International In-house Counsel Journal
Vol. 8, No. 31, Spring 2015, 1

Parental Liability in EU Competition Law – A Fair Presumption? [1]

MARIA TROBERG
Senior Legal Counsel, Competition, Nokia, Finland

Introduction

Under EU competition law, there is a presumption that a parent company with a 100% shareholding in its subsidiary company exercises decisive influence. The European Commission has the power to fine such parent company for the competition infringements of its subsidiary. Irrespective of the parent company's personal involvement or awareness of the competition infringement, the subsidiary's conduct is attributed to the parent and both the parent and the subsidiary are held jointly and severally liable for the infringement. This presumption can be rebutted if there is evidence that the subsidiary "acts independently on the market". It follows in such case that the burden of proof falls on the Commission to demonstrate actual exercise of decisive influence over the day-to-day operations of the subsidiary. Also in the case where the parent does not hold 100% shareholding in its subsidiary, it is (at least in theory) for the Commission to show that the parent in fact exercises a decisive influence.

Considering that the fines awarded for competition law infringements seem to be ever-increasing, parental liability is obviously of much practical interest to all relevant stakeholders, especially European companies and their in-house counsel dealing with competition law compliance, who have reason to be on their guard. If European companies are held liable as a parent company, the ten percent threshold on fines applied in the EU is calculated on the basis of a higher turnover. This article aims to discuss parental liability in the EU and look at some important EU case law according to which it seems that the burden of proof of the Commission, being both the investigator and prosecutor, to demonstrate decisive influence continues to be low. Moreover, where the presumption is applicable, it is a difficult – if not impossible - exercise for companies to rebut. This article will consider the fairness of the presumption.

Parental liability – the concept of "decisive influence"

EU competition law applies to *undertakings* and liability for competition law infringements is imposed on undertakings. An *undertaking* is an entity or group of entities which effectively function as a single economic unit. A parent company and its subsidiaries will form such a unit when the parent exercises *decisive influence* over the conduct of the subsidiary.[2]

In order to establish responsibility for competition law infringements it is necessary that there is a link between the perpetrator subsidiary and the parent as a completely separate legal entity. According to the Court of Justice, *"[t]he fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the*

[1] The opinions expressed in this article are the author's own and do not reflect the view of Nokia.

[2] See the Commission's Memo, issued upon the adoption of the fines in the Bitumen Netherlands cartel, where the enforcement agency's policy was explained: http://europa.eu/rapid/press-release_MEMO-06-324_en.htm?locale=en.

parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, 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."[3] Thus, the connecting link is that the ultimately responsible party has decided upon the behaviour of the perpetrator. As the Court of Justice explained it, parental liability follows from decisive influence. With decisive influence comes liability, and without it, there is no liability.

Interestingly, the decisive influence of the parent company does not need to relate to the anticompetitive behaviour as such, but only the subsidiary's behaviour on the market more generally. In the event that it could be proven that the parent company exercised decisive influence over the anticompetitive behaviour in question, this would likely amount to a competition law infringement in itself, and the responsibility of the parent company would be of direct nature instead of indirect, as discussed here.[4]

The exercise of decisive influence must deprive the subsidiary of 'autonomy in determining its course of action in the market', although the EU courts have also suggested that a lower level of influence on the subsidiary is sufficient, such as 'stimulating and coordinating role'.[5] It has been argued that the key is in fact the *capacity* of the parent company to exercise control, as it may also be that passive failure to control (or 'negligence by omission') render the parent responsible for a competition law infringement.[6]

Obviously, a parent company may play a greater or lesser part in the management of the subsidiary. The level of influence necessary to trigger liability has not been explicitly defined in EU competition law, but the EU courts have cited a number of determining factors for assessing decisive influence, the most important one being the parent company's shareholding in the subsidiary, which is the focus of this article and will be discussed in the following.[7] This article will not go into questions concerning liability in case of successions.

