



Liability of parents and subsidiaries in EU Competition Law

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Part I: Single Economic Entity



Single Economic Entity Doctrine

- EU Competition law is founded on the notion of infringements by undertakings (Articles 101 & 102 EU Treaty)
- Under the single economic entity doctrine different legal entities (i.e. companies) within the same corporate group form an economic entity and therefore an undertaking
- Consequences in 3 areas:
 - Agreements between parents & subsidiaries
 - Agency agreements
 - Liability of parents & subsidiaries



Agreements between parents & subsidiaries

- Article 101 applies to agreement between undertakings
- If the single economy entity doctrine applies the application of Article 101 is excluded (*Viho* Judgement, Court of Justice)
- Article 102 could apply where an abuse of dominance takes place



Agency Agreement

- Principals and agent can also be held to constitute a single economic entity thus excluding the application of Article 101 to agreement between them
- The application of Article 101 depends on the relationship between them and in particular the degree of risk assumed by the distributor
- Particular issues arise in relation to online platforms:
 - Are they genuine agents and outside the scope of Article 101?
 - Are they retailers engaged in resale price maintenance and caught by Article 101?
 - Should Article 102 apply?



Liability between parents and subsidiaries

- Articles 101 and 102 EU Treaty are concerned with undertakings but addressees of Commission infringement decisions must be legal entities
- If parents and subsidiaries are found to fall within the single economic entity doctrine as one undertaking they will be found to be jointly and severally liable for the illegal conduct and payment of the fine
- Commission policy over many years to hold parents responsible for the illegal conduct of their subsidiaries

Part II: Parental Liability



The rationale of parental liability

- Encourages corporate responsibility at the highest level of the undertaking
- Increases deterrence by potentially leading to higher fines
 - Maximum fine is based on the consolidated turnover of the parent
 - Deterrence multiplier also applies on basis of turnover of the parent
 - Commission rules on increases for recidivism are more easily applied
- Allows easier recovery of the fine when the direct infringer is established outside the EU
- Facilitates private damages actions as these can be directed at both parent and subsidiary



Attribution of liability

- Commission has discretion in attributing liability
- Current practice is to identify and hold liable the directly participating entity which employed the individuals involved (i.e. subsidiary)
- To hold liable parent companies to the extent it exercises decisive influence over its subsidiaries commercial policy
- Commission generally goes after the ultimate parent and ignores intermediate companies

Establishing parental liability

- The Commission must show
 - The parent had the capability of exercising decisive influence over the subsidiary; and
 - The parent company in fact exercised this power
- But in applying this test the case law distinguishes between subsidiaries owned 100% (or almost 100%) and those owned by lesser shareholdings



Wholly owned subsidiaries

- In the the case of 100% owned subsidiaries the parent is in a position to exercise decisive control
- The Commission is allowed to presume that that a parent company that holds 100% of the shares of the subsidiary has actually exercised decisive influence over the conduct of that subsidiary
- Less than a 100% shareholding has also given rise to the presumption (98% *Arkema* Judgment, 97% *Elf Aquitaine* Judgment, 96% *Arkema France* Judgment)
- But it is a rebuttable presumption which can be reversed by the parent adducing sufficient evidence



Difficulty of rebutting the presumption – arguments rejected by the EU Courts (1)

- Parent company being unaware of the infringement
- Independence of the subsidiary with respect to day-to-day business and existence of local management
- Very limited reporting obligations between parent and subsidiary
- Activities of the subsidiary being marginal within the group
- Parent entity not active in the same markets as the infringing subsidiary
- The fact that parent entity was not held liable for an infringement committed by the same subsidiary in a prior case



Difficulty of rebutting the presumption – arguments rejected by the EU Courts (2)

- The existence of group compliance training or adoption of a code of conduct to prevent infringements of competition law
- The shareholding is held indirectly
- The infringing company was bought only four months prior to the inspections
- Lack of interest of the parent in the subsidiary/attempts to sell it
- The absence of power to issue binding instructions to the management of the subsidiary



Is the presumption irrebuttable? (1)

- Difficult to rebut but it has powerful roots – highly unlikely that a wholly owned subsidiary acts autonomously and logical a sole owner participates in its subsidiary's commercial strategy
- But not irrebuttable : the parent can put before the Court any will look at all organisational, economic and legal links which are apt to demonstrate they are not a single economic entity



