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## Severing Parent Liability For Cartel Infringements By Employees Of Subsidiaries

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### I. INTRODUCTION

We have previously<sup>2</sup> discussed the *Akzo Nobel* case,<sup>3</sup> in which the European Court of Justice (“ECJ”)<sup>4</sup> clarified the presumption of joint and several liability of parent companies for cartel infringements committed by their wholly-owned subsidiaries. The attribution of liability has major implications for the amount (up to 10 percent of global turnover<sup>5</sup>) and payment of any fines imposed by the European Commission (the “Commission” or “EC”) for such infringements. In most cases, regardless if a parent company has taken all of the steps necessary to ensure that its subsidiaries comply with competition law, it will be held jointly responsible for any subsequent infringement.<sup>6</sup>

Assuming that the current EU competition legislation and the Court’s position are not going to change in the near future, what can be done? In this article, we submit that the criminalization of cartel behavior against employees of subsidiaries could be used to achieve a higher level of deterrence while reducing fines on parent companies, particularly in circumstances where there is a showing that the latter have taken all of the steps within their power to ensure that their subsidiaries and employees strictly comply with EU competition law.

### II. DETERRENCE

In an attempt to achieve adequate deterrence, the Commission has gradually raised the level of fines on cartel participants.<sup>7</sup> The justification for the Commission’s higher fines was recently reiterated by former Director-General Philip Lowe. He stated, “In the absence of criminal sanctions at EU level and taking into account the fact that there is little civil litigation,

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<sup>2</sup> Available at: <http://www.step toe.com/publications-6525.html>.

<sup>3</sup> Case C-97/08, *Akzo Nobel NV v. Commission*, Judgment of the Court on 10 September 2009, not yet reported.

<sup>4</sup> Newly renamed the Court of Justice of the European Union by the Lisbon Treaty, which entered into force on December 1, 2009.

<sup>5</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, O.J. [2006] C 210/2, recitals 32-33.

<sup>6</sup> See Case C-97/08, *Akzo Nobel NV v. Commission*, Judgment of the Court on 10 September 2009, not yet reported and our briefing *supra* note 2.

<sup>7</sup> Particularly since the adoption of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, O.J. [2006] C 210/2, recital 4. See Alan Riley, *The Legacy of the Iron Lady*, EUR. VOICE, (3 December 2009): “Since 2005, the Commission has levied fines totaling €9.5 billion; since 1997, the US has imposed just over \$4bn (€2.7bn).”

finances are the only instrument the Commission has to sanction and deter companies from engaging in the most serious violations of the antitrust rules.”<sup>8</sup>

When calculating these fines, using a number of factors, the Commission may, in accordance with Article 23.2 of Regulation 1/2003, fine a parent company up to 10 percent of its worldwide turnover for cartel violations of one of its subsidiaries. Scholars and practitioners are divided on whether this 10 percent cap is high enough to have the desired effect. We have seen suggestions that a fine may have to be three times the actual gain realized by the cartel to be an effective deterrent.<sup>9</sup> By shifting the liability to the parent company, the Commission may achieve this result as it applies the 10 percent ceiling not to the subsidiary having committed the infringement but to the ultimate parent company. By doing so, the Commission may use a far greater turnover to calculate the ceiling.

However, it is highly questionable whether, by imposing ever-increasing fines on parent companies in the way that it does, the Commission actually achieves the deterrence it seeks.<sup>10</sup> While parent companies may indeed be deterred by such fines, it would appear that their subsidiaries and employees may not. It is interesting to note that, in response to rising criticism about the level of the fines in the EU, former Competition Commissioner Kroes indicated, at the end of her mandate, that it has become important to determine how administrative fines and criminal sanctions can complement each other.<sup>11</sup> This might be taken as a suggestion that criminal sanctions against individuals would achieve better results than imposing heavy fines on parent companies.

On the basis of the existing regulatory and procedural frameworks, we consider below how administrative fines at the Commission level may be complemented with additional “sanctions” on individuals with a view to achieving stronger cartel deterrence in the European Union.<sup>12</sup> While mindful of the division of powers between the Commission and the National Competition Authorities (“NCA”), we take the position that custodial and/or disqualification sanctions on individuals who have actively and knowingly taken part in cartel activities should, in appropriate circumstances, translate into a reduction of the fine imposed by the Commission on the parent company.

### III. OVERVIEW OF SANCTIONS AGAINST INDIVIDUALS

#### A. Damage Actions, Individual Fines, Disqualification, and Imprisonment

We provide below an overview of the alternative sanctions—administrative and criminal—that may be imposed against both the parent company and the individuals and how they may affect effective deterrence.