According to case law, where a parent company owns, directly or indirectly, the totality (or almost the totality) of the shares of a subsidiary, this creates a presumption that the parent company in fact does exercise a decisive influence.[8] The presumption relies on the fundamental premise that a wholly owned subsidiary receives instructions from its parent company and will follow those instructions so that the market behaviour of both the parent and the wholly owned subsidiary is "unified". This presumption allows the Commission to hold the parent company liable for the subsidiary's anticompetitive behaviour by simply proving that the parent company owns all or almost all of the shares of the subsidiary – unless the parent company is able to rebut the presumption and show that the subsidiary acted independently on the market. This was confirmed in the *AKZO*

---

[3] Case 48/69 Imperial Chemicals Industries v. Commission [1972] ECR 619, paragraphs 132-133.

[4] The primary basis for liability is 'direct involvement' in the infringing behaviour, which is typically demonstrated by proving that personnel of the legal entity have taken part in illegal meetings or in other contacts. Direct involvement can also be established where personnel of a different legal entity were aware of the illegal behaviour and failed to intervene to stop it.

[5] Case T-11/89 Shell v. Commission [1992] ECR II-757, paragraphs 311-312.

[6] See W.P.J. Wils, The undertaking as subject of EC competition law and the imputation of infringements to natural legal persons, (2000) EL Rev, pages 99-116.

[7] Other factors for assessing decisive influence include the parent company being active on the same or adjacent markets, the use of the same commercial name by the parent and the subsidiary, functional links through personnel, and instructions from a parent to a subsidiary.

[8] See Case 107/82 AEG v. Commission [1983] ECR 3151, paragraphs 50 and 51.

judgment (which has since been confirmed in a number of cases[9]), where the Court of Justice declared the following:

> *"In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary [...] and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.*
>
> *[...] In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.*[10]

A rebuttable presumption?

When looking at case law dealing with parental liability it quickly becomes clear that in practice, it has proven extremely difficult for parent companies to rebut the presumption of liability. The Commission's rationale behind this seems to be that rebutting the presumption is difficult, because the idea builds on attributing liability for another entity's actions based upon the elements of ownership and control, and therefore companies would have to produce proof of "*exceptional circumstances*" in order to rebut it.[11]

In *Eni SpA v. Commission*[12], the Court of Justice did not depart from its previous statements of principle,[13] and confirmed the difficulty of rebutting the presumption that a parent company exercises decisive influence over a wholly-owned subsidiary. The case is an illustrative example of how hard – if not *de facto* impossible - it is to escape the attribution of the presumption.

The case goes back to the Commission's finding that the corporate predecessors to two of Eni's subsidiaries had participated in a cartel in synthetic rubbers from 1996 to 2002. Eni argued in its defence that it had never operated directly in the sector in question; it had never had any management overlap between the parent company and the subsidiaries; it had no information on the strategic and commercial plans of the subsidiaries, and that it had not been involved in setting prices or annual sales volumes. Upon appeal, the case reached the Court of Justice who recognised that if the factors argued by Eni had been established before the General Court, then those would indeed have proven that the subsidiary "*enjoyed a certain autonomy as regards its chemical activities*".[14] Irrespective of this concession, the Court of Justice upheld the finding of a single economic entity. It did not matter to the Court that Eni was only a financial coordinator or restricted its role to that of financial and investment assistance. Further, the Court held that its conclusion could not be called into question by the fact that Eni had never operated directly in the sector in question or that there had never been any management overlap between the

---

[9] See e.g. Joined Cases C-201/09 P and C-216/09 P ArcelorMittal Luxembourg v. Commission and Commission v. Arcelor Mittal Luxembourg and Others [2011] ECR I-0000, paragraphs 97-98; Case C-90/09 P General Química and Others. v Commission [2011] ECR I-1, paragraphs 39-40.

[10] Case C-97/08 P Akzo Nobel and Others v. Commission [2009] ECR I-08237, paragraphs 60-61.

[11] Case C-508/11 P Eni SpA v. Commission [2013] 5 CMLR 17.

[12] *Ibid*.

[13] See e.g. Case C-90/09 P General Química v. Commission [2011] ECR I-1; Case C-654/11 P Transcatab v. Commission [2012] ECR I-0000.

[14] Case C-508/11 P Eni SpA v. Commission [2013] 5 CMLR 17, paragraph 64.

parent and the subsidiaries. Also, "*[t]he fact that the parent company did not participate directly in that infringement or encourage it to be committed is not such as to show that those two companies did not constitute a single economic unit*."[15] Eni's attempts to rely upon the common law concept of separate legal personality for corporate persons was dismissed as "manifestly unfounded", as was the attempt to refer to antitrust law and practice in the United States.

