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Parental Liability for Cartel Infringements

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I. INTRODUCTION

The imputation of liability to a parent company for its subsidiary's participation in a cartel forms part of a field of law which has been ploughed almost exclusively by the Community Courts.² Ultimately, imputation is permissible where the parent and subsidiary form part of a single economic entity (an "undertaking") such that the subsidiary lacks autonomy with respect to commercial policy. However, the wording of the test originally set out by the European Court of Justice ("ECJ") more than thirty years ago is somewhat ambiguous and appears, at first blush, to impose a very onerous burden on the Commission. The jurisprudence from more recent years shows that the exact wording of the legal test should not be taken too literally. Rather it is necessary to make a global assessment of the influence which the parent has over its subsidiary in deciding whether they are part of a single economic entity.

In September 2009, the Luxembourg courts provided further guidance on parental liability.³ The most important of these judgments is the ECJ's ruling in the *Akzo Nobel (Choline Chloride)* appeal which marks the end of one wave of litigation with respect to the application and strength of the presumption of actual exercise of decisive influence in the case of 100 percent shareholdings. However, that judgment is also significant because it confirms that the Commission should look to all relevant economic, organizational and legal links which tie the subsidiary to the parent in order to assess whether they are part of one undertaking.

II. THE PREDOMINANCE OF ECONOMIC REALITY

It is trite that much of the difficulty in this area of EC competition law arises because of the dichotomy between economic entities (undertakings) and legal entities (e.g., companies or partnerships). On the one hand, in substantive terms, Article 81 of the EC Treaty is aimed at

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² Most of the judgments on parental liability concern annulment actions against Commission cartel decisions. However, the issue also arises in other areas of competition law (*see*, most recently, the judgment of the CFI of September 9, 2009 in Case T-301/04 *Clearstream Banking AG e.a. v Commission*, ¶¶198-204).

³ Judgment of the ECJ of September 10, 2009 in Case C-97/08 *Akzo Nobel v Commission (Choline Chloride)*, not yet reported; and judgments of the CFI of September 30, 2009 in Case T-174/05 *Elf Aquitaine v Commission*, not yet reported and Case T-175/05 *Akzo Nobel v Commission (MCAA)*, not yet reported.

undertakings. Given that the Community Courts define undertakings as economic actors regardless of their legal status, the participants in cartels must be seen, first and foremost, as economic units.⁴ On the other hand, cartel decisions must be addressed to entities possessing legal personality. Thus, in procedural terms, the Commission's interlocutors (and of course the complaining parties before the Community Courts) are individual legal entities.⁵

Imputation of liability relates to when legal entities can be held liable for economic behavior on the market. This is the crossroads where the concepts of legal and economic entities meet. The jurisprudence is clear that economic reality is the dominant force in this dynamic—the legal form of a parent is subjugated to the economic entity to which it forms part.

Thus, the separate legal personality of the subsidiary does not prevent the Commission reaching to what "really lies behind" in economic terms and addressing cartel decisions to parent companies where they are part of a single economic entity.⁶ Similarly, where a parent and subsidiary are part of a single economic entity, the fact that the subsidiary, and not the parent, participated "directly" in an infringement, does not act as a shield against imputation of liability to a parent company. The subsidiary is simply part of a larger economic entity in which it is effectively controlled by the parent. So when the subsidiary participates directly, the parent is in fact deemed to have itself committed the infringement.⁷

III. THE LEGAL TEST AND THE PRESUMPTION

So when are parents and subsidiaries part of a single economic entity? The traditional test is mercurial. According to the articulation in *ICI*, which has been repeatedly used in subsequent judgments, the Community Courts allow the Commission to impute the liability to the parent as part of the undertaking which committed the infringement where, "in particular", 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.⁸ The clarity of this test is undermined by the "in particular" qualifier which must mean that carrying out "in all material respects, the instructions given to it by the parent company" is not even a necessary requirement to establish a single economic entity.