Is the presumption irrebuttable? (2)

- Advocate General Kokott's Opinion in *Choline Chloride* provides possible instances
 - Company is an investment company and behaves like a pure financial investor
 - Parent company holds 100% of the shares in the subsidiary only for a short while
 - The parent company is prevented for legal reasons from fully exercising its 100% control
- The rebuttal was accepted in one case (*BMW Belgium*) on the grounds that the subsidiary acted against the instructions of its parent company



Establishing parental liability with significantly less than a 100% shareholding

- No presumption exists
- The first condition of being in a position to exercise decisive influence can be presumed in the case of majority shareholding
- The second condition must be proved on the specifics of each case having regard to all economic, organisational and legal links



Relevant factors accepted by the EU Courts (1)

- A parent's majority representation on the subsidiary's board (notably, appointment of CEO by parent, or appointment two out of three members of the supervisory board of the subsidiary)
- Individuals holding simultaneous senior positions in parent and subsidiaries (e.g. where the parent and the subsidiary share a common director, or where members of the subsidiary's board had management-level positions within the parent company)
- Specific or explicit (detailed) management/controlling mechanisms, put in place by the parent to enable it to exercise a "stimulating and coordinating role"
- Intra-group sales and synergies (e.g. where both entities are involved in a vertical integration scheme whereby the subsidiary was one of the parent's principal customers)
- Common brand, common company name



Relevant factors accepted by the EU Courts (2)

- The fact that several companies are part of an economically integrated scheme
- The fact that several legal entities have a common single, permanent economic management and possibly internal profit and loss compensation as between the various entities and joint liability externally
- Rights of co-determination or approval
- Upstream reports of information
- Consolidation of results with parent entity
- The fact that the parent and subsidiary present themselves towards the outside world as forming part of the same group



Parental Liability : the practice

- Start with individuals involved in the illegal practices and determine the entity they represent to establish the direct participant
- Establish the ultimate parent which exercised decisive influence (ignore intermediate companies)
- In the Statement of Objections the nature of liability of each addressee must be clearly spelled out (direct participant or parent) – for parents, if relying on the presumption no need to include additional factors
- In the decision properly motivate on an individual basis arguments put forward by addressees to refute their liability

Part III: Case Study: Slovak Telekom



Facts

- Slovak Telekom is incumbent telecom operator in Slovakia
- Found to have abused its dominant position on the market for broadband services over five years by
 - Refusing to supply unbundled access to its local loop competitors
 - Imposing a margin squeeze on alternative operators
- Held jointly and severally liable for the infringement with its parent company Deutsche Telekom



Deutsche Telekom's ability to exercise decisive influence over Slovak Telekom

- Deutsche Telekom was the majority shareholder of Slovak Telekom holding 51% of its shares and simple majority voting prevailed
- Power to nominate the majority of Board members (including the Chairman with casting vote)
- Right to be informed about all management matters within Slovak Telekom
- Information indicating full management control submitted in a separate merger notification by Deutsche Telekom on behalf of Slovak Telekom



Exercise of decisive influence by Deutsche Telekom over Slovak Telekom

- Telekom found to exercise decisive influence over Slovak Telekom through legal and organisational links
- Overlaps in senior management personnel and lease of staff from Deutsche Telekom to Slovak Telekom
- Evidence of Deutsche Telekom's influence over the decision making process of Slovak Telekom's Board of Directors
- Upstream reporting and occasional explicit instructions from Deutsche Telekom to Slovak Telekom
- Deutsche Telekom's involvement in Slovak Telekom's strategic projects



Deutsche Telekom's rejected arguments to rebut decisive influence

- Was purely a financial investor
- No control given role of the Slovak Republic (minority shareholder)
- A number of projects show independence of Slovak Telekom

Fines

- Deutsche Telekom and Slovak Telekom jointly and severally liable for a fine of Eur 39 million
- Deutsche Telekom liable for additional Eur 31 million purely on the basis of its parental liability
 - Deterrence uplift of 20% applied given its high total turnover
 - Recidivism increase of 50% given its previous margin squeeze infringement in Germany



Thank you for your attention