In sum, it seems that the involvement of a parent company (even where it is close to being a mere holding company) in *any* of the economic activities of a subsidiary will most likely be sufficient to prevent the rebuttable presumption of decisive control being rebutted. The Commission does not need to make enquires that go much beyond the corporate structure of the company group in question. The Court of Justice interestingly said that "*the fact that it is difficult to prove the opposite in order to rebut a presumption does not imply, of itself, that it is in fact irrebuttable*."[16]

Developments in EU case law

Also more recent developments in EU case law confirm that the Commission's burden of proof for showing decisive influence is rather low and in situations where the presumption does apply, it is difficult to rebut. Where a parent company does not hold a 100% (or nearly 100%) shareholding in its subsidiary, such as in a 50/50 joint venture, the Commission must prove that the parent in fact exercises a decisive influence. As will be presented below, the evidential burden that the Commission should satisfy is very low.

Liability of joint venture parents

In 2013, the Court of Justice issued two important judgments in *Du Pont de Nemours* and *Dow Chemical Company* dealing with the liability of joint venture parents for the anticompetitive behaviour of their joint venture.[17]

These judgments have their background in 2007, when the Commission had imposed fines totalling EUR 243 million on six different companies, including El DuPont and Dow, for participating in an illegal price fixing and market sharing cartel in relation to chloroprene rubber. The Commission at the time concluded that El DuPont and Dow were held to be jointly and severally liable for the conduct of their 50/50 joint venture, DDE, as they exercised decisive influence on the commercial conduct and policies of the joint venture, and therefore could be held jointly liable for DDE's anticompetitive behaviour. The parent companies challenged the Commission's fining decisions before the General Court, and ultimately before the Court of Justice.

The Court of Justice rejected the appeals and confirmed that joint venture parents can be held jointly and severally liable for the competition law infringement of their 50/50 joint venture. The Court accepted the assessment of the Commission that the legal, economic and organizational factors indicated that the joint venture parents exercised decisive influence and therefore were jointly and severally liable. It was rejected that a 50/50 joint venture could not be under the decisive influence of either parent due to the other parent's right of veto to block strategic decision-making. According to the Court of Justice, the assessment of decisive influence is to be carried with regard to "*all the economic, organizational and legal links between a subsidiary and its parent company*." The Court further noted that *"[t]he decisive influence of one or more parent companies is not necessarily tied with the day-to-day running of a subsidiary*." The judgments confirmed that a full-function joint venture that is deemed as operationally autonomous

[15] Case C-508/11 P Eni SpA v. Commission [2013] 5 CMLR 17, paragraph 65.
[16] Case C-508/11 P Eni SpA v. Commission [2013] 5 CMLR 17, paragraph 68.
[17] Case C-172/12 P El du Pont de Nemours and Others v. Commission [2012] 4 CMLR 7; Case C-179/12 P Dow Chemical v. Commission [2013] ECR I-0000.

under the EU Merger Regulation is not necessarily autonomous when it comes to its strategic decision-making, and might in that regard still be under the decisive influence of its parents. Further, the judgments show the difficulty parent companies face in trying to avoid liability the anticompetitive behaviour of their joint venture. While there is no applicable presumption for decisive influence, the threshold for the evidential burden that the Commission shall meet is very low.

A (nearly) successful rebuttal

The judgment *Portielje* is interesting, as the General Court for the first time found that a parent company (Portielje) had demonstrated sufficient evidence to show that it did not exercise decisive influence over its subsidiary. The presumption of parental liability was rebutted.

The judgment goes back to the Commission in 2008 imposing a fine of EUR 33 million on ten companies for a cartel in the market for international removal services in Belgium. Fines were imposed on Portielje's 100% subsidiary Gosselin and jointly and severally on Portielje as parent.

