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I. INTRODUCTION

On September 10, 2009, the European Court of Justice (the highest court in the European Union) issued its much-anticipated decision in *Akzo Nobel. N.V.*, and held that a parent company's 100 percent ownership of a subsidiary automatically creates a presumption that the parent company controlled the actions of the subsidiary and is therefore liable for the antitrust violations of the subsidiary. Although this presumption of control is rebuttable, the court held that it had not been rebutted in the *Akzo* case. The issue was of special relevance in *Akzo* because the European Commission had imposed a fine upon *Akzo* (which had not been shown to have directly participated in a price-fixing conspiracy) and certain subsidiaries (which had been shown to have directly participated). Under European law, the maximum fine is bounded by 10 percent of the "turnover" (revenues) of the offending undertaking in the immediately preceding year. Since the turnover of *Akzo Nobel* was significantly larger than the turnover of the particular subsidiaries involved, this resulted in a much larger fine than otherwise could have been imposed. In reaching its conclusion, the Court relied heavily upon the concept of "undertaking" as developed in the law interpreting Sections 81 and 82 of the Treaty of Rome.

The *Akzo* decision establishes a clear distinction between United States and European law on the issue of parental liability for the antitrust actions of a subsidiary. As a general rule, mere 100 percent ownership of a subsidiary will not be sufficient to impute liability upon a parent for the actions of a subsidiary; nor does it create a presumption that the parent exercises the degree of control over the subsidiary necessary to impose liability upon the parent for the subsidiary's actions.

Given this conflict between EC and U.S. law, this article summarizes the applicable law on the issue of parental liability for the competition law violations of subsidiaries in three Asian countries—China, Korea, and Japan—and tries to anticipate whether the *Akzo* decision is likely to have a significant impact upon the development of the law in those jurisdictions.

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II. CHINA

China, of course, just implemented its Antimonopoly Law (or AML) this year. Not surprisingly, the law has not yet been interpreted by any decision with regard to the issue of whether a parent company is liable for the actions of its subsidiary. However, existing Chinese law in different areas, as well as the structure of the law, can help make predictions as to how this issue will be resolved in China. In that connection, we will briefly consider:

1. The general treatment of subsidiaries as separate legal entities under Chinese law;
2. The treatment of foreign “branches” under Chinese law; and
3. Parallels and differences between Chinese and European competition law that suggest how the Chinese authorities might resolve this issue.

First, as a general matter, the Company Law of the People’s Republic of states that “[a] company may establish subsidiaries, which shall possess the status of enterprise legal persons, and shall independently bear civil liabilities in accordance with the law.”² Likewise, a company is authorized to “invest” in other enterprises and, “unless otherwise stipulated by law,” such an investing company “shall not bear joint and several liability for the debts of the enterprise in which the company invests.”³ Accordingly, the general rule in China is that a separately incorporated subsidiary of a corporation is regarded as a distinct legal person, and the parent corporation is not deemed or presumed to be liable for its activities. As in the United States, a parent corporation may be held liable if it is proven that the parent actually controlled the actions of the subsidiary in a given case, but no such presumption arises from the mere fact of 100 percent ownership. If this rule were applied to antitrust cases, then the recent rule of *Akzo* would be rejected and China would follow a rule more closely aligned with the approach of American law.

Second, the Company Law provides that, rather than establish subsidiaries, a company may establish “branches.”⁴ Any such branch must register with the government in order to obtain a business license. Unlike the case with subsidiaries, however, a branch “shall not possess the status of enterprise legal persons” (emphasis added) and any civil liability of the branch “shall be borne by the company [establishing the branch.]” With respect to foreign companies in particular, the Company Law provides that a foreign company may establish a “branch” within China, but that “[a] foreign company is a foreign legal person, and its branch established within China does not have the status of a Chinese legal person.”⁵ Accordingly, if a company in general (and a foreign company in particular) establishes a “branch” (as opposed to a subsidiary) in China, the company establishing the branch is considered the legal person and will be liable for the conduct of the branch. As to a branch, then, liability of the “parent” is even more severe than that imposed by *Akzo*. In effect, no distinction between the company and the branch is recognized under Chinese law and the company will be liable for the activities of the branch.