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<sup>8</sup> P. Lowe, *Competition Policy and the Global Economic Crisis*, 5(2) COMPETITION POL’Y INT’L, (Autumn 2009).

<sup>9</sup> OECD, *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation* (2005), page 25.

<sup>10</sup> See, e.g., Karl Hofstetter, *EC Cartel Fining Laws and Policies in Urgent Need of Reform*, 11(2) CPI ANTITRUST CHRONICLE (formerly GCP), (November 2009).

<sup>11</sup> See, SPEECH/09/454, Neelie Kroes European Commissioner for Competition Policy Tackling cartels – a never-ending task Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel session Brasilia, 8th October 2009.

<sup>12</sup> That is, without requiring a complete overhaul of the Commission’s investigative powers and procedures as suggested by Philip Lowe in *Cartels, Fines, and Due Process*, 6(2) CPI ANTITRUST CHRONICLE (formerly GCP), (June 2009); nor requiring the adoption of EU legislation mandating Member States to provide for sanctions against individuals as suggested by Ian Forrester, *E.L. REV.* 34, (December 2009).

Looking to the United States for reference, damage actions could be encouraged. However, private enforcement is still in its infancy in the EU. Last year, the Commission attempted without success to propose EU legislation aimed at introducing national rules on collective redress for cartel injury. Most recently, a study prepared by the Commission entitled “Quantifying antitrust damages: Towards non-binding guidance for courts”<sup>13</sup> indicates that only the United Kingdom, Germany, and to a lesser degree the Nordic countries see any noticeable litigation in this area. It would take a serious cultural shift within the business community and investment in public awareness for other Member States to see any, let alone a significant increase, in damage actions for breaches of competition law.

Some Member States, such as The Netherlands, allow the authorities to impose monetary fines on individuals who participate in a cartel. While this is an attractive option, its deterring effect may be diluted. If an individual is personally fined for participating in a cartel on his/her company’s behalf, the company may reimburse the individual at a later date.

For the time being, as a complement to administrative fines against the undertakings, it would appear that we are left with custodial sanctions, i.e., prison sentences, and disqualification of certain individuals who knowingly breach competition law. A disqualification (or trading prohibition as referred to in Swedish legislation) prohibits an individual from assuming certain positions in any company. For example, a disqualification order in the United Kingdom prohibits an individual from: (a) being a director of a company; (b) acting as a receiver of a company’s property; (c) being concerned with or taking part in any way in the promotion, formation, or management of a company; or (d) acting as an insolvency practitioner.

The majority of literature supports the position that criminal sanctions have a deterrent effect; it is less clear whether disqualification brings the same type of social stigma. That said, we believe that it may be a useful tool. Indeed, both criminal sanctions and disqualification are penalties that may do what the Commission’s fines (alone) cannot, namely prevent employees of subsidiaries from engaging in anticompetitive behavior.

Under the current legislative framework, we envisage a two-pronged approach whereby the Commission would pursue the undertakings, while the Member States would prosecute those individuals who have taken an active part in the cartel. Rather than concurrent enforcement of competition laws, we see scope for more cooperation between the Commission and the national authorities in the Member States. Closer cooperation in the EU would be consistent with the Commission’s efforts to coordinate global cartel enforcement with third countries that have an arsenal of criminal penalties, in particular the United States.

As we explain below, in instances where a parent company, which has spent significant resources to put in place an appropriate compliance program, is involved in the Commission’s proceedings solely as the result of transgressions by employees of one of its subsidiaries and, further, it fully cooperates with a Member State’s proceedings against such employees—which may already have left the company at the time of the investigation—the Commission should consider this active participation in the criminal proceedings at the national level as a “mitigating factor” when calculating the fine on the parent company. Indeed, it is submitted that the combination of a reduced administrative fine on the parent with criminal penalties on the employees would constitute better deterrence than only a fine on the parent company.

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<sup>13</sup> Available at [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf).

### ***B. Member States with Custodial and Disqualification Sanctions***

More than half of the Member States, including the Czech Republic, Estonia, France, Germany (although very limited), Ireland, Romania, Sweden, and the United Kingdom have legislation in place that allows authorities to impose sanctions on individuals:

- Czech Republic: Sanctions include imprisonment for up to five years or a prohibition against carrying out business activities.<sup>14</sup>
- France: Sanctions include imprisonment for up to four years.<sup>15</sup>
- Estonia: Sanctions include imprisonment for up to 30 days.<sup>16</sup>
- Germany: Individuals may be imprisoned for up to five years, but only when there has been bid rigging in tender proceedings conducted under the public procurement rules.<sup>17</sup>
- Ireland: On summary conviction an individual may be imprisoned for up to six months; on conviction on indictment the individual may be imprisoned for up to five years.<sup>18</sup>
- Romania: Sanctions include imprisonment for 6 months up to 4 years.<sup>19</sup>
- Sweden: Sanctions include the imposition of a disqualification order on a person holding a leading position in a company. The individual is prohibited from holding leading positions in companies for a specified period.<sup>20</sup>
- United Kingdom: Sanctions include imprisonment for up to five years and/or the imposition of a disqualification order, which may apply for up to 15 years. During its application it is a criminal offence for the individual to be concerned with the management of a company. An individual may propose a disqualification undertaking rather than having a disqualification order imposed.<sup>21</sup>