In 2011, the General Court annulled the fine imposed on Portielje for the conduct of its subsidiary Gosselin, finding that as a foundation company that was not engaged in any economic activity and which did not generate any revenue, Portielje was not an undertaking for the purposes of competition law. Although Portielje held 100% of the shares in Gosselin, it did not exercise decisive influence as it had not adopted formal management decisions under company law. The General Court considered the following factors in finding a lack of decisive influence: Portielje's only means to influence its subsidiary was by voting at shareholder's meetings, which had not been held during the relevant time period, and Portielje had no influence on its subsidiary's board composition during that period.

The Commission subsequently appealed the ruling. The Court of Justice accepted the Commission's arguments, overturned the General Court's decision and the fine on Portielje was reinstated. According to the Court of Justice, it is irrelevant whether in isolation a parent company (Portielje) is not an undertaking. What mattered was whether there was a single economic entity including Portielje and the infringing subsidiary – which the Court ruled there was. Further, it found that the General Court was wrong to rule that by not adopting formal management decisions, this was sufficient to rebut the presumption of decisive control. In order to establish that a subsidiary acts independently on the market, the General Court should have considered whether there were broader economic, organisational or legal links between the two entities. The General Court had wrongly rebutted the presumption "*purely on the basis of an analysis conducted by reference to company law and did not, before reaching that conclusion, take account of all relevant factors*."[18]

Portielje is one of the rare cases where the presumption that a wholly-owned subsidiary exercises decisive influence over its subsidiary (and can therefore be held jointly and severally liable for infringements) has been rebutted. The Court of Justice's reinstatement of the presumption shows the high evidential threshold required to show that a subsidiary has acted independently. The Court of Justice itself acknowledged that it was "difficult" to rebut the presumption but at the same time noted that it is still proportionate for the Commission to rely on it.

[18] Case C-440/11 P Commission v. Stichting Administratiekantoor Portielje and Gosselin Group NV [2013] ECR I-0000, paragraph 67.

Burden of proof

As set out above, the establishment of the existence of a presumption of decisive influence in situations of 100 % ownership (or as confirmed in case law, close to 100%) ownership has important implications. Importantly, it relieves the Commission of the not always simple task of establishing decisive influence. In particular, when the case is about events that took place in the past, it can be hard to prove who was in fact in charge of the actions leading to the competition law infringement in question. The Commission does not have to engage in such a difficult analytic exercise, as it is sufficient that it looks to the corporate structure of the company group in question. In that sense the presumption shifts the burden of proof from the party whom, according to Article 2 of Regulation 1/2003, has to establish an infringement (usually the Commission), to the party who is accused of misconduct. There is no denying that this can be regarded as quite a controversial change, especially from a competition law policy perspective, and with regard to fundamental rights, as explained below.

Fundamental rights

It has been argued that the presumption of parental liability, although classified as rebuttable by the EU courts, is effectively irrebuttable and therefore in practice a legal rule with a legal consequence.[19] Thus it has been alleged that the *de facto* irrebuttable presumption is in violation of fundamental procedural rights as it is contrary to the rights of defence, violating the presumption of innocence and the principle of personal responsibility.

However, according to the Court of Justice, a rebuttable presumption that is difficult to rebut is not incompatible with Article 47 of the Charter of Fundamental Rights or Article 6 of the European Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).[20] In Portielje the Court of Justice stated that *"[a] presumption remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded. The fact that it is difficult to adduce the necessary evidence to the contrary in order to rebut the presumption or the mere fact that an entity does not, in a given case, produce evidence capable of rebutting a presumption does not, in itself, mean that that presumption cannot in fact be rebutted, especially where […] the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity.*"[21]

Duty to give reasons

There is some case law indicating an increasing scepticism concerning the presumption of parental liability. In cases such as *Elf Aquitane*, *L'Air Liquide*, *Grolsh* and *Edison*, the EU courts have overturned the Commission's findings of parental liability. Even though these decisions held that the Commission's duty to give reasons is "*clearly evident from the rebuttable nature of the presumption at issue*"[22], they have not caused much stir, as their practical implications have been nearly insignificant. Notably, the judgments have

[19] For further elaboration on this topic, see Nils Wahl, Parent Company Liability – A Question of Facts or Presumption? 19th St.Gallen International Competition Law Forum ICF, June 7-8 2012.