² Company Law of the People’s Republic of China, Chapter 1, Article 14

³ *Id.* Article 15

⁴ *Id.* Article 14

⁵ *Id.* Chapter 11, Article 195.

The question then arises as to whether a foreign company may establish a Chinese subsidiary and thus enjoy the benefits of limited liability. The answer to this is generally yes, although the capitalization required for this may exceed \$100,000 and thus may prove onerous for smaller companies. Such a foreign-owned subsidiary is known as a Foreign Investment Enterprise and can take one of several forms, the scope of which are not pertinent here. Another approach taken by some companies is to form a new off-shore subsidiary and then make a “branch” (as described above) a division of that subsidiary. This has the effect of facilitating limited liability without having to undergo the expense of incorporating in China.

Our final observation on this issue under Chinese law is that, in general, the AML more closely parallels EC law than American law. This is true, for example, on issues such as the prohibition of excessive pricing by a dominant firm or monopolist, the issue of “collective dominance,” the treatment of vertical restraints, and various other areas. This by no means assures that China will necessarily interpret the AML in pari material with EC law, but it might suggest that China may be more influenced by European interpretations of competition law than American interpretations. In particular, the AML—like European competition law—revolves around the concept of an “undertaking.” Moreover, the interpretation of the term “undertaking” was quite important to the reasoning of the Court of First Instance, which the European Court of Justice affirmed and quoted at length in the recent *Akzo* decision:

It must be borne in mind, first of all, that the concept of ‘undertaking’ within the meaning of Article 81 EC includes economic activities which consist of a unitary organization of personal, tangible, and intangible elements...It is therefore...because [the parent company and the subsidiary] constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to a parent company of a group of companies. It must be borne in mind that community competition law recognizes that different companies belonging to the same group form an economic undertaking and therefore an ‘undertaking’ within the meaning of Articles 81 and 82 EC if the companies concerned do not determine independently their own conduct on the market.

As the ECJ concluded, the CFI “considered that the [parent] company constituted, together with [its subsidiaries], an undertaking within the meaning of Article 81 EC, and that there was no need to determine whether it had exercised an influence over their conduct.”⁶

Accordingly, to the extent that Chinese law on the definition of “undertaking” is likely to follow EC law on the definition of “undertaking,” there is some possibility that China might adopt an *Akzo*-like approach to the liability of parents for the antitrust violations of their subsidiaries. In this connection, we point out, however, that unlike the concept of

⁶ C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-0000, ¶28; also see ¶¶54-55 (“the concept of an undertaking covers any entity engaged in economic activity, regardless of its legal status...and “designat[es] an economic unit even if in law that economic unit consists of several persons, natural or legal”); ¶59 (liability may be imputed to the parent because “the parent company and its subsidiary form a single economic unit and therefore form a single undertaking”); ¶77 (“If the parent company is part of that economic unit, which, as stated in paragraph 55...may consist of several persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law.”)

“undertaking”—which is not directly defined in the Treaty of Rome—the concept of “enterprise” is specifically defined in Article 7 of the AML:

An ‘undertaking’ in this Law refers to a natural person, a legal person, or any other entity that engages in production or operation of commodities or provision of services.

Given this definition, it seems likely that—notwithstanding the other respects in which the AML parallels EC law—that Chinese authorities will interpret the term “undertaking” to be limited to legal entities and not to groups of entities acting as a single unit, as that term has been now interpreted in Europe.

