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Brian Kennelly[1]

I. INTRODUCTION

This article examines the judgment of Aikens J in *Provimi Ltd and ors v Aventis Animal Nutrition SA and ors*,[2] which opened the door to the stream (if not yet a flood) of non-U.K. claimants bringing competition law damages claims in this jurisdiction. *Provimi* found that a corporate entity (e.g. a subsidiary) may be liable for implementing a cartel contrary to Article 101(1) TFEU[3] where it is part of the same undertaking as the cartelist, even if it had no knowledge of the cartel and never made sales of the cartelized products to the claimants (§§31, 39-41).

On this basis, and armed with Article 6(1) of the Judgments Regulation,[4] a foreign victim can sue all of the foreign members of the cartel in England provided that there is at least one subsidiary of one of the cartelists in England. *Provimi* was clearly a welcome decision for U.K. competition litigators. It may, however, be wrong.

II. THE *PROVIMI* CASE

The *Vitamins* Commission Decision[5] found that Aventis SA (among others) had infringed ex-Article 81(1) EC by fixing the prices of vitamins over a 15 year period. The Commission found that the cartelist within the Aventis Group was in fact Aventis Animal Nutrition SA ("AAN") and made no finding that the parent (Aventis SA) was aware of the cartel. Nevertheless, as parent, Aventis SA was made the addressee of the Decision and the fine was imposed on it.

A group of vitamin purchasers in Germany and France including Trouw Germany (collectively "Trouw") sued Aventis SA, AAN, and an AAN subsidiary in the United Kingdom, Rhodia UK (collectively "Aventis") for damages. Rhodia UK was the anchor defendant for the claim in England under Article 6(1) of Regulation 44/2001, without which the English court would have had no jurisdiction. Aventis applied to strike out Trouw Germany's claim on the basis that Rhodia UK had had no knowledge of the cartel and had never made sales to any claimant.

The relevant findings of the judge (at §§26 to 33) are as follows:

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[2] [2003] EWHC 961 (Comm).

[3] Treaty on the Functioning of the European Union.

[4] Council Regulation 44/2001, Art. 6(1): "A person domiciled in a Member State may also be sued…where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings"."

[5] OJ 2003 L6/1.

- The decision of the ECJ in *Woodpulp*[6] indicates that the implementation of an infringing agreement is itself an infringement of ex-Article 81(1) EC (now Article 101(1) TFEU) by a company.
- Aventis relied upon the *Viho*[7] decision of the ECJ which they said showed that there could be no infringement where the implementation of the agreement relied upon consisted simply of obeying orders of a parent company to sell goods at "cartel prices" fixed by the parent (without the subsidiary knowing such to be cartel prices). However, Aikens J held that decision was not relevant to the present case because:
  - The prices in *Viho* were not set by a cartel consisting of the parent company and other, independent undertakings, but were set by the parent and implemented by the subsidiaries that were part of the same economic unit. The subsidiaries had no independence of action.
  - The issue in the *Provimi* case was whether there was an infringement by a subsidiary when it unknowingly carried out the cartel agreement that had been entered into by the parent and other, independent, "undertakings."
- On the following crucial question:

> what knowledge of the infringing agreement by the legal entity being sued, if any, does a claimant have to plead and prove in order to succeed in a claim for damages for infringement of Article 81(1)(§30)

Aikens J held as follows:

> it seems to me to be arguable that where two corporate entities are part of an "undertaking" (call it "Undertaking A") and one of those entities has entered into an infringing agreement with other, independent, "undertakings," then if the corporate entity which is part of Undertaking A then implements that infringing agreement, it is also infringing Article 81…The legal entities that are a part of the one undertaking, by definition of the concept, have no independence of mind or action or will. They are to be regarded as all one. Therefore, so it seems to me, the mind and will of one legal entity is, for the purposes of Article 81, to be treated as the mind and will of the other entity…. (§31)
>
> …the claimants have maintained their case that the UK company in each of the groups "implemented" and "gave effect" to the cartel agreements entered into by the "undertaking" identified in the Decision. If my analysis of the legal position under EU competition law is correct, that is all the claimants have to plead" (§33).

As a matter of fact, Aikens J also found that it was arguable that, since each infringing entity upheld the cartel prices by implementing the cartel, Rhodia UK contributed to a situation whereby Trouw Germany could not buy at a lower price in Germany and/or the United Kingdom, thus establishing a sufficient causal link between the infringement and the alleged loss (§§ 39-41).

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[6] Joined Cases C- 89/85, C-104/85, C116-117/85 and C-125-129/85 Woodpulp [1993] ECR 1-1307.
[7] Case C-73/95 P Viho v Commission [1996] ECR I-5457.

