. Kashfi v. Phibro-Salomon*, Inc., 628 F. Supp.727; 1986 U.S. Dist. LEXIS 29337,[**11]. The case concerned seeking recovery for services that the plaintiff claimed to have rendered for the

active oversight of the subsidiary by the parent are not sufficient. It must be specified however, that the "plea bargaining" procedure results in many cases ending in a cooperation between the target entity and the antitrust authorities[384], which encompasses also an agreement on who the addressee will become from the group.

1.3 The Akzo case and the "wholly-owned" presumption

An important development in the modern case-law on parental liability is the ECJ judgment rendered in the *Akzo*[385] matter, which gave guidance on how to tackle cases where a parent is held liable based on a presumption of decisive influence over its (nearly) wholly owned subsidiary. At the same time it put an end to a long debate on the interpretation of previous case-law regarding the use of a presumption without supporting evidence.

In essence, this ruling confirmed the Commission's interpretation of a long line of case law before *Akzo*. The "(nearly) wholly-owned" presumption appeared first implicitly in *ICI*[386] where the Court put forward the notion of the "unity of the group" and was later formulated explicitly in *AEG*[387]. It has been confirmed by the Court of Justice, in *BPB Industries*[388] and *Stora*[389], and equally by the General Court in *Stora*[390], *Limburgse Vinyl,*[391] *Michelin II,*[392] *Tokai Carbon (II) – Specialty Graphites*,[393] *Sodium Gluconate*[394] and *DaimlerChrysler*,[395] among others. In none of these judgments did the Court require additional indicia of the exercise of decisive influence for the application of the presumption.

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defendant. The court came to the conclusion that the plaintiff had failed to adduce any evidence that would support piercing the corporate veil.

[384] See also cases *Walter E. Heller & Co .v. Video Innovations, Inc.,* 730 F.2d 50, 53 (2d Cir. 1984) and *Miles v. American Tel. & Tel*., 730 F.2d 193, 195-96 (5th Circ. 1983), and cases *Coastal States v. Zenith*, 446 F Supp. At 337, *Williams v. McAllister*, 534 F.2d at 21 and *Fidenas A.G. v. Honeywell, Inc*., 501 F. Supp. 1029, 1035-38 (S.D.N.Y. 1980).

[385] *Akzo Nobel and Others v Commission,* cited above.

[386] *ICI v Commission,* cited above, in particular, at paragraph 139.

[387] Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50.

[388] Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, paragraph 11.

[389] Case C‑286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I‑9925, paragraph 29.

[390] Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II‑2111, paragraphs 78-84.

[391] Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94,T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and others v. Commission (PVC II)*, [1999] ECR II-931, paragraph 961, where the Court held that «Montedison […] held all the capital of Montedipe and Montepolimeri, with the result that those companies must be regarded as necessarily following a policy laid down by the bodies which, under its constitution, determine the policy of the parent company». See also paragraphs 984 and 985.

[392] *Michelin II,* cited above, paragraph 290.

[393] Judgment of 15 June 2005, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co. v. Commission (Tokai II – Specialty Graphites)*, not yet reported, paragraphs 58-60.

[394] Case T-43/02 *Jungbunzlauer v Commission*, not yet reported, paragraph 125, Case T-314/01 *Avebe v Commission*, not yet reported, at paragraph 136; Case T-330/01, *Akzo Nobel NV v Commission*, not yet reported, paragraph 83.

[395] Judgment of 15 September 2005, Case T-325/01, *Daimler Chrysler AG v. Commission*, not yet reported, at paragraph 221.

The *Akzo* decision held that:

" there is a rebuttable liability presumption of parent companies for their subsidiary's cartel offences in the case of a 100% shareholding"[396], for in such a case "the parent company does in fact exercise a *decisive influence* over the conduct of its subsidiary".[397]

The *Akzo* case concerned a cartel between the main European producers (and initially US producers)[398] of choline chloride (known as vitamin B4), an additive used in the animal feed industry. The European members of the cartel agreed on prices and price increases for particular national markets and for individual customers, allocated individual customers and market shares between themselves, and agreed to control distributors and converters of the product, in order to avoid outside competition. After receiving a leniency application, the EU Commission started an investigation. On 9 December 2004 the EU Commission, in its Decision, found that the cartel was a serious infringement of Article 81 of the Treaty (now article 101 TFUE) and imposed fines of € 66.34 million on the European members of the cartel (Akzo Nobel, BASF and UCB).[399] Akzo Nobel had been fined € 20.99 million. In setting the fine, for the purposes of the 10% cap, the EU Commission took into consideration the economic strength of *the whole undertaking*, rather than the direct involvement in the cartel of the four subsidiaries[400]