The Commission tends to assume the burden of showing not only that the parent company has the possibility to exercise decisive influence on the commercial behavior of its

⁴ Joined Cases C-189/02, e.a. *Dansk Rorindustri A/S v Commission* [2005] ECR I-5425, ¶¶112-113. As noted in that judgment, the direct participant in a cartel does not even need to have legal personality.

⁵ Notably, Article 256 EC refers to "persons" as the addressees of decisions. See also *Choline Chloride*, *supra* note 3, at ¶57.

⁶ In his opinion in *Joined Cases 6 and 7/73 Commercial Solvents v Commission* [1974] ECR 223, at 263, Advocate General Warner stated that there is a risk that blindly importing the doctrine of separate legal personality in the present context would "serve only to divorce the law from reality."

⁷ See *Case C-294/98 P Metsä-Serla and Others v Commission* [2000] ECR I-10065, ¶¶26-28. See also *Case T-69/04 Schunk v Commission*, not yet reported, ¶¶73-74.

⁸ *Case 48/69 ICI v Commission* [1972] ECR 619, ¶¶132-133.

subsidiary, but also that the parent effectively exercises this influence.⁹ This considerable burden is somewhat eased by the evidentiary presumption according to which a parent's 100 percent shareholding means that decisive influence has actually been exercised. It is for the party concerned to rebut that presumption by adducing evidence to establish that the subsidiary was in fact independent.¹⁰

This presumption is firmly rooted in common sense—if a parent owns 100 percent of the shares, it is highly unlikely that the subsidiary will be autonomous.¹¹ However, common sense has not prevented the presumption from being highly controversial. An opening for a concerted attack was provided by the wording of the *Stora* judgment¹² which was unfortunately ambiguous as to the exact consequence to be drawn from 100 percent ownership by a parent company and, in particular, whether the Commission needed to adduce additional indicia of actual exercise of decisive influence. As a result, hundreds of pages of briefs have been devoted to the issue. This was encouraged by a minority strand of judgments of the Court of First Instance (“CFI”) which showed sympathy for the view that the 100 percent shareholding was not enough to establish a presumption. While the more recent judgments from the CFI have firmly batted back the argument that the presumption is inadequate of itself, it was necessary to have clarification from the ECJ itself so that there could be closure on this point.

The ECJ's ruling in *Akzo Nobel (Choline Chloride)* deals with the issue in a typically robust manner. It confirms that it is enough for the Commission to prove 100 percent ownership in order to conclude that the parent exercises decisive influence over the commercial policy of the subsidiary. For those who doubted this, the Court refers, for good measure, back to the *Stora* judgment.¹³ The ECJ added that the CFI should not be criticized for requiring any parent company seeking to rebut the presumption to adduce “any evidence relating to the

⁹ There have been suggestions in the jurisprudence that the first condition is sufficient (*see* Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission* [1998] ECR II-2111, ¶80) and there are strong considerations which can be advanced in support of that conclusion (*see* W. Wils, *The undertaking as a subject of EC competition law and the imputation of infringements to natural or legal persons*, 25 E.L.REV. (2000)). However, out of caution, the Commission has tended to take the formulation in Case 107/82 *AEG v Commission* [1983] ECR 3151, ¶¶49-50, as the state of the law.

¹⁰ Where the Commission relies on the presumption, it is for the party concerned to rebut the presumption during the administrative procedure (*see* Case T-330/01 *Akzo Nobel v Commission (Sodium Gluconate)* [2006] ECR II-3389, ¶¶87-89).

¹¹ This is well explained by Advocate General Kokott at ¶73 of her opinion of April 23, 2009 in *Choline Chloride*:

[The 100% shareholding parent] has the sole right to appoint the members of the subsidiary's management bodies, and it is not unusual for there to be personal interconnections between the two companies. Moreover, it follows from the 100% shareholding that the interests of other shareholders cannot play any part either in strategic decisions or in the day-to-day business of the subsidiary. There is thus complete coincidence of interests between the parent company and its wholly-owned subsidiary. In those circumstances, the obvious conclusion is that the subsidiary does not determine its own market conduct independently, but in accordance with the wishes of its parent company."

¹² Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, ¶¶28-29.