III. THE IMPACT OF *PROVIMI*

Provimi was immediately recognized as an invitation for any victim of an antitrust infringement to bring their claim against the infringer in England regardless of the location of either, provided at least one "anchor" defendant was based in England. That anchor could be an entirely innocent subsidiary of the foreign infringer.[8] *Provimi* has subsequently been upheld in the case-law[9] and approved in the leading text.[10]

Two further factors have led to an increase in cartel damages actions in England between largely foreign parties: the U.S. Supreme Court's ruling in *Empagran*,[11] which obliges "foreign purchaser claims" (claims not relating to sales or purchases in or to the United States) to be brought outside the United States, and the increase in cartel decisions by the European Commission.[12]

IV. IS *PROVIMI* CORRECT?

It has been trite EC competition law since the *Viho* litigation that companies within the "same economic entity" cannot combine in breach of Article 81(1) EC.[13]

The rationale of this *Viho* rule is clear: where companies, although formally legally separate personalities, are, by reason of the linkages between them (common ownership being the most obvious), economically the same unit, it makes no sense to treat formal or other agreements between such entities as significant for competition law purposes.[14] The single economic entity test is a tool used to prevent the application of Article 101(1) TFEU in circumstances where the formal requirements of Article 101(1) TFEU might suggest a relevant agreement has been formed. It is arguable that Aikens J erroneously used this test to impose liability.

Although Aikens J sought to distinguish *Viho*, the fact remains that the only vice on the part of Rhodia UK as giving rise to its liability was Rhodia UK's alleged agreement with or direction from the parent companies, AAN or Aventis SA, to implement the cartel. According to *Viho*, this should have been of no legal consequence. The various distribution arrangements imposed upon the subsidiaries by AAN were not in themselves objectionable. What was potentially objectionable is how these arrangements were used by AAN to further the price-fixing objects of the cartels. Thus, what was in issue was the parent's actions and ability to control its subsidiary through such arrangements, not the actions of the subsidiary *per se*.

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[8] M. Hansen, *Civil cartel litigation in Europe: the changing landscape,* 8(5) GLOBAL COUNSEL 27-29 (2003); C. Ryngeart *Foreign-to-foreign claims: the US Supreme Court's decision (2004) v the English High Court's decision (2003) in the Vitamins case* 25(10) ECLR 25(10), 611-616 (2004); J. Joshua, *After Empagran: could London become a one-stop shop for antitrust litigation?* 4(14) COMP LI, 4(14) 3-5 (2005); Chairman of the OFT to the Law Society (6 June 2006).

[9] Cooper Tire & Rubber Co v Shell Chemicals UK [2009] UKCLR 1097.

[10] BELLAMY & CHILD, EUROPEAN LAW OF COMPETITION, §§14-117, (2008).

[11] F. Hoffman La Roche et al v Empagran et al 542 US 03-724 (2004).

[12] Between 2005 and (so far in) 2010, the Commission has taken 34 major cartel decisions. Between 1995 and 1995 it took 10. The number of decisions per undertaking has increased from 60 in 1995-1999 to 223 in 2005-2009. In three major cartel decisions in 2009 (Gas), 2008 (Car Glass) and 2007 (Elevators and escalators) the Commission imposed fines totaling EUR 3.4 billion. Most recently (19 May 2010), the Commission fined nine computer chip makers EUR 331 million for price-fixing contrary to Article 101 TFEU, (*see*, http://ec.europa.eu/competition/cartels/statistics/statistics.pdf).

[13] *See* Viho in the ECJ, §§13-18.

[14] Bellamy & Child, §§2-037.

Instead, the task for the Court (like that of the Commission when exercising its fining jurisdiction) is to identify, by reference to some principled criteria of responsibility, the appropriate entity or entities upon which to pin liability. In this context, the following is relevant:

- First, subsidiaries may be liable in their own right for competition infringements because: (a) the offending action was taken at the subsidiary's initiative (where there are no like actions by the parent) in an area where it is free to determine its own course on the market (and so not caught by the "single economic entity" test); and/or (b) it is distinct in nature from other infringements committed by its parent.[15] In such a scenario, the relevant features of the subsidiary (freedom to act, autonomy, own resources, etc.) dictate that it is the relevant "undertaking."
- Second, in certain circumstances the actions of subsidiaries may be imputed to their parents, in order to work out whether the parents' actions (taken as a whole) offend against competition rules. The ECJ case law shows such imputation will occur where the parent controls or decisively influences the activities of the subsidiary.[16] The relevant "undertaking" in this context is the parent, to which actions of subsidiaries may be imputed by reason of the ability to control the subsidiaries' actions.
- Imputing the actions of the subsidiary to the parent is necessary to secure the objectives of EU competition policy by preventing parent companies undermining or avoiding competition obligations through a host of obedient subsidiaries. In the consistent case-law, the imputation of conduct is to the parent, because of the parent's control.
- It is arguable that the relationship between these techniques and the "single economic entity" doctrine is symmetrical. Where the subsidiary has freedom of action: (a) there will be no "single economic entity," with the result that: (b) the subsidiary may be liable in its own right where the conditions for showing a breach of Article 101(1) TFEU are otherwise met[17]; and (c) the parent will not be liable.
- Where the subsidiary is fully controlled by the parent: (a) there will be a single economic entity, with the result that (b) the parent will be liable for its own actions and any relevant actions of its subsidiary, as imputed to it. In this scenario, the (joint and several) culpability of the subsidiary will depend upon whether or not a case for breach of Article 101(1) TFEU can be made out against the subsidiary for its own actions. Most frequently, this will depend upon whether or not the subsidiary is itself party to an agreement between undertakings.
- The test of who is a party to an agreement in EU competition law is a wide and purposive one. At its broadest it can be satisfied by assistance in the form of knowing implementation of a cartel (i.e. the conscious adoption of the original cartel agreement).[18] In some instances, no case will be capable of being made out against the subsidiary (as opposed to the parent). In others, appropriate pleaded facts will bear cases against both.