1.4 Rebutting the "wholly-owned" presumption

The parent company may not be aware of its subsidiaries' illegal conduct, or it may be involved only indirectly. If the first statement is true and the "nearly wholly-owned" presumption is applicable, the parent company has the possibility to rebut it by substantiating its claims and by using the following arguments:[401]

1) The parent company is a pure financial holding company. However, usually such a claim is not successful because most often it is made by industrial holdings which are involved in shaping the group strategy. In fact, a financial institution can and often does equally engage in defining the strategy of its portfolio companies (at least by appointing managers and approving business plans), and nowadays the early capitalistic image of a pure rent seeker, without any engagement with the business, is very rare. In the *Akzo* matter, "Akzo Nobel NV [was] not a simply an investment vehicle which serves merely to invest capital in companies whose commercial operations it then leaves to those companies, withdrawing capital as soon as it considers that an investment in other companies, possibly not belonging to the Akzo Nobel group, would provide a better return".[402] In such a case, there is no "single economic unit" pursuing one commercial policy.

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396 Erik H. Pijnacker Hordijk and Simone J. H. Evans, Article: The Akzo Case:…, cited above, p.127. (Emphasis added).
397 Case *Akzo Nobel NV and Others. v. Commission*, cited above, paragraph 60. (Emphasis added).
398 The fines have not been imposed on the US producers participating in the cartel as they have stopped participating in the cartel more than 5 years before the Commission's investigation began.
399 Frederique Wenner and Bertus Van Barlington, *European Court of Justice confirms Commission's approach on parental liability*, DG COMP Competition Policy Newsletter, 1/2010, p.23.
400 Ibidem. (Emphasis added).
401 Richard Burnley, Article: Group Liability for Antitrust Infringements…, cited above, pp. 606-607.
402 Commission Decision, COMP/E-1/37.773, *MCAA*, paragraph 240.

2) The provisions of national law prevent the exercise of decisive influence by the parent company over its subsidiary (it can also be merger hold-separate obligations before divestments). In that case, the group liability principle will not apply as parent and subsidiary are not acting as a single "economic unit". One may note that the group liability principle will still be applicable in cases where a parent company, while able to exercise a decisive influence, cannot be held liable for the conduct of its subsidiary under national law.[403]

3) The subsidiary had acted against the instruction of the parent company[404], but the case law requires full autonomy in this regard. A few disregarded instructions e.g. on the compliance program, or even misleading the parent for a period, while the parent could and did exercise its decisive influence on other aspects of commercial policy (not necessarily related to the market in question) would not exculpate the parent company.
If a parent company was involved in a non-direct way in a cartel it is, of course, an infringement of EU Competition law. However, its liability is normally demonstrated by the EU Commission (in the case of partly-owned subsidiaries or joint ventures) or usually presumed (in the case of the "nearly wholly-owned" subsidiaries); if the liability is presumed can be rebutted.

It should be understood that the EU Commission makes decisions on a case-by-case basis;[405] however authors note that the following arguments have proved unsuccessful in the past: [406]

1) The parent company was not aware of the infringement, the subsidiary acted without its approval and without informing the parent company;[407]
2) The parent company and the subsidiary chose different legal counsels and sent independent submissions during the proceedings before the EU Commission;[408]
3) The subsidiary's turnover was insignificant in comparison with the group turnover;[409]
4) Entrustment of day-to-day business to the local management of the subsidiary;[410]
5) The parent company was not itself involved in the production and sale of the relevant product;[411]

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[403] Commission Decision, COMP/39.165, *Flat Glass*, paragraph 414.
[404] Joined Cases 32/78 and 36/78 to 82/78, *BMW Belgium and Others v. Commission* [1979] ECR 2435.
[405] *General Química SA and Others v. Commission*, cited above, paragraph 79.
[406] Richard Burnley, Article: Group Liability for Antitrust Infringements…, *cited above,* pp. 603-605.
[407] Commission Decision, COMP/37.980, *Souris Bleue/TOPPS*, paragraph165; Commission Decision, COMP/37.857, *Organic Peroxyde*, paragraphs 377-378.
[408] Commission Decision, *Souris Bleue*, cited above, paragraph 165; Case T-175/05 *Akzo Nobel NV and others v. Commission* [2009] ECR II-00184, paragraph 111.
[409] *Bolloré SA and others v. Commission* [2007] ECR II-947, paragraph 144; Commission Decision, COMP/38354, *Industrial Bags*, paragraph 592; Commission Decision, COMP/F/38.456, *Bitumen NL*, paragraph 201.
[410] Commission Decision, COMP/C.38.238/B.2, *Raw Tobacco Spain*, paragraph 381; Commission Decision, *Butimen NL*, cited above, paragraph200; Commission Decision, COMP/39.165, *Flat Glass*, paragraph 409.
[411] Commission Decision, *MCAA*, cited above; Commission Decision, *Butimen NL*, cited above, paragraph259; Commission Decision, *Flat Glass*, cited above, paragraph445; Case T-168/05 *Arkema SA v. Commission* [2009] ECR II-00180, paragraph159.