While a growing number of Member States have the necessary legislation in place, national authorities have thus far been hesitant to engage in proceedings against individuals. The time seems to be ripe for them to put their powers to good use. Using the two-pronged approach, with the Commission doing the heavy lifting on the administrative side, particularly where the cartel is likely to affect the internal market as a whole, Member States could devote resources to pursuing *inter alia* criminal proceedings against individuals.

The recent Marine Hoses<sup>22</sup> proceedings provide an opportunity to see how authorities, in that instance the Commission and the United Kingdom (and the United States), can ensure that the more burdensome criminal procedure rules can be respected to the utmost. In its Decision, the Commission makes a point of stating:

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<sup>14</sup> Section 127 of Act no. 140/1961 Coll., as amended (the “Criminal Code”).

<sup>15</sup> Article L. 420-6 of the Commercial Code.

<sup>16</sup> Articles 399-402 of the Penal Code.

<sup>17</sup> Section 298 of the Criminal Code.

<sup>18</sup> Section 8 of the Competition Act (2002).

<sup>19</sup> Article 60 of Competition Law No. 21/1996.

<sup>20</sup> Article 24 of the Competition Act.

<sup>21</sup> Section 190 of the Enterprise Act 2002 and Company Directors Disqualification Act 1986, as amended.

<sup>22</sup> Case COMP/39406 - Marine Hoses; US plea agreements are *available at*:

<http://www.justice.gov/atr/cases/f228500/228582.pdf>; <http://www.justice.gov/atr/cases/f228500/228585.htm>;

<http://www.justice.gov/atr/cases/f228500/228588.htm>; UK Court of Appeal Judgment available at:

<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2560.rtf>.

The criminal trial before the UK court concerned charges brought against several individuals under the UK Enterprise Act, while the proceedings in this case aim to verify whether an infringement of Article [101] of the Treaty by a number of undertakings took place. The present proceeding concerning an infringement of Article [101] of the Treaty and any criminal investigation of the UK Office of Fair Trading into a violation of the Enterprise Act are governed by different procedural rules and were therefore conducted separately without any exchanges concerning the substance of the case.<sup>23</sup>

Under the two-pronged approach, once the authorities initiate their respective investigations, the parties should be reassured that their rights of defense under the applicable legislation will be respected. The Commission's proceeding against the undertaking(s) will not "pollute" the Member State's proceeding against the individuals.

#### **IV. EC'S ABILITY TO COLLABORATE ACTIVELY WITH NCAS TO PURSUE INDIVIDUALS**

Depending on the procedural rules applicable in a Member State, it may be unnecessary for the national competition authority to build its individual case from scratch. Articles 12(1) and (3) of Regulation 1/2003<sup>24</sup> provide for the sharing of evidence among the Commission and Member States. Article 12(1) simply gives the Commission and Member States' competition authorities "the power to provide one another with and use in evidence any matter of fact or of law, including confidential information." Article 12(3) is of particular relevance since it explains that:

Information exchanged can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article [101] or Article [102] of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defense of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

All hope of cooperation is not lost.<sup>25</sup> The above provision would prevent a Member State from using information provided by, in our scenario, the Commission in evidence in its jurisdiction to initiate, for example, a criminal proceeding. It does not prevent the Member State from using the information as "intelligence." For example, if a national authority receives some information from the Commission concerning a potential cartel, it could use the "tip-off" to initiate, in parallel with the Commission, its own investigation whereby it collects its own information that could later be used as evidence in a proceeding against one or more individuals (this is assuming that national procedural rules allow the use of such information to initiate an investigation).

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<sup>23</sup> Case COMP/39406 - Marine Hoses, ¶ 184.

<sup>24</sup> O.J. [2003] L 1/1.

<sup>25</sup> Wouter P.J. Wils, *Is Criminalization of EU Competition Law the Answer?* REMEDIES AND SANCTIONS IN COMPETITION POLICY: ECONOMIC AND LEGAL IMPLICATIONS OF THE TENDENCY TO CRIMINALIZE ENFORCEMENT IN THE EU MEMBER STATES (Edward Elgar ed.)(2005).