It is arguable that Aikens J erred in §31 of his Judgment where he stated: "In my view it is arguable that it is not necessary to plead or prove any particular 'concurrence of wills' between

[15] Bellamy & Child, §§2-018.
[16] Case C-286/98P Stora Kopparbergs v Commission ("Stora") [2001] 4 CMLR 370, at §§22-30.
[17] As in Case C-279/89P Cascades v Commission [2000] ECR I-9693
[18] Bellamy & Child, §§2-023.

the two entities within Undertaking A.*"* According to *Viho*, however, any internal concurrence of wills is irrelevant in a single economic entity. What must be shown in order to found liability against any one particular defendant is, instead, a "concurrence of wills" between that defendant and a third party. Such concurrence can be shown where a subsidiary knowingly adopts or assists in its parent's agreement with a third party.

There is a good argument that there is no authority in EU law for imputing the knowledge of, actions of, and responsibility for the controlling parent to its subsidiary simply by reason of the parent's control over the subsidiary. Still less is there authority for imputing such responsibility from one subsidiary to another subsidiary directly. Such an approach is:

1. unnecessary to secure the effective application of Community competition law;
2. contrary to principle; and
3. inconsistent with the Commission's fining practice.

As to (1), the Commission has never adopted the approach upheld in *Provimi*.

As to (2), it is plain that such reverse piercing of the corporate veil leads to unsafe results. Control, the criterion used in *Stora*, is a logical basis for imputing responsibility for actions upwards, but not down the corporate chain, so as to assess the totality of the actions for which the parent is responsible. The controlling party can accurately be taken to be responsible for the action of the controlled.

Under such reverse piercing, entirely innocent subsidiaries become fixed with liability for the cartels as a whole. Such innocent subsidiaries may have long ago been divested by a cartelist parent and may on the basis of *Provimi* be fixed with the entire liability for the damage caused by the cartel during the period of control.

Even in the most developed competition jurisdiction, namely the United States, there is no instance of a claimant which has sued a subsidiary company for a breach of the Sherman Act 1890 by virtue of its reselling of cartel products, where that subsidiary had no knowledge of the cartel in which its parent or other sister companies participated.

The rules determining standing and the appropriate defendant in U.S. antitrust law are informed by concepts of foreseeability. As a matter of U.S. antitrust law, the resale of cartel products could only give rise to a cause of action against by a purchaser if it could be shown that the harm to the purchaser or its class was foreseeable. In this context the U.S. court examines the actual or the constructive knowledge of the defendant company.[19] Although the legislation applied in the U.S. case law and that of the Community is not the same, the policy objectives of both systems of antitrust enforcement are very similar.

As to (3), the Commission, in determining which entity to fine, consistently identifies the specific legal personality responsible for the conduct of that undertaking. The Commission will in certain circumstances pin such liability upon the subsidiary, where such subsidiary is responsible for the breach in question, as it did in the *Vitamins* Decision for Takeda.

There is a good argument that such a test of responsibility in the fining context should be used in order to determine liability to provide compensation. The courts, as part of their duty of loyalty to the EU, must implement EU competition law consistently with Commission practice.

[19] CLIFFORD A. JONES, PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE EU, UK AND USA at 169, (1999).

Arguably, *Provimi* leads directly to results that are inconsistent with the fining policy of the Commission.

V. CONCLUSION

There are, of course, arguments in favor of *Provimi*. The ECJ's judgment in *Woodpulp* provides support for an argument that the implementation of an infringing agreement (without more) is itself an infringement of Article 81(1) EC by an undertaking. Moreover, the concept of an undertaking is defined broadly for the purposes of the competition rules, and may include different corporate entities with no knowledge of each other's behavior, e.g. whether one of the entities is engaged in price-fixing contrary to Article 101(1) TFEU.

Nevertheless, the core finding in *Provimi* has not been subject to any serious judicial scrutiny since it was handed down in 2003. In view of its dramatic consequences, it should not be viewed as an immutable part of English law in this field. For the reasons set out above, there are strong arguments to suggest that it was wrongly decided.