6) The role of the ultimate parent company was apparently very limited given the size of the corporate group and the fact that there were intermediary holding companies between the ultimate parent and the subsidiary participating in the cartel;[412]
7) Reporting obligations between the subsidiary and parent company were restricted to financial reports and forecast only;[413]
8) The subsidiary had its own production installations and its own staff, and it entered its turnover into its own annual accounts;[414]
9) The Commission did not hold the parent company liable for cartel infringement by the same subsidiary in a previous case;[415]
10) The subsidiary acquired a significant proportion of its raw material from a group competitor;[416]
11) Overall corporate object of the parent company, as that object is very broad and allows for the management and running of subsidiaries;[417]
12) The existence only of the general compliance programme for the corporate group. The EU Commission has shown that it may interpret the exercise of such a programme as an attempt by the parent company to exercise *decisive influence*.[418] According to Richard Burnley, Competition counsel at the European Broadcasting Union, "in terms of ensuring an effective cartel deterrence policy, this position is clearly problematic since it encourages parent companies to implement little or no compliance supervision over the corporate group"[419].

Given the lack of success in rebutting the presumption in numerous cases, the claim has arisen that the presumption is not rebuttable. However, this has been specifically rejected recently in case C-521/09 P *Elf Aquitaine v Commission*.[420] While it has been confirmed by the EU Courts that the presumption of decisive influence is a rebuttable one and there is no "probatio diabolica"[421], the reason why it is often difficult to rebut is common to presumptions that are applied by all legal systems to typical situations. The prudent approach of the EU Commission to apply the presumption to nearly 100%

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[412] Commission Decision, COMP/F/38.638, *Butadine Rubber and Emulsion Styrene Butadiene Rubber*, paragraph 410.
[413] Commission Decision, *MCAA*, cited above, paragraphs 238-239 ; Case T-175/05, cited above, paragraphs 94-95; Case T-168/05, cited above, paragraph159.
[414] Joined Cases T-109/02 etc., cited above, paragraph142.
[415] Case T-203/01*Manufacture française des pneumatiques Michelin v. Commission [2003]* ECR 4071, paragraph290 ; Commission Decision, *Raw Tobacco Italy*, cited above, paragraph 348 ; Commission Decision, *Butimen NL*, cited above, paragraph 203; Commission Decision, *Butadine Rubber*, cited above, paragraph411.
[416] Joined Cases T-109/02 etc., cited above, paragraphs 143-144.
[417] Case T-69/04 *Schunk GmbH and Schunk Kolnestoff-Technik GmbH v. Commission* [2008] ECR II-02567, paragraph 62; Commission Decision, COMP/E-2/38.359 *Electrical and Mechanical Carbon and Graphite Products*, paragraphs 259-260.
[418] Commission Decision, COMP/E-1/38.823, *PO/ Elevators and Escalators*, paragraph631; Commission Decision, COMP/37.857, *Organic Peroxyde*, paragraphs 377-378; Commission Decision, *Flat Glass*, cited above, paragraph413.
[419] Richard Burnley, Article: Group Liability for Antitrust Infringements…, cited above, p.605.
[420]Case C-521/09 P *Elf Aquitaine SA v European Commission* [2011] ECR 00000, see paragraphs 53-67.
[421] Ibidem.

owned entities makes it difficult for parents in normal situations to show that they did not have or exercise their influence. [422]

The EU Commission has set the following test for rebuttal: to rebut the presumption, it must be shown that under special circumstances of the case where the parent company was not in a position to exert a decisive influence on its “wholly-owned” subsidiary, the latter nonetheless determined autonomously its commercial policy (that is, the parent company, despite its controlling rights, did not actually exercise a decisive influence as regard the basic orientations of the subsidiary’s commercial strategy and operations on the market).[423]

<u>*Recent developments*</u>

<u>a) The General Química case</u>

One of the most interesting recent cases concerning the rebutting the “wholly-owned” presumption is the judgement of the ECJ in the *General Química – Repsol*[424] matter.