III. SOUTH KOREA

South Korean law recognizes the legal distinction between a parent corporation and a subsidiary and does the principle of limited liability for shareholders.⁷ Since the establishment of the Commercial Code in 1962, only one Supreme Court decision has ever disregarded the corporate entity Judgment of Nov. 22, 1988.⁸

Korean courts addressing the question of “piercing the corporate veil” have examined factors such as when: (1) a debtor incorporates in order to evade execution of a judgment; (2) the purpose of incorporation is to avoid a contractual obligation, such as a covenant not to compete; and (3) a new corporation with the same employees and business structure as the old corporation is employed to escape punishment for the old corporation’s violation of law.⁹ These veil-piercing cases do not suggest that Korean courts would apply a presumption of parent liability for acts of a subsidiary.

However, three decisions in the past decade by the Korean Fair Trade Commission (“KFTC”), the agency charged with enforcing Korea’s Monopoly Regulation and Fair Trade Act, suggest that particularly when faced with a situation involving the computation of fines (as in *Akzo*) the KFTC might be inclined to broaden the traditional scope of parental liability for a subsidiary’s actions.

In 2006, the KFTC rendered two decisions suggesting that it would be open under some circumstances to consider a parent and affiliated entities as a single entity for purposes of assessing liability or computing fines. The first case involved the so-called high-density polyethylene (“HDPE”) cartel. One of the participants in the cartel, Tae Rom Corp., held a 13.02 percent equity interest in a similarly-named company (Tae Rom Co.). (Hereafter, we will call Tae Rom Corp. the “partial parent” and Tae Rom Co. the “partial subsidiary.”) In addition to the 13.02 percent equity interest that the partial parent held in the partial subsidiary, the individual who owned 89.8 percent of the stock in the partial parent was also the single largest shareholder in the partial subsidiary and served as that company’s representative director. There was also an overlap in the identity of some of the officers of the two entities. The partial

⁷ Korean Commercial Code, Articles 171(1) and 331.

⁸ Supreme Court, 87-Daka-1671 (South Korea) (disregarding corporate entity when common officers and directors occupied same office space); see also Sung Bae Kim, *A Comparison of the Doctrine of Piercing the Corporate Veil in the United States and in South Korea*, 3 TULSA J. COMP. & INT’L L. 73, 88 (1995).

⁹ *Id.* at 87-88.

subsidiary manufactured goods that were then sold on consignment by the partial parent. Under these circumstances, the KFTC considered the partial subsidiary to be the respondent, even though the partial parent was the one who had participated in the cartel. This also meant that the fine was based upon the partial subsidiary's total sales revenues, rather than just the commissions paid to the partial parent (which would have been the case if the entities had been viewed as independent).¹⁰

At about the same time, the KFTC decided a case involving a cartel in the polypropylene industry. One of the defendants was Samsung Chemical. Samsung Chemical operated as a consignee for a manufacturing company in which it held a 50 percent interest, the remainder of the affiliate being owned by a French company. Because it viewed Samsung and the 50 percent-owned affiliate as essentially the same entity from an economic perspective, the KFTC imposed a monetary penalty based upon the total sales revenue of the 50 percent affiliate. This figure was substantially higher than the penalty that would have otherwise been based upon the commissions that Samsung Chemical received from the affiliate.¹¹

These cases are similar in effect to an earlier decision by the KFTC which found a parent company liable for its wholly-owned subsidiary's abuse-of-dominance violations. In that case, the KFTC was persuaded by the fact that the only purpose of the subsidiary was to serve as the parent's sales division.¹² That case was subsequently affirmed by the Seoul High Court of Appeal, which found that the 100 percent ownership, combined with the fact that the subsidiary's only purpose was to sell and distribute its parents products, meant that the subsidiary was a mere instrumentality of the parent.¹³ However, when the Seoul Supreme Court heard the case, it decided the case on the narrower ground that the parent had instructed the subsidiary to engage in the illegal activities. Thus, although the KFTC and Seoul High Court decisions could be seen as similar in effect to *Akzo*, the Supreme Court decision rested on a much more conservative ground and provides no support for an *Akzo* theory.