¹³ *Choline Chloride*, *supra* note 3, ¶61.

organizational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity".¹⁴

Many have argued that the Commission has applied the presumption in an absolutist manner such that the presumption is effectively "irrebuttable." This is incorrect: Each time the presumption is applied, the Commission recognizes that it is rebuttable and systematically considers any evidence advanced to rebut the presumption. The reality is that the evidence presented by way of rebuttal tends to be weak and does not meet the standard laid out by the Courts.¹⁵ Ultimately, this presumption has very powerful roots and is therefore difficult to rebut.¹⁶ There are, no doubt, cases where the presumption will be rebutted,¹⁷ but they will be the exception rather than the rule.

While the ECJ's judgment in *Akzo Nobel (Choline Chloride)* marks the end of a debate regarding the significance of 100 percent ownership, the exact scope of the shareholding presumption remains to be defined. Apart from situations where the parent is the 100 percent shareholder, the Commission has also applied the presumption to cases where the parent owns the quasi-totality of the subsidiary's shares. Notably, in its *MCAA* decision, the Commission presumed the exercise of decisive influence where Elf Aquitaine owned 98 percent of the shares of Arkema, the direct participant in the cartel.¹⁸

This approach was endorsed by the CFI in the *Elf Aquitaine* judgment of September 30, 2009.¹⁹ According to the CFI, in this situation, it is reasonable to conclude that the subsidiary does not autonomously determine its own conduct on the market. This makes perfect sense—it is highly likely that a parent owning the vast majority of shares will exercise decisive influence over its subsidiary. Of course, it is possible that the minority shareholders have special voting rights or a veto over strategic decisions and, in such cases, the presumption of single control may be rebutted.²⁰ However, it is up to the company attempting to rebut the presumption to provide this evidence.²¹ Given that the parent and subsidiary company will have easy access to

¹⁴ See *Choline Chloride, Id.*, ¶65.

¹⁵ It is, for example, insufficient to show that the parent was not involved in the day to day activities of the subsidiary or its operational business. Even if these facts are established, they do not show that the parent and subsidiary were part of two different economic entities.

¹⁶ See *AEG, supra* note 9, where the ECJ found that a wholly owned subsidiary "necessarily" follows its parent's policy (¶¶49-50). For a useful general explanation on the rationale behind this kind of evidentiary presumption, see Advocate General Kokott's opinion of February 19, 2009 in Case C-8/08 *T-Mobile Netherlands BV and Others*.

¹⁷ See *Choline Chloride* opinion, *supra* note 11, where Advocate General Kokott agrees with examples given by the Commission. These examples include the situation where the parent only has ownership of the shares for a short time and is prevented from exercising control for that reason, as well as more general situations where the parent is prevented for legal reasons from exercising its 100% control (footnote 67).

¹⁸ In that decision, the Commission did not support the presumption with additional indicia of influence.

¹⁹ See also Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, ¶290.

²⁰ But see also Case T-314/01 *Avebe v Commission* [2006] ECR II-3085.

²¹ Interestingly, in her opinion in *Choline Chloride* (*supra* note 11, footnote 35), Advocate General Kokott stated that "It is clear from the case-law that decisive influence or control for the purposes of competition law can be assumed to exist even with a shareholding below 100%" and referred to the *ICI* judgment which in turn referred, *inter alia*, to a majority shareholding (¶136).

any such evidence, it is entirely justified to require them to discharge the burden of proof in this regard.²²

IV. THE NATURE OF INFLUENCE WHICH NEEDS TO BE EXERCISED BY THE PARENT COMPANY

Regardless of whether the shareholding presumption is applicable, the jurisprudence shows that the Commission can rely on a variety of elements to demonstrate a parent's influence over the subsidiary (where the shareholding presumption is in play, these elements will operate to further bolster it). While the Commission bears the legal burden of proof, if it adduces evidence supporting the conclusion that the parent and subsidiary formed part of a single economic entity, then the evidentiary burden may shift such that the party seeking to resist imputation needs to convincingly respond to the evidence.²³

Thus, if the Commission shows that the parent company had the sole right to appoint the subsidiary's management then the parent company might be expected to demonstrate that the subsidiary was autonomous of its parent.²⁴ Similarly, if there is evidence, even on isolated occasions, of the parent company providing instructions to the subsidiary with respect to its commercial policy, then it would seem reasonable for the addressee of the decision to explain how such parental instructions were consistent with a subsidiary's autonomy.