According to the EU Commission[425] and the General Court[426] the infringement committed by General Química (GQ) (producer of certain rubber chemicals) could be attributed to the owner of the 100% of its shares: Repsol Química (RQ), and also to Repsol YPF, owner of the 100% of the Repsol Química shares.[427]

Focusing on the general application of the ECJ’s decision on the case, one may summarise as follows: first, the application of the “wholly–owned” presumption shall not be dependent upon the existence of additional evidence on the exercise of decisive influence over the conduct of the subsidiary; conversely, it may be applied automatically in cases of 100% ownership (paragraphs 41 and 42); second, the presumption is applicable even though the 100% ownership in the subsidiary is held indirectly through other entities (paragraph 88)[428]; and finally, according to the ECJ (also supported by AG Mazak) the decision shall be taken on case-by-case basis and “the General Court committed an error of law in affirming (…), that the arguments raised in order to establish such independence could not succeed “in the light of the case-law cited”, without carrying out a concrete examination of the factors raised by the appellants” (paragraph 79).

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[422] In the Joined Cases T-204/08 and T-212/08 *Team Relocations NV and al. v European Commission* the General Court stated again that “there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the commercial policy of its subsidiary [...]”, paragraph 150, see also paragraphs 145-154.

[423] See, for example, Commission Decision, *PO/Elevators and Escalators*, cited above, paragraph 605.

[424] Case C-90/09 P *General Química SA, Repsol Química SA, Repsol YPF SA v European Commission* [2011] ECR 00000.

[425] COMP/F/C.38.443, JO 2006, L 353, p.50.

[426] *General Química SA, Repsol Química SA, Repsol YPF SA v European Commission*, T-85/06 [2008] ECR II-00338.

[427] The ECJ rules on parenthood (*General Química v Commission*), http://chillingcompetition.com/2011/01/21the-ecj-rules-on-parenthood-general-quimica-v-commission/ , 5.05.2011.

[428] See Antoine Winckler, *Parent’s Liability: New case extending the presumption of liability of a parent company for the conduct of its wholly owned subsidiary*, [2011], Vol. 2, No. 3, Journal of European Competition Law and Practice, pp. 231-233.

The ECJ also stated that:

a) The evidence that RQ did not know of the infringement before inspecting GQ's premises and did not partake in the infringement does not suffice to establish that the two companies did not make up a single economic unit, or to rebut the presumption of decisive influence (paragraph 103).

b) While it was proven that several management and administrative competencies were delegated from GQ to its executives, other evidence hinted that RQ interfered heavily in GQ's strategic and commercial policy (paragraphs 104-108).

Furthermore, the Court underlined that RQ's board was greatly involved in the shareholding of, and sale of real estate by, the other companies of the group; that GQ's sole director, who was appointed by RQ, provided the latter company with commercial and financial information and thus served as a significant link between the two companies; and finally note that such a provision of information was admitted by the parties themselves.

Finally, the ECJ upheld the decision of the EU Commission stating in the paragraph 109 that "the Commission did not commit an error of assessment in considering that the evidence submitted by the appellants, first, the fact that RQ was not aware of the infringement at issue and did not participate in that infringement or encourage its subsidiary to commit it, and, secondly, the detailed rules for determining and implementing GQ's commercial policy, (…), does not show that GQ determined its conduct on the market independently and, therefore, does not make it possible to rebut the presumption that RQ exercised decisive influence over GQ's conduct".

b) Testing the presumption before the ECHR

An unnamed Dutch company has recently asked the European Court of Human Rights (ECHR) to review the "wholly-owned" presumption, believing it to violate certain provisions of the European Convention concerning presumption of innocence. Although the fate of this request is still unknown, it must be noted that previous instances of presumption of culpability were not automatically condemned by the Court, its position being however that "Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[429]

2. PARTIALLY-OWNED SUBSIDIARY

The situation of the subsidiaries held far below 100% remains unclear[430]. Recent case-law has given only partial guidance on how far the logic of presumption extends below a 100% shareholding. The General Court has expressly extended the presumption to a shareholding of 98%, upholding the EU Commission's application of the "wholly-owned" presumption in the *MCAA* case. According to the Court: "all or substantially all of the capital of the subsidiary is held by its parent company and, therefore, that the

[429] ECHR, 07.10.1988, *Salabiaku v. France*, 10519/83.