It also bears noting that Korea's competition law devotes much attention to the so-called "chaebols," large conglomerations that dominated Korean industry in the early days of Korean industrialization and, to a lesser extent, continue to dominate it today. A number of the rules applicable to these groups are designed to promote "enterprise-wide" transparency and financial reporting. Such an approach, although certainly not directly applicable to the issue of parent liability for violations by a subsidiary, suggests a willingness to look at the overall business operation of a "single economic unit" rather than to fixate on the technicalities of corporate form. In broad principle, such an approach is philosophically consistent with *Akzo*.

In sum, Korean case law (other than the intermediate decision of the Seoul High Court noted above that was affirmed on other grounds) provides scant authority for arguing for an *Akzo* presumption. However, there are a few cases suggesting that the KFTC is open to such an

¹⁰ In re HDPE, No. 2006kajung2146, available at www.ftc.go.kr (in Korean).

¹¹ In Re Polypropylene, No. 2006kajung2147, available at www.ftc.go.kr (in Korean).

¹² No. 98-252, described in K.S. Oh, S.U. Yun, & R.B. Kim *Imputed Liability for Anti-trust Violations*, available at www.baekimlee.com/data/DATA1_92.pdf.

¹³ *Id.* No. 99nu3524.

approach where it appears that the parent and the subsidiary act as a single economic unit and one is simply the sales arm of the other.

IV. JAPAN

Like China and Korea, Japan recognizes the separate legal existence of corporate subsidiaries and basic principles of limited liability. Moreover, since 1969, it has looked to the “piercing-the-corporate-veil” doctrine when determining whether a parent should be liable for the actions of a subsidiary.¹⁴ As one commentator noted:

A parent company will not generally be liable for the debts of its KK subsidiary unless it has given a guarantee. Although the corporate veil may be pierced, this is only in cases where the corporate veil is either abused (for example, to evade the parent’s obligations to creditors) or has no substance (for example, where the subsidiary is a mere shell, with assets of the parent and subsidiary regularly confused, directorships shared and administrative irregularities). In practice, the courts are reluctant to disregard the principle of a company’s limited liability.¹⁵

There appears to be no indication that Japanese courts would apply an *Akzo*-style presumption of parent liability for the actions of a subsidiary. Moreover, Japanese law tends to recognize the separateness of various affiliated corporate entities even more than other nations. For example, a wholly-owned subsidiary will not be protected under Japan’s leniency program if the parent qualifies as a leniency applicant: the subsidiary must submit its own, separate leniency application.¹⁶ Likewise, it was only this year that Japan amended its premerger notification guidelines to require companies to report the turnover of affiliates, parents, and subsidiaries as well as the turnover of the specific company involved in the proposed merger transaction.

Accordingly, on balance, it would appear unlikely that Japan will follow *Akzo*.

V. CONCLUSION

In sum, a few Korean decisions on the KFTC level suggest a potential willingness to indulge an assumption similar to that adopted in *Akzo* but, to date, that approach has not been endorsed by Korea’s Supreme Court. Such a presumption appears to be inconsistent with laws governing corporate separateness in China and Japan, but only time will tell whether the reasoning of the *Akzo* court will be accepted or rejected by Asian jurisdictions.

¹⁴ See *Corporations & Partnerships, Japan*, INT’L ENCYCLOPEDIA OF LAWS v.3, at 91-92 (Nov. 2001) (citing *Saihan*, 27 February 1969, 23 Minshu 511).

¹⁵ Y. Fuchibe, T. Takahara, and J. Daniel, *DOING BUSINESS IN JAPAN*, Simmons & Simmons/TMI Associates, available at www.tmi.gr.jp/english/backnumber/pdf/GCH_GC3000_Trading_Direct_200304.pdf

¹⁶ A. Uesugi & K. Yamada, *Japan: Two Years into the New Leniency Programme*, available at globalcompetitionreview.com/apar2008/japancartels.cfm.