[20] See e.g. Case C-508/11 P Eni SpA v. Commission [2013] 5 CMLR 17. See also Case C-440/11 P Commission v. Stichting Administratiekantoor Portielje and Gosselin Group NV [2013] ECR I-0000, paragraph 72: "*No infringement of Article 47 of the Charter of Fundamental Rights of the European Union or Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, may therefore be established*."

[21] Case C-440/11 P Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV [2013] ECR I-0000, paragraph 71.

[22] See e.g. Case T-185/06 L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude v. European Commission [2011] ECR II-2809, paragraph 75.

not questioned the *legitimacy* itself of the presumption. Rather, the cases were overturned because the Commission had not adequately responded to the appellant's rebuttal arguments. The EU courts have made clear that the Commission must justify in full the basis upon which it rejects arguments presented by companies to counter the presumption that parent companies should be held liable for the acts of their subsidiaries. The EU courts have highlighted the Commission's duty to give reasons, meaning that to live up to this duty, the Commission must issue sufficiently reasoned decisions that respond to the arguments submitted by a parent company to prove that its subsidiary determines its conduct on the market independently. This message from the EU courts may lead to the Commission exercising a more cautious approach when faced with arguments that the presumption of parental liability should not apply.

Conclusions

The topic of parental liability remains one of the most debated legal topics in EU competition law and the fairness of the *de facto* irrebuttable presumption is questionable.

It can of course be argued that the use of the presumption has an overall objective of deterrence and meets the need for clear rules. As Advocate General Kokott noted in her opinion in *AKZO*: "*[t]he effective enforcement of competition law requires clear rules. A presumption rule […] which allows the Commission as the competition authority to attribute to a parent company the responsibility for the cartel offences of its wholly-owned subsidiaries, creates legal certainty and is straightforward to implement in practice*."[23]

However, the presumption raises fundamental questions concerning procedural rights, compliance by the Commission with the high standard guaranteed by the ECHR, and the application of EU competition law in a way that is consistent with civil and criminal law of the EU member states. Importantly, parental liability has enormous financial consequences for parent companies whose wholly-owned subsidiaries are found guilty of a competition law infringement. The EU case law on parental liability relieves the Commission of the need to factually establish decisive influence and seems to more often than not endorse the Commission's hardened approach of attributing competition law liability, wherever possible, to parent companies. This approach maximises the level of fines by enabling the Commission to take advantage of a higher absolute fines for one and the same competition law infringement and a higher exposure to classification as recidivism (applying an aggravation factor to the fine). In addition, the attribution of liability on a higher level may facilitate actions for damages against parent companies and encourage complainants to bring such actions.

A consequence of the above is that global companies with a presence in the EU need to ensure that they have in place an effective competition law compliance program, which is implemented throughout the entire corporate group, including joint ventures and other non-wholly owned subsidiaries. It is also a reminder for companies that it is of significant importance to consider competition law issues when structuring joint venture arrangements and making minority ownership acquisitions.

***

Maria Troberg is a Senior Legal Competition Counsel at Nokia based in Espoo, Finland. Prior to joining Nokia, Maria spent five years working at Roschier Attorneys, a leading Nordic law firm, doing EU and competition law. She was also seconded to GE Healthcare and Nokia. Maria has also worked in a Finnish technology start up in online

[23] Opinion of Advocate General Kokott in Case C-97/08 P Akzo Nobel and Others v. Commission [2009] ECR I-8237, paragraph 71.

advertising as the company's Head of Legal. Her professional experience includes working at the European Commission's DG Competition, the U.S. Federal Trade Commission in Washington DC, and the law firm Cleary Gottlieb Steen Hamilton in Brussels. Maria holds an LL.M. in European law from the College of Europe in Bruges (2008) and an LL.M. in antitrust law from Georgetown University (2011), where she studied on a Fulbright-Schuman scholarship and graduated with distinction (Dean's list). She is a qualified lawyer in Finland and New York (member of the New York State Bar).

About Nokia

Nokia invests in technologies important in a world where billions of devices are connected. Headquartered in Espoo, Finland, and with operations around the world, Nokia is focused on three businesses: network infrastructure software, hardware and services, which are offered through Nokia Networks; location intelligence, which are provided through HERE; and advanced technology development and licensing, which are pursued through Nokia Technologies. Each of these businesses is a leader in its respective field. http://company.nokia.com