[430] The EU Commission applies the presumption to the most obvious cases, while normally under merger rules there can be sole control above even 50%.

latter is able to exert influence on the commercial policy of its subsidiary, it is up to the parent to rebut the presumption"[431]. This follows the General Court's earlier judgment in *Michelin v. Commission*[432], where the Court upheld the application of the presumption to a parent company with a shareholding of more than 99% but less than 100%. In the past, the EU Commission has applied the presumption to a majority shareholding as low as 96% (*Flat Glass*[433] and *Hydrogen Peroxide and Perborate*[434] but the General Court so far ruled on the cases of *Arkema* and upheld the presumption in that regard. It is worth examining some recent judgments related to Arkema and its parents.

2.1 Arkema and Elf Aquitaine cases

By the MCAA decision of 19 January 2005[435], the European Commission imposed fines on Elf Aquitaine SA and its subsidiary at that time Arkema SA (formerly Atofina SA) relating to a cartel on the market for monochloroacetic acid.

According to the Commission, from 1984 to 1999 the members of the cartel were parties to an agreement regarding the maintenance of their market shares through a volume and customer allocation system.[436] Thus, the Commission imposed a fine of €45 million, jointly and severally, on Elf Aquitaine and Arkema. In addition, it imposed an increase for repeated infringement on Arkema alone, by virtue of its participation in an earlier cartel, since, at the time of that first infringement, Arkema was not yet controlled by Elf Aquitaine. Hence, Arkema was also fined, individually €13.5 million.

The companies brought two separate actions before the General Court and later before the ECJ seeking annulment of the Commission's Decision or a reduction of the amount of the fines imposed.

As it was mentioned before, Arkema was at the time of the relevant facts owned by Elf Aquitaine, at first to the extent of 97.6%, then, from the acquisition of the Elf group by Total Fina SA, in 2000, of 96.48%. From that day on, and for the remaining of the relevant period, Elf Aquitaine itself has been owned to the extent of 99.43% by Total.

The General Court in its decision stated that "the parent company which owns the near entirety of its subsidiary's share capital is, in principle, in a situation that is similar to that of an exclusive owner, regarding its power to exert a decisive influence over its subsidiary's conduct, as regards the economic, organisational and legal links which relate it to said subsidiary. Therefore, the Commission may apply to such situation the same regime of evidence, namely, rely on the presumption that said parent company effectively uses its power to exert a decisive influence on its subsidiary's conduct. Admittedly, it is not unconceivable that in some cases, minority shareholders might

[431] Case T-168/05 *Arkema v Commission*, cited above, paragraph70.
[432] *Michelin II*, cited above, paragraph 290.
[433] Commission Decision, *Flat Glass*, cited above, paragraph 451.
[434] Commission Decision, COMP/F/38.620, *Hydrogen Peroxide and Perborate,* paragraphs 428-429 (96.48%).
[435] Commission Decision, C (2004) 4876 final, Case COMP/E-1/37.773-MCAA.
[436] See also the article summarizing the facts by Ricardo Oliviera and Miguel Romão, European Union: Court of Justice Annuls General Court's, "*Elf Aquitane" and "Arkema*" Rulings, 26.10.2011, http://www.mondaq.com/x/150690/EU+Law+Regulatory/Court+Of+Justice+Annuls+General+Courts+Elf.

have rights towards the subsidiary whose existence challenges the aforementioned analogy" (paragraph 53)[437].

Hence, one may wonder how *low* the percentage of ownership could fall to until the Court decides that the aforementioned presumption is not applicable any more, insofar as the decision does not provide with any guidelines (whether numerical or others) as to the calculation of such threshold.

It is interesting to note that in the litigation concerning another cartel case (Methacrylates), Arkema partially won its challenge against a 219.1 million euro fine. The Court reduced the fine imposed by the European Commission in 2006[438] on Arkema and its units for participating in a cartel in the acrylic glass sector to € 113.3 million. [439] However this reduction of the fine was not related to the percentage of Total/Elf Aquitaine's control over Arkema.

The original fine had been calculated on the basis of the worldwide turnover of Total SA, which was the parent company at the time, along with Elf Aquitaine. Total was originally held liable for € 140.4 million, while Elf Aquitaine was liable for the payment of € 181.35 million. The merged Total-Elf Aquitaine group spun off the chemicals group Arkema in 2006.[440] Thus, the Court upheld the fines levied on the parent companies, Total and Elf Aquitaine, for their roles in the cartel that ran from 1997-2002, which shared pricing and sensitive information.