We should point out here that the Commission's 2009 Report on the functioning of Regulation 1/2003<sup>26</sup> states that Member States and the Commission have been discussing whether Article 12(3) is "too far-reaching and is an obstacle to efficient enforcement."<sup>27</sup> The Report further indicates that the authorities, including the Commission, may explore other options, although it does not list any, which may be available, while ensuring parties' rights of defense.

Following this line of argument, individuals and companies wishing to protect their employees and themselves may be less willing to cooperate with the Commission's investigation. However, the Commission's Notice on Cooperation within the Network of Competition Authorities<sup>28</sup> does not allow information provided under a leniency program to be transmitted unless the receiving Member State undertakes not to use the information, nor any information obtained following that information, to impose sanctions on the leniency applicant or on any of its employees or former employees.

#### **V. PARENT COMPANY'S COOPERATION WITH THE EC AND MEMBER STATES**

This brings us to the heart of the matter. What happens when a parent company, which has in place a compliance program, is involved in a Commission proceedings as the result of a rogue subsidiary's transgressions? Simply put, it must cooperate to the fullest extent possible with both the Commission and Member State(s). The parent company can assume one of several roles in a proceeding at the EU level. It may be the immunity applicant, a (subsequent) leniency applicant, or a cooperating undertaking.

As a successful immunity applicant, the parent company would not be subjected to a fine by the Commission.<sup>29</sup> And, as provided in the Notice on Cooperation within the Network of Competition Authorities, its current and previous employees would be sheltered from any type of custodial sanctions by Member States as a result of information being shared in our two-pronged approach. In such a case, it would appear that everyone is a winner!

As a leniency applicant, the parent company would be subject to a fine by the Commission, although it would be somewhat reduced.<sup>30</sup> Again, the Notice on Cooperation within the Network of Competition Authorities would apply to avoid sanctions. However, we should explore the possibility of the parent company giving its consent to the Member State to use the information it receives from the Commission as intelligence to build a case to subsequently impose sanctions on its subsidiary's employees or former employees. In such a case, the Commission should consider this additional cooperation, coupled with the fact that the parent company had in place a compliance program, as a mitigating factor when calculating the fine.<sup>31</sup>

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<sup>26</sup> COM(2009) 206 final.

<sup>27</sup> COM(2009) 206 final, ¶ 27.

<sup>28</sup> O.J. [2004] C 101/43, ¶¶ 37 – 42.

<sup>29</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. [2006] C 298/17, recitals 8 – 13.

<sup>30</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. [2006] C 298/17, recitals 23-26.

<sup>31</sup> Guidelines on the method of setting fines contain a non-exhaustive list of mitigating factors; nothing seems to preclude the Commission from taking account of the parent company's assistance to national authorities in prosecuting employees of subsidiaries.

As a cooperating undertaking or unsuccessful leniency applicant, the parent company should assist both the Commission and the Member State with their respective investigations. Intelligence should be provided which allows the Member State to build a case to subsequently impose sanctions on its subsidiary's current or former employees. Again, this additional cooperation, coupled with the fact that the parent company had in place an effective compliance program, could be considered a mitigating factor when calculating the fine.

## VI. CONCLUDING REMARKS

Admittedly, we have taken a controversial position. Why would a parent company “sell out” current or former employees of its group? Assuming that the company does not have a proverbial axe to grind with a former employee, the reason is as follows: many companies have expressed frustration at the fact that they have done everything they can to ensure that their subsidiaries comply with competition laws. They have devised and implemented compliance programs and nurtured an environment in which management and employees are encouraged to behave accordingly. However, from time to time employees of subsidiaries go astray. The fact that the parent company may be fined is not sufficient to deter them. This creates a somewhat awkward situation. The Commission is steadily increasing the fines it imposes on parent companies that have vigorously sought to prevent a breach of the rules. Such a policy misses the mark. Where is the deterrent effect? By fully cooperating with the Commission and the Member State responsible for imposing individual sanctions, the parent company signals to the authorities, its subsidiaries, and employees that it is serious about compliance with competition law. Such a bold step should not be ignored.

The above thoughts assume that the existing regulatory and procedural framework will not change significantly in the near future. While the Commission is committed to improving transparency and predictability of its proceedings,<sup>32</sup> we do not see how major improvements may be made to the cartel enforcement system in Europe in the foreseeable future. It is also unlikely that the approach of the Commission and the EU courts in the parent/daughter liability debate will change dramatically if there is not a debate run in parallel on the mechanisms available to improve deterrence in Europe. The above proposition hopefully provides “food for further thought” and constitutes a call for the Commission and the EU courts to take a more open-minded approach in the parent liability debate.

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<sup>32</sup> See Commission press release of 6 January 2010 *Improved transparency and predictability of proceedings*, IP/10/2.