One crucial issue before the ECJ in the *Akzo Nobel (Choline Chloride)* case related to the subject matter of the parent's exercise of decisive influence. Does the Commission need to show influence by the parent on the "commercial policy" in the narrow sense, that is on the determination of the subsidiary's operational market conduct, or can it rely on evidence with respect to commercial policy more broadly (i.e. strategic policy, business plans, investment, financing, human resources, legal matters)? The Court responded as follows:

It is clear, as the Advocate General pointed out in paragraphs 87 to 94 of her Opinion, that the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit.

The Court went on to say that account should be taken of "all the relevant factors relating to economic, organisational and legal links" which tie the parent and subsidiary together.²⁵

²² *Id.* ¶75.

²³ 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-123, ¶¶79. See also Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases" (14th Annual EU Competition Law and Policy Workshop), forthcoming in Ehlermann and Marquis, *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Law Cases*, Hart 2010, and in *World Competition*, Volume 32, No 1, December 2009.

²⁴ The evidence would be even stronger where the Commission could show that most of the board of directors were in fact the parent's appointees.

²⁵ See *Choline Chloride* judgment, *supra* note 3, ¶¶74, 58.

The reference to specific paragraphs of Advocate General Kokott's opinion shows that the Court endorsed her reasoning. Significantly, those paragraphs reveal an open approach to establishing evidence of influence by a parent over a subsidiary.²⁶ The Advocate General's mantra is that the general commercial relationship between the parent and subsidiary should be examined to assess the influence of the former.

More specifically, the Advocate General opined that the Commission cannot be required to provide evidence of precise instructions, or involvement in decision-making, by a parent company whether with respect to the infringement itself, market conduct (viewed narrowly) or commercial policy (viewed generally). Rather, "a single commercial policy within a group may also be inferred indirectly from the totality of the economic and legal links between the parent company and its subsidiaries."²⁷ The message reflects the approach of the Community Courts in practice – they will assess the nature of the relationship between the parent and the subsidiary, and infer from this whether the subsidiary is likely to be influenced by its parent. Revealingly, Advocate General Kokott pointed out, by way of example, that a company's mere membership of a group may influence its market conduct with respect to with whom it may compete. Ultimately, according to the Advocate General, "the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit."²⁸ The significance of this opinion should not be under-estimated.

V. CONCLUSION

The imputation of liability to parent companies is an important means of ensuring that the economic forces behind cartel infringements are properly held accountable for their actions (and omissions). The Commission seeks to impose responsibility at the upper echelons of a group in order to ensure the maximum deterrent value of any fines.²⁹ However, this will not always be feasible and the Commission must have discretion as to whether to attribute liability to any parent company in the corporate group hierarchy, depending on the circumstances of the case.³⁰

²⁶ With respect to the ICI wording, that the subsidiary carries out the parent's instructions "in all material respects", Advocate General Kokott noted that it could lead to misunderstandings (*see* Choline Chloride opinion, *supra* note 11, footnote 75).

²⁷ *Id.* (Kokott) ¶91.

²⁸ *Id.* ¶93.

²⁹ FAULL & NIKPAY, *THE EC LAW OF COMPETITION*, 2ND ED; Ch. 8, ¶8.557 (2007).

³⁰ This proposition would seem to have been implicitly accepted by the CFI in *Case T-65/89 BPB Industries Pic and British Gypsum Ltd v Commission* [1993] ECR II-389, at ¶¶148-155 and, more recently, in *Elf Aquitaine v Commission*, *supra* note 3, at ¶¶105-109. See also judgment of the ECJ of September 24, 2009 in *Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P Erste Group Bank AG and others v Commission (Austrian Banks)*, ¶82.