But the Court contended in a statement that the spin-off of Arkema, which took place shortly before the Commission decision, meant the large deterrent effect of the fine was not justified for the separated company (paragraphs 338 – 353). The General Court found the 200 percent increase excessive and that a 25 percent increase is adequate to ensure a sufficiently deterrent effect of the fine imposed on them.[441]

Very recently, the ECJ confirmed the General Court's position on the MCAA *Arkema* matter but provided us with new insight on parental liability on the occasion of its appeal judgment regarding Arkema's former parent, Elf Aquitaine. Although the ECJ affirms that rebuttal of the wholly-owned presumptions is not *per se* "probation diabolica", it quashes the General Court's decision against Elf Aquitaine to the extent that the Court did not express its motives sufficiently regarding the refusal to rebut the presumption against the backdrop of the arguments brought to the case by Elf Aquitaine. The grounds for the final decision is, interestingly, represented by the rights of defence.[442]

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[437] Case T-217/06 *Arkema France, Altuglas International SA, Altumax Europe SAS v Commission* [2011] ECR 00000.

[438] Commission Decision, C (2006) 2098 final, 31 May 2006, COMP/F/38.645 – Methacrylate.

[439] *EU court cuts Arkema acrylic glass cartel fine*, Reuters, http://www.reuters.com/article/2011/06/07/eu-cartel-arkema-idUSLDE7560OU20110607, 09.07.2011.

[440] Ibidem.

[441] Ibidem.

[442] Case V-521/09 P *Elf Aquitane SA v Commission* [2011], not published in the ECR. See also, Conclusions de l'Avocat Général M. Paolo Mengozzi Aff. C-520/09 P *Elf Aquitane SA c/ Commission européenne* [2011], paragraph 13, in which he mentions that the applicant does not dispute the application of the presumption by the EU Commission when the parent company holds 98% of capital of the subsidiary.

Thus, after the judgments related to Arkema and its parents, the question of where we could draw a clear line of the (non-)application of the "wholly-owned" presumption is still open, but this depends on the policy choices of the EU Commission, which so far has shown restraint in applying the presumption to situations of close to 100% ownership.

2.2 (Non) application of the "wholly-owned" presumption

However, on the basis of the EU Commission's practice and the EU case-law, and relying on the existing literature,[443] the following factors could be considered as relevant and taken into account for actually demonstrating (not presuming) the parent's decisive influence over a partially-owned subsidiary[444]:

Share capital. The closer the shareholding in the subsidiary is to 100%, the more likely decisive influence will be found (and very close to 100% this has even given rise to a presumption of actual exercise of decisive influence).

1. Rights for shares. In some cases, voting rights attached to minority shareholding will give parent company a decisive influence over strategic decisions.
2. Composition of Board and supervisory Board. The EU Commission may rely on interlocking directorships or senior management overlaps to support a finding a decisive influence.[445]
3. Activity on same/ adjacent markets could be one of the proofs of decisive influence.[446]
4. Instructions to the subsidiary or reporting lines going up from the subsidiary to the parent. Such instructions/reports do not have to be linked to the subsidiary's cartel activity, but only need to relate to the subsidiary's commercial activities or strategy.[447] For example, the Board minutes will be considered carefully for the evidence of the decisive influence.[448]
5. Ownership of business assets. If the parent company owns the production installations used by the subsidiary and/or directly employs the staff working for the subsidiary, those facts will be taken as evidence of the existence of the decisive influence of the parent company.[449]

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[443] Richard Burnley, *Group Liability for Antitrust Infringements…*, cited above, pp. 609-611, see also Erik H. Pijnacker Hordijk and Simone J. H. Evans, *The Akzo Case…*, cited above, Antoine Winckler, *Parent's Liability…*, cited above, and Frederique Wenner and Bertus Van Barlington, European Court of Justice confirms Commission's approach on parental liability, cited above.

[444] In cases of fully owned subsidiary, where a presumption is applied, the EU Commission often supports its presumption by additional indicia without assuming at the same time the full burden of proving actual exercise of decisive influence; however, the company's rebuttal of the presumption has to be take into account also such supporting evidence by the EU Commission.

[445] Case T-345/94 *Stora Kopparbergs Bergslags AB v. Commission* [2011] ECR II-2111, paragraph70; joined cases T-109/02 etc. *Bolloré v. Commission,* cited above, paragraphs 135-140.

[446] Case T-308/94 *Cascades SA v. Commission* [2002] ECR II-925, paragraph 158; *Stora*, cited above, paragraph 83.

[447] *Shell International Chemical Co. Ltd v. Commission*, cited above, paragraph 312.

[448] Case T-314/01*Cooperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe v. Commission* [2006] ECR II-3085, paragraph37.

[449] Case T-352/94 *Mo och Domsjo AB v. Commission* [1998] ECR II-1989, paragraphs 89-94, Case *Knauf Gips KG v. Commission*, cited above, paragraphs 101-102.

6. Intra-group sales. If the sales by the relevant subsidiary to another group entity are treated in that subsidiary's accounts as intra-group sales, this may be considered as evidence that the group is being run as one economic unit.[450]

Furthermore, the use of the same commercial name and/or trademark will be taken into consideration, as in that case the two companies are perceived by third parties and on the market as forming one and the same economic entity.[451]

a) Joint Ventures

When the illegal conduct was carried out by a joint venture, the EU Commission will examine all the facts in order to determine whether one or more of the parent companies exercised decisive influence over the joint venture at the relevant time.[452] So far in cases of jointly controlled entities the EU Commission has not applied the presumption but has demonstrated the exercise of decisive influence by the parents.

b) Sister Companies

Where the EU Commission can prove that sister companies acted in a coordinated way as one and the same economic unit, it may hold one liable for an infringement where the other participated directly.[453] This is logical, because several types of entities within an undertaking can have a link to the infringement and thus constitute an undertaking: usually the subsidiary which is selling the product attends the cartel meetings, but the cartelised product is produced by the other subsidiary, and both are under the supervision of the managing company.

Thus, in order to conclude this discussion one may describe the **"nearly wholly-owned"** presumption in the following way: *if close to 100% of shares of the subsidiary are owned by parent company, it may be presumed under EU Competition law, that the parent company has exercised decisive influence over the subsidiary and may be held liable for the cartel infringement by its subsidiary.* However, the parent company can rebut this presumption by proving that it did not exercise decisive influence at the relevant period of time.

2.3 Recent developments in a Member State: The Durkan case

We have observed recently a remarkable case judged in the UK. *Durkan*[454] is the first case where the Competition Appeal Tribunal (CAT) did not apply a presumption that a parent controls subsidiary, but examined the issue as a factual matter. The contestable decision delivered by the Office of Fair Trading "concerns the practice of cover pricing

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[450] Case *Knauf Gips KG v. Commission,* C-407/08P, cited above, paragraph78.
[451] Commission Decision, COMP/F/38.620, *Hydrogen Peroxide and Perborate*, paragraphs 404-405, Case C-407/08P, cited above, paragraph104.
[452] Case *Avebe v Commission*, cited above, paragraphs 135-141, Commission Decision, COMP/38.899, *GIS Switchgear*, Commission Decision, COMP/F/38.433, *Rubber Chemicals*, paragraph 263, see also Commission Decision, COMP/38.628, *Chloroprene Rubber.*
[453]Case T-9/99 *HFB Holding für Fernwärnetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v. Commission* [2002] ECR II-2429, paragraphs 66 and 75; Case T-43/02 *Jungbunzlauer AG v. Commission* [2006] ECR II-3435; *Knauf Gips*, cited above; Case C-196/99 P *Siderurgica Aristrain Madrid SL v. Commission* [2003] ECR I-11005.
[454] CAT, *Durkan Holdings Ltd et al. v Office of Fair Trading*, Case No. 1121/1/09, 22.03.2011.

which, […], was for many years endemic in the construction industry in England" (paragraph 2).

Actually, this case is mostly known for the fact that Durkan is the first company to appeal on cover pricing and win. The CAT has reduced the fines imposed by the OFT on Durkan and Concentra (formerly Durkan Pudelek) by 64% following a ruling that the companies were not liable for all areas alleged by the OFT.[455] However, I am more interested in the fact that, in this case, the CAT quoted, followed and reproduced the ECJ's approach concerning the parental liability issue. Durkan Holdings owned 51 per cent of shares in Durkan Pudelek (1992-2007), thus, the OFT held them jointly and severally liable for the infringements concerning prohibition in relations to three tenders. Hence, as Durkan Pudelek was not 100% owned by Durkan Holding it was necessary to establish the existence of the decisive influence in order to hold them jointly liable, which has been done consequently, by applying the "decisive influence" test following the *Akzo* judgement.

3. COMPANY LAW NOTIONS VS. COMPETITION LAW NOTIONS IN PARENTAL LIABILITY

Consistently, the EU Courts and the EU Commission use notions which originate in Company law (for example: share capital, right to shares, composition of Board etc.) in order to establish or deny the existence of decisive influence[456]. Nevertheless, it is important to highlight that the EU Courts and the EU Commission do not follow the Company law approach as such when it comes to defining an undertaking.

However, some suggest that the logic used by the Court when deciding on a parental liability case in competition matters should be the one proper to Company law.[457] It is hard to agree with such a proposal, as it is likely to raise many difficulties.

The biggest issue will be the absence of a harmonised European Company law, where – as opposed to competition law - each Member State has its own, often quite particular and specific rules. Only some of the aspects of the Company law have been harmonised (such as certain aspects of the taxation, disclosure requirements, mergers, takeover bids, rights of shareholders in listed companies).[458]

[455] Luke McLeod-Roberts, *Durkan's OFT fine cut by £4m*, Building.Co.UK, 21.03.2011, http://www.building.co.uk/news/breaking-news/durkans-oft-fine-cut-by-£4m/5015358.article , 13.06.2011

[456] See the list of factors that will be considered as relevant and taken into account in assessing the status of a part-owned subsidiary.

[457] Philipp VOET van VORMIZEELE, *Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen*, WuW vom 10.10.2010, Heft 10, Seite 988-989.

[458] We do have the "European company", governed by European law and no longer subject to different legislative systems simultaneously and thus better suited to the dimensions of enterprises established in several Member States. Likewise, the "European cooperative company" allows cooperatives to develop their business on a European scale. European enterprises not wishing to merge or set up subsidiaries also have a transnational cooperation instrument at their disposal - the European Economic Interest Grouping (EEIG).http://europa.eu/legislation_summaries/internal_market/businesses/company_law/index_en.htm, 12.07.2011.

Thus, if it were decided to use more Company law, shall we refer to the French one or to the English one, or to any other? It seems almost impossible to envision the creation of the EU Company law, as it has always been a sphere belonging more to the Member States' competence.

Hence, if we want to switch to the Company law approach, at first we have to create it. We cannot apply the EU Company law together with different national Company laws – it will be running the risk of inconsistency and complete loss of harmonisation in both spheres.

For example, the understanding of the term "undertaking" which is crucial for the EU Competition law (as only the "undertaking" can be a subject of the EU Competition law) will vary significantly in EU Competition law and the Company law of Member States. Under the EU law we must apply economic criteria, and the exact legal form of the enterprise is irrelevant[459], while in national Company law in most cases the very legal form is crucial if we want to apply the law[460].

For instance, in the UK, partnerships are not regarded as companies and are subject to Contract law instead of Company law; whereas in France similar entities (*commandites*) are considered not only as legal persons, but even more as companies, and are hence subjects to French Company law. Thus, if we were applying EU Competition law based on Company law notions we would have a case-law that differs considerably, depending on the nationality of the enterprises.

One may say that in Competition law, we use what we may call an "organisational", "dynamic" approach, while deciding whether to hold the parent company liable. Thus, we do use Company law notions, such as shareholding, composition of the board of directors etc., but only in order to establish the actual decisional processes. The Company law approach is much more static and formal. Under the Company law we cannot hold a parent company liable unless we are able to pierce the corporate veil. Under this approach, legal acts, and not the actual processes at working the company, play the crucial role.

According to AG Warner, "It would be inappropriate to apply rigidly in the sphere of competition law the doctrine referred to by English lawyers as that of *Salomon v. Salomon & Co. Ltd*. (1987) A.C. 22 – i.e. the doctrine that every company is a separate legal person that cannot be identified with its members. Basically that doctrine exists in order to preserve the principle of limited liability. It is concerned with the rights of creditors in the context of company law. It has been applied, with more or less happy results, in other spheres, such as those of convenyancing, of contracts and of liability for tort. But to export, it blindly into branches of the law where it has little relevance, could, in my opinion, ***serve only to divorce the law from the reality***".[461]

It is undeniable that we use some Company law terms and notions. However, it seems inconsistent to apply the Company law approach as its purposes are fundamentally distinct from those of Competition law; indeed we would like to draw attention to the

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[459] *HFB v Commission*, cited above, paragraph 54.
[460] At the same time there are notable exceptions of tax or bankruptcy fraud when even national corporate legal concepts could not prevent the piercing of the corporate veil in the laws of several Member States.
[461] Opinion of AG Warner, *Commercial Solvents v Commissio*n, 22.01.1974.

fact the Company law is mostly private law, whereas Competition law is mostly public law. They regulate the same entities, but Company law has more of a microeconomic approach, when the Competition law is interested in bigger picture (the market).

Very recently, in the *Knauf Gips* case, the Court has restated that its approach was not subject to the methods goals of company law, but rather to the necessities of its dynamic viewpoint in unambiguous fashion: "the legal structure particular to a group of companies (…) is not decisive where that structure does not reflect the effective functioning and actual organisation of that group" (paragraph 108). Obviously, its position could not be clearer.

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